Opinion issued December 29, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01113-CV

DOV AVNI KAMINETZKY, A/K/A DOV K. AVNI, INDIVIDUALLY AND AS ASSIGNEE OF TWO CORPORATE CO-DEFENDANTS, Appellant

V.

DAVID A. NEWMAN, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2010-22875

MEMORANDUM OPINION

Appellant, Dov Avni Kaminetzky, a/k/a Dov K. Avni, appeals the rendition of a default judgment obtained against him and two corporate entitities by appellee, David A. Newman. In five issues, Kaminetzky argues (1) the trial court lacked

personal jurisdiction over the six defendants; (2) the trial court lacked subject-matter jurisdiction over the claims; (3) the judgment was erroneously granted "after mandate was issued [in a prior appeal], affirming [the trial court's] prior erroneous judgments . . . without bill of review"; (4) Newman's motion for summary judgment lacked essential evidentiary elements; and (5) Newman's motion for summary judgment contained conflicting evidence on material fact issues.

We affirm in part and reverse and remand in part.

Background

Back in the late 1980s, Newman had managed a number of Kaminetzky's Texas properties. This relationship eventually turned sour, however, and litigation ensued. In 2000, Kaminetzky sued Newman about ownership of certain property, and Newman countersued. On March 10, 2005, a judgment was rendered against Kaminetzky and in favor of Newman, determining that Newman held title in the property.

While that suit was pending, Kaminetzky brought another suit against Newman about the property, and Newman again countersued. On October 17, 2006, Newman again prevailed, obtaining an anti-injunction suit against Kaminetzky.

In February 2010, Newman attempted to sell one of the properties that was the subject of the earlier suits. Newman then discovered that there were two clouds on his title for the property, which prevented the sale. Newman brought suit against Kaminetzky and five other defendants on April 12, 2010 seeking to remove the cloud on his title and to obtain a permanent injunction against Kaminetzky prohibiting him from filing any further encumbrances on Newman's properties.

Newman directed the Harris County District Clerk's Office to serve Kaminetzky with citation by certified mail. The record contains a copy of the citation. The return is on the same page as the citation. It does not state when the citation was served. It is not signed by an officer of the district clerk's office. Finally, the return is not notarized.

Newman filed a motion for summary judgment on July 9, 2010. A hearing was set on September 3, 2010.

On September 9, 2010 Kaminetzky filed a special appearance. On September 10, he filed a supplement to his special appearance. Also on September 10, the trial court rendered judgment in favor of Newman and against all six defendants.

On October 8, 2010, Kaminetzky filed a motion to vacate and for new trial. Kaminetzky set a hearing on this motion for November 12, 2010, but passed on the hearing the day before. The motion was ultimately overruled by operation of law.

On November 12, 2010, Kaminetzky filed a motion to disqualify or recuse the trial court judge. The trial court judge denied the motion and referred it to the Presiding Judge of the Second Judicial Administrative Region, who denied it as well.

Appellate Jurisdiction

As an initial matter, Newman argues that we lack jurisdiction over this appeal because Kaminetzky did not timely file a notice of appeal.

The trial court rendered the final judgment on September 10, 2010. On October 8, 2010, Kaminetzky filed a document entitled "Pro-Se Defendant Dov K. Avni a/k/a Dov Avni Kaminetzky's original sworn motion to vacate the erroneously rendered order . . . on 9/10/2010 . . . ." Kaminetzky argued in this motion that he was not served with process for the suit. In the prayer for the motion, Kaminetzky asked the court to vacate the September 10 order and grant a new trial. Kaminetzky filed his notice of appeal on December 9, 2010.

Typically, a notice of appeal must be filed within 30 days after the judgment is signed. TEX. R. APP. P. 26.1. If any party files a timely motion for new trial or motion to modify the judgment, the deadline to file a notice of appeal is extended

to within 90 days after the judgment is signed. TEX. R. APP. P. 26.1(a)(1), (2). Any "timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g) [of the Texas Rules of Civil Procedure], thus extending the trial court's plenary jurisdiction and the appellate timetable." *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000). Failure to timely file a notice of appeal deprives an appellate court of jurisdiction. *See* TEX. R. APP. P. 25.1(b) (providing filing notice of appeal by any party invokes jurisdiction of appellate court).

The title of Kaminetzky's October 8 motion indicates it is a motion to vacate the September 10 judgment. The body of the motion argues that he was never served with process. The prayer asks for the judgment to be vacated and a new trial granted. We hold that this qualifies as a motion for new trial or motion to modify the judgment. Accordingly, Kaminetzky's deadline to file his notice of appeal was extended to December 9, 2010, the date that Kaminetzky filed his notice of appeal. It follows, then, that we have jurisdiction over this appeal.

Preservation of Issues on Appeal

Next, we must consider what issues have been preserved for appeal and by which parties.

In the style of this appeal, Kaminetzky identifies himself as the appellant "individually and as assignee of two corporate co-defendants." There is no

evidence in the record establishing that the assignment exists, the extent of the assignment, or the legal authority for the assignment.

"Generally, a corporation may be represented only by a licensed attorney." *Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996). A notice of appeal filed by a corporate representative that is not a licensed attorney has no effect. *Globe Leasing, Inc. v. Engine Supply & Mach. Serv.*, 437 S.W.2d 43, 45 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

Rule 7 of the Texas Rules of Civil Procedure allows a person to represent himself pro se. TEX. R. CIV. P. 7. This only applies, however, when the person is litigating his rights on his own behalf, instead of litigating certain rights in a representative capacity. *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex. App.—Waco 2006, no pet.).

We hold that Kaminetzky has failed to establish that these rules do not apply to him in whatever capacity he brings the appeal on behalf of the two corporations. Accordingly, the notice of appeal filed by Kamintezky was not effective to file a notice of appeal for the two corporations. *See Globe Leasing*, 437 S.W.2d at 45.

The filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment. TEX. R. APP. P. 25.1(b). When an additional party fails to file a timely notice of appeal, however, nothing is preserved for appellate review. TEX. R. CIV. P. 25.1(c); *Brooks v. Northglen Ass'n*,

141 S.W.3d 158, 171 (Tex. 2004). Accordingly, we hold that whether there was any error in the judgment as it applies to the two corporations has not been preserved for appeal. We overrule all issues as they apply to the two corporations.

Kaminetzky filed his brief on the merits along with a motion seeking time to file a supplement to the brief. This Court granted the motion, and he later filed his supplemental brief.

In his brief on the merits, Kaminetzky identifies five issues for this appeal: (1) the trial court lacked personal jurisdiction over the six defendants; (2) the trial court lacked subject-matter jurisdiction over the claims; (3) the judgment was erroneously granted "after mandate was issued [in a prior appeal], affirming [the trial court's] prior erroneous judgments . . . without bill of review"; (4) Newman's motion for summary judgment lacked essential evidentiary elements; and (5) Newman's motion for summary judgment contained conflicting evidence on material fact issues. His brief on the merits, however, does not address the fourth or fifth issues. Nor are they addressed in his supplemental brief.

A brief on the merits "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). If an issue on appeal lacks legal authority and citations to the record, it is inadequately briefed and, as a result, waives any error. *Esse v. Empire Energy III, Ltd.*, 333 S.W.3d 166, 180 (Tex. App.—Houston [1st Dist.] 2010, pet.

denied). "[L]itigants choosing to appear *pro se* must comply with the applicable procedural rules and are held to the same standards that apply to licensed attorneys." *Sedillo v. Campbell*, 5 S.W.3d 824, 829 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Accordingly, we hold that Kaminetzky has waived any error relating to his fourth and fifth issues. We overrule those issues.

The issues remaining for our consideration are the first three issues as they apply to Kaminetzky in his individual capacity.

Personal Jurisdiction

In his first issue, Kaminetzky argues the trial court lacked personal jurisdiction over him because he was never served.

A. Applicable Law

In *Craddock*, the Texas Supreme Court set forth three requirements that a defendant must satisfy to set aside a default judgment and obtain a new trial: (1) the failure to file an answer or appear at a hearing was not intentional or the result of conscious indifference, but was a mistake or accident; (2) a meritorious defense; and (3) a new trial will not result in delay or prejudice to the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). If the record does not establish that a defaulting defendant was properly served with process, the defendant does not need to meet all the *Craddock* requirements. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86–87, 108 S. Ct. 896, 900 (1988) (holding

defendant who was not properly served was not required to establish a meritorious defense). Instead, lack of proof of proper service is enough to obtain a new trial. *See Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (holding record must affirmatively show strict compliance with rules of citation to withstand default judgment on direct appeal).

Texas procedural law and constitutional due process require that a defendant be served, waive service, or voluntarily appear before judgment may be rendered. *See* TEX. R. CIV. P. 124; *Peralta*, 485 U.S. at 84–87, 108 S. Ct. at 898–900; *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60, 61–62 (Tex. 2008). "A trial court has 'no more solemn judicial obligation than that of seeing that no litigant is unjustly saddled with a judgment in the absence of notice and a hearing.'" *Marrot Commc'ns, Inc. v. Town & Country P'ship*, 227 S.W.3d 372, 376 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (quoting *Finlay v. Jones*, 435 S.W.2d 136, 138–39 (Tex. 1968)).

"[I]n order for a default judgment to be properly rendered, the record must affirmatively show, *at the time the default judgment is entered*, either an appearance by the defendant, proper service of citation on the defendant, or a written memorandum of waiver." *Id.* at 378 (emphasis in original); *see also Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991). "Actual notice to a defendant, without proper service, is not sufficient to convey upon the court

jurisdiction to render default judgment against him." *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

There are no presumptions in favor of valid issuance, service, and return of citation in an attack on a default judgment on direct appeal. *See Uvalde Country Club v. Martin Linen Supply Co., Inc.*, 690 S.W.2d 884, 885 (Tex. 1985). "Strict compliance with the Rules of Civil Procedure relating to the issuance of citation, the manner and mode of service, and the return of process is necessary to sustain a default judgment." *Laidlaw Waste Sys., Inc. v. Wallace*, 944 S.W.2d 72, 73–74 (Tex. App.—Waco 1997, writ denied) (citing *Primate Const.*, 884 S.W.2d at 152; *Wilson*, 800 S.W.2d at 836).

One of the requirements to establish service on a defendant is the officer's or authorized person's return. TEX. R. CIV. P. 107. Rule 107 provides, in pertinent part, "The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person." *Id.* Additionally, for nonresidents of the State, Rule 108 requires that the return "be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer." TEX. R. CIV. P. 108.

"The return of service is not a trivial, formulaic document. It has long been considered prima facie evidence of the facts recited therein." *Primate Const.*, 884 S.W.2d at 152. "The officer's return is historically afforded this special status because the officer may forfeit his official bond and be punished for failing to return a process or making a false return." *Hot Shot Messenger Serv., Inc. v. State*, 818 S.W.2d 905, 908 (Tex. App.—Austin 1991, no writ).

> It is the responsibility of the one requesting service, not the process server, to see that service is properly accomplished. This responsibility extends to seeing that service is properly reflected in the record. The Rules of Civil Procedure allow for liberal amendment of the return of service to show the true facts of service. If the facts as recited in the . . . return, pre-printed or otherwise, are incorrect and do not show proper service, the one requesting service must amend the return prior to judgment.

Primate Const., 884 S.W.2d at 153.

Failure of the officer to sign the return is fatal and will defeat a default judgment. *Laidlaw Waste Sys.*, 944 S.W.2d at 74; *Hot Shot Messenger*, 818 S.W.2d at 908. This is true even when a postal return receipt is included in the record. *Laidlaw Waste Sys.*, 944 S.W.2d at 74; *see also* TEX. R. CIV. P. 107 (requiring completed return of officer *and*, when citation was served by certified mail, inclusion of postal return receipt with addressee's signature). Additionally, failure to include the time of service will defeat the rendition of a default judgment. *Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 256 (Tex. 2009).

B. Analysis

Kaminetzky asserts in his brief that the citation in the record purporting to establish that he was served lacks a complete return. The citation and original petition were sent by certified mail to Kaminetzky by the Harris County District Clerk's Office. The record contains a copy of the citation. The return is on the same page as the citation. It is not, however, completed. It does not state when the citation was served. *See* TEX. R. CIV. P. 107. It is not signed by an officer of the district clerk's office. *See id.* Additionally, because Kamintezky is not a resident of Texas and was not served within the state, the return was required to be notarized. *See* TEX. R. CIV. P. 108. The return is not notarized.

These deficiencies render the return ineffective. *See Laidlaw Waste Sys.*, 944 S.W.2d at 74; *Lejeune*, 297 S.W.3d at 255. The record does not show that Newman made any attempts to cure these deficiencies. *See Primate Const.*, 884 S.W.2d at 153 (allowing party seeking service to cure defective returns up until time of judgment). Because the deficiencies in the return were not cured, the default judgment against Kaminetzky cannot stand. *Laidlaw Waste Sys.*, 944 S.W.2d at 74; *Lejeune*, 297 S.W.3d at 255.

Newman argues in his brief that the judgment was not in fact a default judgment. Newman argues, instead, that Kaminetzky made a general appearance. He relies on the following events to establish Kaminetzky's general appearance:

(1) the day before the judgment was rendered, Kaminetzky filed a special appearance; (2) after the judgment was rendered, Kamnietzky set a hearing on his special appearance and then passed on it;[1] (3) Kaminetzky then filed a motion to disqualify or recuse the trial court judge; and (4) Kaminetzky obtained a ruling on the motion from both the trial court judge and the Presiding Judge of the Second Judicial Administrative Region.

A party that objects to the trial court's jurisdiction over it may file a special appearance. TEX. R. CIV. P. 120a. "Every appearance, prior to judgment, not in compliance with this rule is a general appearance." *Id.* A party enters a general appearance when it invokes the judgment of the court on any question other than the court's jurisdiction. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). A general appearance subjects a party to the jurisdiction of the court. TEX. R. CIV. P. 120; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985).

Although Rule 120a asserts that actions taken prior to judgment can constitute a general appearance, this does not foreclose the possibility that a general appearance can be made after judgment is entered. *See* TEX. R. CIV. P. 120a. In fact, actions such as seeking a motion for new trial, when not made

[1] This is not apparent from the record. The hearing set and passed by Kaminetzky was on his motion to vacate the judgment and for new trial. Our review of the record does not show that Kaminetzky set a hearing for the special appearance.

subject to a special appearance, have been held to constitute a general appearance. *See, e.g.*, *Liberty Enters., Inc. v. Moore Transp. Co., Inc.*, 690 S.W.2d 570, 571–72 (Tex. 1985); *Steve Tyrell Prods., Inc. v. Ray*, 674 S.W.2d 430, 436–37 (Tex. App.—Austin 1984, no writ). In each of these cases, however, the general appearance has the effect of being a general appearance for all matters from that point on—that is, after a motion for new trial has been ordered. *See Liberty Enters., Inc.*, 690 S.W.2d at 571–72; *Steve Tyrell Prods.*, 674 S.W.2d at 437. None of these cases stand for the proposition that a general appearance can be retroactive to validate a judgment.

Instead, Rule 124 of the Texas Rules of Civil Procedure requires, "In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant . . . ." TEX. R. CIV. P. 124. As this Court has emphasized, "[I]n order for a default judgment to be properly rendered, the record must affirmatively show, *at the time the default judgment is entered*, either an appearance by the defendant, proper service of citation on the defendant, or a written memorandum of waiver." *Marrot Commc'ns*, 227 S.W.3d at 378 (emphasis in original). If the record does not show *at the time the default judgment is entered* that rendition was appropriate, subsequent acts will have no bearing on the appropriateness of the rendition of judgment. *Id.*

The day before the judgment was rendered, Kaminetzky filed a special appearance. The day the judgment was rendered, he filed a supplement to his special appearance, including certain documents he deemed relevant. No other action was taken by Kaminetzky before the judgment was entered against him.

We hold that the return on Kaminetzky's citation was defective and, at the time judgment was entered, Kaminetzky had not taken any other action constituting a general appearance. Accordingly, the default judgment cannot stand against him. We sustain Kaminetzky's first issue.[2]

Conclusion

When a judgment is reversed on appeal because of a defect of service of process, "the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed." TEX. R. CIV. P. 123. Accordingly, we reverse the judgment as it applies to Kaminetzky in his individual capacity and remand for a new trial.

Any outstanding motions are denied.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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[2] Because they cannot provide any greater relief than that obtained in his first issue, we do not need to address Kaminetzky's remaining issues. TEX. R. APP. P. 47.1.