

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-14-00352-CV**

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**DRAGO DAIC, Appellant**

**V.**

**STRAIGHT LINE METAL BUILDINGS, INC., Appellee**

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**On Appeal from the 411th District Court  
San Jacinto County, Texas  
Trial Cause No. CV13890**

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**MEMORANDUM OPINION**

Drago Daic appeals an order denying his bill of review, in which he challenged the trial court's rendition of a default judgment in another case that was rendered against him based on his failure to appear. In his bill, Daic asserted that he was never served with citation regarding the case in which he was defaulted. On appeal, Daic argues that because the evidence that he presented to support his bill raised a question of fact on the issue of whether he was properly served, the trial

court erred by denying his bill in a preliminary hearing without the benefit of a trial. We conclude that Daic's evidence established a prima facie case to support his claim that the default judgment is void, so the trial court erred in disposing of his bill without conducting a trial. We reverse the trial court's order denying Daic's bill and remand the cause for further proceedings to resolve the issues Daic presented in his bill.

### Background

In 2012, Straight Line Metal Buildings, Inc. obtained a default judgment against "Drago Mortgage Daic" in cause number CV13163 ("the underlying suit"). The default judgment rendered in the underlying suit recites that Daic, "although having been duly and legally cited to appear and answer, failed to appear and answer and wholly made default."

In 2014, Daic filed a bill of review, seeking to overturn the default judgment. In his bill, Daic asserted that he was never served with process in the underlying suit. Daic supported his allegations by an affidavit, which he attached to his bill. In his affidavit, Daic stated that he had not "received service of process[.]" Daic's bill also asserted that he had a valid defense to Straight Line's suit. Daic's affidavit indicates that Daic denied he had any knowledge of the contract that formed the basis of Straight Line's suit. In his bill, Daic also asserted

that the default judgment taken in the underlying suit was improper because the petition named Drago Daic as one of the defendants, but the court rendered judgment against “Drago Mortgage Daic.” Both Daic’s bill and appeal assert that the variance between the name of the defendant in Straight Line’s petition and the name of the defendant identified in the default judgment is a defect that voids the judgment taken by default.

In its answer to Daic’s bill of review, Straight Line asserted that Daic was a proper party to the underlying suit, and that a private process server properly served Daic with its suit. Straight Line also alleged that Daic failed to demonstrate that he had exercised due diligence by pursuing all available legal remedies to prevent the default judgment from becoming final, and it disputed Daic’s claim that he was not liable for the claims that formed the basis of its suit. Straight Line attached several exhibits to the answer it filed to Daic’s bill of review, including a copy of the citation in the underlying suit. The citation includes a certificate of delivery, and the certificate contains a signature of a person that the certificate identifies as a private process server. By his signature, the private process server certified that he delivered a copy of the citation in the underlying suit to “Draco Daic” in October 2011.

In July 2014, the trial court conducted a preliminary hearing to determine whether a trial would be required to resolve the issues Daic raised in his bill. At the hearing, Daic argued that the evidence attached to his bill showed that a trial would be required. In response, Straight Line argued that the copy of the citation in the underlying suit reflected that Daic had been properly served. Straight Line further argued that without additional evidence to corroborate Daic's affidavit, Daic's testimony was not sufficient to overcome the presumption that he had been properly served with Straight Line's suit. At the conclusion of the hearing, the trial court decided that a trial would not be required, and it denied Daic's bill of review.

In his appeal, Daic asserts that the trial court erred in denying his bill because he presented a prima facie case to show that further proceedings were necessary. In response, Straight Line asserts that Daic failed to present evidence to corroborate his affidavit; Straight Line concludes the trial court properly denied Daic's bill.

In four appellate issues, Daic argues the trial court's ruling should be overturned. In issue one, Daic argues that the evidence he presented during the preliminary hearing established a prima facie case that he was never served with citation in Straight Line's suit. In issue two, Daic contends that it was error for the trial court, in the preliminary hearing, to consider the exhibits attached to Straight

Line's response and then resolve the disputed issues of fact without a trial. In issue three, Daic contends the trial court erred in denying his bill.<sup>1</sup> In issue four, Daic argues that the default judgment is void based on the variance that exists between the defendant named in the citation in the underlying suit, Drago Daic, and the person named in the default judgment, Drago Mortgage Daic.

#### Service of Process

“A bill of review is an independent action to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial.” *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926-27 (Tex. 1999). Ordinarily, a petitioner seeking a bill of review must plead and prove: “(1) a meritorious defense to the cause of action alleged to support the judgment; (2) an excuse justifying the failure to make that defense which is based on the fraud, accident or wrongful act of the opposing party; and (3) an excuse unmixed with the fault or negligence of the petitioner.” *Beck v. Beck*, 771 S.W.2d 141, 141 (Tex. 1989) (footnote omitted); *see also Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam).

In Daic's case, the trial court conducted a preliminary hearing to determine whether Daic had a meritorious defense to the claims on which the default judgment was based. However, when a bill of review petitioner presents a

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<sup>1</sup> On appeal, Daic did not brief issues one through three separately, as his argument on these three issues is combined in his appellate brief.

complaint that he was not properly served in the underlying case in which he suffered a judgment by default, the trial court is not allowed to resolve the matter in a preliminary hearing; instead, the trial court should “hold a trial, at which the bill of review plaintiff assumes the burden of proving that the plaintiff was not served with process[.]” *Caldwell*, 154 S.W.3d at 97.

Daic’s affidavit asserted that he was never served with citation in the underlying suit. For the purposes of the preliminary hearing, the court was required to accept Daic’s sworn affidavit claiming he was never served. *See id.* at 96. Straight Line’s controverting evidence, which arguably shows Daic was served, was a matter to be resolved by a trial; it was not a matter the trial court was entitled to weigh and decide during a preliminary hearing. *See Cash v. Beaumont Dealers Auto Auction, Inc.*, 275 S.W.3d 915, 918 (Tex. App.—Beaumont 2009, no pet.) (holding that the trial court erred in resolving a no-answer default without a trial when the bill-of-review plaintiff presented prima facie proof that he was never served with citation in the underlying case). We sustain Daic’s first three issues.

#### Default Judgment

In support of his fourth issue, Daic argues that the default judgment is void because there is a variance between the name of the defendant that Straight Line identified in the citation on which the default judgment was based and the name of

the defendant identified in the default judgment. Although Daic's bill complained of the variance in the names of these instruments, the record does not show that Daic presented his complaint about the variance in a motion for summary judgment. Additionally, Daic did not argue his complaint regarding the variance during the preliminary hearing, and the trial court's order denying Daic's bill does not show that the trial court ruled on Daic's complaint relating to the variance about which he complains. We hold that Daic's complaint about the variance is not an issue that can be reached in this appeal. *See* Tex. R. App. P. 33.1(a) (preserving error for appellate review requires the complaining party to show that he presented his complaint to the trial court in a timely request, objection, or motion, and that the trial court ruled on the request).

Based on our resolution of issues one through three, we reverse the trial courts order of July 24, 2014. We remand cause number CV13890 to the trial court for further proceedings that are consistent with the Court's opinion.

REVERSED AND REMANDED.

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HOLLIS HORTON  
Justice

Submitted on April 23, 2015  
Opinion Delivered February 18, 2016  
Before McKeithen, C.J., Kreger and Horton, JJ.