Opinion issued November 17, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00608-CV

MARCUS TODD, Appellant

V.

SPORT LEASING & FINANCIAL SERVICES CORP., Appellee

On Appeal from the Third County Court at Law
Harris County, Texas
Trial Court Case No. 946316

MEMORANDUM OPINION

In this restricted appeal from a default judgment, Marcus Todd contends that he was not properly served with process, and thus lacked notice of the suit against him. We hold that the trial court erred in entering the default judgment because

Sport Leasing & Financial Services Corporation ("Sport Leasing") did not strictly comply with the rules for service of process in the Texas Rules of Civil Procedure. We reverse the judgment of the trial court and remand for further proceedings.

BACKGROUND

In August 2006, Marcus Todd leased a 2005 BMW 530i from Nxcess Motorcars. Nxcess assigned Todd's lease contract to Sport Leasing. In August 2009, Sport Leasing sued Todd to recover amounts due and owing under the lease agreement.

Sport Leasing attempted to serve Todd with notice of its suit at Todd's address listed on the lease agreement: 4315 South Kirkwood #138, Houston, TX 77072 ("apartment 138"). After one unsuccessful attempt, the process server tried six times to serve Todd at his father's apartment located in the same building ("apartment 104"). When the process server could not serve Todd in person, Sport Leasing moved for substituted service. The trial court granted Sport Leasing's motion. It approved substituted service by: (1) delivering a copy of the citation and petition to anyone over sixteen years of age at apartment 138; or (2) attaching a copy of the citation and petition to the front door of apartment 138. The trial court did not authorize any other method or location for service. Nevertheless, when the process server issued service under the order authorizing

substituted service of process at apartment 138, the process server posted the citation on apartment 104.

In addition to posting citation on apartment 104, Sport Leasing mailed a copy of the petition and citation to apartment 104, return receipt requested. Sport Leasing believed Todd lived at apartment 104 because the process server had indicated that Todd might live there instead of apartment 138. Sport Leasing certified that Todd's last known address was apartment 104. A citation returned to Sport Leasing contained the signature of Arthur Todd, not Marcus Todd.

In March 2010, after receiving no answer to the underlying suit, Sport Leasing moved for entry of a default judgment against Todd. The trial court granted the motion, ordering Todd to pay principal and interest under the lease and Sport Leasing's attorney's fees. Todd never answered the suit or otherwise appeared in the trial court proceedings.

DISCUSSION

Appellate Jurisdiction

Rule 30 of the Texas Rules of Appellate Procedure provides that:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c).

TEX. R. APP. P. 30. Todd appeals within six months of a default judgment and did not participate in the default judgment hearing or file any post-judgment motions or requests. He filed a notice of appeal within six months as required by Rule 26.1(c). TEX. R. APP. P. 26.1(c). Accordingly, we determine whether error appears on the face of the record. *Hubicki v. Festina*, 226 S.W.3d 405, 407 (Tex. 2007) (per curiam) (citing *Wachovia Bank of Del. v. Gilliam*, 215 S.W.3d 848, 849 (Tex. 2007)).

Standard of Review

A no-answer default judgment cannot withstand a direct attack by a defendant who shows that he was not served in strict compliance with the Texas Rules of Civil Procedure. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Hubicki*, 226 S.W.3d at 407. In contrast to the usual rule that presumptions will be made in support of a judgment, when examining a default judgment, we accord no presumption of valid issuance, service, or return of citation. *Uvalde Country Club*

v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985) (per curiam). Failure to strictly comply with the Rules of Civil Procedure renders any attempted service of process invalid and of no effect. *Hubicki*, 226 S.W.3d at 408; *Wilson*, 800 S.W.2d at 836.

Analysis

Sport Leasing attempted to serve Todd by certified mail and substituted service. In both instances, Sports Leasing failed to strictly comply with the Texas Rules of Civil Procedure. First, Sport Leasing did not serve Todd by certified mail at the correct address and his signature does not appear on the return receipt. Second, Sport Leasing did not serve Todd under the court's order authorizing substituted service because Sport Leasing posted its notice at a different apartment number from the number identified in the order. We address the governing rules for each method in turn.

(1) Mailing to apartment 104

Rule 106 of the Texas Rules of Civil Procedure provides:

> Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized . . . by (1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or (2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

TEX. R. CIV. P. 106. If a defendant is served by certified mail under Rule 106(a)(2), then Rule 107 requires that "the return by the officer or authorized person must also contain the return receipt with the addressee's signature." TEX. R. CIV. P. 107. Failure to affirmatively show strict compliance renders the attempted service of process invalid and of no effect. *Uvalde Country Club*, 690 S.W.2d at 885. Several Texas courts have held that process is invalid where the face of the record shows that the addressee or a person designated to receive service did not sign the green slip. *See id.* (holding service invalid where registered agent named "Henry Bunting, Jr." but service delivered to "Henry Bunting"); *see also Sw. Sec. Serv., Inc. v. Gamboa*, 172 S.W.3d 90, 93 (Tex. App.—El Paso 2005, no pet.) (concluding that service directed to registered agent named "Jesus Morales" was invalid when signed for by "Guillermo Montes"); *All Commercial Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723, 727 (Tex. App.—Fort Worth 2003, no pet.) (holding that return receipt signed by "Mark," with illegible last name, was invalid, given Kelly Lynn Arreola was designated to receive service for defendant); *Pharmakinetics Labs., Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 2001, no pet.) (holding service of process defective when receipt card was signed by someone other than registered agent); *Bronze & Beautiful, Inc. v. Mahone*, 750 S.W.2d 28, 29 (Tex.App.—Texarkana 1988, no writ) (same). "If someone other than the defendant named in the citation is served

with process, the court [does] not secure jurisdiction over the named defendant." *P&H Transp. v. Robinson*, 930 S.W.2d 857, 860 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

The return receipt shows that Arthur J. Todd was served with a copy of Sport Leasing's petition at apartment 104. The record does not indicate that Arthur Todd was authorized to accept service on behalf of Marcus Todd. Without evidence in the record supporting that Arthur Todd was authorized to accept service on Marcus Todd's behalf, we may not presume that he was. Because Marcus Todd did not sign the return receipt and Arthur Todd was not authorized to accept service on his behalf, the record does not show that Sport Leasing strictly complied with the Rules of Civil Procedure. Accordingly, Sport Leasing did not accomplish service by mail.

(2) Substituted service under the trial court's order

Rule 106(b) authorizes a court to order substituted service of process upon a proper showing that the plaintiff has been unable to serve the defendant through any default method listed in Rule 106(b). TEX. R. CIV. P. 106(b). When a court orders substituted service under Rule 106(b), the order itself provides the only authority for the substituted service. *Berkefelt v. Jackson*, No. 01-07-00526-CV, 2008 WL 4530693, at *1 (Tex. App.—Houston [1st Dist.] Oct. 9, 2008) (mem. op., not designated for publication). As a result, "any deviation from the trial

court's order necessitates a reversal of the default judgment based on service." *Id.* (citing *Becker v. Russell*, 765 S.W.2d 899, 900 (Tex. App.—Austin 1989, no writ)).

The trial court authorized Sport Leasing to serve Todd by affixing a copy of the citation to the door of apartment 138 or by delivering a copy of the petition and citation to any person over the age of sixteen at apartment 138. Sport Leasing was required to follow the trial court's instructions exactly. However, instead of affixing the citation on apartment 138 as specified in the trial court's order, Sport Leasing posted the citation on apartment 104. Accordingly, Sport Leasing did not comply with the trial court's order substituting service of process. Failure to strictly comply with the trial court's order is fatal. Because Sports Leasing affixed the citation to the wrong apartment, we hold that there is error on the face of the record and that Sport Leasing did not serve Todd under Rule 106(b).

CONCLUSION

We hold that neither service attempt in this case was valid. Accordingly, we reverse the default judgment and remand the case to the trial court for further proceedings.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.