Reversed and Remanded and Memorandum Opinion filed June 8, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00602-CV

WILFRID RANDALL NELSON, Appellant

V.

AMITY LEIGH NELSON, Appellee

On Appeal from the 247th District Court
Harris County, Texas
Trial Court Cause No. 2015-63453

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

In this restricted appeal, appellant Wilfrid Randall Nelson seeks reversal of a no-answer default judgment rendered against him. In his first and second issues, Wilfrid contends that the judgment is void because he was not properly served with process. In his four remaining issues, Wilfrid contends that the trial court erred in awarding damages to appellee Amity Leigh Nelson. We find that Wilfrid was not properly served with process, and therefore, the trial court did not acquire personal

jurisdiction over Wilfrid. Accordingly, the judgment is void. We reverse and remand.

I. BACKGROUND

This restricted appeal stems from Amity's suit to enforce a contract incident to the parties' divorce. As alleged in Amity's original and amended petitions, Wilfrid was in breach of the parties' alimony contract. Nothing in the record shows that Wilfrid was served with the original petition.

The record reflects that the amended petition was served on Wilfrid in person. However, it was served without a citation. For instance, a form in the record entitled "NOTICE (SHORT FORM)" directed an authorized person to serve the amended petition to Wilfrid at a certain address in Houston, Harris County, Texas. The notice affixes a return of service, which was completed on December 22, 2015. The return states that the amended petition was served on Wilfrid at the Houston address. The notice and return do not mention a citation. Wilfrid did not otherwise waive service of process.

The amended petition contains a notice of hearing, which was set for January 27, 2016 at 9:30 a.m. Wilfrid did not appear at the scheduled hearing. The trial court signed an order granting default judgment on January 28, 2016. In the order, the trial court found: (1) it had jurisdiction over the subject matter and the parties; (2) all persons entitled to citation were properly cited; (3) Wilfrid breached a contractual obligation to pay alimony to Amity; (4) Wilfrid owed $55,632.66 in past-due alimony payments; (5) Wilfrid committed anticipatory breach of his remaining contractual obligations; (6) attorney's fees of $1,670.00 should be assessed against Wilfrid; and (7) interest of five percent would accrue (compounded annually). The trial court ordered Wilfrid to pay these amounts on or before February 19, 2016. Wilfrid filed a notice of appeal on July 28, 2016.

Although Amity was represented by counsel at the trial court level, she appears pro se on appeal.

II. STANDARD OF REVIEW AND APPLICABLE LAW

A direct attack on a judgment by restricted appeal must: (1) be brought within six months after the trial court signs the judgment; (2) by a party to the suit; (3) who did not participate in the hearing that resulted in the judgment made the subject of the complaint; (4) who did not file a post-judgment motion, request for findings of fact and conclusions of law, or other notice of appeal; and (5) demonstrate that the error upon which the complaint is based is apparent on the face of the record. Tex. R. App. P. 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Conseco Fin. Servicing v. Klein Indep. Sch. Dist.*, 78 S.W.3d 666, 670 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The face of the record consists of all papers on file before the judgment as well as the reporter's record. *Conseco*, 78 S.W.3d at 670.

In restricted appeals, "[t]here are no presumptions in favor of valid issuance, service, and return of citation." *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994). If the record in a restricted appeal fails to affirmatively show strict compliance with the rules of civil procedure governing service of citation, the attempted service of process is invalid and of no effect. *See Uvalde Country Club v. Martin Linen Supply Co., Inc.*, 690 S.W.2d 884, 885 (Tex. 1985) (holding that record did not reflect strict compliance with procedural rules relating to issuance, service, and return of citation, where petition alleged that registered agent was "Henry Bunting, Jr." whereas sheriff's return on citation showed delivery to "Henry Bunting"). When the service of process is invalid, the trial court acquires no personal jurisdiction over the defendant, and the default judgment is void. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). Even actual notice, without

proper service, is insufficient to invoke a trial court's jurisdiction to render a default judgment. *Id.* Whether service strictly complies with the rules is a question of law that we review de novo. *Furst v. Smith*, 176 S.W.3d 864, 869–70 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

The citation must be directed to the defendant and be styled "The State of Texas." Tex. R. Civ. P. 99(b). The citation must also include: (1) a signature by the clerk under seal of court; (2) name and location of the court; (3) date of the filing of the petition; (4) date of issuance of the citation; (5) file number; (6) names of parties; (7) name and address of plaintiff's attorney or plaintiff; (8) response deadline; (9) clerk's address; and (10) notification regarding default in absence of an answer. *Id.* Finally, the citation must include the following notice language:

> You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Tex. R. Civ. P. 99(c). The officer or authorized person executing the citation must complete a return of service. *See* Tex. R. Civ. P. 107. The return must state the manner, date, and time the officer or authorized person served the citation, among other requirements. *See id.*

III. ANALYSIS

A. Wilfrid has met the first four criteria for a restricted appeal.

First, Wilfrid filed his notice of appeal within six months of the order which provided for the default judgment. Second, Wilfrid is a party to the suit. Third, Wilfrid did not appear or file an answer. Fourth, Wilfrid did not file a post-judgment motion. Therefore, Wilfrid has met the first four criteria for a restricted

appeal and we consider only whether the record reflects error. *See* Tex. R. App. P. 30; *Conseco*, 78 S.W.3d at 670.

B. The face of the record reflects error.

Wilfrid's first and second issues are the same, and accordingly, we address them together. In his first and second issues, Wilfrid argues that error is apparent from the face of the record because the record does not reflect that Wilfrid was properly served with process. We agree.

Wilfrid was never served with the original petition. Amity purportedly requested to have Wilfrid served with the amended petition in person and by citation, but no citation or return of citation appears in the record. Assuming the notice that was served on Wilfrid with the amended petition is a citation, it is defective. The notice lacks these requirements for the form of a citation under rule 99(b): the filing date of either petition; the defendant's response deadline; and a notification that defendant's failure to answer may result in a default judgment. *See* Tex. R. Civ. P. 99(b). It also lacks the required notice language. *See* Tex. R. Civ. P. 99(c). These omissions are a failure to strictly comply with the rules governing service of citation and render service invalid. *See Uvalde*, 690 S.W.2d at 885 (omitting suffix to agent's name in return of citation is a failure to strictly comply with rules and renders service invalid); *Mansell v. Ins. Co. of the W.*, 203 S.W.3d 499, 501 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (same result when citation omitted petition's filing date).

Amity argues that her trial counsel "properly requested from the district clerk's office issuance of both [c]itation and [p]recept in the breach of alimony case" and that defective service was the fault of the Harris County District Clerk's office. However, the party requesting service, not the process server, bears the responsibility to see that (1) service is properly accomplished and (2) service is

properly reflected in the record. *Primate Constr.*, 884 S.W.2d at 153 (citing Tex. R. Civ. P. 99(a)). As discussed above, Amity failed in both respects.[1]

The record affirmatively shows that Wilfrid was not properly served with process. Accordingly, the trial court acquired no personal jurisdiction over Wilfrid and erred in rendering default judgment against him. *See Wilson*, 800 S.W.2d at 836. We sustain Wilfrid's first and second issues.

Because the remedy for improper service is reversal of the entire judgment, we need not address Wilfrid's remaining issues which (if successful) would provide the lesser relief of a new trial on damages only. *See* Tex. R. App. P. 47.1; *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992) ("[W]hen an appellate court sustains a no-evidence point after an uncontested hearing on unliquidated damages following a no-answer default judgment, the appropriate disposition is a remand for a new trial on the issue of unliquidated damages.").

[1] Amity also asserts, without citation to the record or law, that Wilfrid concealed his residential address. To the extent that Amity argues that the default judgment may stand because of Wilfrid's purported conduct, we disagree. Strict compliance with service requirements in the default context is well established and is intended to safeguard due process, allowing the defendant an opportunity to appear and defend the action on the merits. *See Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007) (per curiam); *Conseco*, 78 S.W.3d at 675–76. We know of no Texas rule or case law that permits defective service of process upon a defendant when the defendant conceals his address.

Further, in circumstances where the defendant's whereabouts are unknown and plaintiff has exercised due diligence to attempt to locate the defendant, a party may request service by publication or some other substituted method under Texas Rules of Civil Procedure 109 and 109a. Amity did not pursue any alternative method of service of process.

IV. CONCLUSION

We reverse the judgment and remand for further proceedings consistent with this opinion.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Jamison, and Brown.