Opinion issued August 18, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00393-CV

GEICO COUNTY MUTUAL INSURANCE COMPANY, Appellant

V.

FESTUS KUYE, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 1155293

MEMORANDUM OPINION

In this restricted appeal, appellant, GEICO County Mutual Insurance Company ("GEICO"), challenges the trial court's no-answer default judgment in favor of appellee, Festus Kuye, in Kuye's suit against it for breach of contract, breach of implied contract, quantum meruit, and violations of the Texas Deceptive Trade

Practices Act ("DTPA") and the Texas Insurance Code. In three issues, GEICO contends that the trial court erred in entering a no-answer default judgment in favor of Kuye against it and in awarding Kuye attorney's fees.

We reverse and remand.

Background

In his petition, Kuye alleged that he held an automobile insurance policy with GEICO under which GEICO "agreed to pay for bodily injury, un/underinsured bodily injury and perhaps for personal injury protection and medical payment for any and all injur[ies] sustained by the insured or any occupant in any accident caused by either [the] insured or by [the] negligence of any other person." According to Kuye, on or about August 27, 2017, while the insurance policy was in effect, Kuye was involved in a car collision. Kuye alleged that Jaleel Syed, driver of another car involved in the collision, drove in "a reckless and inattentive manner," ran a stop sign, and "failed to yield the right of way," causing the collision. After Kuye "presented" his claim under the insurance policy to GEICO, GEICO "failed to properly and adequately evaluate the claim and pay for the full value of the un-insured claim." Further, GEICO improperly paid Syed, "who was clearly at fault," in the collision.

Kuye brought claims against GEICO for breach of contract, breach of implied contract, quantum meruit, and violations of the DTPA[1] and the Texas Insurance Code.[2] As to his breach-of-contract and breach-of-implied-contract claims, Kuye asserted that GEICO breached its obligations under the insurance policy by refusing to pay Kuye "the value of his case." And Kuye asserted that he had entered into an implied contract with GEICO "whereby [GEICO] agreed to pay to [Kuye] losses resulting from the negligent actions of another party." Kuye sought damages, attorney's fees, and costs.

As to service, in his petition, Kuye alleged that GEICO was "an [i]nsurance [c]ompany authorized to do business in the State of Texas" and could be served with process through its "registered agent MATHEW J. ZURAW at 2280 N Greenville Ave, Dallas, Texas, 75082" (the "Greenville Avenue address"). The Civil Process Request Form filed by Kuye with the trial court clerk sought service of his petition on "Mathew J. Zuraw" at the Greenville Avenue address. The "Original Petition Citation" issued by the trial court clerk and accompanied by a copy of Kuye's petition was addressed to "GEICO COUNTY MUTUAL INSURANCE COMPANY, REGISTERED AGENT: MATHEW J. ZURAW" at the Greenville Avenue address.

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1 *See* TEX. BUS. & COM. CODE ANN. §§ 17.45(5), 17.46(b)(5), (7), (12), (23).

2 *See* TEX. INS. CODE ANN. §§ 542A.001–.007.

The officer's return of citation filed with the trial court clerk stated that the citation and Kuye's petition were delivered "to each of the within named [d]efendants, in person, . . . at the following time and places." Below that declaration was a chart for recording the name, date, time, and place or address of service. Handwritten in the corresponding spaces on the chart was "GEICO County Mutual Insurance Company"; "Registered Agent: Kenny Seay"; June 17, 2020; 11:38 a.m.; and the Greenville Avenue address.

After GEICO did not answer or otherwise appear, Kuye moved for a no-answer default judgment against GEICO and later supplemented his motion with affidavits in support of his requests for damages and attorney's fees. The trial court granted Kuye's motion and signed an order granting a no-answer default judgment against GEICO and awarding Kuye $93,700.61 in damages and $40,000.00 in attorney's fees. The trial court clerk sent a notice of the no-answer default judgment to "GEICO COUNTY MUTUAL INSURANCE COMPANY C/O Mathew J Zuraw" at the Greenville Avenue address on the same day that the trial court signed its order.

Restricted Appeal

A restricted appeal is a direct attack on a judgment. *Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 721 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). To prevail on a restricted appeal, an appellant must show that: (1) it filed notice of the

restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the complained-of judgment and did not timely file any post-judgment motion or request for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *see* TEX. R. APP. P. 30.

Only the fourth requirement—whether error is apparent on the face of the record—is disputed here. Although review by restricted appeal affords review of the entire case and thus permits the same scope of review as an ordinary appeal, the face of the record must reveal the claimed error. *See Norman Commc'ns, Inc. v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997). The face of the record consists of all the papers on file in the appeal, including the reporter's record, if one was made, as they existed in the trial court when the trial court entered its judgment. *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.). "[E]rror that is merely inferred [from the record] will not suffice." *Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009).

In reviewing a no-answer default judgment in a restricted appeal, an appellate court does not presume valid issuance, service, and return of citation. *Hubicki v. Festina*, 226 S.W.3d 405, 407 (Tex. 2007); *Martell v. Tex. Concrete Enter. Readymix, Inc.*, 595 S.W.3d 279, 282 (Tex. App.—Houston [14th Dist.] 2020, no

pet.). A no-answer default judgment cannot stand unless the record shows strict compliance with the rules of procedure governing issuance, service, and return of citation. *See World Envtl., L.L.C. v. Wolfpack Envt'l, L.L.C.*, No. 01-08-00561-CV, 2009 WL 618697, at *2 (Tex. App.—Houston [1st Dist.] Mar. 12, 2009, no pet.) (mem. op.); *see also Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). Defective service constitutes error on face of the record. *World Envtl., L.L.C.*, 2009 WL 618697, at *2; *Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex. App.—Houston [1st Dist.] 1992, writ denied). "Whether service strictly complies with the rules [of procedure] is a question of law which we review de novo." *Martell*, 595 S.W.3d at 282.

Service

In its first and second issues, GEICO argues that the trial court erred in entering a no-answer default judgment in favor of Kuye because "service . . . was invalid." According to GEICO, the "Original Petition Citation" was issued for service on Mathew J. Zuraw as GEICO's registered agent, but the officer's return of citation filed with the trial court clerk showed service on "Registered Agent: Kenny Seay," and nothing in the record showed that Kenny Seay was a registered agent of GEICO.

A plaintiff may move for a no-answer default judgment against a defendant at any time after an answer was required if that defendant did not previously file an

answer and the citation with proof of service has been on file with the trial court clerk for at least ten days. TEX. R. CIV. P. 107, 239. Before the trial court may render a no-answer default judgment, though, the record must reflect that the trial court has jurisdiction over the parties and the subject matter and the case is ripe for judgment. *Marrot Commc'ns, Inc. v. Town & Country P'ship*, 227 S.W.3d 372, 376 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). A trial court does not have jurisdiction to enter a no-answer default judgment against the defendant unless the record affirmatively shows that before the trial court renders the default judgment, the defendant appeared, was properly served, or waived service in writing. *Id.*; *see* TEX. R. CIV. P. 124 ("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, as prescribed in these rules, except where otherwise expressly provided by law or these rules.").

No-answer default judgments are disfavored, and a trial court lacks jurisdiction over a defendant who was not properly served with process. *Spanton v. Bellah*, 612 S.W.3d 314, 316 (Tex. 2020); *Pro-Fire & Sprinkler, L.L.C. v. Law Co.*, 637 S.W.3d 843, 849 (Tex. App.—Dallas 2021, no pet.). Texas courts require strict compliance with the rules for service, and a no-answer default judgment cannot stand unless strict compliance with the rules appears in the record. *See Spanton*, 612 S.W.3d at 316; *Pro-Fire & Sprinkler*, 637 S.W.3d at 849–50; *Furst v. Smith*, 176

S.W.3d 864, 869 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also Frazier v. Dikovitsky*, 144 S.W.3d 146, 149 (Tex. App.—Texarkana 2004, no pet.) ("Virtually any deviation from the statutory requisites for service of process will destroy a default judgment."). Strict compliance is determined by whether the exact procedural requirements for service have been satisfied, not whether the intended party received notice of the lawsuit. *Union Pac. Corp. v. Legg*, 49 S.W.3d 72, 78 (Tex. App.—Austin 2001, no pet.); *see also In re Z.J.W.*, 185 S.W.3d 905, 908 (Tex. App.—Tyler 2006, no pet.) (strict compliance means literal compliance with service rules). It is the responsibility of the party requesting service, not the process server, to see that service is properly accomplished. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994); *Pro-Fire & Sprinkler*, 637 S.W.3d at 850. This responsibility extends to seeing that service is properly reflected in the record as well. *Primate Constr.*, 884 S.W.2d at 153; *Pro-Fire & Sprinkler*, 637 S.W.3d at 850. There is no presumption in favor of valid service in the face of an attack on a default judgment by restricted appeal. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006); *Primate Constr.*, 884 S.W.2d at 152.

Pertinent here, a business entity is not a person capable of accepting process on its own behalf; it must be served through an agent. *Paramount Credit, Inc. v. Montgomery*, 420 S.W.3d 226, 230 (Tex. App.—Houston [1st Dist.] 2013, no pet.). An entity doing business in Texas is required to "designate and continuously

maintain" a registered agent in Texas. *See* TEX. BUS. ORGS. CODE ANN. § 5.201(a)(1). The individual or an organization so designated is "an agent of the [business] entity on whom may be served any process, notice, or demand required or permitted by law to be served on the entity." *Id.* § 5.201(b)(1), (b)(2). To change its registered agent, the business entity must file a statement of the change. *See id.* § 5.202(a), (b). The change is effective "[o]n acceptance of the statement" by the Texas Secretary of State. *See id.* §§ 1.002(24)(A), 5.202(c).

Because strict compliance with the rules governing issuance, service, and return of citation is required, even minor discrepancies between the citation and return as to the address or name of a defendant or its registered agent can render service invalid. *See Spanton*, 612 S.W.3d at 317; *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). For instance, in *Uvalde Country Club*, the record showed that citation was directed to a country club's registered agent, "Henry Bunting, Jr." *Id.* The officer's return of citation, though, showed delivery on "Henry Bunting." *Id.* The Texas Supreme Court held that service was invalid because the record did not affirmatively show "Henry Bunting" was authorized to receive service for the country club and thus "did not reflect strict compliance with the rules of . . . procedure relating to the issuance, service, and return of citation." *Id.*; *see also All Comm'l Floors, Inc. v. Barton & Rasor*, 97 S.W.3d 723, 727 (Tex. App—Fort Worth 2003, no pet.) (plaintiff failed to strictly

comply with service rules where "Kelly Lynn Arreola" was individual designated to receive service by certified mail for defendant but return receipt was signed by "Mark," with illegible last name); *Bronze & Beautiful, Inc. v. Mahone*, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ) (reversing no-answer default judgment where citation was issued for service by certified mail on "Bronze & Beautiful, Inc., [c/o] Carol Jeannine Duty, Its Registered Agent," but return receipt was signed by "Eunice Harvey" under "Signature—Addressee" and initials "M.W." appeared under "Signature—Agent"); *Am. Univ. Ins. Co. v. D.B. & B.*, 725 S.W.2d 764, 765 (Tex. App.—Corpus Christi-Edinburg 1987, writ ref'd n.r.e.) (concluding there was no showing of strict compliance with service rules where petition alleged "Mr. Jack Keith" was registered agent for defendant but return receipt for certified mail was signed by "J. Williams" and record did not show "J. Williams" was registered agent for defendant); *Pharmakinetics Labs., Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ) (holding service of process invalid where individual designated to receive service for business entity was "Steve Woodman" but return receipt was signed by "Charlotte Young").

Here, as to service, Kuye's petition alleged that GEICO could be served with process through its "registered agent MATHEW J. ZURAW," and the Civil Process Request Form filed by Kuye with the trial court clerk sought service of his petition on "Mathew J. Zuraw." Further, the "Original Petition Citation" issued by the trial

court clerk and accompanied by a copy of Kuye's petition was addressed to "GEICO COUNTY MUTUAL INSURANCE COMPANY, REGISTERED AGENT: MATHEW J. ZURAW." But the officer's return of citation filed with the trial court clerk stated that the citation and Kuye's petition were personally served on "Registered Agent: Kenny Seay" on June 17, 2020 at 11:38 a.m. As a result, in this case the record is contradictory as to whether Mathew J. Zuraw or Kenny Seay was the registered agent authorized to accept service for GEICO. *See Hubicki*, 226 S.W.3d at 407 (appellate court does not presume valid issuance, service, and return of citation); *World Envt'l*, 2009 WL 618697, at *2. Because the record does not affirmatively show that the individual served in this case was the registered agent for GEICO, it does not reflect strict compliance with the rules of procedure governing service. See *Frazier*, 144 S.W.3d at 149.

Defective service constitutes error on the face of the record. *See World Envt'l*, 2009 WL 618697, at *2; *Hesser*, 842 S.W.2d at 765. We conclude that Kuye's attempt to serve GEICO was invalid in this case. Thus, the trial court lacked personal jurisdiction over GEICO, and the trial court lacked jurisdiction to grant the no-answer default judgment against GEICO. *See Marrot Commc'ns*, 227 S.W.3d at 376 (before trial court may render default judgment, record must reflect it had jurisdiction over parties); *see also Pro-Fire & Sprinkler*, 637 S.W.3d at 849 (trial court lacks jurisdiction over defendant who was not properly served with process).

Accordingly, we hold that the trial court erred in entering a no-answer default judgment in favor of Kuye against GEICO. *See Spanton*, 612 S.W.3d at 316 (no-answer default judgment cannot stand unless strict compliance with rules appears in record); *Pro-Fire & Sprinkler*, 637 S.W.3d at 849–50; *Furst*, 176 S.W.3d at 869.

We sustain GEICO's first and second issues.[3]

Conclusion

We reverse the trial court's order granting a no-answer default judgment against GEICO and remand the case for further proceedings consistent with this opinion.

Julie Countiss
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.

[3] Due to our disposition, we need not address GEICO's third issue. *See* TEX. R. APP. P. 47.1.