Reversed and Remanded and Memorandum Opinion filed January 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00021-CV

FRED A. ROBERTS A/K/A FRED ALLEN ROBERTS, Appellant

V.

MARINER VILLAGE CONDOMINIUM ASSOCIATION, INC., Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2014-71183

M E M O R A N D U M O P I N I O N

In this appeal from the judgment in favor of Mariner Village Condominium Association, Inc. in its suit for delinquent maintenance assessments, defendant Fred Roberts contends that the trial court erred in rendering a no-answer default judgment against him. We conclude that Roberts's "motion to dismiss improper service" was in effect a motion to quash citation, and that by filing the motion, Roberts appeared in the cause. Because a defendant who has appeared in the cause

must be notified of a dispositive hearing and it is undisputed that Roberts had no notice of the hearing on the motion for default judgment, his due-process rights were violated. We therefore reverse the judgment and remand the cause.

I. BACKGROUND

Mariner Village sued Roberts for delinquent maintenance assessments on six marina berths and sought to foreclose its vendor's lien on the property. After a Sarasota County deputy sheriff personally served Roberts in a Florida post office, Roberts filed a "motion to dismiss improper service" on the ground that the Sarasota County sheriff's department has no jurisdiction on federal property. The record contains neither a ruling on the motion nor any indication that the trial court was ever asked to rule on it.

Several months later, Mariner Village successfully moved for a no-answer default judgment against Roberts. In the judgment, the trial court recited that Roberts was duly served with process, but that he failed to appear. The trial court ordered Roberts to pay $13,717.46 in delinquent fees, late charges, interest, and collection costs for the years 2011, 2012, and for January 1st through September 15th of 2015, together with $5,754.48 in attorney's fees incurred through the date of judgment and additional attorney's fees if Roberts pursued an unsuccessful appeal.

Roberts moved for a new trial on the grounds that (a) he was never notified of any ruling on his "motion to dismiss improper service"; (b) he was never notified of a hearing date on Mariner Village's motion for default judgment; (c) he has not owned the property since 2010; and (d) he has a counterclaim against Mariner Village for more than $50,000,00. The trial court allowed the motion to be overruled by operation of law.

II. ANALYSIS

We review the trial court's failure to grant Roberts's motion for new trial for abuse of discretion. *See Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam). The dispositive ground raised in Roberts's motion for new trial is his assertion that he was never notified of a hearing date on Mariner Village's motion for default judgment.[1] To satisfy due-process requirements, a defendant who has appeared in a cause must be notified of a hearing on a dispositive motion—including a motion for default judgment. *See LBL Oil Co. v. Int'l Power Servs., Inc*., 777 S.W.2d 390, 390–91 (Tex. 1989) (per curiam). Roberts therefore is entitled to reversal and remand if he appeared in the cause but had no notice of the hearing setting for Mariner Village's motion for default judgment.

A. Roberts appeared in the cause.

Roberts argues on appeal that his "motion to dismiss improper service" constitutes an answer, while Mariner Village contends that the "motion amounts to nothing more than a Motion to Quash Service, which constitutes an appearance, not an [a]nswer." Mariner Village is correct: Roberts's motion to dismiss for improper service was, in effect, a motion to quash citation.

A motion to quash citation does not constitute an answer to the plaintiff's petition. *Cf.* TEX. R. CIV. P. 85. By successfully moving to quash service or citation, the defendant can obtain an extension to the deadline to answer the plaintiff's petition. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985) (per curiam). If the trial court grants the motion to quash, then the defendant's appearance—and concomitantly, the deadline for the defendant to

[1] We do not consider grounds for setting aside the default judgment that Roberts failed to raise in his motion for new trial. *See* TEX. R CIV. P. 324(b)(1).

answer the plaintiff's petition—is postponed until 10:00 a.m. on the first Monday after the expiration of twenty days from the date that the trial court quashes the service or citation. TEX. R. CIV. P. 122. Because a successful motion to quash extends the time to answer the plaintiff's petition, we cannot agree with Roberts's argument that his motion was itself an answer that prevented Mariner Village from obtaining a no-answer default judgment.

On the other hand, Mariner Village acknowledges that by filing a motion to quash citation, a defendant appears in the case. Here, too, Mariner Village is correct. *See GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varme*, 991 S.W.2d 785, 786 (Tex. 1999) (per curiam); *Kawasaki Steel Corp.*, 699 S.W.2d at 201–02; *see also* TEX. R. CIV. P. 123 (when a judgment is reversed for failed or defective service of process, no new service is required because the defendant already has appeared in the case by challenging the adequacy of service); *Summersett v. Jaiyeola*, 438 S.W.3d 84, 92 (Tex. App.—Corpus Christi 2013, pet. denied) ("Any defect in service is cured by a general appearance." (citing *Baker v. Monsanto Co.*, 111 S.W.3d 158, 160–61 (Tex. 2003) (per curiam))).

B. Roberts was not notified of the hearing.

Because Roberts appeared in the case, he was entitled to notice of the hearing on Mariner Village's motion for default judgment. *See LBL Oil Co.*, 777 S.W.2d at 390–91. Mariner Village, however, mistakenly represented in its motion for default judgment that Roberts had not entered an appearance. Moreover, Mariner Village has never contended, either in the trial court or on appeal, that it notified Roberts of the hearing setting for its motion for default judgment. Not only is any such notice absent from the record, but the judgment itself fails to state when or how the motion for default judgment was heard.

Although Mariner Village does not mention due process in its brief, it nevertheless acknowledges that Roberts contends "he is entitled to reversal because he did not receive notice." Mariner Village responds to that argument by pointing out that its motion for default judgment contains a certificate of service stating that Mariner Village mailed a copy of the motion to Roberts, but this response misses the point. Roberts does not represent that Mariner Village failed to serve the motion; he complains that Mariner Village failed to serve notice of the hearing.

Mariner Village also cites a decision in which this court affirmed a default judgment rendered without notice to the defendant even though the defendant had filed a motion to quash. *See Wells v. S. States Lumber & Supply Co.*, 720 S.W.2d 227, 228 (Tex. App.—Houston [14th Dist.] 1986, no writ). However, two years after our decision in *Wells*, the Texas Supreme Court held that due process requires that a party who has answered a suit must be notified of the trial setting. *See Lopez v. Lopez*, 757 S.W.2d 721, 722 (Tex. 1988) (per curiam) (reversing and remanding where "there is nothing in the record to suggest that any attempt was made to notify Guadalupe of the trial setting"). A year later, the Texas Supreme Court applied the same reasoning when reversing a post-appearance, no-answer default judgment. *See LBL Oil Co.*, 777 S.W.2d at 390–91 (holding that "[o]nce a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process" and a hearing on a motion for no-answer default judgment "effectively was [the defendant's] trial setting since it was dispositive of the case"). Thus, this case is not governed by *Wells*; it is governed by *LBL Oil*.

We sustain this issue.

III. CONCLUSION

Because Roberts appeared in the suit by filing his "motion to dismiss improper service" but was not notified of the hearing on the motion for default judgment, the trial court violated Roberts's due-process rights in rendering the judgment against him. *See id*; *Vining v. Vining*, 782 S.W.2d 261, 262 (Tex. App.—Houston [14th Dist.] 1989, no writ). The trial court abused its discretion in failing to grant Roberts's motion for new trial, in which he pointed out both that he had filed a "motion to dismiss improper service" and that he never was notified of a hearing setting on the motion for default judgment. We accordingly do not address his remaining arguments, but reverse the judgment and remand the cause for further proceedings.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.