IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 14, 2015

# IN RE BECKWITH CHURCH OF CHRIST

**Appeal from the Chancery Court for Wilson County**
**No. 2014CV308 Charles K. Smith, Chancellor**

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**No. M2015-00085-COA-R3-CV – Filed September 23, 2016**

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In this case, two former members of a dissolved church filed a petition seeking permission to sell the improved real property formerly occupied by the church and donate the money to a nonprofit Bible school or, in the alternative, to convey the property directly to the school. The petitioners filed suit against unknown former members of the church and obtained permission to serve the unknown respondents by publication in a local newspaper. After publication of the action, no responsive pleadings were filed, and the petitioners obtained a default judgment. Before the default judgment became final, a descendant of the original owners of the real property filed a motion to set aside the default judgment and dismiss the petition based on insufficient service of process. The court granted the motion, set aside the default judgment, and dismissed the petition with regard to the descendant. On appeal, the petitioners argue: (1) the chancery court erred in finding constructive service insufficient; (2) that the descendant waived his objections to service of process by filing a notice of appearance; and (3) that the descendant should be estopped from setting aside the judgment because he delayed asserting his rights. Upon review of the record, we conclude that service of process on the descendant was insufficient and that the descendant's conduct did not preclude him from setting aside the void judgment. Therefore, we affirm the decision of the chancery court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II, and BRANDON O. GIBSON, JJ., joined.

Steve D. Gibson, Nashville, Tennessee, for the appellants, Steve D. Gibson and Sara Worrell.

No brief filed on behalf of the appellee, Tony Young.

## OPINION

### I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves the disposition of a one-half acre tract of improved real property located at 3431 Beckwith Road in Mount Juliet, Tennessee, the former home of the Beckwith Church of Christ. In August 2014, two former church members,[1] Steve Gibson and Sara Worrell (the "Petitioners"), filed a verified petition in the Chancery Court for Wilson County, Tennessee, against "unknown former members" of the church. Petitioners requested that the court establish their lawful ownership of the property and authorize them either to convey the property directly to a nonprofit Bible school or to sell the property and donate the proceeds to the school.

According to the petition, by deed dated November 15, 1920, J.W. Young and his wife, Mary Young, conveyed the real property at issue to several individuals as trustees for the Beckwith Church of Christ "to have and to hold the same . . . in trust for ever." The deed specified that the land was being conveyed "in order that the Church of Christ may be established at Beckwith, Tennessee." The deed further specified as follows:

> that no instrumental music of any kind shall ever be played or rendered in said church in connection with the worship at said church, and that no organized religious societies shall ever be maintained in connection with said church, and it is further agreed that the above terms and conditions shall be and remain in force forever, and shall not be changed, modified or violated by any subsequent or future congregation of the Church of Christ at Beckwith, Tennessee, whether the members of said congregation desiring a change, modification, or violation of the above terms or conditions shall be in a majority or in a minority.

The petition alleged that the Beckwith Church of Christ began operating that same year.

Petitioners claimed that the Beckwith Church of Christ ceased "operations . . . at the end of April 2013" and that "its members and/or former members [we]re no longer meeting to worship or for other religious purposes." Petitioners also alleged, "based on personal conversations and written communications with current members of the Young family," that the legal heirs of J.W. Young and Mary Young were no longer active members of the church and had no desire to "support the continuation or renewal of accustomed worship services" at Beckwith Church of Christ.

[1] Before Beckwith Church of Christ ceased operations, Mr. Gibson served as the minister and treasurer of the church and Ms. Worrell as the bookkeeper.

Petitioners also asked the court to authorize constructive service of process instead of personal service. Based upon the verified allegations of the petition, the clerk and master ordered Petitioners to serve the unknown former church members by publication because their "whereabouts are unknown so that the ordinary process of law cannot be served." The publication notice directed the unknown former members to file an answer on or before October 27, 2014, or a default judgment would be taken at a hearing on November 3, 2014. The publication notice appeared for four consecutive weeks in the Lebanon Democrat, a local newspaper.

Subsequently, Petitioners filed a notice of service with the court indicating that a copy of the petition was also served by regular U.S. mail on "certain particular interested individuals." The notice reflected that Petitioners mailed a copy of the petition to six former church members, two individuals who had expressed interest in purchasing the property, the president of the Bible school, and Tony Young, a descendant of the original owners of the property. On October 13, 2014, an attorney filed a notice of appearance on behalf of Mr. Young.

On November 3, 2014, the court held a hearing on the request for a default judgment. After finding that notice of the pending action had been published for four consecutive weeks and that no answer or other responsive pleading had been filed, the court granted Petitioners a default judgment. The court's order declared Petitioners to be the lawful owners entitled to sell the property and directed them to convey the property to the Bible school within thirty days. Although neither Mr. Young nor his attorney appeared[2] at the hearing, a copy of the court's order was mailed to the attorney.

On December 2, 2014, Mr. Young filed a motion to set aside the court's order pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Mr. Young additionally asked the court to dismiss the action for insufficiency of service of process.

In response, Petitioners filed the affidavit of Mr. Gibson in which he described his interactions with Mr. Young prior to filing the petition. Mr. Gibson explained that he was aware that Tony Young was a descendent of J.W. and Mary Young and that he had met with Mr. Young at his home to discuss the closure of the church. According to the affidavit, after Mr. Gibson asked Mr. Young for the family's position on disposal of the church property, Mr. Young informed him that the family did not wish to sell the property. Mr. Gibson also

[2] Mr. Gibson later filed an affidavit with the court in which he alleged that Mr. Young's attorney may have been present in the courtroom on the date of the default judgment hearing, although he had never met the attorney and "would not recognize him by face." Mr. Gibson stated that he heard the clerk call the name of Mr. Young's attorney in connection with another case, but he did "not know or recall who actually answered."

informed the court that Petitioners had already conveyed the property to the Bible school, as evidenced by a quitclaim deed filed with the Wilson County Register of Deeds on November 18, 2014.

After a hearing on December 19, 2014, the court granted Mr. Young's motion. The court faulted Petitioners for not serving Mr. Young in accordance with Rule 4 of the Tennessee Rules of Civil Procedure even though they knew he possibly had a claim to the property as evidenced by the notice of service Petitioners had filed. Consequently, the court set aside its November 3, 2014 order and dismissed the petition as to Mr. Young for insufficient service of process.

## II. ANALYSIS

Petitioners submit three grounds for reversal of the chancery court's decision. First, they contend Mr. Young was properly served with process. According to Petitioners, constructive service is an authorized method of service in quiet title actions, and Mr. Young received actual notice of the action by virtue of the courtesy copy of the petition. Second, they assert Mr. Young waived insufficient service when his attorney filed a notice of appearance. Finally, they argue that equity should preclude Mr. Young from setting aside the default judgment because he waited too long to file his motion.

### A. STANDARD OF REVIEW

Ordinarily, this court reviews a trial court's ruling on a motion to set aside[3] a final judgment under the abuse of discretion standard. *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012). When the basis of the motion, however, is that a judgment is void, we apply a de novo standard of review with no presumption of correctness. *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). "Any factual findings a trial court makes shall be reviewed de novo, with a presumption of correctness, unless the evidence preponderates otherwise." *Id.*

### B. SERVICE OF PROCESS

"[P]roper service of process is an essential step in a proceeding." *Watson v. Garza*, 316 S.W.3d 589, 593 (Tenn. Ct. App. 2008). Before a court may deprive an individual of an

[3] Because Mr. Young's motion was filed before the default judgment order became final, his motion should have been filed pursuant to Rule 59, not Rule 60. Tenn. R. Civ. P. 59; s*ee Discover Bank v. Morgan*, 363 S.W.3d 479, 489 (Tenn. 2012) (explaining that "for thirty days after entry of a final judgment, motions for relief should be premised upon Rule 59"). Nevertheless, "Tennessee courts judge motions by their substance rather than their form." *Id.* at 490 n.20.

interest in life, liberty, or property, due process guarantees that individual an opportunity to be heard.[4] U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314.

Personal service of process always meets the requirements of due process. *Id.* at 313. When constructive service is used due process requires the provision of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. "The critical distinction [in the due process analysis] is between notice to known claimants and notice to persons unknown." Restatement (Second) of Judgments § 2, reporter's note, cmt. a (Am. Law Inst. 1982) (cited with approval in *Turner*, 473 S.W.3d at 273); *see also Mullane*, 339 U.S. at 317-19 (discussing the different considerations when beneficiaries are known or unknown). "[C]onstructive service by publication should be viewed as a last resort means of serving a party whose identity is known." *Turner*, 473 S.W.3d at 273.

Service of process must strictly comply with Rule 4 of the Tennessee Rules of Civil Procedure. *Hall v. Haynes*, 319 S.W.3d 564, 571 (Tenn. 2010); *Watson*, 316 S.W.3d at 593. Rule 4.04 specifies two methods of personal service for individuals located within Tennessee. Tenn. R. Civ. P. 4.04(1), (10). A copy of the summons and complaint may be delivered personally to the defendant, or a copy may be mailed to the defendant by registered return receipt or certified return receipt mail. *Id.* Rule 4.08 allows constructive service of process when permitted by statute. *Id.* 4.08.

The Tennessee statutes that permit constructive service incorporate safeguards to ensure due process requirements are met. *Turner*, 473 S.W.3d at 273. "Because service of process is not 'a merely perfunctory act' but has 'constitutional dimensions,' a plaintiff who resorts to constructive service by publication must comply meticulously with the governing statutes." *Id.* at 274 (quoting *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *6 (Tenn. Ct. App. June 3, 2003)). In this case, we conclude the governing statutes did not authorize constructive service by publication for Mr. Young.

Petitioners rely on Tennessee Code Annotated § 29-29-102 as authority for constructive service in a quiet title action. However, the statute addresses quiet title actions seeking "to determine the rights or claims of any person not in being." Tenn. Code Ann. § 29-29-101 (2012). In those cases, publication notice is "deemed constructive service on all

[4] The Tennessee Supreme Court has interpreted the "law of the land clause" in the Tennessee Constitution to provide the same protections as the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006).

unborn parties defendant." *Id.* § 29-29-102 (2012). As such, the statute does not authorize constructive service of process on living claimants like Mr. Young.

The publication notice in this case did make reference to the whereabouts of the respondents being unknown. Under Tennessee Code Annotated § 21-1-203,[5] constructive service is permitted "[w]hen the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry." *Id.* § 21-1-203 (a)(5) (2009). But, Petitioners clearly knew Mr. Young's address, as evidenced by both the allegations of the petition and the notice of service they filed with the court. Because this case does not fit within any of the other specified circumstances in which constructive service is allowed by the statute, Petitioners also cannot rely on Tennessee Code Annotated § 21-1-203. Without specific statutory permission, constructive service did not comply with Rule 4.08.

Petitioners contend that, even if constructive service was not permitted by statute, any defect in service was cured by mailing Mr. Young a courtesy copy of the petition. We disagree. First, Rule 4.04, which addresses service on in-state defendants, does not authorize service by regular mail. Tenn. R. Civ. P. 4.04; *Wilson v. Blount Cty.*, 207 S.W.3d 741, 745-46 (Tenn. 2006); *see also Toler v. City of Cookeville*, 952 S.W.2d 831, 834 (Tenn. Ct. App. 1997) (holding service by regular mail failed to comply with the provisions of Rule 4.04); *Stitts v. McGown*, No. E2005-02496-COA-R3-CV, 2006 WL 1152649, at *3 (Tenn. Ct. App. May 2, 2006) ("[M]ere receipt of a complaint in the mail does not comply with the requirements of Tenn. R. Civ. P. 4 and, therefore, does not suffice for proper service."). Second, our courts have repeatedly held that actual knowledge of a pending action cannot cure insufficient service of process. *See, e.g.*, *Hall*, 319 S.W.3d at 572 (affirming that actual

[5] Tennessee Code Annotated § 21-1-203 allows constructive service of process in chancery court under the following specific circumstances:

> (1) When the defendant is a nonresident of this state;
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> (2) When, upon inquiry at the defendant's usual place of abode, the defendant cannot be found so as to be served with process, and there is just ground to believe that the defendant is gone beyond the limits of the state;
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> (3) When the sheriff makes return upon any leading process that the defendant is not to be found;
>
> (4) When the name of the defendant is unknown and cannot be ascertained upon diligent inquiry;
>
> (5) When the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry;
>
> (6) When judicial and other attachments will lie, under this code, against the property of the defendant; and
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> (7) When a domestic corporation has ceased to do business and has no known officers, directors, trustees or other legal representatives on whom personal service may be had.

Tenn. Code Ann. § 21-1-203(a) (2009).

notice of an action is not a substitute for service of process); *Toler*, 952 S.W.2d at 835 (rejecting argument that defendant was precluded from raising defense of insufficiency of process because he had actual notice of action); *Watson*, 316 S.W.3d at 593 (rejecting the argument that notice of the action was sufficient substitute for service of process); *Yousif v. Clark*, 317 S.W.3d 240, 245-46 (Tenn. Ct. App. 2010) (agreeing that knowledge of lawsuit cannot substitute for service of process). We decline to hold otherwise in this case.[6]

Because Mr. Young was not served with process as required by Rule 4, he was not properly before the court when the default judgment was entered. *See West v. Jackson*, 186 S.W.2d 915, 917 (Tenn. Ct. App. 1944) ("[T]he defendant must be before the court by actual or constructive service of process."). Petitioners next claim that, even if service of process was insufficient, Mr. Young waived his objections to service of process or he is estopped from asserting them. We address each argument in turn.

### C. WAIVER

We conclude that Mr. Young did not waive insufficient service of process by filing a notice of appearance. As a general rule, defects in service of process may be waived. *Faulks v. Crowder*, 99 S.W.3d 116, 125-26 (Tenn. Ct. App. 2002). We have previously noted, "[i]f a party makes a general appearance and does not take issue with . . . adequacy of service of process, . . . the courts customarily find that the party has waived its objections . . . ." *Dixie Sav. Stores, Inc. v. Turner*, 767 S.W.2d 408, 410 (Tenn. Ct. App. 1988). However, Mr. Young did not make a general appearance. "General appearances consist of acts from which it can reasonably be inferred that the party recognizes and submits itself to the jurisdiction of the court." *Id.* Our Supreme Court has explained that, in the context of waiver, our courts are looking for whether the defendant filed a motion or a pleading going to the merits of the action without challenging personal jurisdiction. *Landers v. Jones*, 872 S.W.2d 674, 677 (Tenn. 1994). In our view, a notice of appearance, without more, does not go to the merits of the action and does not constitute a waiver. *See Bell v. Brewer*, No. 01A01-9404-CV-00147, 1994 WL 592099, at *4 (Tenn. Ct. App. Oct. 26, 1994) (holding notice of appearance did not constitute waiver of right to contest service of process); *Newgate Recovery, LLC v. Holrob-Harvey Rd., LLC*, No. E2013-01899-COA-R3-CV, 2014 WL 3954026, at *5 (Tenn. Ct. App. Aug. 14, 2014) (holding defendant's communication with the clerk and master and filing of notice of appearance were "hardly tantamount to waiver").

[6] Petitioners rely on *Marlowe v. Kingdom Hall of Jehovah's Witnesses*, 541 S.W.2d 121, 125 (Tenn. 1976), for the proposition that actual notice cures any defects in constructive service. But the *Marlowe* decision has been expressly overruled. *Wilson*, 207 S.W.3d at 747. Moreover, Petitioners' argument is contrary to our responsibility to give the Tennessee Rules of Civil Procedure full force and effect. *See State v. Hodges*, 815 S.W.2d 151, 155 (Tenn. 1991); *Watson*, 316 S.W.3d at 593.

Absent waiver, the default judgment was void as to Mr. Young. *See Overby v. Overby*, 457 S.W.2d 851, 852 (Tenn. 1970) (affirming that a judgment against a defendant who has not been served with process in the way provided by law is void). As a result, the proper remedy was to vacate the judgment. *Ramsay v. Custer*, 387 S.W.3d 566, 569 (Tenn. Ct. App. 2012). Petitioners assert, however, that even if Mr. Young was not properly served and he did not submit himself to the jurisdiction of the court by waiver, equity should prevent him from obtaining relief from the default judgment.

D. EQUITABLE GROUNDS FOR DENYING RELIEF FROM THE DEFAULT JUDGMENT

Petitioners' arguments based on the equitable theories of laches and equitable estoppel are premised on the assumption that Mr. Young waited too long to assert his rights. Petitioners point to these facts as evidence of unreasonable delay: (1) Mr. Young waited until the day before the judgment became final to file his motion; (2) Mr. Young did not file an answer; and (3) Mr. Young's attorney "may have been" in the courtroom during the default judgment hearing and did not object to the entry of the default judgment. We again disagree. After Mr. Young received a copy of the order granting a default judgment, he filed a motion to set it aside before the default judgment was final, hardly an unreasonable delay.[7] But more importantly, mere delay does not preclude an attack on a void judgment.

Our Supreme Court has recently reaffirmed the "longstanding rule that void judgments may be attacked at any time." *Turner*, 473 S.W.3d at 279. Only in "exceptional circumstances" will a court deny relief from a void judgment. *Id.* Exceptional circumstances exist when: "(1) The party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and (2) Granting the relief would impair another person's substantial interest of reliance on the judgment." Restatement (Second) of Judgments § 66 (Am. Law Inst. 1982); *see Turner*, 473 S.W.3d at 280-82.

[7] We also note that Petitioners apparently only provided notice of the date of the default judgment hearing in the publication notice. Rule 55.01 allows a court to enter a default judgment only after certain requirements are met:

> The party entitled to a judgment by default shall apply to the court. Except for cases where service was properly made by publication, all parties against whom a default judgment is sought shall be served with a written notice of the application at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action. **A party served by publication is entitled to such notice only if that party has made an appearance in the action.**

Tenn. R. Civ. P. 55.01 (emphasis added). As acknowledged by Petitioners, a notice of appearance was made on behalf of Mr. Young.

Exceptional circumstances are not present in this case. Mr. Young asserted his rights within the time permitted by our rules of procedure. Although Petitioners claim they conveyed the property to the Bible school in reliance on the default judgment, the conveyance occurred before the default judgment was final. *See* Tenn. R. Civ. P. 62.01 ("[N]o execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry."). Under these circumstances, we see no basis to deny Mr. Young relief from the void judgment.

## III. CONCLUSION

For the foregoing reasons, we affirm the decision of the chancery court and remand this case for proceedings consistent with this opinion.

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W. NEAL MCBRAYER, JUDGE