



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00518-CV

PAVING & SEAL PRO and Courtnay Brooks,
Appellants

v.

MCCONNELL CARS & RV, LLC,
Appellee

From the 407th Judicial District Court, Bexar County, Texas
Trial Court No. 2015-CI-18929
Honorable David A. Canales, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: May 31, 2017

REVERSED AND REMANDED

In the underlying litigation, appellee, McConnell Cars & RV, LLC, sued appellants, Paving & Seal Pro and Courtnay Brooks. When appellants did not answer the suit, appellee moved for and was granted a default judgment against both appellants. Appellants filed a restricted appeal in this court, alleging there is error on the face of the record because appellee did not properly serve them. We conclude there is error on the face of the record; therefore, we reverse the trial court's default judgment and remand the cause to the trial court for further proceedings.

BACKGROUND

Appellee sued Paving & Seal Pro (“PSP”) and Courtney Brooks (“Brooks”), alleging breach of contract and DTPA violations against only PSP, and fraud against both appellants. PSP is a sole proprietorship owned by Brooks. Appellee later moved for a default judgment against both appellants. Appellee attached to its motion a copy of the citation directed to Brooks and a copy of the citation directed to PSP. The “Officer’s Return” section of both citations is blank. Instead, a private process server served the citations. Appellee also attached an Affidavit of Due Diligence completed by Norma De La Cruz, the private process server.

Regarding the citation directed to Brooks, De La Cruz attested, in pertinent part, that she mailed a true and correct copy of the citation and plaintiff’s original petition “by Certified Mail tracking number (70150640000460713185) to Courtney Brooks, 902 Kitty Hawk Road, Ste 170, PMB 452, Universal City, Tx 78148 It was delivered on January 6, 2016 at 10:19 am and signed for by Lisa Palmer.” The return receipt indicates Brooks’s name and address and is signed by Lisa Palmer. However, both the return receipt and the USPS tracking sheet print-out indicate the tracking number as 7015 0640 0004 6071 3192—a number different from that stated in the affidavit.

Regarding the citation directed to PSP, De La Cruz attested, in pertinent part, that she mailed a true and correct copy of the citation and plaintiff’s original petition “by Certified Mail tracking number (70150640000460713185) to Paving & Seal Pro, Courtney Brooks, 902 Kitty Hawk Road, Ste 170, PMB 452, Universal City, Tx 78148 It was delivered on January 6, 2016 at 10:19 am and signed for by Lisa Palmer.” The return receipt indicates the same address in Universal City, is signed by Lisa Palmer, and the tracking number is the same as the number stated in the affidavit. Both the return receipt and the USPS tracking sheet print-out also indicate the same tracking number as the number stated in the affidavit.

On appeal, appellants assert appellee failed to personally serve them because appellee served Lisa Palmer, a person unrelated either to the litigation or to appellants. Appellee did not file a brief in response to appellants' arguments.

APPLICABLE LAW

To prevail in this restricted appeal, appellants must show (1) a notice of appeal was filed within six months of the date the complained-of judgment was signed; (2) appellants were parties to the suit but did not participate in the hearing that resulted in the judgment; (3) appellants did not timely file a post-judgment motion, request findings of fact and conclusions of law, or file a notice of appeal within the time permitted under the Rules of Appellate Procedure; and (4) the complained-of error is apparent from the face of the appellate record. *See* TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). The only element at issue in this appeal is whether appellants' complained-of error is apparent from the face of the record.

Strict compliance with the rules for service of citation must affirmatively appear on the record in order to establish jurisdiction over a defendant and support a default judgment. *See Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). When a default judgment is challenged by restricted appeal, there are no presumptions in favor of valid issuance, service, and return of citation. *See Wachovia Bank of Del., N.A. v. Gilliam*, 215 S.W.3d 848, 848 (Tex. 2007) (per curiam); *Primate Constr.*, 884 S.W.2d at 152. For purposes of a restricted appeal, the record consists of all papers on file in the appeal. *Norman Commc'n v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *Mansell v. Ins. Co. of the W.*, 203 S.W.3d 499, 500 (Tex. App.—Houston [14th Dist.] 2006, no pet.). If the record does not show strict compliance with the rules governing issuance, service, and return of citation, the attempted service of process is invalid and the trial court has no personal jurisdiction over a defendant. *Greystar, LLC v. Adams*, 426 S.W.3d

861, 866 (Tex. App.—Dallas 2014, no pet.); *see also Mansell*, 203 S.W.3d at 501. Virtually any deviation from these rules is sufficient to set aside the default judgment in a restricted appeal. *Id.*

The return of service on a defendant must satisfy the requirements of Texas Rule of Civil Procedure 107. As relevant here, Rule 107 requires that the return, “together with any document to which it is attached,” must include the person or entity served and the address served. TEX. R. CIV. P. 107(b)(5)–(6). Further, the Rule mandates that if citation was served by certified mail, the return must be accompanied by the return receipt that contains the addressee’s signature. TEX. R. CIV. P. 107(c). If an agent of the addressee is served, the record must show the agent was authorized to receive service for the addressee. *See Reed Elsevier, Inc. v. Carrollton-Farmers Branch ISD*, 180 S.W.3d 903, 905 (Tex. App.—Dallas 2005, pets. denied). If the individual who signs the receipt of delivery is not the addressee or an agent otherwise capable of receiving service, service of process is invalid. *Master Capital Sols. Corp. v. Araujo*, 456 S.W.3d 636, 639-40 (Tex. App.—El Paso 2015, no pet.).

In this case, both return receipts were signed by “L. Palmer” and included her printed name as “Lisa Palmer.” However, the face of the record does not identify Lisa Palmer or her status or affiliation, if any, with either Brooks or PSP. Neither the return of service nor any other portion of the record designates her as the addressees’ authorized representative or indicates she has the authority to receive service on the addressees’ behalf. The return of service does not indicate the capacity in which Lisa Palmer signed the return receipt or explain why she signed the receipt. It is simply not possible to determine from the record who she is, much less whether she is an agent authorized to accept service on the addressees’ behalf. Because the record does not indicate Lisa Palmer’s capacity or authority, if any, to receive service, appellee failed to establish that either Brooks or PSP were served through her in accordance with applicable requirements. Thus, service of process was invalid. Because service was not effectively completed on either Brooks or PSP,

divesting the trial court of personal jurisdiction over both, we conclude there is error on the face of the record.

CONCLUSION

The deficiency in service of process mandates that the default judgment cannot stand. Accordingly, we sustain appellants' issue on appeal, reverse the trial court's default judgment, and remand the cause to the trial court for further proceedings.

Irene Rios, Justice