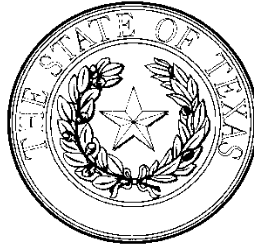
Opinion issued December 22, 2011.



In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00775-CV
01-11-00767-CV

DORINDA ALLISON, Appellant

V.

POST-NEWSWEEK STATIONS HOUSTON LP D/B/A KPRC TV, Appellee

* * * *

CAMELL ALLISON, Appellant

V.

POST-NEWSWEEK STATIONS HOUSTON LP D/B/A KPRC TV, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 920,781

MEMORANDUM OPINION

Appellants Dorinda Allison ("Dorinda") and Camell Allison ("Camell") bring separate challenges to the trial court's grant of summary judgment in favor of appellee, Post-Newsweek Stations Houston, a limited partnership d/b/a KPRC TV ("KPRC"). In her appeal, Dorinda argues that (1) she did not receive proper notice of KPRC's motion for summary judgment, (2) KPRC's motion for summary judgment was improperly based solely on merits-preclusive deemed admissions, and (3) the trial court improperly denied her motion for new trial. In his restricted appeal, Camell argues that reversal is warranted because the return of service shows that he was served with an incorrect pleading.

We affirm.

BACKGROUND

In June 2008, KPRC filed an original petition against Dorinda and Camell, both individually and doing business as Party King. In this underlying suit on a sworn account, KPRC alleged that it had entered into an agreement to provide Dorinda and Camell with advertising services; that it had provided those services; that appellants had failed to make payments on the account; and that, as a result of this failure, KPRC had sustained damages totaling $30,000.00 plus interest and attorneys' fees. In late July 2008, a process server filed copies of the original petition citation and officer's return and affidavit of service with the Harris County

Clerk, claiming that Camell had been served with "a true copy of the Citation & Plaintiff's Original Petition with Requests for Disclosure and Requests for Admissions."

The following month, the trial court granted KPRC's request for default judgment against Camell and Dorinda and then voided it shortly thereafter. In September 2008, KPRC sent its requests for disclosure, admissions and production and its first set of interrogatories to Dorinda. Dorinda never responded or moved to set aside her deemed admissions.

KPRC also requested an interlocutory default judgment against Camell. The trial court granted this motion in October 2008, citing Camell's failure to appear or answer in his behalf. Dorinda, however, was expressly excluded from this interlocutory default judgment.

In November 2008, a letter was filed with the court asking it to set aside the October default judgment against Camell. Although it stated that "we are asking [the court] to 'set aside' this judgment," only Dorinda's name and signature appear on the letter. A notice of hearing on the motion to set aside the default judgment was also filed with the court. The blank entitled "party requesting hearing" on the pre-printed notice of hearing form was completed (in handwriting) with "Dorinda/Camell Allison" but contained no signature. The trial subsequently granted Camell a new trial.

In February 2009, a request for continuance (in the form of a letter) and a notice of hearing were filed with the court. The signatures of Dorinda and Camell appeared on the letter, and both names were listed (in handwriting) as the parties requesting the hearing on the preprinted notice of hearing form. The trial court granted the motion for continuance and then reset the trial date to May 2009. That same month (February 2009), KPRC mailed its first set of discovery requests (including a request for disclosure, request for admissions, request for production, and interrogatories) to Camell.

In April 2010, two years after serving requests for admissions on Dorinda and one year after serving discovery requests on Camell, KPRC filed a motion for summary judgment against Dorinda and Camell. Neither filed a response; Dorinda claimed that this was because she was never served with notice of the summary judgment motion or hearing. The trial court then entered judgment for KPRC and against both appellants. Dorinda filed a motion for new trial, motion to withdraw deemed admissions, and a motion for severance. The motion for new trial was overruled by operation of law, and Dorinda timely filed a notice of appeal. Within six months of the date of the judgment, Camell filed a restricted appeal.

DORINDA'S APPEAL

Notice of Summary Judgment Hearing

In her first issue, Dorinda argues that the trial court erred by granting KPRC's motion for summary judgment and denying her motion for new trial because she did not receive sufficient notice of the motion before the hearing. The trial court's decision on a new trial motion is subject to review for abuse of discretion. *Cliff v. Huggins,* 724 S.W.2d 778, 778–79 (Tex. 1987); *Strackbein v. Prewitt,* 671 S.W.2d 37, 38 (Tex. 1984).

The record contains a "green card" showing that the motion for summary judgment was delivered to Dorinda's business address on April 13, 2010, where it was signed for by Desiree Loase. The motion was received more than the required twenty-four days' notice prior to the date on which the motion for summary judgment was set for submission. *See Lewis v. Blake*, 876 S.W.2d 314, 316 (Tex. 1994) (requiring 24 days minimum notice of a summary judgment hearing when motion is served by mail). Dorinda argues that she never received the motion from Loase, citing *United Nat'l Bank v. Travel Music of San Antonio, Inc.*, 737 S.W.2d 30, 37 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.), for the proposition that notice is ineffective when signed for by someone other than the intended addressee.

However, *United Nat'l Bank* dealt with service of citation under Rules 103 and 106(a)(2) of the Texas Rules of Civil Procedure; the present case deals with a motion for summary judgment and is governed by Rules 21a and 166a. Thus, we consider whether Dorinda received proper notice under Rule 21a.

Proper notice to the nonmovant of the summary-judgment hearing is a prerequisite to summary judgment, the absence of which violates the nonmovant's due process rights. *Tanksley v. CitiCapital Commercial Corp.,* 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied). Notice may be served on the nonmovant by delivering a copy via certified or registered mail to the party's last known address. *See* TEX.R. CIV. P. 21a. Service by mail is complete upon deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. *Id.* A certificate by a party or an attorney of record is prima facie evidence of the fact of service. *Id.* Accordingly, Rule 21a creates a presumption that a notice of hearing setting, if mailed pursuant to the Rule, was received by the intended recipient. *See Cliff,* 724 S.W.2d at 780; *Approx. $14,980 v. State,* 261 S.W.3d 182, 187 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The intended recipient, however, may rebut this presumption by offering proof of non-receipt. *Cliff,* 724 S.W.2d at 780; *see also* TEX. R. CIV. P. 21a ("Nothing [in Rule 21a] shall preclude any party from offering proof that the notice or instrument was not received. . . .");

see also Ruiz v. Nicolas Trevino Forwarding Agency, Inc., 888 S.W.2d 86, 88 (Tex. App.—San Antonio 1994, no writ) (holding that certificate of service created only rebuttable presumption, which "vanished" when appellant filed a sworn affidavit denying receipt of notice and appellee failed to produce "green card" verifying timely service of notice).

Here, Dorinda contends that she rebutted the presumption created by the certificate of service by offering her affidavit, in which she testified that she was not Desiree Loase, the person listed on the green card who signed for the letter at Dorinda's business address.[1] Dorinda also asserted that Desiree Loase never gave her the letter. KTRK responds that it complied with Rule 21a by delivering notice to appellant's place of business, which she had designated as her address for service pursuant to Rule 57. KPRC produced a "green card" as evidence of delivery to Dorinda's place of business. We agree with KPRC.

It is universally recognized that notice to [an] agent is notice to the principal. *Elite Towing, Inc. v. LSI Fin. Group*, 985 S.W.2d 635, 642 (Tex. App.—Austin 1999, no pet.). Dorinda never claims that Loase did not have authority to sign for her mail. Instead, Dorinda points to her own affidavit in which she affirms that she is not Desiree Loase and that she (Dorinda) did not receive the motion for

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[1] We note that Dorinda's business address is the address that Dorinda provided the court in compliance with TEX. R. CIV. P. 57. The record also contains "green cards" showing KPRC had previously served documents on Dorinda at this address.

summary judgment from Desiree Loase. The affidavit, though, contains no evidence that Loase was not Dorinda's authorized agent or had no authority to sign for her mail at the address that she had designated for service of process. At most, then, the affidavit shows that Loase, after receiving the motion, did not give it to Dorinda. However, an "[a]ppellant cannot excuse himself because of the negligence or oversight of his own attorney or employees." *Mackay v. Charles W. Sexton Co.*, 469 S.W.2d 441, 445 (Tex. Civ. App.—Dallas 1971, no writ). "To hold otherwise would allow the manipulation of receipt for notices and would undermine and render useless the provisions of Rule 21a." *Elite Towing*, 985 S.W.2d at 644.

This case is similar to those for which a green card indicates delivery, but the mail is unclaimed. The notice in that instance is sufficient if properly addressed. *See Wright v. Wentzel*, 749 S.W.2d 228, 232 (Tex. App.—Houston [1st Dist.] 1988, no writ). The defendant must then deny receipt and that the recipient was an agent to receive mail at that address. Here, there is no allegation by Dorinda that the notice was not properly addressed. Nor is there a denial by Dorinda that Loase was authorized to receive mail on Dorinda's behalf at the address Dorinda had designated for service of process.

In *Blackbird v. Blackbird*, No. 01-09-00409, 1991 WL 140945, *6 (Tex. App.—Houston [1st Dist.] Aug. 1, 1991, writ denied) (mem. op., not designated

for publication) the appellant argued that the trial court erred in denying his motion for new trial after a default judgment was entered against him and provided an affidavit alleging that he did not receive proper notice of a deposition or hearing on a motion for sanctions. *Id.* The appellee controvered appellant's lack of notice allegation by providing proof that notice was sent to the appellant's last known address by certified mail, return receipt requested, and that someone at that address accepted delivery on appellant's behalf. *Id.* The burden then shifted back to appellant to show that his failure to respond was not the result of conscious indifference. *Id.*

Here, Dorinda claimed lack of notice, which KPRC controverted by presenting a green card showing delivery at Dorinda's designated place of business, where it was accepted by Loase on Dorinda's behalf. The burden then shifted back to Dorinda to show that her failure to respond to the summary judgment was not intentional or the result of conscious indifference. *See Carpenter v. Cimmarron Hydrocarbons Corp.*, 98 S.W.3d 682, 683, 684 (Tex. 2002) (discussed below). Dorinda presented no evidence showing that Loase was not authorized to receive mail on Dorinda's behalf at the address Dorinda had designated for service of process.

Right to New Trial

In her third issue, Dorinda contends that the trial court erred in denying her motion for new trial under *Craddock v. Sunshine Bus Lines, Inc.,* 133 S.W.2d 124 (Tex. 1939). A trial court abuses its discretion by denying a motion for new trial when the defaulting party in a post-answer default judgment establishes that it has met the test set forth in *Craddock*. *Cliff,* 724 S.W.2d at 778–79. The *Craddock* test provides that a default judgment should be set aside and a new trial granted if (1) the failure to answer was not intentional or the result of conscious indifference but was due to a mistake or accident, (2) the defendant sets up a meritorious defense, and (3) the motion is filed at such time that granting a new trial would not result in delay or otherwise injure the plaintiff. *In re R.R.,* 209 S.W.3d 112, 114–15 (Tex. 2006) (citing *Craddock,* 133 S.W.2d at 126). To meet the *Craddock* test in a post-answer default judgment, however, the defaulting party need only establish that he did not receive notice of the trial setting, which is the first element of *Craddock,* and the other elements need not be established. *See Mathis v. Lockwood,* 166 S.W.3d 743, 744 (Tex. 2005); *Green v. McAdams,* 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ). The same requirements have been applied to motions for new trial following "default" summary judgments. *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ).

However, when a motion for new trial is filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means our civil procedure rules make available, the standard set out in *Craddock* does not apply. *Carpenter*, 98 S.W.3d 688.

Instead, *Carpenter* holds that a motion for leave to file a late summary judgment response should be granted if the litigant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. *Id.* at 688.

As discussed earlier, Dorinda presented no evidence to show that her failure to respond was not intentional or the result of conscious indifference. There is only the bare assertion in her affidavit that she did not receive the notice, which is insufficient to show a lack of intent or conscious indifference. *See Carpenter*, 98 S.W.3d 688. There is no evidence that the notice was delivered to an incorrect address or that Loase was unauthorized to receive mail at Dorinda's place of business. Nor is there evidence of any other accident or mistake. Accordingly, we cannot say that the trial court abused its discretion in denying Dorinda's motion for new trial to allow her to file a late response to the motion for summary judgment.

Accordingly, we overrule Dorinda's first and third issues on appeal.

Propriety of Summary Judgment Based on Deemed Admissions

In her second issue, Dorinda argues that the trial court erred in granting KPRC's motion for summary judgment because the only evidence presented by KPRC in support of that motion was in the form of merits-preclusive deemed admissions.

Even if we were to agree that the trial court erred by refusing to withdraw Dorinda's deemed admissions, such error would be harmless because other evidence submitted by KPRC in its motion for summary judgment was sufficient to support the judgment.

For KPRC to succeed in its suit on a sworn account, it was required to prove (1) a sale and delivery of goods or services, (2) the charges on the account are just, *i.e.,* the prices are charged in accordance with an agreement or, in the absence of an agreement, are the usual, customary and reasonable prices for that good or service; and, (3) the amount remains unpaid. *See Andrews v. East Tex. Med. Ctr.—Athens*, 885 S.W.2d 264, 266 (Tex. App.—Tyler 1994, no pet.).

As KPRC notes, deemed admissions were a large component of the motion for summary judgment, but were not the only evidence offered. Attached as Exhibit "C" to the motion was the affidavit of Eddy Fisher, KPRC's credit and collections clerk. Fisher's affidavit stated that Dorinda and Camell had an account

with KPRC, that Dorinda and Camell had failed to make payment on the account, that the amount of $30,000.00. was due, owing, and unpaid, that that within Fisher's personal knowledge, this amount was just and true, due and owing, and that all just and lawful offsets, payments and credits had been allowed. KPRC also attached a credit application signed by Dorinda, along with numerous invoices.

Rule 185 of the Texas Rules of Civil Procedure states:

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept, and is supported by the affidavit of the party, his agent or attorney taken before some officer authorized to administer oaths, to the effect that such claim is, within the knowledge of affiant, just and true, that it is due, and that all just and lawful offsets, payments and credits have been allowed, the same shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath. A party resisting such a sworn claim shall comply with the rules of pleading as are required in any other kind of suit, provided, however, that if he does not timely file a written denial, under oath, he shall not be permitted to deny the claim, or any item therein, as the case may be. No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.

TEX. R. CIV. P. 185.

Fisher's affidavit satisfies the requirements of this rule. Moreover, although Dorinda filed a letter with the court disputing KPRC's claim, it was not made under oath as required by Rule 185. Thus, Fisher's affidavit constituted prima

facie evidence of KPRC's claim. *See Andrews*, 885 S.W.2d at 267. Furthermore, although Dorinda claims otherwise in her reply, KPRC provided evidence of its attorneys' fees. Even viewing the evidence in the light that most favors Dorinda, as we must, there is no disputed issue of material fact.

We overrule Dorinda's second issue on appeal.

Conclusion Regarding Dorinda's Appeal

We affirm the trial court's judgment against Dorinda.

CAMELL'S RESTRICTED APPEAL

In his restricted appeal, Camell argues that the July 2008 return of service is defective and therefore constitutes error on the face of the record warranting reversal of the trial court's judgment against him.

Standard of Review

A party filing a restricted appeal must demonstrate that (1) he filed the appeal within six months of the date the judgment was rendered; (2) he was a party to the suit; (3) he did not participate in the hearing that resulted in the judgment complained of or file any post-judgment motions or appeals; and (4) error is apparent on the face of the record. TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). Camell's appeal concerns only the fourth element. The face of the record in a restricted appeal consists of the papers on file with the trial court when it rendered judgment, including the

clerk's record and any reporter's record. *Miles v. Peacock*, 229 S.W.3d 384, 387 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Service of Incorrect Pleading

Camell argues that the return of service shows that he was served with an incorrect pleading because the citation itself identified the document to be served as the "Original Petition," while the return of service states that Camell was served with a "true copy of the Citation & Plaintiff's Original Petition with Requests for Disclosure and Request for Admission." No Requests for Disclosure were included in the Original Petition or attached as an additional document.

Service of citation must be in strict compliance with the rules of civil procedure to establish jurisdiction over a defendant and support a default judgment. *Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex. 1990); *Uvalde Country Club v. Martin Linen Supply Co.,* 690 S.W.2d 884, 885 (Tex. 1985); *Barker CATV Constr., Inc. v. Ampro, Inc.,* 989 S.W.2d 789, 792 (Tex. App.—Houston [1st Dist.] 1999, no pet.). If strict compliance is not shown, the service of process is invalid and of no effect. *Uvalde Country Club,* 690 S.W.2d at 885. We make no presumptions of valid issuance, service, or return of citation when examining a default judgment. *Id.* We note, however, that strict compliance with the rules does not require "obeisance to the minutest detail." *Ortiz v. Avante Villa at Corpus Christi, Inc.,* 926 S.W.2d 608, 613 (Tex. App.—Corpus Christi 1996, writ denied)

(quoting *Herbert v. Greater Gulf Coast Enters., Inc.,* 915 S.W.2d 866, 871 (Tex. App.—Houston [1st Dist.] 1995, no writ)). As long as the record as a whole, including the petition, citation, and return, shows that the citation was served on the defendant in the suit, service of process will not be invalidated. *Regalado v. State,* 934 S.W.2d 852, 854 (Tex. App.—Corpus Christi 1996, no writ); *Ortiz,* 926 S.W.2d at 613; *Payne & Keller Co. v. Word,* 732 S.W.2d 38, 41 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

Camell cites two cases in support of his argument: *Primate Const., Inc. v. Silver*, 884 S.W.2d 151 (Tex. 1994) and *Shamrock Oil Co. v. Gulf Coast Natural Gas, Inc.*, 68 S.W.3d 737 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In both cases, default judgments were reversed because the returns of service contained incorrect descriptions of the pleadings served on the defendants. *See Primate*, 884 S.W.2d at 152 (return stated that defendant was served with original petition while citation referred to second amended petition); *Shamrock*, 68 S.W.3d at 738–39 (return failed to indicate which version of petition was served on defendant).

KPRC argues that these cases are distinguishable because, unlike in *Primate* and *Shamrock*, the return of service leaves no doubt as to whether the defendant was served with the original or an amended petition. Specifically, KPRC points out that both the citation and the return of service refer to the same petition, i.e.,

the "Original Petition." We agree that *Primate* and *Shamrock* are distinguishable. In those cases, it was impossible to compare the citation with the return and determine which petition was served on the defendant. However, here, both the citation and the return of service refer to the "Original Petition," and there can be but one "Original Petition" in a case. The addition of the phrase "with Requests for Disclosure and Requests for Admissions" to the return does not create any confusion as to which petition was served—there was only one petition. KPRC admits that no discovery was included with the citation and petition, but the issue is not whether Camell was served with discovery, but whether he was served with the petition. We hold that the record as a whole, including the petition, citation, and return, shows that the citation of the "Original Petition" was served on Camell, thus service of process will not be invalidated. As such, Camell cannot show error on the face of the record, and his restricted appeal fails.

Conclusion Regarding Camell's Restricted Appeal

We affirm the trial court's judgment against Camell.

Sherry Radack
Chief Justice

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