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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2008

1051093

Rodney D. Truss

v.

Sandra N. Chappell

Appeal from Jefferson Circuit Court
(CV-03-5814)

MURDOCK, Justice.

Rodney D. Truss, the defendant below, appeals from the denial of his motion, made pursuant to Rule 60(b)(4), Ala. R.

1051093

Civ. P., to set aside a default judgment in favor of the plaintiff, Sandra N. Chappell. Truss contends that the default judgment was void because, he says, Chappell did not properly serve him with process. We agree, and we reverse and remand.

In September 2001, Chappell's automobile was struck by a truck owned by Old Dominion Freight Line, Inc. ("Old Dominion"), and driven by John Clark. Chappell alleged that the collision occurred when she was forced to stop suddenly to avoid Truss's vehicle, which had swerved into Chappell's lane.

In September 2003, Chappell sued Truss, Old Dominion, and Clark. Chappell made an attempt to serve Truss with process by certified mail in 2003; that attempt was unsuccessful. In February 2005, Chappell again attempted to serve Truss with process by certified mail. This second mailing was addressed to Truss at his mother's address in Birmingham. The case-action-summary sheet notes that this certified mail was received at that address on February 5, 2005. The return receipt shows that the envelope was received and signed for by Sam Edwards. The record contains evidence indicating that

1051093

Edwards was Truss's younger brother, and that he was 15 years old at the time.

Truss did not file an answer or otherwise respond to the summons and complaint. In September 2005, Chappell filed an application for an entry of default against Truss, accompanied by an affidavit from Chappell's counsel stating that service had been effected on Truss. A default was entered against Truss on September 26, 2005.

Beginning on October 31, 2005, Chappell tried her claims against Old Dominion and Clark before a jury and apparently presented evidence of her damages. Truss did not appear for trial. The jury returned a verdict against Chappell and in favor of Old Dominion and Clark. In November 2005, the trial court entered a judgment in favor of Old Dominion and Clark and against Chappell; the trial court also entered a default judgment in favor of Chappell and against Truss in the amount of \$60,000.¹

¹The record indicates that the trial court made its determination of the amount of Chappell's damages from evidence presented during the jury trial of Chappell's claims against Old Dominion and Clark.

1051093

In February 2006, Truss filed a motion under Rule 60(b)(4), Ala. R. Civ. P., asking that the default judgment in favor of Chappell be set aside as void because, he said, he had not been properly served with process. Although Truss's motion was not supported by any evidentiary submissions, following a March 17, 2006, hearing on that motion, Truss submitted an affidavit of his mother, a copy of the return receipt for the certified-mail letter, and a specimen of Edwards's signature. The only evidence Chappell presented in response to Truss's Rule 60(b)(4) motion was marriage records that, according to Chappell, established that the Sam Edwards who signed the return receipt was Truss's grandfather and not Truss's brother.² On March 30, 2006, the trial court entered an order denying Truss's Rule 60(b)(4) motion.

²Chappell introduced this evidence in an effort to establish that the person who took delivery of the certified mail was of "suitable age and discretion," as required by Rule 4(c)(1), Ala. R. Civ. P. For reasons discussed below, we dispose of this case without finding it necessary to consider the true identity of the Sam Edwards who signed for the receipt or whether that person was of "suitable age and discretion."

1051093

On April 7, 2006, Truss filed a "motion to reconsider" the denial of his Rule 60(b)(4) motion, together with his own affidavit. On April 11, 2006, the trial court held an evidentiary hearing at which it heard ore tenus testimony from Truss. On April 20, 2006, the trial court entered an order denying Truss's motion to reconsider the denial of the Rule 60(b) motion as to liability but granting the motion as to the amount of damages. Truss filed a notice of appeal on May 5, 2006.

In December 2006, this Court dismissed Truss's appeal insofar as it was an appeal from the April 20 order, citing Ex parte Keith, 771 So. 2d 1018 (Ala. 1998). For purposes of this appeal, therefore, we consider only the March 30 order denying Truss's Rule 60(b)(4) motion and the evidence before the trial court when it entered that order. We also limit our review to a single issue briefed by the parties to this Court: Whether Chappell proved that the Birmingham address to which service of process was attempted was in February 2005 Truss's

1051093

"dwelling house or usual place of abode" for purposes of Rule 4(c)(1), Ala. R. Civ. P.³

When service of process is contested, the plaintiff bears the burden of establishing proper service of process. This Court has held:

"One of the requisites of personal jurisdiction over a defendant is "perfected service of process giving notice to the defendant of the suit being brought." Ex parte Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 884 (Ala. 1983). "When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." Id. A judgment rendered against a defendant in the absence of personal jurisdiction over that defendant is void. Satterfield v. Winston Industries, Inc., 553 So. 2d 61 (Ala. 1989)."

³Both parties treat Rule 4(c)(1) ("Upon Whom Process Served -- Individual") as the applicable rule for purposes of resolving this case. Assuming, without deciding, that they are correct in this treatment, we discuss in the text how the evidence before the trial court when it entered its March 30 order was insufficient to establish one of the requirements for proper service under that rule.

We note that, if we were to apply Rule 4(i)(2)(C) ("Methods of Service -- Service By Certified Mail -- When Effective"), our disposition of this case would be no different. In particular, the record before the trial court when it entered its March 30 order contained no evidence as to whether Truss "actually receive[d] the summons and complaint in time to avoid a default."

1051093

Bank of America Corp. v. Edwards, 881 So. 2d 403, 405 (Ala. 2003) (considering an appeal from a trial court's denial of a Rule 60(b)(4) motion) (quoting Horizons 2000, Inc. v. Smith, 620 So. 2d 606, 607 (Ala. 1993)) (emphasis added).⁴ See also Duncan v. S.N., 907 So. 2d 428 (Ala. 2005); Cain v. Cain, 892 So. 2d 952 (Ala. Civ. App. 2004).

Rule 4(c)(1), Ala. R. Civ. P., provides:

"(c) Upon Whom Process Served. Service of process, except service by publication as provided in Rule 4.3, shall be made as follows:

"(1) Individual. Upon an individual, other than a minor or an incompetent person, by serving the individual or by leaving a copy of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent

⁴In Insurance Management & Administration, Inc. v. Palomar Insurance Corp., 590 So. 2d 209, 213 (Ala. 1991), this Court held that the clerk's notation of proper service creates a presumption of proper service that can be rebutted only by "clear and convincing evidence." In Northbrook Indemnity Co. v. Westgate, Ltd., 769 So. 2d 890, 893 n.4 (Ala. 2000), this Court stated that the Palomar Insurance presumption established only that the "clerk mailed the process and the person signing the certified-mail receipt received the process." Palomar Insurance did not establish a presumption as to whether the person signing the receipt was a proper person to receive process or whether the place of service was the defendant's "dwelling house or usual place of abode."

1051093

authorized by appointment or by law to receive service of process...."

The affidavit from Chappell's attorney that accompanied Chappell's motion for entry of default against Truss states only that Truss "was duly served with a copy of the summons, together with a copy of [Chappell's] complaint, on February 5, 2005." This conclusory statement is not sufficient to establish any of the alternatives prescribed by Rule 4(c)(1) for serving an individual defendant, particularly in light of the contrary evidence in the record. Compare Fisher v. Amaraneni, 565 So. 2d 84, 88 (Ala. 1990) (conclusory statements in an affidavit were not sufficient to establish that the defendants were avoiding service); Kanazawa v. Williams, 838 So. 2d 392, 395 (Ala. Civ. App. 2002) ("[T]he conclusory assertions made by ... legal counsel in counsel's affidavit that Kanazawa had attempted to avoid service are insufficient as a matter of law.").

Specifically, although the evidence that was before the trial court on March 30, 2006, shows that process was delivered by certified mail to Edwards at Truss's mother's house, there is no evidence indicating that the mother's house

1051093

was Truss's "dwelling house or usual place of abode."⁵ To the contrary, the affidavit of Truss's mother states that she had resided at that Birmingham address since 2000 and that, on February 5, 2005, Truss "was not a resident [there]". He had been called to service in Iraq and may have been still overseas or stationed in North Carolina at that time." (Emphasis added.) The parties argue at length concerning whether and when Truss changed his "domicile" from Alabama to North Carolina, but there was no evidence before the trial court showing that Truss was, at the time of the alleged service, or ever had been, a resident at the particular address in Birmingham at which service was attempted in February 2005.

Because Chappell failed to meet her burden of establishing proper service of process on Truss, we must reverse the judgment of the trial court and remand the cause for further proceedings.

REVERSED AND REMANDED.

⁵There also is no evidence in the record specifically showing that Edwards was Truss's agent, and Chappell does not argue that Edwards was Truss's agent. See Rule 4(c)(1), Ala. R. Civ. P.

1051093

See, Smith, Bolin, and Parker, JJ., concur.

Murdock, J., concurs specially.

Cobb, C.J., and Lyons, Woodall, and Stuart, JJ., dissent.

1051093

MURDOCK, Justice (concurring specially).

I write separately to respectfully disagree with views expressed by Justice Woodall in his dissenting opinion. First, I cannot conclude that Rule 4(i)(2)(C), Ala. R. Civ. P., is the "obviously applicable rule" to the exclusion of Rule 4(c), Ala. R. Civ. P. As indicated by its title, as well as by its text, the focus of Rule 4(c) is "Upon Whom Process [may be] Served." (Emphasis added.) For eight different categories of defendants, it describes the individuals into whose hands the summons and complaint are to be placed. It is a rule of general application; it is not limited by its terms to service of process by a process server. For an individual defendant, it provides that the summons and complaint be placed in the hands of (i) the defendant, (ii) a person of suitable age and discretion residing in the defendant's dwelling house or usual place of abode, "or" (iii) an agent authorized to receive service of process on behalf of the defendant.

Nor do I read the main opinion as holding "that an individual may be served by certified mail received and signed for by an agent only at the individual's 'dwelling house or usual place of abode.'" ___ So. 2d at ___. Nothing in the

1051093

main opinion purports to discard the disjunctive portions of Rule 4(c) providing for service of process directly upon the individual defendant or upon "an agent authorized by appointment or by law," neither of which by its terms requires service to be accomplished at the defendant's dwelling house or usual place of abode. Nor does the main opinion discard the portion of Rule 4(i)(2)(C) explaining that, for purposes of service by certified mail, a defendant's "agent" is a person or entity specifically authorized to receive the addressee's mail and to deliver that mail to the addressee. The main opinion merely recognizes that, at the time the trial court entered its March 30, 2006, order, there was no evidence before it upon which it could have ruled in favor of Chappell on the basis of any of these provisions; that none of these provisions were put at issue in the trial court prior to the entry of the March 30 order; and that none of these provisions have been argued on appeal to this Court.

1051093

WOODALL, Justice (dissenting).

"It is the appellant's obligation to demonstrate error on the part of the trial court and ... that includes providing this Court with citations to pertinent cases, statutes, and other authorities." FabArc Steel Supply, Inc. v. Composite Constr. Sys., Inc., 914 So. 2d 344, 355 (Ala. 2005) (emphasis added). I cannot conclude that Truss has fulfilled this obligation when his arguments do not address the obviously applicable rule, namely, Rule 4(i)(2)(C), Ala. R. Civ. P. Today, this Court has unnecessarily and incorrectly held that an individual defendant may be served by certified mail received and signed for by an agent only at the individual's "dwelling house or usual place of abode." This holding is contrary to the plain language of Rule 4 and ignores the reality that many people regularly receive their mail by agent at other locations, including post office boxes. Consequently, I respectfully dissent.

Cobb, C.J., and Lyons, J., concur.