

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00138-CV

STEPHEN E. RATCLIFF, Appellant

V.

CARLISA JEAN RATCLIFF, Appellee

**On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 08-08-08453 CV**

MEMORANDUM OPINION

Stephen E. Ratcliff asks this Court to reverse a default judgment and remand the case for a new trial. Ratcliff raises four issues on appeal -- three relating to defective service of process and one relating to the trial court's order finding him in civil contempt for failure to obey temporary orders. Because the record does not show strict compliance with the order authorizing substitute service of process, we reverse the default judgment and remand the case to the trial court for a new trial.

Carlisa Jean Ratcliff filed a petition for divorce and for a division of the marital estate. The trial court signed a temporary restraining order the following day. The

original petition and restraining order were not served on appellant, although service was attempted.

Carlisa amended her petition and requested citation by publication or other substitute service. *See* TEX. R. CIV. P. 106(b). The trial court granted her motion for alternative service, and signed another temporary restraining order.

The order permitting alternative service states in part as follows:

[T]he Court . . . ORDERS that service on Stephen E. Ratcliff be effected by any person authorized by rule 103, Texas Rules of Civil Procedure, by leaving a copy of the citation with pleadings and orders attached at either of the following address listed below located in Montgomery County, Texas, with anyone over sixteen years of age at that address or affixing a true copy of the citation with a copy of the petition attached, to the front door of the usual place of abode or residence.

The record contains a document entitled “Divorce Citation” and one entitled “Temporary Restraining Order.” A form entitled “Constable’s Return” is attached to both documents. The constable’s return on each document sets out the date and time of “attempted service,” and the address of “attempted service,” as follows:

10-27-08 12:42 p.m. Spoke to older lady who was the receptionist who advised that Stephen E. Ratcliff was not there at 5022 Central Parkway, Hangar 17 A, Conroe, Tx 77303; she would not give her name or accept papers. Spoke to young lady in her late 20’s to early 30’s who refused to accept the papers, the receptionist advised that the younger lady was Mr. Ratcliff’s daughter. Posted temporary restraining order and citation in the door.

Each return also states the same time, date, and place of “service” and states service is “by attaching to the door under Rule 106” at 5022 Central Parkway, Hangar 17A, Conroe, Texas 77303.

No answer was filed prior to judgment. The trial court signed a default judgment granting the divorce, dividing the property, and ordering appellant to make payments to appellee. Appellee filed a certificate of last known address on the same date as the judgment; the certificate listed appellant’s last known address as one different from those at which substitute service was attempted. Appellant then filed an answer and a motion for new trial.

Appellant argues the trial court erred in granting a default judgment because the deputy failed to comply with the order regarding substitute service. He asks for a new trial. If the defendant was not served with process, the defendant is “generally entitled to a new trial without any further showing.” *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tx., L.P.*, 260 S.W.3d 561, 564 (Tex. App.--Dallas 2008, no pet.) (citing *Fid. & Guar. Ins. Co. v. Drewery Constr. Co., Inc.*, 186 S.W.3d 571, 574 (Tex. 2006)).

Section 6.408 of the Texas Family Code provides in part that “[c]itation on the filing of an original petition in a suit for dissolution of a marriage shall be issued and served as in other civil cases.” *See* TEX. FAM. CODE ANN. § 6.408 (Vernon 2006); *see also* TEX. FAM. CODE ANN. § 6.701 (Vernon 2006) (“In a suit for divorce, the petition may

not be taken as confessed if the respondent does not file an answer.”). Rule 99 of the Texas Rules of Civil Procedure states that the “party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition.” TEX. R. CIV. P. 99(a). Where the plaintiff has not been able to obtain service on the defendant, the plaintiff may file with the court a motion, supported by affidavit stating that service, though unsuccessful, has been attempted, and requesting substitute service. *See* TEX. R. CIV. P. 106. Pursuant to Rule 106, the trial court may authorize citation served as follows: “(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.” TEX. R. CIV. P. 106.

In this case, the trial court’s order granting appellee’s request for alternative service stated that citation was to be served by serving anyone over sixteen at appellant’s business or his abode or residence, or by “affixing” the notice to the door of appellant’s abode or residence. Service is invalid if not in strict compliance with the requirements of the order authorizing the substitute service. *See generally Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (Strict compliance with the rules for service of citation must affirmatively appear in the record for a default judgment to withstand direct attack.); *see also Dolly v. Aethos Commc’ns. Sys., Inc.*, 10 S.W.3d 384, 388 (Tex. App.--Dallas 2000, no pet.) (The requirements set forth in an order for substitute service must be

strictly followed.). The return must identify how the citation was served. See TEX. R. CIV. P. 107. In a direct attack on the judgment, “[t]here are no presumptions in favor of valid issuance, service, and return of citation in the face of a [direct] attack on a default judgment. . . .” *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990) (quoting *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985)); *Dolly*, 10 S.W.3d at 388 (Deviation from the trial court’s order authorizing substituted service requires a reversal of the default judgment.).

The returns state that the citations were affixed to the door at the address identified in the order as the appellant’s business address. The returns in part characterize the effort as “attempted service.” The trial court’s order provided that if service was by affixing the citation and petition to the door, the door was to be that of appellant’s “abode or residence.” The citations, petition, and temporary restraining order were not left with an individual. The trial court’s order authorizing substitute service was not followed.

In his motion for new trial, appellant stated in an attached affidavit that he “was never served with any papers to give [him] notice to this suit or any hearing related thereto.” Appellee’s responsive affidavit states she told appellant she had filed for divorce. She further states Stephen was served at his office. Attached to appellee’s response to the motion for new trial is a letter, apparently received and signed for by S. Ratcliff prior to the judgment, in which appellee’s attorney informed him that the temporary order and contempt order were enclosed. Receiving actual notice through a

procedure not authorized for service is not strict compliance with the service requirements of the order. *See Wilson*, 800 S.W.2d at 836 (“Actual notice to a defendant, without proper service, is not sufficient to convey upon the court jurisdiction to render default judgment against him.”).

The party requesting citation is responsible for obtaining service of the citation and copy of the petition. TEX. R. CIV. P. 99(a). Rule 124 of the Texas Rules of Civil Procedure prohibits rendition of judgment “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.” TEX. R. CIV. P. 124; *see Shamrock Oil Co. v. Gulf Coast Natural Gas, Inc.*, 68 S.W.3d 737, 739-40 (Tex. App.--Houston [14th Dist.] 2001, pet. denied); TEX. R. CIV. P. 99(a). “[J]urisdiction is dependent upon citation issued and served in a manner provided for by law.” *Wilson*, 800 S.W.2d at 836. Because the service of citation was defective, the trial court’s jurisdiction over Stephen Ratcliff was not invoked prior to judgment, and the trial court did not have jurisdiction to render the default judgment. *See Bird v. Kornman*, 152 S.W.3d 154, 160 (Tex. App. -- Dallas 2004, pet. denied).¹ We sustain issue two.

The default judgment is reversed, and the case is remanded to the trial court for a new trial.

¹The contempt order also flows from a defective service of process. *See Tracy v. Tracy*, 219 S.W.3d 527, 530 (Tex. App.--Dallas 2007, no pet.). We are confident the court will not attempt to enforce the order.

REVERSED AND REMANDED.

DAVID GAULTNEY
Justice

Submitted on February 26, 2010
Opinion Delivered March 25, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.