TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-10-00090-CV

Angela M. Dean, Appellant

v.

Darrin M. Hall, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 22ND JUDICIAL DISTRICT
NO. 05-0568, HONORABLE BRENDA K. SMITH, JUDGE PRESIDING

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

Appellee Darrin M. Hall filed a suit to modify the parent-child relationship against his ex-wife, appellant Angela M. Dean. Hall moved for substituted service on Dean, asserting that he did not know her current whereabouts. The judge granted Hall's motion; Hall served Dean's father per the order. Dean failed to file an answer, and the trial court granted default judgment against her. Dean brought this restricted appeal, arguing in two issues that the trial court erred (1) in granting default judgment because the motion and affidavit requesting substituted service were inadequate, and (2) in failing to make a record of the default proceedings contrary to the requirements of the family code. We will reverse the trial court's judgment and remand the cause for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Dean and Hall divorced in 2006. They have three minor children together. On July 15, 2009, Hall filed a petition to modify the parent-child relationship along with a "Motion for Alternative Service or Substituted Service." The motion asserted that Dean refused to tell Hall her current address and that Hall did not otherwise know Dean's current address. It also stated that "[a] method of service as likely as publication to give Angela M. Hall actual notice is by serving her mother or father . . . [at their address in San Marcos]." Hall's affidavit in support of the motion stated in relevant part:

> The best possible way to give my children's mother, Angela Dean, [notice] is through her parents . . . [at their address in San Marcos]. The residence of Angela M. Dean, a party in this case, is unknown to me. I have exercised due diligence to locate the whereabouts of this party and have been unable to do so.

The trial court granted the motion for substituted service. The record contains the process server's return of service in affidavit form. The return states that the citation, petition, and order on substituted service were delivered to Dean's father at his home address on July 16, 2009.

Dean did not file an answer timely, and Hall proceeded with a default-judgment hearing. According to Hall, the trial court made an audio recording of the hearing, but that recording is inaudible. The trial court rendered a default judgment against Dean. About six weeks later, Dean filed an untimely answer and a motion for new trial, which the court denied. She then filed this restricted appeal.

STANDARD OF REVIEW

To prevail on a restricted appeal, the appealing party must establish that: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004) (citing Tex. R. Civ. P. 26.1(c), 30; *Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226, 227 (Tex. 1999)). We limit our review to the face of the record and may not consider extrinsic evidence. *Id.* At issue in the present case is only whether there is error on the face of the record.

DISCUSSION

In her first issue, Dean asserts that service on her father was improper and ineffective to give her notice because Hall's motion for substituted service and affidavit in support of the motion did not comply with the relevant rules on substituted service. Defective service of process constitutes error on the face of the record. *Hubicki v. Festina*, 226 S.W.3d 405, 407 (Tex. 2007). In a restricted appeal from a default judgment, we make no presumptions in favor of valid service. *Id.* at 408. The supreme court has "long demanded strict compliance with applicable [service] requirements when a defendant attacks a default judgment." *Id.* Even proof that the defendant had actual notice will not cure defective service. *Id.* Also relevant here, the family code requires that the respondent be served with process in a suit to modify the parent-child relationship and specifies that the Texas Rules of Civil Procedure apply to such suits. Tex. Fam. Code Ann. §§ 156.003 ("A

party whose rights and duties may be affected by a suit for modification is entitled to receive notice by service of citation."), .004 ("The Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply to a suit for modification under this chapter.") (West 2008).

After reviewing the record, we agree with Dean that Hall's motion and its supporting affidavit did not comply with the rules regarding substituted or alternative service. For a court to allow alternative service under Texas Rule of Civil Procedure 106, the movant's motion and affidavit must state "the location of the defendant's usual place of business or usual place of abode or other place whether the defendant can probably be found" and recite facts showing that service has been attempted unsuccessfully at "the location named in such affidavit." Tex. R. Civ. P. 106. Although Hall's affidavit stated that he did not know the location of Dean's residence, it said nothing about her place of business or any other place where she could probably be found. Nor did it recite facts showing that service was attempted unsuccessfully at such location. Accordingly, it did not comply with rule 106.

Rule 109 allows service of citation by publication if a person's whereabouts are unknown. *Id.* R. 109. Although Hall averred that he did not know of Dean's whereabouts, he did not request service by publication.

Rule 109a permits "other substituted service" if the prescribed method "would be as likely as publication to give defendant actual notice," but such substituted service may be used only where "citation by publication is authorized." *Id.* R. 109a. For citation by publication to be authorized, the movant's supporting affidavit must set forth facts showing the movant's due diligence in attempting to ascertain the defendant's whereabouts. *Id.* R. 109. Hall's affidavit states

that he used diligence in attempting to locate Dean, but does not describe any steps that he actually took to do so. Thus, Hall's statement that he "exercised due diligence" is a mere conclusion and does not constitute a sufficient showing of facts demonstrating diligence to allow citation by publication. Because citation by publication was not authorized under rule 109, "other substituted service" under rule 109a was also not authorized.[1]

Having determined that Hall's motion and supporting affidavit did not strictly comply with the rules regarding alternative or substituted service, we hold that the trial court erred in granting Hall's motion for alternative or substituted service. As the record does not show that Dean was otherwise personally served or made a general appearance prior to the rendition of judgment, the trial court erred in granting default judgment against her. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985) (absent general appearance, valid service of process required for court to have personal jurisdiction). We sustain Dean's first issue. Because we do so, we need not reach her second.[2]

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[1] Additionally, the trial court must "inquire into the sufficiency of the diligence exercised . . . before granting any judgment on such service." Tex. R. Civ. P. 109. The record does not show that the trial court made the required inquiry into the sufficiency of Hall's diligence before granting the default judgment.

[2] In her second issue, Dean asserts that the trial court erred by not making a record of the hearing contrary to the family code's requirements. Although the order recites that "the making of a record was waived by the parties," as Dean was not present at the hearing, such a statement is obviously erroneous. The making of a record in a suit to modify the parent-child relationship cannot be waived by a party who is not present in person or represented by counsel at the hearing. *In re Vega*, 10 S.W.3d 720, 722 (Tex. App.—Amarillo 1999, no pet.). Hall, who was present at the hearing, represented that the trial court made an audio recording of the hearing. But, according to Hall, the recording is now inaudible. We note that Texas Rule of Appellate Procedure 34.6(f) requires that we grant an appellant a new trial if (1) the appellant timely requested the reporter's record; (2) by no fault of the appellant, the electronic record is inaudible; (3) the inaudible record was necessary to the appeal's resolution; and (4) the inaudible record cannot be replaced by

CONCLUSION

We reverse the trial court's judgment and remand the cause to the trial court.

J. Woodfin Jones, Chief Justice

Before Chief Justice Jones, Justices Puryear and Pemberton

Reversed and Remanded

Filed: December 31, 2010

agreement of the parties. *See* Tex. R. App. P. 34.6(f).