TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00747-CV

Jim Farrow, Appellant

v.

Gamma Medica, Inc., Appellee

FROM COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-16-005432, HONORABLE TODD T. WONG, JUDGE PRESIDING

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

Jim Farrow appeals from the trial court's final default judgment awarding Gamma Medica, Inc. $18,048.57 plus prejudgment interest, attorney's fees, and court costs. In seven issues, Farrow contends that this Court should reverse the default judgment because of problems related to the service of citation. Because we conclude that the record does not affirmatively show that the return of service was on file with the clerk of the court for at least ten days before the court rendered the default judgment, we will reverse the judgment and remand for further proceedings.

BACKGROUND

In June 2016, Gamma Medica sued Farrow, bringing claims for breach of contract and restitution based on unjust enrichment. On September 22, 2016, the trial court rendered a final default judgment in Gamma Medica's favor. On October 25, 2016, Farrow filed an "Agreed Motion to Set Aside Entry of Default Judgment and Motion for New Trial," which does not bear Gamma

Medica's signature. In this motion, Farrow stated, "The parties have discovered and agree that Defendant Farrow was not served as stated in the return of citation on file with the Court, and therefore there is good cause for the Court to grant a new trial in this case. As such, the parties request that the Default Judgement [sic] be vacated and a new trial granted." On the same day, October 25, the trial court signed an order stating that it was granting the motion, vacating the default judgment, and granting a new trial. On October 26, Farrow filed an "Original Answer," and, on November 4, he filed a notice of appeal.

DISCUSSION

We begin by noting that, because Farrow filed the "Agreed Motion" more than thirty days after the trial court rendered its final judgment, the court's plenary power had expired. *See* Tex. R. Civ. P. 329b(d). Therefore, the trial court's order purporting to vacate the default judgment and grant a new trial was void, and this Court has jurisdiction over Farrow's appeal. *See id.* R. 329(b)(f); *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 72 (Tex. 2008) ("The . . . order granting a new trial was signed after the court's plenary power period expired, and, therefore, that order was void."); *Pipes v. Hemingway*, 358 S.W.3d 438, 445 (Tex. App.—Dallas 2012, no pet.) ("Any action taken by a trial court after it loses plenary power is void.").

On appeal, Farrow alleges the following defects in service: (1) the return of service fails to show when, if ever, it was provided to the district clerk; (2) the record fails to show that the purported server was authorized to serve the citation; (3) the citation lacks the seal of the court; (4) the citation lacks the signature of the clerk under seal of the court; and (5) the citation fails to show that it was directed to a sheriff, constable, or other person authorized to serve it.

Proper citation and return of service are required for the trial court to exercise personal jurisdiction over the defendant. *TAC Ams., Inc. v. Boothe*, 94 S.W.3d 315, 318–19 (Tex. App.—Austin 2002, no pet.). Strict compliance with the rules for service of citation must affirmatively appear in the record for a default judgment to withstand a direct attack. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). "Virtually any deviation will be sufficient to set aside a default judgment on appeal . . . ." *Becker v. Russell*, 765 S.W.2d 899, 900 (Tex. App.—Austin 1989, no writ).

Because it is dispositive, we will address Farrow's third issue—that the record fails to demonstrate that the return of service was on file with the clerk of the trial court for at least ten days before the court rendered its default judgment. "No default judgment shall be granted in any cause until proof of service . . . shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment." Tex. R. Civ. P. 107(h). The record before us contains two copies of the return of service, but neither copy is file-stamped, and there is no indication of when the return was filed with the court.

In response to Farrow's arguments, Gamma Medica points out that the table of contents of the clerk's record states "Citation Returned Served" and provides the date "08/02/2016" and that the "Register of Actions" gives the dates "06-20-2016" and "08-02-2016" for "RET: CV CITATION RET SERVED." However, docket entries and similar documents are inherently unreliable and are not part of the record before us. *See Davis v. West*, 433 S.W.3d 101, 109 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("[D]ocket sheets are not evidence and, therefore, cannot demonstrate that proper notice was given."); *see also In re V.G.*, No. 04-14-00802-CV, 2015 WL 1640340, at *4 (Tex. App.—San Antonio Apr. 8, 2015, no pet.) (mem. op.) ("A trial judge's

notes are for his or her own convenience and form no part of the record."); *Barnes v. Deadrick*, 464 S.W.3d 48, 53 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("A docket-sheet entry ordinarily forms no part of the record that may be considered; rather, it is a memorandum made for the trial court and clerk's convenience."); *In re Latimer*, No. 05-14-01099-CV, 2014 WL 4288886, at *1 (Tex. App.—Dallas Aug. 29, 2014, no pet.) (mem. op.) (noting that the mandamus record contains "a notation on the trial court's register of actions" and stating, "A docket entry forms no part of the record which may be considered . . . .") (internal quotation marks omitted); *Aguirre v. Phillips Props., Inc.*, 111 S.W.3d 328, 333 (Tex. App.—Corpus Christi 2003, pet. denied) (en banc) (stating that docket entry forms no part of the record); *First Nat'l Bank of Giddings, Tex. v. Birnbaum*, 826 S.W.2d 189, 191 (Tex. App.—Austin 1992, no writ) (op. on reh'g) (per curiam) (noting that "docket entries are inherently unreliable because they lack the formality of orders and judgments").

Gamma Medica also argues that "each copy of the return [in the clerk's record] is attached to a copy of the citation" and that "the first sheet of the pair—the copy of the citation—bears the clerk's file stamp." In other words, Gamma Medica argues that we should understand the stamp on the citation to apply to the return as well. However, nothing in the record before us indicates that the return was in fact attached to the citation and filed with the court at the same time, and we will not assume that the return was simultaneously filed with the citation. Our sister court has addressed a similar situation:

> As to the return of citation, there is no indication on the return itself that it was ever filed with the clerk of the court, let alone that it was on file for ten days. *See* Tex. R. Civ. P. 107(h). Peterson responds that the return was attached to the citation on which there is a file-mark stamp from the clerk showing the citation was filed on September 17, 2012, long before the hearing on the default judgment was held.

> However, the return need not be attached to the citation, *id.* (a), and there is no indication in the record that the return was attached to the citation and filed by the clerk. We cannot presume that it was. Thus, this is also a defect that would preclude a default judgment.

Midstate Envtl. Servs., LP v. Peterson, 435 S.W.3d 287, 290–91 (Tex. App.—Waco 2014, no pet.) (footnote and citations omitted).

Because the record before us does not affirmatively reflect that the return of citation was on file with the clerk of the trial court for at least ten days before the court rendered its default judgment, we sustain Farrow's third issue and must reverse the judgment. We need not address Farrow's remaining issues.

CONCLUSION

We reverse the trial court's final default judgment and remand this case for further proceedings consistent with this opinion.

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Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Reversed and Remanded

Filed: August 8, 2017