IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2017 Session

LISA MARIE KROGMAN v. BOB GOODALL, ET AL.

Appeal from the Circuit Court for Davidson County
No. 14C729 Hamilton V. Gayden, Jr., Judge

No. M2016-01292-COA-R3-CV

In this appeal, the plaintiff sued her former real estate agent and his real estate company for malpractice and negligence in the attempted sale of her home. The trial court granted summary judgment to the defendants upon holding (1) that the plaintiff failed to effectuate service of process on the defendants; (2) that the defendants did not waive the affirmative defense by filing their answers more than 30 days after the complaint was filed, by filing a notice of appearance, and by participating in the litigation; and (3) that the defendants properly pled the affirmative defense in their answers. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Christopher K. Thompson, Nashville, Tennessee, for the appellant, Lisa Marie Krogman.

Robert M. Burns and Brooke McLeod Coplon, Nashville, Tennessee, for the appellees, Bob Goodall and Haven Real Estate, LLC.

OPINION

I. BACKGROUND

On February 21, 2014, Lisa Marie Krogman initially filed her lawsuit against her real estate agent Bob Goodall in his individual capacity and vicariously against Haven Real Estate, LLC ("Haven" and collectively "Appellees"). In the complaint, Ms. Krogman alleged professional negligence and malpractice by Mr. Goodall under

Tennessee Code Annotated section 47-18-5402(a)(2), a consumer protection provision.[1] Mr. Goodall served as Ms. Krogman's real estate agent during an attempted short sale of her home, but the sale never occurred and foreclosure resulted.

According to the return on Personal Service of Summons for Haven, on February 27, 2014, a copy of the complaint and summons was sent via certified mail to "Haven Real Estate, LLC, c/o Lance Pugliese, 644 Sage Road N, White House, TN, 37188-9141." Lance Pugliese is the sole and only registered agent of Haven, and he also serves as president of Haven. According to the same return, on February 28, 2014, Vickie Self signed the certified mail address card for Haven. The return reveals that the certified address card was returned on March 10, 2014. The stamps on both the return and the certified address card state March 31, 2014. The affidavit of Ms. Krogman's counsel states that the clerk improperly put February instead of March on Haven's affidavit (we assume he means the return). Ms. Krogman's counsel also asserts that Vickie Self signed the certified address card on March 20, 2014, according to the Case Link system.

Vickie Self is a clerical assistant for Greg Riley, an affiliated broker and independent contractor who worked as a property manager, we assume, for Haven. Ms. Self was not an authorized agent of Haven, was never given direction or authority to accept legal service of process for Haven, was not an employee of Haven, and was not paid by Haven. Haven had no other authorized agents beside Mr. Pugliese.

On March 17, 2014, a copy of the complaint and summons was sent via certified mail to "Bob Goodall, c/o Haven Real Estate & Management, 131 Indian Lake Road, Suite 202, Hendersonville, Tennessee 37075." This is another business address for Haven. On March 18, 2014, David Langarod signed the certified mail card for Mr. Goodall. According to Mr. Pugliese's and Mr. Goodall's undisputed testimony, Mr. Langarod worked at the same suite address as Haven, in an insurance broker's office. He was not an employee of Haven, nor was he authorized by Haven to act as an agent of service of process for Haven or any of Haven's independent contractor affiliated brokers. Mr. Goodall was at all times during his association with Haven an independent contractor affiliated broker. Mr. Pugliese and Mr. Goodall were never personally served with the complaint and summons, nor were they served at their business or home addresses. Ms.

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[1]Tennessee Code Annotated section 47-18-5402(a)(2) provides as follows:

> (a) In the course of offering or providing foreclosure-related rescue services, no foreclosure-rescue consultant shall:
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> * * *
>
> (2) Engage in or . . . initiate foreclosure-related rescue services without first executing a written agreement with the homeowner for foreclosure-related rescue services . . . .

Krogman never attempted another service of process upon Haven or Mr. Goodall.

On March 18, 2014, Appellees' counsel, Robert Burns, filed a notice of appearance in the trial court. According to Ms. Krogman's counsel's affidavit, two days later, Appellees' counsel served interrogatories and requests for production of documents on Ms. Krogman. Appellees each filed answers to the complaint on June 18, 2014. In their answers, both Haven and Mr. Goodall stated that they were not properly served with process in this action. In paragraph five under the heading "**AFFIRMATIVE DEFENSES**," Haven stated:

> Haven affirmatively avers the defenses of insufficiency of process and insufficiency of service of process pursuant to Rule 12.02(5-6),[2] T.R.C.P. Haven affirmatively avers that its designated agent was not personally served with process in this action. Further, based upon the return on service of the summons issued against it in this action, Haven did not authorize, either expressly or on implied basis, that the individual who appears to have signed the certified mail service of summons on Haven's behalf to sign or accept that mail for Haven. The individual whose name and signature appears on the return receipt card had no authority to sign and accept delivery by certified mail service of process in this action, and, accordingly, Haven affirmatively avers that it has not been properly served.

Mr. Goodall noted in his affirmative defense number 5 that he "affirmatively avers that he was not personally served with process in this action" and that he "did not authorize, either expressly or on implied basis, that the individual who appears to have signed the certified mail service of summons on Mr. Goodall's behalf to sign or accept that mail for him." Mr. Goodall asserted that "[t]he individual whose name and signature appears on the return receipt card had no authority to sign and accept delivery by certified mail service of process in this action." According to Appellees' brief, there appears to have been no specific written discovery interactions between Ms. Krogman and Haven. All interrogatory requests were directed to Mr. Goodall and other defendants, although we note that counsel for Mr. Goodall also represented Haven.

On February 29, 2016, Appellees filed two separate motions for summary judgment and accompanying statements of material facts, affidavits and exhibits, including affidavits from Mr. Goodall, Mr. Pugliese, and Appellees' counsel Burns. Ms. Krogman filed responses to both along with her own supporting documentation,

[2]We believe Appellees meant 12.02(4-5) for insufficiency of process and service of process, not failure to state a claim, which is 12.02(6).

including an affidavit from her attorney.

In essence, Appellees argued in both motions that Ms. Krogman did not properly serve the summons and complaint on Appellees in compliance with Rule 4 because the persons who received and signed for the documents were not authorized agents. Further, Ms. Krogman did not obtain issuance of new process within one year, and, thus, she could not rely on the filing of the original lawsuit to toll the statute of limitations for the action, pursuant to Rule 3 of the Tennessee Rules of Civil Procedure. Therefore, the statute of limitations had expired and Appellees were entitled to judgment as a matter of law. Additionally, Appellees argued that participation in the litigation, including filing an appearance and involvement in discovery, did not constitute waiver of process.

In response, Ms. Krogman argued the issue concerning adequacy of service of process was waived because Appellees evaded service (were aware of it ahead of time due to a letter from another attorney), they waived the affirmative defense by noncompliance with Rule 12 of the Tennessee Rules of Civil Procedure, they waived the defense by actively participating in the lawsuit, and the affirmative defense was not properly raised because the answer was filed too late.

The trial court heard arguments on May 6, 2016, and the court granted Appellees' motions for summary judgment on May 23, 2016. The court referred to the motions as properly being motions to dismiss, rather than motions for summary judgment. However, the written order provides that it is for "Summary Judgment," and the motions brought in significant evidence outside of the pleadings, thus making summary judgment appropriate. The trial court held that Appellees had properly pled the affirmative defense of insufficient service of process under Rule 8.03 of the Tennessee Rules of Civil Procedure[3] and provided sufficient notice to Ms. Krogman. Further, the court held that Appellees' participation in the litigation did not constitute a waiver of the affirmative defense. As a result, the court held that the statute of limitations had run on her claim because Ms. Krogman did not properly serve process within ninety days of the filing of the complaint as required by Rule 3 of the Tennessee Rule of Civil Procedure. This timely appeal followed.

[3]"In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tort feasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense. . . ."

II. ISSUES

We have consolidated the issues on appeal as follows:

> (1) Whether Appellees waived their affirmative defenses of insufficiency of service of process by filing a notice of appearance and by filing its answer approximately two months after initiation of the lawsuit?
>
> (2) Whether Appellees' participation in litigation waived the affirmative defense of insufficiency of service of process?
>
> (3) Whether Appellees properly pled the affirmative defense of insufficiency of service of process by stating the facts supporting the basis for the defense?

III. STANDARD OF REVIEW

A trial court's ruling on a motion for summary judgment is reviewed de novo, with no presumption of correctness. *Russell v. HSBC Mortgage Servs., Inc.*, No. M2015-00197-COA-R3-CV, 2016 WL 1588091, at *11 (Tenn. Ct. App. Apr. 15, 2016) (citing *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015)). In doing so, "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Greeze v. Tennessee Farmers Mut. Ins. Co.*, No. E2016-00792-COA-R3-CV, 2017 WL 1163680, at *4 (citing *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)).

In *Rye*, the Tennessee Supreme Court stated our appellate standard for summary judgment as follows:

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment *de novo*, without a presumption of correctness.
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> * * *
>
> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving

> party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. . . . The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.

Rye, 477 S.W.3d at 250, 264-65. In determining whether summary judgment was properly granted,

> [w]e must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox Cnty. Bd. of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). If the undisputed facts support only one conclusion, then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

Demastus v. Univ. Health Sys., No. E2016-00375-COA-R3-CV, 2017 WL 829815, at *3 (Tenn. Ct. App. Mar. 2, 2017) (quoting *Wells Fargo Bank, N.A. v. Lockett*, No. E2013-02186-COA-R3-CV, 2014 WL 1673745, at *2 (Tenn. Ct. App. Apr. 24, 2014)).

IV. DISCUSSION

As an initial matter, Haven argues that Ms. Krogman's appellate brief only specifically alleges waiver of service of process because of participation in the lawsuit and because the affirmative defense was not properly pled in the answer by Mr. Goodall, not Haven. Haven therefore asks that the court narrowly construe these arguments as only applying to Mr. Goodall and as having not been properly raised on appeal against Haven.

Service of Process

Ms. Krogman argues that Appellees evaded service of process and thus substitute service was sufficient. Alternatively, she contends that Appellees waived service of process because they did not properly raise the affirmative defense in their responsive pleading, because they filed a notice of appearance, and because they participated extensively in the litigation.

As we noted recently in *Urban v. Nichols*:

> "Interpretation of a rule of civil procedure presents a question of law, which we review de novo with no presumption of correctness." *Doyle v. Town of Oakland*, No. W2013-02078-COA-R3-CV, 2014 WL 3734971, at *3 (Tenn. Ct. App. 2014) (citing *Lacy v. Cox*, 152 S.W.3d 480, 483 (Tenn. 2004). "Although the rules of civil procedure are not statutes, the same rules of statutory construction apply in the interpretation of rules." *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009) (*see Crosslin v. Alsup*, 594 S.W.2d 379, 380 (Tenn. 1980); 1 Tenn. Juris. Rules of Court § 2 (2004)). The goal in construing rules of the court "is to ascertain and give effect to this [c]ourt's intent in adopting its rules." *Id.* (citing *State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001). This court has a duty to enforce the rule(s) as written. *Fair v. Cochran*, 418 S.W.3d 542, 544 (Tenn. 2013).

No. E2014-00907-COA-R3-CV, 2015 WL 5178431, at *2 (Tenn. Ct. App. Sep. 4, 2015).

Rule 4.04(1) of the Tennessee Rules of Civil Procedure provides:

> The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:
>
> (1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

Tenn. R. Civ. P. 4.04(1). The rule's language is clear that "the preferred method of service upon an individual . . . is clearly by delivery of the summons and complaint to the defendant personally." *Hall v. Haynes*, 319 S.W.3d 564, 572 (Tenn. 2010) (quoting Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 2-3(d), at 2–26 (2d ed. 2004)). Service may also be effectuated upon a properly registered agent. *Id.*

Significantly, our courts have repeatedly held that actual notice of the lawsuit is not a substitute for service of process where it is required by the Rules of Civil Procedure. *Id.* (citing *Frye v. Blue Ridge Neuroscience Ctr.*, 70 S.W.3d 710, 715 (Tenn. 2002); *see also City of Oak Ridge v. Levitt*, 493 S.W.3d 492, 502 (Tenn. Ct. App. 2015); *In re Beckwith Church of Christ*, No. M2015-00085-COA-R3-CV, 2016 WL 5385853, at *4 (Tenn. Ct. App. Sep. 23, 2016); *Regions Bank v. Sandford*, No. M2015-02215-COA-R3-CV, 2016 WL 6778188, at *2 (Tenn. Ct. App. Nov. 16, 2016).

Concerning organizational defendants, including limited liability companies like Haven, Rule 4.04(3) states service shall be made:

> Upon a partnership or unincorporated association (including a limited liability company) which is named defendant under a common name, by delivering a copy of the summons and of the complaint to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

Tenn. R. Civ. P. 4.04(3).

Service of process may be perfected via mail, and Rule 4.04(10) provides that:

> Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). . . .

Tennessee Rule of Civil Procedure 4.04(10); *Hall*, 319 S.W.3d at 557. Rule 4.03(2) further states:

> When process is served by mail, the original summons, endorsed as below; an affidavit of the person making service setting forth the person's compliance with the requirements of this rule; and, the return receipt shall be sent to and filed by the clerk. The person making service shall endorse over his or her signature on the original summons the date of mailing a certified copy of the summons and a copy of the complaint to the defendant and the date of receipt of the return receipt from the defendant. *If the return receipt is signed by the defendant, or by a person designated by Rule 4.04 or by statute, service on the defendant shall be complete.* If not, service by mail may be attempted again or other methods authorized by these rules or by statute may be used.

Tennessee Rule of Civil Procedure 4.03(2); *Hall*, 319 S.W.3d at 557. Rule 4.03 "set[s] forth a mandatory requirement rather than a discretionary ideal that need not be strictly enforced to confer jurisdiction over a party." *Id.* (citing *Estate of McFerren v. Infinity Transp., LLC*, 197 S.W.3d 743, 748 (Tenn. Workers' Comp. Panel 2006)).

A. Evading Service

Ms. Krogman first argues that substitute service was properly provided on Mr. Goodall under Rule 4.04(1) of the Tennessee Rules of Civil Procedure because he was evading service of process. She contends that a prior attorney notified Mr. Goodall of the pending lawsuit on October 21, 2013; his attorney appeared on March 18, 2014, to represent him; his attorney did not protest service at that time; and someone else (Mr. Langarod) had signed the address card in his stead, despite the complaint and summons being mailed to his home (though it appeared the documents were then forwarded to Haven's address). Appellees did not address this argument.

As noted above, an unbroken line of cases have held that actual notice of a lawsuit cannot cure defective service of process as required by the Rules of Civil Procedure. *Hall*, 319 S.W.3d at 572 (citing *Frye*, 70 S.W.3d at 715); *see also City of Oak Ridge*, 493 S.W.3d at 502; *In re Beckwith Church of Christ*, 2016 WL 5385853, at *4; *Regions Bank*, 2016 WL 6778188, at *2.

Under Rule 4.04(1), the only time any type of service other than personal service can be had upon an individual, including service upon an authorized agent, is if the individual evades or attempts to evade service or if he is an infant or incompetent. *Novack v. Fowler*, No. W2011-01371-COA-R9-CV, 2012 WL 403881, at *6 (Tenn. Ct. App. Feb. 9, 2012) (citing *Eaton v. Portera*, No. W2007-02720-COA-R3-CV, 2008 WL 4963512, at *4 (Tenn. Ct. App. Nov. 21, 2008)). The burden of proving that an individual evaded or attempted to evade service of process is on the serving party. *Id.*

(citing *Haley v. Hitt Elec. Co.*, No. 01-A-01-9107-CH-00258, 1992 WL 7669, at *2 (Tenn. Ct. App. Jan. 22, 1992)). For a plaintiff to warrant substituted service, the plaintiff must make a sufficient showing before the trial court to satisfy the requirements of the substituted service statute. *Id.* (citing *Stanley v. Mingle*, No. 01-A-01-9007-CV-00253, 1991 WL 53423, at *3 (Tenn. Ct. App. Apr. 12, 1991)).

In *Stanley*, this court utilized the "ordinary dictionary definition" of evade, which defined the term as "to escape or avoid by cleverness." 1991 WL 53423, at *3 (quoting American Heritage Dictionary 453 (New College ed. 1979)). The failure to serve the defendant must be attributable to the defendant's actions, rather than the plaintiff's to support a finding that the defendant was evading service of process:

> [T[he fact that serving a defendant has proven to be a difficult and onerous task does not equate with a finding that a defendant is avoiding service. . . . [A] plaintiff's inability to ascertain the current location/residence of a defendant and a process server's failed attempts to effectuate service are insufficient to demonstrate that a defendant "is responsible for this failure of service because he is hiding from or avoiding it."

Novack, 2012 WL 403881, at *8 (quoting *Bedgood v. Garcia*, No. 2:08-CV-953-WKW[WO], 2009 WL 1664131, at *3-4 (M.D. Ala. 2009)).

The facts before us in this case are insufficient to conclude that evasion of service occurred. Without a finding of evasion, substitute service of process was improper.

B. Waiver of Insufficient Service of Process

Notice of Appearance

Ms. Krogman next argues that Appellees waived the affirmative defense of insufficient service of process because Appellees' counsel failed to raise the issue of improper service when he entered a notice of appearance on March 18, 2014. In response, Appellees argue that Tennessee law is clear that filing a notice of appearance does not constitute a waiver.

Pursuant to Rule 12.01 of the Tennessee Rules of Civil Procedure, "[a] defendant shall serve an answer within thirty (30) days *after the service of the summons and complaint upon him*." (Emphasis added). Rule 12.02 states: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in

writing . . . (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

Rule 8.03 of the Tennessee Rules of Civil Procedure states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms . . . constituting an avoidance or affirmative defense." Tenn. R. Civ. P. 8.03. Rule 12.08 further provides that "[a] party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply. . . ." Tenn. R. Civ. P. 12.08.

As a general rule, "defects in service of process may be waived." *In re Beckwith Church of Christ*, 2016 WL 5385853, at *5 (citing *Faulks v. Crowder*, 99 S.W.3d 116, 125–26 (Tenn. Ct. App. 2002)). However, 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." *Id.* (citing *Landers v. Jones*, 872 S.W.2d 674, 677 (Tenn. 1994)). "[A] notice of appearance, without more, does not go to the merits of the action and does not constitute a waiver." *Id.* (citing *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)).

This court has held definitively that an appearance by counsel is not a "pleading" within the meaning of Rule 8.03. *Dye v. Murphy*, No. W2003-01521-COA-R3-CV, 2004 WL 350660, at *3 (Tenn. Ct. App. Feb. 24, 2004). More importantly, the *Dye* court found, without explicitly holding, that a notice of appearance by counsel is insufficient to constitute a waiver of a defense based on the statute of limitations. *Id.* More recently, this court held in *Newgate Recovery, LLC,* that a garnishee's appearance in court did not constitute a waiver of service of process. 2014 WL 3954026, at *5. Under the facts in this case, we find no waiver resulted from Appellees' counsel's appearance. Appellees were entitled to contest sufficiency of service of process.

Timeliness of Answer

Ms. Krogman next argues that Appellees' alleged failure to file an answer in the appropriate timeframe required by Rule 12.01 of the Tennessee Rules of Civil Procedure constituted a waiver of the insufficient service of process affirmative defense. Appellees contend that Ms. Krogman's failure to effectuate service of process meant Appellees were not required to file an answer within the 30-day timeframe required by Rule 12.01.

As noted previously, Rule 12.01 states unequivocally that a "defendant shall serve an answer within thirty (30) days *after the service of the summons and complaint upon him*." Tenn. R. Civ. P. 12.01. The record before us reveals that service was never

perfected upon Appellees. Even though Appellees undoubtedly received actual notice of the lawsuit, such notice does not qualify as service of process. *Hall*, 319 S.W.3d at 572. In our view, "after the service of the summons and complaint upon him" undoubtedly means after service of process has been properly effectuated upon the defendant. That has not occurred in the instant case. We have "a duty to enforce the rules as written." *Fair v. Cochran*, 418 S.W.3d 542, 544 (Tenn. 2013).

Further, this court has explicitly held that "[t]he answer is not due 30 days after the filing of the complaint as the Defendant seems to argue, but rather 30 days after the *service* of the summons *and* the complaint." *Elliott v. Akey*, No. E2004-01478-COA-R3-CV, 2005 WL 975510, at *2 (Tenn. Ct. App. Apr. 27, 2005). In *Elliott*, the court held that a deficiency in service of process "would not have been sufficient service to commence the running of the 30 days." *Id.* Therefore, the defendant's answer could not be considered to be untimely or in violation of Rule 12.01, despite being filed more than 30 days after the complaint or the receipt of actual notice. *Id.* The common sense principle that the running of the 30 days to file an answer under Rule 12.01 does not begin until a defendant is properly served is aligned with our civil procedure jurisprudence. *Id.; see also Hall*, 319 S.W.3d at 585; *Fair*, 418 S.W.3d at 544.

Ms. Krogman cites the Tennessee case *Liput v. Grinder* to support her proposition, but, as Appellees point out in their brief, the issue of a late-filed answer barring the service of process affirmative defense was waived in that case because the plaintiff did not raise it at the trial court level. 405 S.W.3d 664, 680 (Tenn. Ct. App. 2013). Thus, the appellate court did not address the issue for which Ms. Krogman cited it. Regardless, *Elliott* and other case law provide far clearer guidance in this matter.

The crux of Ms. Krogman's argument is that several federal courts construing the *Federal* Rules of Civil Procedure have found similar affirmative defenses waived after the Federal Rules' *21* day response period had elapsed. However, as Appellees point out, the defendants in these cases were either properly served, unlike the instant case, *e.g., Granger v. Kemm, Inc.*, 250 F. Supp 644, 645 (E.D. Penn. 1966); or they dealt with defendants who did not file answers or responsive pleadings until after a judgment was entered, *e.g., Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733-34 (7th Cir. 1991) (filing a motion to vacate judgment for insufficient process seven years after default judgment was properly denied and the defense was waived); or they covered issues not related to service of process. *E.g., Nelson v. Victory Electric Works, Inc.*, 210 F. Supp. 954, 955 (D. Md. 1962) (venue). Further, Ms. Krogman relies on cases that held that appearance on a motion to dismiss for lack of personal jurisdiction without raising an objection to service constitutes a waiver of such objection. *E.g., Totalplan Corp. of Am. v. Lure Camera*, 613 F. Supp. 451, 456 (W.D.N.Y. 1985). That issue is not before this court. Even if Ms. Krogman cited a case more on point, we are not bound by this persuasive authority. We recognize the Tennessee Rules of Civil Procedure are similar, but not the same, to their federal counterparts, and we are bound by mandatory Tennessee

precedent, such as *Elliott*. We find no waiver of the insufficient service of process affirmative defense by Appellees due to the timing of their answer.

Participation in Litigation

Ms. Krogman next argues that Appellees' extensive participation in litigation constitutes a waiver of service of process and that the *Hall* holding is merely *obiter dictum*. This argument is simply against the weight of Tennessee law.

Despite finding the argument waived at the appellate level, our Supreme Court in *Hall* held that having "adequately raised insufficiency of process as an affirmative defense in their answer, [d]efendants did not waive the defense by their continued participation in the lawsuit." *Hall*, 319 S.W.3d at 584-85. Ms. Krogman argues this portion of *Hall* was merely *obiter dictum*, claiming it was "not relating directly to the matters in controversy or necessary to the court's decision." However, a thorough review of *Hall* reveals that it was in fact crucial to the decision. Our Supreme Court affirmed summary judgment in *Hall* "because we hold that Plaintiff never effectively served Defendants with process and *that Defendants have not waived this defense* . . . ." *Id.* at 585.

Even if we were to find *Hall* not instructive here under principles of *stare decisis*, our courts have consistently held that participation in litigation does not constitute a waiver of insufficient service of process after the defense has been properly pled in an answer. *State ex rel. Barger v. City of Huntsville*, 63 S.W.3d 397, 399 (Tenn. Ct. App. 2001); *Regions Bank*, 2016 WL 6778188, at *2 (citing *Barger*); *Doyle*, 2014 WL 3734971, at *3 (citing *Barger*); *Eaton*, 2008 WL 4963512, at *3 (citing *Barger*). Ms. Krogman's reliance on this court's decision in *Goodner v. Sass* is similarly misplaced. That case dealt with two complaints; the defendant answered the first complaint in a timely manner and raised the service issue. *Goodner v. Sass*, No. E2000-00837-COA-R3-CV, 2001 WL 35969, at *2 (Tenn. Ct. App. Jan. 16, 2001). The plaintiff filed a second alias complaint, but the defendant did not respond to it until over a year later in a motion for summary judgment based on insufficient service of process, after participating heavily in discovery. *Id.* We held that the defendant's untimely response to the second complaint, failure to file an answer to the second complaint, and extensive participation in litigation constituted a waiver of his service of process defense. *Id. Goodner* is easily distinguished from the present case. Here, Appellees filed an answer before participating in additional, extensive litigation, except for filing a Notice of Appearance and serving interrogatories and requests for production of documents on Ms. Krogman. Accordingly, under the facts shown by the record on appeal, we hold that Appellees did not waive their defense of insufficiency of process by participating in the litigation.

Pleading

Finally, Ms. Krogman argues that Appellees' waived their service of process affirmative defense because it was not properly stated in their answer pursuant to Rule 8.03. Essentially, Ms. Krogman alleges that Appellees did not identify the person who signed for the complaint and summons, Mr. Langarod, in their answer when asserting the affirmative defense and in subsequent discovery. Appellees argue that they clearly and specifically stated the affirmative defense and that identifying the individual who signed for the documents is not required by the rules or Tennessee law.

Rule 8.03 states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms . . . constituting an avoidance or affirmative defense." Tenn. R. Civ. P. 8.03; *Hall*, 319 S.W.3d at 584. Our courts have consistently held that Rule 8.03 "applies to the defense of insufficiency of service of process." *Milton v. Etezadi*, 2013 WL 1870052, at *3, No. E2012-00777-COA-R3-CV (Tenn. Ct. App. May 3, 2013) (citing *Barker v. Heekin Can Co.*, 804 S.W.2d 442, 444 (Tenn. 1991)); *Faulks*, 99 S.W.3d at 125). "Insufficiency of service of process is an affirmative defense that must be presented in the defendant's answer or in a pre-answer motion." *Allgood v. Gateway Health Sys.*, 309 S.W.3d 918, 925 (Tenn. Ct. App. 2009) (citing Tenn. R. Civ. P. 12.02(5); *Eaton*, 2008 WL 4963512, at *3). A party that fails to comply with this requirement presumptively waives the defense. *Id.* (citing *Barker*, 804 S.W.2d at 444). A "mere notice of a possible problem is insufficient to satisfy Rule 8.03." *Id.* at 925 (citing *Barker*, 804 S.W.2d at 444).

Although the plaintiff conceded as much, our Supreme Court in *Hall* agreed that defendant's statement in his answer that the "[t]he Summons, Complaint, and First Amended Complaint were not delivered personally to Dr. Haynes or the authorized agent for service of process for MedSouth Healthcare, P.C." was sufficient to satisfy the pleading requirements of Rule 8.03. *Hall*, 319 S.W.3d at 570, 584. Similarly, in *Eaton*, an answer that "asserts the defense of insufficiency of process and insufficiency of service of process in that he was never served with the Complaint pursuant to the Rules of Civil Procedure and Tennessee law" complied with Rule 8.03 and set forth a sufficient factual basis to give the plaintiff notice. 2008 WL 4963412, at *3. We hold that Appellees conclusively established their affirmative defense. The answers of Appellees complied with Rule 8.03.

Statute of Limitations & Summary Judgment

Rule 3 of the Tennessee Rules of Civil Procedure provides:

> If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process

> within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

Tennessee Code Annotated section 47-18-110 provides that "[a]ny action commenced pursuant to § 47-18-109 shall be brought within one (1) year from a person's discovery of the unlawful act or practice." A violation of section 47-18-5402, the statute which Ms. Krogman filed her claim pursuant to, is an "unfair or deceptive act" under section 47-18-104 that gives rise to a cause of action under section 47-18-109. Tenn. Code Ann. §§ 47-18-109(a)(1); 47-18-104(b)(45) (2017). The initial complaint was filed on February 21, 2014. The separate motions for summary judgment were both filed on February 29, 2016. Accordingly, the trial court properly determined that Appellees were entitled to summary judgment as a matter of law.

V. CONCLUSION

The judgment of the trial court is affirmed, and this cause is remanded for collection of costs below. Costs of appeal are assessed to the appellant, Lisa Marie Krogman and her surety, if any, for which execution may issue if necessary.

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JOHN W. MCCLARTY, JUDGE