IN THE COURT OF APPEALS OF TENNESSEE
FOR THE WESTERN DISTRICT AT JACKSON

SCOTT PATRICK WERNER and
KELLY LYN WERNER BECK, as
Personal representatives of THE ESTATE
OF DR. STANLEY WERNER,

Plaintiffs/Appellees,

v. **No. W2025-00779-COA-R3-CV**

DE'ANTHONY MELTON,

Defendant/Appellant.

AMENDED APPELLEES' BRIEF

On Appeal from the Shelby County Circuit Court
Case No. CT-2234-22, Div. V, Honorable Rhynette Hurd

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

The issues in this appeal, as presented by Appellant and restated[1] by Appellees, are:

I. Whether the Circuit Court properly denied Appellant's Rule 60.02 Motion to Set Aside Judgment in favor of Appellees on their unopposed Motion for Summary Judgment?

A. Did the Circuit Court err in denying Appellant's Motion under Rule 60.02(3) when it found the Order of Judgment was not void as Appellant was properly served with process in accordance with Tennessee and New Jersey law when a private process server served a copy of the Complaint and Summons upon Steve Eushery, Appellant's uncle and roommate, at Appellant's residence in New Jersey and when Appellant was served via certified mail and simultaneous ordinary mail to Appellant's residence in New Jersey?

B. Did the Circuit Court abuse its discretion when it denied Appellant's Motion under Rule 60.02(1), (2), or (5) as Appellant did not file his Motion within a reasonable time after the judgment?

C. Did the Circuit Court abuse its discretion when it denied Appellant's Motion under Rule 60.02(1), (2), or (5) on the

[1] As instructed by the Appellate Court Clerk's Office, Western Division, Appellees submit this Amended Appellees' Brief for the purpose of correcting a typographical error on page 6 of Appellees' Brief that omitted the first line of Appellees' Statement of the Issues and updating the word count to reflect this new footnote.

grounds that any factual discrepancies between the *ad damnum* in the Complaint and the damages in the Order of Judgment, or the factual basis therefor, were not timely asserted within thirty days of the Order of Judgment under Rule 59.04 or within a reasonable time under Rule 60.02?

STATEMENT OF THE CASE

Dr. Stanley Werner[2] ("Dr. Werner") brought this action for negligence and negligence per se on June 3, 2022, by filing a Complaint ("Complaint") against Appellant De'Anthony Melton ("Appellant") arising from an incident on January 23, 2022, in which Appellant's German Shepherd dog got loose while it was under the supervision of Steve Eushery, Appellant's uncle and roommate, and viciously attacked Dr. Stanley Werner causing severe injuries. (Technical Record,[3] vol. 1, at 1–3, 405).

On June 3, 2022, the Circuit Court Clerk issued the first Summons to Appellant at his residential address of 85 West Wickliff Creek Circle, Eads, Tennessee 38028. (TR, at 5). This Summons was returned unserved as Defendant was not to be found. (*Id.*). Shortly after Dr. Werner filed the Complaint, Appellant moved from Memphis, Tennessee to Vorhees Township, New Jersey because he—a professional basketball player—was traded from the Memphis Grizzlies to the Philadelphia 76ers. (TR, at 11).

On September 14, 2022, the Circuit Court Clerk issued an Alias Summons to be served upon Appellant at his place of employment, the

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[2] As set forth in the Suggestion of Death of Appellee, Dr. Stanley Werner passed away on or about May 3, 2025. (TR, at 412–13). As ordered by the Court, Appellees in this appeal are the personal representatives of Dr. Werner's Estate. Order, July 18, 2025 (granting Motion for Substitution of Party).

[3] Hereinafter abbreviated as "TR." Except for the supplemental and separately paginated Volume 6 and Volume 7 of the Technical Record, Appellees' record citations will identify only the page number.

Philadelphia 76ers training facility as 1-99 S. Front Street, Camden, New Jersey, 08103. (TR, at 5). The Alias Summons was also returned unserved, as the process server was not allowed access to Appellant. (TR, at 5).

On October 14, 2022, Dr. Werner sent a copy of the Alias Summons via USPS Registered Mail, return receipt requested, and U.S. First Class Mail to the Philadelphia 76ers training facility—the return receipt was not signed by Appellant. (TR, at 6, 25–33). On October 26, 2022, another copy of the Alias Summons was sent to the main office of the Philadelphia 76ers at 3601 Broad Street, Philadelphia, Pennsylvania 19148, but the return receipt was not signed by Appellant. (TR, at 6, 35–41).

On November 18, 2022, Dr. Werner filed a Motion to Deem Service Complete, or In The Alternative, Motion for Service by Publication, in which he asserted he had complied with Tennessee and New Jersey, or alternatively requested leave to serve Appellant by publication. (TR, at 5). In support of this Motion, counsel for Dr. Werner executed an Affidavit detailing Dr. Werner's diligent effort to effect service of process on Appellant unsuccessfully on multiple occasions and at multiple addresses. (TR, at 10–13). In the supporting Affidavit, counsel for Dr. Werner included allegations of his diligent efforts to locate Melton and that Melton was attempting to avoid service. (TR, at 13). On December 12, 2022, the Circuit Court granted Dr. Werner leave to serve Appellant by publication, (TR, at 45–46), and Dr. Werner ran notices for four consecutive weeks in the following local newspapers: Daily News (Memphis, Tennessee), Philadelphia Tribune (Philadelphia,

Pennsylvania), and the Star Ledger (Camden, New Jersey) (TR, vol. 7, at 1–4).

For the avoidance of doubt, on March 29, 2023, Dr. Werner's private process server, Timothy Maduzia of Gill & Associates, personally served Appellant at his New Jersey residence at 1 Carly Court, Vorhees, New Jersey 08043, by handing a copy of the Complaint and Alias Summons to "Steven Eushery, ***identified as Roommate of the [Appellant]***." (TR, at 325 (Aff. of T. Maduzia) (emphasis added); TR, at 404–08 (Order Denying Appellant's Rule 60.02 Motion)).

On April 10, 2023, to further remove any doubt as to the effectiveness of service on Appellant, Dr. Werner also sent a copy of the Complaint and Alias Summons via certified mail, restricted delivery and return receipt requested to Appellant's New Jersey residence. (TR, at 326–27). Appellant did not claim this mailing. (TR, at 327). Pursuant to New Jersey Court Rule 4:4-3, Dr. Werner simultaneously sent a copy of the Complaint and Alias Summons to Appellant's residence in New Jersey via ordinary mail. (TR, at 326).

After serving Appellant via private process server and by mail, on May 10, 2023, Dr. Werner propounded Plaintiff's First Request for Admissions on a number of relevant topics related to Appellant's liability; the full extent, reasonableness, and necessity of Dr. Werner's medical expenses attached to the Requests; and the damages Dr. Werner suffered. (TR, at 55–92). Dr. Werner served his Request for Admissions on Appellant via FedEx at his residence and two separate work addresses. (TR, at 53, 81–84 (Proof of Delivery)). The FedEx return states that the delivery was signed for by: "[S.] Melton." (TR, at 81-82).

When Appellant did not respond to the Requests for Admissions, Dr. Werner filed a Motion to Requests for Admissions Admitted, (TR, 53–54), and the Court granted the Motion to Deem on June 30, 2023, (TR, Vol. 7, at 6–7 (Order on Motion to Deem)).

On September 8, 2023, Dr. Werner filed and served a Motion for Summary Judgment, Memorandum of Law, and Statement of Undisputed Material Facts supported chiefly by Appellant's deemed admissions, an Affidavit of Dr. Werner, and numerous medical bills. (TR, at 95–131). In his Motion, Dr. Werner argued the undisputed material facts demonstrated no genuine issue for trial as to Appellant's negligence and liability for his dog running at large and biting Dr. Werner, as well as Dr. Werner's injuries and the damages he suffered as a result of the dog attack. (TR, at 101–06). Although Dr. Werner duly filed and served a Notice of Hearing on the Motion on September 12, 2023, (TR, at 132–33), Appellee did not respond to the Motion for Summary Judgment or Statement of Undisputed Material Facts or appear for the hearing on the Motion on October 31, 2023. (TR, Vol. 6, at 1).

Based upon Appellant's admissions, the applicable Tennessee law, and undisputed facts contained in the entire record, the Circuit Court entered summary judgment in favor of Dr. Werner on October 31, 2023 ("Order of Judgment"). (TR, Vol. 6, at 1–6). Specifically, the Circuit Court found:

- [Dr. Werner]'s Motion and Statement of Undisputed Material Facts includ[e] each element necessary to support liability and damages under [Dr. Werner]'s causes of action for negligence per se and negligence.

- The medical damages, as well as damages for past and future pain and suffering are established by Requests for Admission filed by [Dr. Werner] and served on [Appellee] on May 10, 2023.

- [Appellee] admitted liability for Dr. Werner's medical damages, past pain and suffering, and future pain and suffering in the total amount of $758,325.72 and is liable to Dr. Werner for those damages.

(TR, Vol. 6, at 3). Dr. Werner served a copy of the Order of Judgment on Appellant on October 31, 2023 via Certified Mail, return receipt requested, and ordinary mail. (TR, at 346–53).

For a period of nine (9) months after the entry of Order of Judgment, over fifteen (15) bank levies and garnishments were executed and answered resulting in a substantial amount of the judgment being actually collected from Appellant's bank accounts and wages without any objection or communication from Appellant. (TR, at 134–229, 405). During these nine months, despite hundreds of thousands of dollars being garnished and disbursed from the Circuit Court clerk to Dr. Werner, neither Dr. Werner nor his attorneys received any attempt from Appellant to communicate, object, or otherwise acknowledge Dr. Werner's levies and wage garnishments.

Finally, on July 23, 2024, Appellant appeared in this case and filed a Motion to Set Aside Judgment Pursuant to Tenn. R. Civ. P. 60.02 ("Appellant's Rule 60.02 Motion"), in which Appellant argued he was not properly served with process rendering the judgment void, the damages award was more the amount of the *ad damnum*, and Dr. Werner's Motion for Summary Judgment was based upon false statements of fact. (TR, at

230–59). In support of his Motion, Appellant filed the Declaration of Steve Eushery, dated July 15, 2024 ("July Declaration") (TR, at 252–55), and Declaration of De'Anthony Melton (TR, at 257–59). Mr. Eushery declared ***under penalty of perjury*** that he is Appellant's uncle, that Appellant was not living in Memphis, Tennessee when this action was commenced, and that he did not reside with Appellant in New Jersey, and that he did not represent to Dr. Werner's process server that he was Appellant's "roommate." (TR, at 254–55). Additionally, Mr. Eushery explained he received two citations for the dog bite incident and personally appeared before the Shelby County Environmental Court on February 16, 2022 for his arraignment. (TR, at 252–53). He further declared ***under penalty of perjury*** as follows:

> 19. An individual who represented himself to be, and who I believe in fact was, [Dr. Werner], also appeared in court at that case setting.
>
> 20. [Dr. Werner] admitted to the General Sessions Court that the dog bite was his fault—that he had reached toward the dog when it was eating in a neighbor's garage and the dog bit him.
>
> 21. As a result, Judge Dandridge dismissed the dog running at large charge against me at costs but dismissed the animal bit charge against me without assessing any costs at all.

(TR, at 253–54). Each of these statements was demonstrably false, as Appellees' subsequent filings would prove.

On August 6, 2024, Dr. Werner filed a Response in Opposition to Appellant's Rule 60.02 Motion, asserting that he had properly served

Appellant under Tennessee and New Jersey law, that Appellant had actual notice of the lawsuit and judgment and was dilatory in failing to respond to the lawsuit and judgment, and that Appellant's conduct demonstrated waiver of his delinquent objections under Tennessee Rules of Civil Procedure 59 and 60. (TR, at 260–81).

On November 4, 2024, Appellant filed a Supplement to Appellant's Rule 60 Motion, with new Declarations of Steve Eushery and De'Anthony Melton, attempting to dispute Dr. Werner's evidence corroborating Mr. Eushery's residence with Appellant. (TR, vol. 7, at 14–23).

On December 6, 2024, the Circuit Court held a hearing on Appellant's Rule 60.02 Motion and initially granted the Motion from the bench in reliance upon Steve Eushery's false Declaration, (TR, vol. 4, 33:9–10), stating that "[the Court's] principal concern is what happened in Environmental Court," but the Court never entered an Order granting the Motion. At this hearing, in addition to the false statements contained in Eushery's Declaration, Melton's counsel also made false statements to the Court asserting that Dr. Werner personally appeared in Mr. Eushery's Environmental Court citation hearing "with his arm wrapped up" and that Dr. Werner stated to the Environmental Court judge that [the dog attack] was his fault and as a result, the charges against Mr. Eushery were dismissed. (TR, Vol 4, pp. 9-10). These things never happened and were completely fabricated as later shown by Dr. Werner in his Motion to Reinstate the Judgment or for Rehearing on Defendant's Motion to Set Aside Judgment and supporting Memorandum. (TR, at 366–68 (Motion); TR, at 369–95 (Memorandum and Exhibits).

On March 28, 2025, after obtaining additional information and evidence, Dr. Werner filed a Motion to Reinstate the Judgment or for Rehearing on Defendant's Motion to Set Aside Judgment and supporting Memorandum on March 28, 2025. (TR, at 366–68 (Motion); TR, at 369–95 (Memorandum and Exhibits). In his Motion, Dr. Werner provided a detailed explanation of each of the statements Appellant contends were false and attached supporting documents and four (4) separate Declarations from Dr. Werner, Dr. Scott P. Werner (son), Kelly Beck, Ph.D. (daughter), and Dewey Parnell (neighbor/tenant). (TR, at 377–89). In toto, these Declarations and other Exhibits uniformly establish that, ***contrary to the sworn testimony*** in Steve Euchery's July Declaration, and contrary to false statements put forth by Melton's counsel in open court, Dr. Werner never appeared in Environmental Court or admitted fault for the dog bite, and the Environmental Court found Mr. Eushery ***guilty*** on the charge of dogs running at large. (TR, at 394 (Order Requiring Defendant's Compliance)).

On April 17, 2025, Dr. Werner filed a Supplemental Response in Opposition to Appellant's Rule 60.02 Motion that identified "demonstrably false and misleading assertions made by [Appellant] and his counsel in support of [Appellant's Rule 60 Motion]" (TR, at vol. 7, at 25). The Supplemental Response further argued that Appellant's Rule 60.02 Motion was not filed within a reasonable time as required by Rule 60, failed to establish grounds to set aside the judgment by clear and convincing evidence, failed to timely raise objections under Tennessee Rule 59 as to the judgment amount and factual disputes, and that Dr.

Werner would be greatly prejudiced were the judgment nullified. (TR, vol. 7, at 24–38).

Some five (5) months after filing the perjured Declaration, on April 22, 2025, Appellant filed a Notice of Correction wherein Appellant acknowledged that "Mr. Eushery's statement that [Dr. Werner] was present for the Environmental Court proceeding on February 16, 2022, was ***in error***." (TR, at 397) (emphasis added). In his attached Corrected Declaration, Mr. Eushery attested that not Dr. Werner, but rather an unnamed Code Enforcement Officer who appeared in Environmental Court and stated in Environmental Court that Dr. Werner reached toward the dog. (TR, at 400–01). Curiously, the Corrected Declaration maintains that all charges against Mr. Eushery were dropped, (TR, at 401), though they were apparently not (TR, at 394).

The Circuit Court held a second hearing on Appellant's Motion on April 25, 2025, and considered the question of Mr. Eushery's residency and weighed his credibility in light of the perjured testimony in his July Declaration and the unreliable testimony in his Corrected Declaration. (TR, Vol. 5). During the hearing, the Circuit Court acknowledged that its previous decision (that was not articulated in or otherwise reduced to a written Order) was based on inaccurate information Appellant provided regarding the Environmental Court proceedings:

> And I'm looking at the record here, and there was ample opportunity to do something and nothing. And I cannot tell you how frustrating it is to a court to have granted a motion for summary judgment, to have allowed a garnishment and all of that and then to learn that ***the basis for doing that*** is based on a finding by another court, I guess—right—on the same case, saying that everything you thought is wrong.

> Then to find out that, no, you weren't wrong, that didn't really happen in Environmental Court.

(TR, vol.5, at 27:6–23) (emphasis added).

On May 1, 2025, the Circuit Court entered its Order Denying Defendant's Motion to Set Aside Judgment Pursuant to Tenn. R. Civ. P. 60.02 ("Rule 60.02 Order"). (TR, at 404–08). After detailing the numerous and myriad efforts to serve Appellant, the Circuit Court's Rule 60.02 Order specifically found "the private process served Mr. Melton's uncle ***and roommate***, Steven Eushery, with a copy of the lawsuit on March 29, 2023." (TR, at 405) (emphasis added). The Circuit Court expressly considered and disregarded Mr. Eushery's conflicting sworn testimony regarding his residency and the Environmental Court proceedings, affirmatively finding "Mr. Eushery's testimony lacking any credibility." (TR, at 406).

The Rule 60.02 Order also details Dr. Werner's post-judgment activities—including over fifteen (15) execution documents (i.e. garnishments and levies) to numerous banking institutions and relevant NBA teams—which the Court specifically found to put Appellant on "actual notice of the judgment against him." (TR, at 405–06).

Ultimately, the Circuit Court ruled:

> The Court finds that [Appellant] was properly served in this matter under both Tennessee and New Jersey Rules of Civil Procedure. The Court further finds that [Appellant]'s delay in seeking to set aside this judgment under Rule 60.02(2) was not reasonable . . . The Court finds this delay is willful and unreasonable.
>
> [Appellant]'s other argument for relief based upon the ad damnum also fails on the bases that (i) the argument falls

> within Rule 59 which has a strict thirty (30) day time limit after entry of the judgment, and (ii) even if it could be raised under Rule 60, again, [Appellant]'s delay in seeking relief was willful and unreasonable.

(TR, 406–07).

On May 23, 2025, Appellant timely filed his Notice of Appeal. (TR, at 409–10).

STANDARD OF REVIEW

"Tennessee law is clear that the disposition of motions under Rule 60.02 is best left to the discretion of the trial judge." *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 335 (Tenn. 2010). Therefore, the standard of review applicable to this appeal of the Circuit Court's denial of Appellant's Rule 60.02 Motion is abuse of discretion. *Rogers v. Estate of Russell*, 50 S.W.3d 441, 444 (Tenn. Ct. App. 2001) ("A motion for relief from a judgment pursuant to Rule 60.02 addresses the sound discretion of the trial judge, and the scope of review on appeal is limited to whether the trial judge abused his discretion." (citing *Banks v. Dement Const. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991))); *see also Smartbank v. Stephens*, No. E2018-01900-COA-R3-CV, 2019 WL 5306883, at *2–3, 5 (Tenn. Ct. App. Oct. 21, 2019) (applying an abuse of discretion standard of review and affirming the Circuit Court's denial of a Rule 60.02(3) motion when the Circuit Court made a factual finding regarding residency after considering conflicting testimony and making a credibility determination that ultimately supported the Circuit Court's finding that the defendant had been properly served with process).

As concerns the Circuit Court's denial of Appellant's Motion under Rule 60.02(3), this Court reviews questions law regarding of personal jurisdiction on a *de novo* basis. *See Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015) ("We . . . will apply *de novo* review, with no presumption of correctness, when reviewing a trial court's ruling on a Tennessee Rule 60.02(3) motion to set aside a judgment as void.").

However, *the factual findings* upon which the Circuit Court based the legal conclusion that it had personal jurisdiction over Appellant are reviewed with a presumption that the Circuit Court was correct unless the evidence preponderates otherwise. *See Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012) ("As to the findings of fact, the standard of review is *de novo* upon the record with a presumption of correctness as to the trial court's findings of fact, unless the preponderance of the evidence is otherwise." (citing *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000))); *see also* Tenn. R. App. P. 13(d) ("Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.").

Similarly, "[o]n an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings." *Brummitte v. Lawson*, 182 S.W.3d 320, 322 (Tenn. Ct. App. 2005) (quoting *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990)).

ARGUMENT

Appellant challenges the Circuit Court's valid denial of Appellant's Rule 60.02 Motion to set aside the Order of Judgment granted nine months earlier in favor of Dr. Werner after Appellant was duly served with and ignored this lawsuit. The Circuit Court weighed the veracity of testimony and evidence before it and properly applied Tennessee and New Jersey law governing service of process and the timeliness requirement under Tennessee Rule 60.02, and Appellees respectfully submit this Court should affirm the Circuit Court's decision below.

I. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S RULE 60.02 MOTION ON THE GROUNDS THE JUDGMENT WAS VOID FOR LACK OF SERVICE OF PROCESS UNDER TENNESSEE RULE OF CIVIL PROCEDURE 4.05.

The Circuit Court properly exercised jurisdiction over Appellant, as he was duly served with process under Tennessee law, and denying Appellant's Rule 60.02 Motion was, therefore, appropriate.

A. High standard to obtain relief under Rule 60.02.

Tennessee Rule 60.02 provides, in relevant part,

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; . . . or (5) any other reason justifying relief from the operation of the judgment. The motion shall be

> made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Tenn. R. Civ. P. 60.02. The Advisory Commission Comments provide additional guidance to trial courts considering a Rule 60.02 motion:

> Rule 60.02 provides that a motion filed pursuant to the Rule "shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken." The Supreme Court, however, has held that "the reasonable time filing requirement of Rule 60.02 does not apply to petitions seeking relief from void judgments under Rule 60.02(3)." *Turner v. Turner*, 473 S.W.3d 257, 260 (Tenn. 2015).

Tenn. R. Civ. P. 60.02, *Adv. Comm'n Cmt.* (2017).

Whether to grant Appellant relief from the Order of Judgment under Tennessee Rule of Civil Procedure 60.02 is left to the sound discretion of the Circuit Court. *See City of Memphis v. Beale St. Dev. Corp.*, No. W202000523COAR3CV, 2021 WL 4282736, at *2 (Tenn. Ct. App. Sept. 21, 2021) ("We review a trial court's ruling on a Rule 60.02 motion under the abuse of discretion standard.") (citing *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012)). "[A]n appellate court is not permitted to substitute its judgment for that of the trial court." *Pryor v. Rivergate Meadows Apartment Assocs. Ltd. P'ship*, 338 S.W.3d 882, 885 (Tenn. Ct. App. 2009). Therefore, this Court "will set aside the trial court's ruling ***only when*** the trial court applied an incorrect legal

standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *Id.* (quoting *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003)) (emphasis added).

To obtain relief under Rule 60.02, the moving party "must describe the basis of relief with specificity, and establish by ***clear and convincing evidence*** that she is entitled to relief." *Hussey v. Woods*, 538 S.W.3d 476, 483 (Tenn. 2017) (internal citations omitted) (emphasis added). Clear and convincing evidence "leaves no serious or substantial doubt about the correctness of the conclusions drawn." *Id.* "Rule 60.02 is an escape valve" that "should not be easily opened." *Hussey*, 538 S.W.3d at 483; *see also Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991) ("Because of the importance of this principle of finality, the 'escape valve' should not be easily opened.") (internal quotation marks omitted). The standard for relief under Rule 60.02 is "strict," and because the judgment Appellant seeks to overturn was one of summary judgment, the "liberal" treatment afforded defendants seeking relief from a default judgment is inapplicable. *Id.*

Appellant devotes a significant portion of his Brief to Tennessee law regarding default judgments under Rule 55, calling it "instructive," since the Order of [Summary] Judgment was "essentially a default judgment." Appellant's Brief, at 14. Yet, Tennessee law clearly distinguishes the standard for overturning a default judgment under Rule 60.02 and the standard for overturning a final judgment on the merits under Rule 60.02. *See Patterson v. SunTrust Bank*, 328 S.W.3d 505, 510 (Tenn. Ct. App. 2010) ("Motions to set aside default judgments are not viewed with

the same strictness that motions to set aside judgments after a hearing on the merits are viewed."). Summary judgment, with its supporting facts, evidence, and deemed admissions, is indeed a judgment on the merits. *See Ferguson v. Tomerlin*, 656 S.W.2d 378, 382 (Tenn. App.1983) ("A motion for summary judgment goes directly to the merits of the litigation, and a party faced with such a motion may neither ignore it nor treat it lightly."). In any event, this case would be unlike the prototypical default judgment case in that, consistent with Tennessee Rule 5.01, Dr. Werner could have, but chose not to, move for default against Appellant and cease providing service copies of court filings after it was clear Appellant was ignoring the lawsuit. *See* Tenn. R. Civ. P. 5.01 ("[N]o service need be made on parties adjudged to be in default for failure to appear . . . .").

"Relief under Rule 60.02(5) is not proper simply because relief under other provisions is time barred," and this catchall provision of Rule 60.02(5) "affords relief in the most extreme, unique, exceptional, or extraordinary cases." *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 128 (Tenn. 2013) (internal quotation marks omitted). The standard for obtaining relief under Tennessee Rule 60.02(5) is higher than Rule 60.02(1) or (2). *See Hussey*, 538 S.W.3d at 486 ("The standards of Rule 60.02(5) are more demanding than those applicable to the other grounds for Rule 60.02 relief. The bar for obtaining relief is set very high, and the ***moving party bears a heavy burden***. A Rule 60.02(5) motion is not to be used to relieve a party from free, calculated, and deliberate choices he has made; a party remains under a duty to take legal steps to

protect his own interests.") (citations and quotation marks omitted) (emphasis added).

Appellant asserts that the Order of Judgment is void under Rule 60.02(3) on the basis that Appellant was not served, and the Circuit Court lacked personal jurisdiction due to ineffective service of process. Brief of Appellant De'Anthony Melton, Oct. 29, 2025, at 15 ("Appellant's Brief"). In order to prevail on this issue, Appellant must present ***clear and convincing*** evidence to overcome the Circuit Court's presumptively correct findings of fact that informed its legal conclusion that Appellant was properly served.[4] For the reasons below, Appellant has not and cannot satisfy this high standard.

B. Appellant was personally served at his residence in Vorhees Township, New Jersey.

The Circuit Court correctly found Dr. Werner served Appellant in New Jersey on March 29, 2022, when a private process server handed a copy of the Complaint and Alias Summons at Appellant's residence to a member of Appellant's family then and there residing: Steve Eushery. Even under a *de novo* review, this Court should uphold the Circuit Court decision.

Tennessee Rule of Civil Procedure 4.05 provides, in relevant part:

[4] Tennessee Rule of Appellate Procedure 36(b) provides, in part, "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b).

> Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: (a) by any form of service authorized for service within this state pursuant to Rule 4.04; (b) in any manner prescribed by the law of the state in which service is effected for an action in any of the courts of general jurisdiction in that state; (c) as directed by the court.

Tenn. R. Civ. P. 4.05.

Tennessee Rule of Civil Procedure 4.04 provides, in relevant part:

> The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows: (1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

Tenn. R. Civ. P. 4.04.

Unlike Tennessee Rule 4.04, which requires that the defendant evade service before service upon a cohabitating family member

constitutes good service, New Jersey Court Rule 4:4-4 contains no such prerequisite:

> The primary method of obtaining in personam jurisdiction over a defendant in this State is by causing the summons and complaint to be personally served within this State pursuant to R. 4:4-3, as follows: (1) Upon a competent individual of the age of 14 or over, by delivering a copy of the summons and complaint to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein . . . ."

N.J. Ct. R. 4:4-4(a).

Appellant cites to *In re Ethan D.*, No. E2024-01322-COA-R3-CV, 2025 WL 2673874 (Tenn. Ct. App. Sept. 18, 2025), ***a default judgment case***, for the proposition that substitute service under Tennessee Rule 4.04 or 4.05 cannot constitute good service unless Dr. Werner established Appellant was evading service. Appellant's Brief, at 23–24. However, as Appellant's Brief acknowledges, New Jersey law contains no such evasion prerequisite, and the Court in *In re Ethan D.* did not analyze whether the plaintiffs' attempts to serve the defendant complied with the laws of the State of Florida, where the defendant resided at the time. Therefore, Appellant's argument regarding substitute service is legally inapplicable to this particular case.

In this case, Tennessee Rule 4.05 allows Appellant to be served "in any manner prescribed by the law of the state in which service is effected," or the law of New Jersey. Tenn. R. Civ. P. 4.05(1)(b). Thus, if

Appellant was served in New Jersey in accordance with New Jersey's Court Rules, then regardless of the substitute service requirements set forth in Tennessee Rule 4.04(1), Dr. Werner's compliance with N.J. Court Rule 4:4-3 via Tennessee Rule 4.05(1) constitutes good service.

In his Brief, Appellant concedes that Mr. Eushery (1) received the summons and complaint, (2) is of sufficient age, and (3) is competent. *See* Appellant's Brief, at 24. Therefore, the sole question of fact necessary to determine the sufficiency of service is whether Mr. Eushery resided with Appellant as of March 29, 2023. If so, Appellant was duly served.

With support in the record, the Circuit Court explicitly found that Mr. Eushery resided at Appellant's dwelling place. The Rule 60.02 Order plainly states, "At the Vorhees address, the private process server served [Appellant]'s uncle ***and roommate, Steven Eushery***," such that "[Appellant] was properly served in this matter." (TR, at 405, 406).

The Circuit Court's finding of this fact is corroborated in three ways, with no clear or convincing evidence to the contrary. First, the Rule 60.02 Order specifically considered Mr. Eushery's sworn statements regarding his residency in his Declaration and Corrected Declaration. After due consideration of his statements and their veracity, the Court found "Mr. Eushery's testimony lack[s] any credibility" in light of Mr. Eushery's false sworn statement that Dr. Werner admitted fault for the dog bite to the Environmental Court when Dr. Werner, in fact, ***never*** appeared before the Environmental Court—and therefore, never made such admission. (TR, at 406). This statement was simply and completely untrue, and the Court's sequent credibility determination is entirely justified and warranted based upon the record.

Second, the totality of facts in the record reinforces the reasonableness of the Circuit Court's finding that Mr. Eushery was a member of Appellant's household: (i) Mr. Eushery's physical presence at both Appellant's Tennessee residence and New Jersey residence for both the subject dog attack and service of process; (ii) Mr. Eushery gave Appellant's Tennessee address as his own to the Shelby County Sheriff or Code Enforcement officer, as seen in the Environmental Court Rabies Control Summons to Mr. Eushery (TR, at 395) and the Environmental Court's Order Requiring Defendant's Compliance (TR, at 394); (iii) Equifax Credit Header for Mr. Eushery shows his address as Appellant's New Jersey residence (TR, at 270).

Third, the most direct and credible evidence in the record on this key factual issue is the Affidavit of Timothy Maduzia, in which Mr. Maduzia testified that Mr. Eushery was "identified as Roommate of the [Appellant]." (TR, at 325). As the record is devoid of any other evidence to support Appellant's factual contention, Appellant has failed to provide "clear, concrete, and convincing evidence" to reverse the Circuit Court. *Brummitte v. Lawson*, 182 S.W.3d 320, 322 (Tenn. Ct. App. 2005).

Finally, New Jersey courts interpreting New Jersey Court Rule 4:4-4 have distinguished between "residence" and "domicile," emphasizing that a person may have multiple residences under the Rule. In *Miller v. United States Fidelity & Guaranty Co.*, the court explained that residence lacks the elements of permanency and intention associated with domicile, and a person may reside in more than one place. *Miller v. United States Fidelity & Guaranty Co.*, 316 A.2d 51, 55 (N.J. App. 1974). This distinction is critical in service of process cases, as the focus is on the

individual's actual living arrangements rather than his legal domicile. New Jersey courts interpret "residing" under Rule 4:4-4 to mean the actual, physical presence of an individual in a household or dwelling, without requiring the permanency or intent associated with domicile, to ensure that service of process is effective in reaching individuals based on their practical living circumstances at the time of service. *Id.*; *see also* N.J. Ct. R. 4:4-4; *see also Bank of N.Y. ex rel. Benefit of Asset-Backed Certificates Series 2007-2 v. Tross*, No. A-6229-08T1, 2011 WL 1584426, at *4 (N.J. Super. Ct. App. Div. Apr. 28, 2011) ("[T]he plain language 'then residing' implies that the recipient of service need not be a permanent resident of the household; the recipient need only be residing in the household when service is made. The key is whether the person present in the household is sufficiently connected to the defendant, such that actual notice is reasonably assured.").[5] Like New Jersey courts interpreting Court Rule 4:4-4, this Court should hold that the Circuit Court's acted within its discretion when it found, consistent with New Jersey law, that Mr. Eushery, Appellant's uncle, resided with Appellant when he was served.

[5] Appellees acknowledge the *Tross* opinion is unpublished. Pursuant to New Jersey Court Rule 1:36-3, "No unpublished opinion shall constitute precedent or be binding upon any court." Although it cannot bind this Court, the New Jersey Superior Court's interpretation of New Jersey's Court Rule concerning residency for service of process purposes is factually on point, instructive, and, thus, persuasive, even if the Court's reasoning does not constitute binding authority because it appears in an unpublished opinion from a jurisdiction other than Tennessee.

This Court should not disturb the Circuit Court's evaluation of credibility and determination of fact when Appellant has failed to identify any credible evidence that preponderates against the Circuit Court's conclusions—much less clear and convincing evidence to the contrary. Accordingly, the Circuit Court's determination that Appellant was properly served when the process server served Mr. Eushery is supported by Tennessee law and the record, and no other conclusion is supported by either.

C. Appellant was served via mail under Tennessee and New Jersey rules.

Tennessee Rule 4.05 and New Jersey Court Rule 4:4-3 both permit service of process by mail. Tennessee law allows service upon an out-of-state individual in any manner prescribed in Tennessee Rule 4.04, including and further provides, as stated in Tennessee Rule 4.05, service on an out-of-state individual may be made "in any manner prescribed by the law of the state in which service is effected for an action in any of the courts of general jurisdiction in that state." Tenn. R. Civ. P. 4.05(1). "Service by mail is complete upon mailing." Tenn. R. Civ. P. 4.05(5).

New Jersey Court Rule 4:4-3 provides:

> If personal service cannot be effected after a reasonable and good faith attempt, which shall be described with specificity in the proof of service required by R. 4:4-7, service may be made by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the usual place of abode of the defendant or a person authorized by rule of law to accept service for the defendant or, with

> postal instructions to deliver to addressee only, to defendant's place of business or employment. If the addressee refuses to claim or accept delivery of registered or certified mail, service may be made by ordinary mail addressed to the defendant's usual place of abode. The party making service may, at the party's option, make service simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim or accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service.

N.J. Ct. R. 4:4-3(a).

Dr. Werner complied with New Jersey Court Rule 4:4-3, which constitutes valid service under Tennessee Rule 4.05. As the record reflects, Dr. Werner served Appellant via certified mail with restricted delivery and ordinary mail on April 10, 2023 (TR, at 326). At that time, Dr. Werner had already established by Affidavit from his attorney detailing how Dr. Werner was unable to effect personal service on Appellant after several reasonable, diligent, and good faith attempts. (TR, at 10–14). So, while Appellant correctly points out that the April 10, 2023, certified mail was returned "Unclaimed," Appellant's Brief, at 10, Appellant's Brief does not address the sufficiency of the simultaneous ordinary mail under New Jersey law, which Court Rule 4:4-3 clearly states, "shall constitute effective service."

For each or all of the foregoing reasons, this Court should hold the Circuit Court acted within its discretion to make findings of fact concerning service of process, including weighing the incredibility of

conflicting and perjured testimony of Steve Eushery. In light of Appellant's failure to bring forth "clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings," this Court should affirm the decision of the Circuit Court. *Brummitte*, 182 S.W.3d at 322.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S RULE 60.02 MOTION ON GROUNDS OTHER THAN SERVICE AS UNTIMELY.

The Circuit Court rightly rejected Appellant's attempt to set aside the Order of Judgment when, after receiving actual notice of the judgment, Appellant unreasonably waited until nine (9) months passed and fifteen (15) levies or garnishments were executed, resulting in the collection of more than $300,000.00 before seeking relief from the Order of Judgment for the first time.

Tennessee Rule 60.02 mandates that motions to set aside "shall be made within a reasonable time, and for reasons [of mistake, inadvertence, surprise or excusable neglect] and [fraud, misrepresentation, or other misconduct of an adverse party], not more than one year after the judgment, order or proceeding was entered or taken." Tenn. R. Civ. P. 60.02.

Whether Appellant's delay in bringing his Rule 60.02 Motion until nine months after the Order of Judgment on October 31, 2023, (TR, vol. VI, at 1), and seven months after the first levy or garnishment in December 22, 2023, (TR, at 134), was reasonable is—as Appellant acknowledges—a question of fact left to the sound discretion of the Circuit Court. *See Silliman v. City of Memphis*, 449 S.W.3d 440, 451

(Tenn. Ct. App. 2014) ("Whether a Rule 60.02 motion is filed within a reasonable time is a question of fact for the trial court, and this Court will review the trial court's determination under the abuse of discretion standard.").

Appellant claims the argument is simple, that "any delay was reasonable" because Appellant was allegedly not served and unaware of the lawsuit. Appellant's Brief, at 32. For one thing, as the Circuit Court found, Appellant ***was*** served on March 29, 2023, by private process server and again by simultaneous mail sent on April 10, 2023. (TR, at 325, 326–27). For another thing, Appellant's argument focuses on the wrong time frame. On this issue, the Circuit Court's analysis is precisely on point:

> [Appellant] had ***actual notice*** of the judgment against him with the first garnishment and levy executed against him in January of 2024 and continue to do nothing as some fifteen (15) separate garnishments and levies were executed on him resulting in funds being deducted from his paycheck and/or bank accounts. Despite all of this, [Appellant] did not seek relief from this Court until some nine (9) months after entry of the final judgment on the merits, and some seven (7) months after execution on the judgment through various garnishments and levies. The Court finds this delay is willful and unreasonable.

(TR, at 406–07) (emphasis added). The inquiry under Rule 60.02 is whether Appellant acted reasonably ***after*** the judgment, not before as Appellant argues.

Appellant offers various Tennessee and federal cases with longer delays than Appellant's but not much more context, ostensibly to demonstrate that the mere passage of nine months and collection of over $300,000.00 is somehow a reasonable delay. But, the only facts Appellant relies upon to show the reasonableness of his delay—*a question of fact*—are that Appellant is a busy professional basketball player, that he is rarely home, that he relies "heavily on others to assist with matters not pertaining directly to playing basketball, including receiving and reviewing mail," that he is constantly barraged with requests and documents and ***must rely on other people to assist with his affairs***. Appellant's Brief, at 35; (TR, at 257–58 (Declaration of De'Anthony Melton))(emphasis added). Tennessee law is clear on this point, and "[p]arties are not justified in neglecting their cases merely because of the stress or importance of their own private business and such neglect is ordinarily not excusable." *Food Lion, Inc. v. Washington County Beer Board*, 700 S.W.2d 893, 896 (Tenn. 1985) (citations omitted). Further, Appellant's misplaced reliance "on other people [his uncle, Steve Eushery] to assist with his affairs" cannot now be used as a shield and an excuse to avoid participation in the legal process.

None of these facts establishes that it was reasonable for the Appellant to ignore the lawsuit or judgment until July 2024, nor do they alleviate Appellant from the rules of law and civil procedure that bind everyone else. Moreover, Appellant's explanations are completely undermined by the fact that Appellant was on actual notice of the Order of Judgment by virtue of substantial amounts—more than $35,000 every two weeks for a period of time, (TR, at 134–229, 405)—of money being

removed from his accounts or paychecks on a regular basis for seven months. For Appellant to argue that these were not "noticeable sums" thereby implying the amounts garnished were insufficient to get his attention exemplifies his persistent disregard for the proceedings in this matter. Appellant's Brief, at 36. Finally, Appellant's Brief has failed to identify any particular mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other reasons justifying relief from the Order of Judgment.

Appellant cites *Brown v. Consolidation Coal Co.*, 518 S.W.2d 234 (Tenn. Ct. App. 2014), for the proposition that Appellant's nine-month delay is reasonable because this Court found a judgment debtor waiting thirteen (13) months to move for Rule 60.02 relief was reasonable when a mistake of law by the trial court judge resulted in the wrong workers' compensation benefit being paid to an injured employee. Appellant's Brief, at 38. Critically absent from Appellant's argument is any factual comparison between the reason for Appellant's nine-month delay and the reason for the thirteen-month delay in *Brown*. Moreover, nowhere in the *Brown* case does the Court suggest—much less state, as Appellant's Brief expressly argues—that the defendant "discovered the error" after thirteen months or that the "defendants were unaware" the judgment amount was incorrect. Appellant's Brief, at 38. *See Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000) ("Federated's reliance on *Brown,* however, is misplaced. This Court granted relief in that case under Rule 60.02(5) because the initial award was based on an incorrect legal construction of the workers' compensation laws.").

Regardless, the *Brown* case is factually and legally distinguishable. In *Brown*, the employer of an injured worker filed an unopposed Rule 60 motion to modify a workers' compensation judgment that awarded benefits in accordance with the statutory rate at the time of the judgment, rather than the lower statutory rate in effect at the time of the injury. *Id.* at 236. The worker did not dispute that the trial court had misconstrued the applicable law, but he challenged the timeliness of the motion, which was brought more than one year after the judgment was entered. *Id.* Similarly, the employer did not seek to invalidate the judgment entirely or its obligation to pay some benefit pursuant to the judgment; it sought only to reduce the weekly rate of the workers' compensation benefit to comply with the then-applicable Tennessee law. *Id.* Ultimately, the Court ruled "the award of the correct workmen's compensation rates applicable to any given suit under said Act is of such overriding importance to employer and employee alike" that the trial court exercised its authority vested in Rule 60.02(5) to revise the judgment more than one year after its entry to correct it. *Id.* at 238. None of these considerations driving the *Brown* Court's rationale and justifying the exceptional treatment in *Brown* apply in the present case.

In addition, overturning the Order of Judgment now would cause immense prejudice to Appellees. Appellant's contends, "there is no prejudice in setting aside the Judgment and trying this case on the merits." Appellant's Brief, at 38. Importantly, this case ***was*** decided on the merits of summary judgment, supported by affidavits and Appellant's deemed admissions. The Rule 60.02 Order specifically identifies the

Order of Judgment as "final judgment on the merits." (TR, at 407). To undermine the finality of the Order of Judgment so many months later undermines the purpose final judgments. *See Creech v. Addington*, 281 S.W.3d 363, 380–81 (Tenn. 2009) (extoling the goals of res judicata as "the finality of litigation, consistency and stability of judgments, judicial efficiency and the conservation of resources of both the courts and litigants").

Additionally, setting aside the Order of Judgment would cause insurmountable prejudice to Appellees as Dr. Werner passed away during the pendency of this litigation, leaving no witnesses to the underlying incident available to testify. (TR, at 412–13). Finally, from an administrative and logistical standpoint, to set aside the Order of Judgment after more than $300,000.00 had already been collected and distributed over seven months from several entities while Appellant did nothing would be highly prejudicial, if not outright impracticable.

For these reasons, this Court should uphold the Circuit Court's factual finding that Appellant unreasonably delayed in seeking relief under Rule 60.02(1), (2), and (5), and the Circuit Court's denial of Appellant's Rule 60.02 Motion should be affirmed.

III. THE CIRCUIT COURT CORRECTLY REJECTED APPELLANT'S ARGUMENTS AGAINST THE AWARD OF DAMAGES OR FACTUAL FINDINGS AS UNTIMELY UNDER RULE 59.04 OR IMPROPER UNDER RULE 60.02.

Appellant's objections to the amount of the judgment or its factual basis, derived largely from Tennessee law concerning default judgments under Rule 55 rather than summary judgments under Rule 56, were

properly considered and dispensed by the Circuit Court pursuant to the thirty-day deadline to raise such arguments under Rule 59.04.[6] Specifically, the Circuit Court accurately characterized Appellant's argument and ruled as follows:

> [Appellant]'s other argument for relief based upon the ad damnum also fails on the bases that (i) this argument falls within Rule 59 which has a strict thirty (30) day time limit after entry of the judgment, and (ii) even if it could be raised under Rule 60, again, [Appellant]'s delay in seeking relief was willful and unreasonable.

(TR, at 407).

Appellant again likens the summary judgment awarded to Dr. Werner to a default judgment, advocating that Dr. Werner "plucked" the damages award "from thin air to slide in just under the damages cap," and that the damages awarded were "based on nothing more than Dr. Werner's unilateral declaration that he was entitled to such amounts." Appellant's Brief, at 41. Appellant's contentions fail for a few reasons.

Firstly, the Circuit Court's Order of Judgment was not based unilaterally on Dr. Werner's statements; the vast majority of evidence supporting Dr. Werner's motion for summary judgment were Appellant's admissions. The Order of Judgment was decided "[u]pon consideration of [Dr. Werner]'s motion, the Affidavit of Dr. Stanley Werner, ***the***

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[6] "[A] trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought." *Ferguson v. Brown*, 291 S.W.3d 381, 387 (Tenn. Ct. App. 2008) (quoting *Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn.1995)).

Admissions by [Appellant] resulting from his failure to respond to [Dr. Werner]'s Requests for Admissions, statements of counsel, and the entire record." (TR, vol. 6, at 1) (emphasis added).

Second, Tennessee Rule 15.02 provides, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they have been raised in the pleadings." Tenn. R. Civ. P. 15.02. The damages plead in this case, totaling $758,325.72, were included in Dr. Werner's Motion for Summary Judgment, and the Requests for Admissions (sent via FedEx and signed for by [S.] Melton) which were deemed admitted by the Circuit Court. (TR, at 95–112; TR, vol. 7, at 6–7, 55–92).

Third, as the Circuit Court found, Appellant's factual contentions were untimely. To the extent the contentions were actually mislabeled Rule 59.04 arguments, the time to raise such arguments under Rule 59.04 expired in November 2023—thirty days after the Order of Judgment. To the extent the contentions were indeed Rule 60.02 arguments, the time to raise such arguments expired at some reasonable amount of time after the Order of Judgment and before Appellant filed his Rule 60.02 Motion in July 2024.[7] In any event, the Circuit Court's finding that Appellant's Rule 60.02 Motion was untimely is well

[7] The distinction between Rule 59.04 and 60.02 is largely irrelevant for the purpose of this appeal. *See Donnelly v. Walter*, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997) ("Regardless of the category to which the motion is properly assigned, the question is the same: Did the trial court abuse its discretion?").

supported by the record and Tennessee law, and denying the Motion was not an abuse of discretion.

Moreover, the Circuit Court lacked subject matter jurisdiction to entertain Appellant's Rule 59 arguments pertaining to the judgment amount/ad damnum and the factual contentions in Appellant's untimely-filed Rule 60.02 Motion. These challenges fall within the purview of Rule 59, and Rule 59 motions have a strict thirty (30) day filing deadline.

Tennessee Rule 59.04 provides, "A motion to alter or amend a judgment ***shall*** be filed and served within thirty (30) days after the entry of the judgment." Tenn. R. Civ. P. 59.04 (emphasis added). "If a post-trial motion is not timely, the trial court lacks jurisdiction to rule on the motion." *Ball v. McDowell*, 288 S.W.3d 833, 836 (Tenn. 2009) (noting that motions brought under Rule 59 must be filed within thirty (30) days of the entry of final judgment); *see also* Tenn. R. Civ. P. 59.02 ("A motion for new trial and all other motions permitted under this rule shall be filed and served within 30 days after judgment has been entered in accordance with Rule 58."); *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 328 (Tenn. 1982) ("A final judgment or decree is one which adjudicates all the claims and rights and liabilities of the parties and cannot be revised after the expiration of 30 days.").

Perhaps because Appellant knew his time for seeking relief under Rule 59 had long since passed, he erroneously attempted to fit his square Rule 59 arguments (a square peg) into the Rule 60.02 paradigm (a round hole). Neither the judgment amount/ad damnum, nor Appellant's factual quibbles could constitute "mistake, inadvertence, surprise or excusable neglect" under Rule 60.02(1). Nor is there any basis to render the

judgment "void" under Rule 60.02(3) for the reasons Appellant proffers. A void judgment is one that never had any legal meaning or authority. *See generally Turner*, 473 S.W.3d 257 (Tenn. 2015); *see also Lipin v. Hunt*, 573 F.Supp.2d 830, 832, n.2 (S.D. N.Y. 2008) ("Under Rule 60(b)(4), a judgment is 'void,' as basis for relief from judgment, only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law."). No reasonable court could conclude Appellant's factual disputes deprived the Circuit Court of subject matter jurisdiction or that the Order of Judgment deprived Appellant of due process of law.

Virtually all Tennessee cases involving "void" judgments are cases involving default judgment in which a trial court did not have jurisdiction. By contrast, in the case at bar, the Circuit Court had personal jurisdiction over Appellant based upon personal service in New Jersey, and the Court granted Dr. Werner summary judgment based upon supporting affidavits and Requests for Admissions deemed "admitted." Accordingly, Appellant's arguments regarding the judgment amount and the factual disputes do not fall within the purview of a Rule 60 motion, but rather Rule 59, and under Rule 59, Appellant's procedural avenues to achieve the specific relief he seeks expired long before he pursued them. In this sense, Appellant's continued reliance upon default judgment jurisprudence remains unavailing.

Federal jurisprudence is consistent with the Circuit Court's analysis and conclusion in denying Appellant's Rule 60.02 Motion. Tennessee is guided by the decisions of the federal courts interpreting comparable Rules of Civil Procedure. *Hussey v Woods*, 538 S.W.3d 476,

486-87 (Tenn. 2017). To that end, the Seventh Circuit Court of Appeals recently held, "it is well-settled that a motion to reconsider is not the proper vehicle to raise new arguments that could and should have been raised prior to judgment." *Word Seed Church v. Vill. of Homewood*, 43 F.4th 688, 691 (7th Cir. 2022). In *Word Seed*, the plaintiff attempted under Rule 59 to advance for the first time a theory of standing—an argument against that could have been presented before the trial court dismissed the plaintiff's lawsuit. *Id.* The trial court denied the plaintiff's motion and the plaintiff appealed. *Id.* at 691. On appeal, the Seventh Circuit refused to consider the plaintiff's arguments directed to the original judgment or the denial of their untimely Rule 59 motion. "To preserve arguments on appeal related to the original judgment, [the plaintiffs] needed to file a notice of appeal within 30 days after judgment or the denial of their Rule 59(e) motion." *Id.* "Our jurisdiction is limited to whether the district court abused its discretion in denying [the plaintiffs'] Rule 60(b) motion." *Id.*

Likewise, Appellant's arguments with respect to the judgment amount and factual contentions, are not proper under a Rule 60 analysis. The amount sought by Dr. Werner and the factual contentions could have been presented to the Circuit Court before judgment was entered, and these contentions could have been raised a timely Rule 59 motion to alter or amend. *See id.* Those arguments may only be raised in a timely filed Rule 59 Motion to Alter or Amend, or an appeal to the Tennessee Court of Appeals—both deadlines the Appellant missed by many months. Therefore, Appellant's only proper, albeit insufficient, argument on

appeal is whether service of process was properly effected. Appellant's failure to timely or properly raise these contentions is fatal. As set forth above, there should be little question that indeed Appellant was properly served as found by the Circuit Court.

Notwithstanding the fact that the law does not permit Appellant to raise the judgment amount or factual contentions in a Rule 60 motion as a basis for setting aside the judgment, it is worth noting that with respect to the ad damnum, the purpose is to provide notice to the Defendant of potential exposure and such amount may be amended in the pleadings. *See Abshure v. Methodist Healthcare–Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn.2010); *see also* Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 5–4(a) (3d ed. 2009) ("The essential function of the pleadings is simply to give notice of a claim or defense. History, as Professors Wright and Miller point out, has shown that the pleadings cannot successfully do more.") Again, the Circuit Court's finding that Appellant's Rule 60.02 Motion was untimely is well supported by the record and Tennessee law, and denying the Motion was not an abuse of discretion.

CONCLUSION

Appellant has failed to demonstrate that the Circuit Court committed legal error requiring reversal, and he has not shown that he is entitled to relief from the Order of Judgment as a result of any legal error. The Circuit Court properly concluded that Appellant was served with process that comports with due process because the Circuit Court did not abuse its discretion in finding that Steve Eushery resided with Appellant such that service of process upon Mr. Eushery constituted

proper service of process upon Appellant. Nor did the Circuit Court commit any error in rejecting Appellant's objections to the Order of Judgment on grounds other than service of process as not raised in a reasonably timely manner. Finally, the Circuit Court appropriately characterized the remaining arguments in Appellant's Rule 60.02 Motion as grounds under Rule 59.04 and rejected them as untimely.

For the foregoing reasons, this Honorable Court should **AFFIRM** the decision of the Circuit Court to deny Appellant's Rule 60.02 Motion to Set Aside Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **Appellees' Brief** contains 9,938 words, in compliance with the word limitation requirements set forth in Section 3.02(a)(1) of Tenn. R. Sup. Ct. 46.

/s/ Clay Culpepper
Certifying Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Amended Appellees' Brief** has been served upon the following counsel of record via e-mail and by automatically generated notice pursuant to Tenn. S. Ct. R. 46, § 4.01 on December 5, 2025:

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT KNOXVILLE.

IN RE ETHAN D.

No. E2024-01322-COA-R3-PT
|
Assigned on Briefs April 2, 2025
|
FILED September 18, 2025

Appeal from the Chancery Court for Anderson County, No. 21CH3631, James W. Brooks, Jr., Chancellor

Attorneys and Law Firms

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W. Neal McBrayer, J., delivered the opinion of the court, in which J. Steven Stafford, P.J., W.S., and John W. McClarty, J., joined.

OPINION

W. Neal McBrayer, J.

***1** In proceedings to terminate his parental rights, a father who lived out of state claimed that he was not served with process. The case went to trial based upon substitute service, and the father's parental rights were terminated. Because we conclude that the father was not properly served, we vacate the judgment terminating his parental rights.

I.

John B. ("Stepfather") wanted to adopt the biological child of his wife, Nicole H. ("Mother"). So he filed a "Petition for Step-Parent Adoption and Termination of Parental Rights" against the child's biological father, Yan D. ("Father"). *See* Tenn. Code Ann. § 36-1-113(b)(1) (2021) (granting a prospective adoptive parent standing to file a petition to terminate parental rights). Mother joined in the petition to give consent to the adoption. *See id.* § 36-1-117(f) (2021) (providing that "the co-signing of the petition by the child's parent who is the spouse of the petitioner shall not affect the existing parent/child legal relationship between that parent and the parent's child who is the subject of the adoption petition by the stepparent of the child").

Father, representing himself, responded with repeated motions to dismiss "by special appearance." He complained that Stepfather and Mother "never served [him] with a complaint and summons as required by law for a new case." With some of the motions, he exhibited emails from counsel for Stepfather and Mother acknowledging the lack of service.

At first, Stepfather and Mother denied responsibility for filing a return of service. Their "counsel had followed procedure" by sending process to the Tennessee Secretary of State for service on Father, "which ultimately placed the responsibility ... on the Secretary of State." *See id.* §§ 20-2-214(a), -215(a) (2021) (providing for service of process on nonresidents through the Secretary of State). And, in their view, Father was "attempt[ing] to avoid service by demanding that he must be personally served" and by "refus[ing] to confirm his physical address."

For his part, Father denied avoiding service and asserted that Stepfather and Mother, not the Tennessee Secretary of State, were responsible for serving him. He also noted that he had included his mailing address on each of the documents filed "by special appearance."

As the second anniversary of the case approached, Stepfather and Mother moved for a default despite Father's multiple motions to dismiss. They claimed that Father finally had been served through the Secretary of State. Father responded by denying that he had been served and renewing his request that the case be dismissed.

Later, Stepfather and Mother acknowledged that Father had not been served. In an affidavit filed in support of a motion for service by publication, their attorney explained that they had reported service based upon notification that certified mail sent to Father by the Secretary of State was returned as "unclaimed." However, "[u]pon further research of the Statute, and the recent revisions of Tennessee Rules of Civil Procedure," their attorney conceded that unclaimed mail was no longer sufficient to prove refusal of service and, thus, actual and valid service of process. [1]

***2** Still, they blamed Father for the lack of service. Father obviously "ha[d] knowledge that this case exist[ed], and [was] aware of what ha[d] been filed" based on his responses contesting jurisdiction. Counsel for Stepfather and Mother had "contacted [Father], via electronic mail, to try to coordinate service, which was unsuccessful." And Father "had sufficient and prior knowledge that service was being handled by the Secretary of State of Tennessee, via certified mail," yet the mail was returned "unclaimed." The failure to claim the mail, they argued, was further evidence that Father "intentionally avoided service."

Thirty-one months after filing the termination petition, Stepfather and Mother again moved for a default judgment, informing the court that "service was attempted and obtained." This time, they had used "a private process serving agency in Florida." The court found that Father had been served via "substitute service on [another] adult in the residence" where Father lived. And it concluded that substitute service was appropriate because Father "ha[d] exerted tremendous efforts to avoid service of process." As support for this determination, the court explained that Father knew about the case "because he was filing numerous motions to dismiss and motion [sic] for a continuance and ... these special appearances pleadings ... well before he was served."

A short time later, as the date for the trial approached, Father, still complaining that he had not been served, moved to stay the proceedings or, in the alternative, "to attend by Zoom or by Phone." He filed two notes from medical professionals explaining that he was "in the process of recovering from" open-heart surgery and a post-operative leg infection. According to his physician, Father was unable "to drive long distances until he [was] medically stable." The physician recommended "that any legal processes be undertaken telephonically so as not to put [Father's] health in peril." But the court "d[id] not accept [Father's] inability to be present for Court." It "d[id] not find that [physician's] letter to be convincing and [was] not delaying this proceeding any further, as [Father] ha[d] elected to represent himself, ha[d] no one to blame but himself, as he was served and aware of this proceeding."

The trial proceeded in Father's absence with Mother serving as the only witness. At the conclusion of the proof, the court terminated Father's parental rights. It concluded that there was clear and convincing evidence of three statutory grounds for termination and that termination of Father's parental rights was in the child's best interest. [2]

II.

A.

Father raises six issues on appeal. His first issue, whether the trial court erred in finding that substitute service was effective service of process, is dispositive. Tennessee courts follow the "well-established principle that a court must have jurisdiction over a defendant before it can enter a valid judgment." *Baskin v. Pierce & Allred Constr., Inc.*, 676 S.W.3d 554, 566 (Tenn. 2023) (citing *Kulko v. Superior Ct. of California In & For City & Cnty. of San Francisco*, 436 U.S. 84, 91 (1978)). The Due Process Clause of the United States Constitution limits a state court's power to exercise jurisdiction over a nonresident defendant. *Id.* at 566-67 (citing *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021)); *see also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011) (recognizing that "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power[ ] and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause"). "A court obtains personal jurisdiction over a party defendant by service of process." *Turner v. Turner*, 473 S.W.3d 257, 271 (Tenn. 2015). Thus, service is

not "a mere perfunctory act"—it has "constitutional dimensions." *Id.* at 274 (quoting *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *6 (Tenn. Ct. App. June 3, 2003)).

***3** Where the termination proceeding is filed in circuit or, as here, chancery court, service of process must be "made pursuant to the Tennessee Rules of Civil Procedure and the statutes governing substituted service." Tenn. Code Ann. §§ 36-1-117(m)(1), -113(e). For defendants outside the state, such as Father, service may be effected "by any form of service authorized for service within this state" under Tennessee Rule of Civil Procedure 4.04. TENN. R. CIV. P. 4.05(1)(a). Under Rule 4.04(1), "the preferred method of service upon an individual ... is clearly by delivery of the summons and complaint to the defendant personally."[3] *Hall v. Haynes*, 319 S.W.3d 564, 572 (Tenn. 2010) (quoting ROBERT BANKS, JR. & JUNE F. ENTMAN, TENNESSEE CIVIL PROCEDURE § 2-3(d), at 2-26 (2d ed. 2004)). But the Rule also permits what is known as substituted service. *See Service*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "substituted service" as "[a]ny method of service allowed by law in place of personal service"). Specifically, an individual may be served by leaving copies 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 [in the house or abode]" but only if the defendant "evades or attempts to evade service." TENN. R. CIV. P. 4.04(1).

The serving party carries the burden of proving that a defendant attempted to evade service. *Novack v. Fowler*, No. W2011-01371-COA-R9-CV, 2012 WL 403881, at *6 (Tenn. Ct. App. Feb. 9, 2012). "Evade" in this context means "to escape or avoid by cleverness or deceit." *Stanley v. Mingle*, No. 01-A-019007CV00253, 1991 WL 53423, at *3 (Tenn. Ct. App. Apr. 12, 1991) (quoting *American Heritage Dictionary,* 453 (New College ed. 1979)). Generally, to support a finding that a defendant was evading service, "the failure to serve ... must be attributable to the defendant's actions." *Novack*, 2012 WL 403881, at *8.

Here, the trial court found that Father was attempting to evade service based on his knowledge of the ongoing case, as evidenced by his numerous motions contesting jurisdiction and service "by special appearance." But our courts "have repeatedly held that actual notice of the lawsuit is not a substitute for service of process where it is required by the Rules of Civil Procedure." *Krogman v. Goodall*, No. M2016-01292-COA-R3-CV, 2017 WL 3769380, at *5 (Tenn. Ct. App. Aug. 29, 2017); *Hall*, 319 S.W.3d at 572. Father repeatedly raised the issue of insufficient service in his motions to dismiss. *See* TENN. R. CIV. P. 12.02(5). He even went so far as to make multiple "special appearances" to contest personal jurisdiction. *See Landers v. Jones*, 872 S.W.2d 674, 676 (Tenn. 1994) (noting the "modern legal trend away from the technical requirement that a defendant must enter a special appearance to contest personal jurisdiction"); 6 C.J.S. APPEARANCES § 6 (2025) (explaining that the purpose of making a special appearance "is to question the jurisdiction of the court").

Still, Stepfather and Mother contend that the record supports a finding that Father "was actively evading or attempting to evade service." In addition to Father's "various filings," they highlight their attorney's affidavit, which recounted the unsuccessful efforts to coordinate service of process with Father. It explained that the "United States Postal Office [had] attempted service through certified mail to [Father's] residence, to no avail."[4] And it asserted that Father "was aware of the service attempts" that were ultimately unsuccessful; Father was just being uncooperative.

These facts, either alone or in combination, are insufficient to find that Father was attempting to evade service. Courts may not infer or presume that a defendant has attempted to evade service based solely on failed prior attempts at service. *See Stanley*, 1991 WL 53423, at *3. Even a defendant's "actual knowledge of attempted service" does not necessarily provide evidence of evasion. *See Turner*, 473 S.W.3d at 271 (Tenn. 2015) (quoting *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012)). Nor does a lack of success in coordinating service or "confirming" an address, as argued here, constitute an attempt "to escape or avoid [service] by cleverness or deceit." *Krogman*, 2017 WL 3769380, at *6;

Novack, 2012 WL 403881, at *8. We note that, for months, Father repeatedly informed Stepfather and Mother that he had not yet been served and provided his address.

***4** Stepfather and Mother failed to meet their burden of showing that Father was attempting to evade service of process. So service on an adult in Father's residence did not constitute effective service of process on Father. And we find it appropriate to vacate the judgment terminating Father's parental rights. *See In re A.W.*, No. M2020-00892-COA-R3-PT, 2021 WL 4075102, at *4 (Tenn. Ct. App. Sept. 8, 2021) (vacating judgment terminating parental rights where "father was not served under the Tennessee Rules of Civil Procedure or the statutes governing substituted service").

B.

Father requests an award of attorney's fees incurred on appeal under Tennessee Code Annotated § 36-5-103(c). Under that statute, the court may award reasonable attorney's fees to a prevailing party in several domestic relations contexts, including "in any suit or action concerning the adjudication of the custody or change of custody of any children, both upon the original divorce hearing and at any subsequent hearing." Tenn. Code Ann. § 36-5-103(c) (2021). Father acknowledges that, over a decade ago, this Court determined that a termination of parental rights case could not be "accurately ... characterized as a custody case under Tenn. Code Ann. § 36-5-103(c)." *In re Nathaniel C.T.*, 447 S.W.3d 244, 247 (Tenn. Ct. App. 2014). But he suggests our prior determination "should be revisited" in light of an earlier decision holding that "a termination of parental rights proceeding constitutes a 'custody proceeding' within the meaning of [the Uniform Child Custody Jurisdiction and Enforcement Act]." *In re Adoption of Copeland*, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000) (citing Tenn. Code Ann. § 36-6-202(3) (1996)).

Although Tennessee Code Annotated § 36-5-103(c) was amended in 2018 to, among other things, "provide for an award of attorney fees to a 'prevailing party' instead of a 'plaintiff spouse' in specified family law proceedings," we decline the invitation to revisit the application of the statute to parental termination cases. *Colley v. Colley*, 715 S.W.3d 293, 308 (Tenn. 2025); *see also* 2018 Tenn. Pub. Acts 1186. Before the amendment, we concluded that the statute was not applicable to termination cases. *In re Makenzie L.*, No. M2014-01081-COA-R3-PT, 2015 WL 3793788, at *21 (Tenn. Ct. App. June 17, 2015); *Bryant v. Bryant*, No. 01A01-9806-CV-00337, 1999 WL 43282, at *6 (Tenn. Ct. App. Feb. 1, 1999). And we reached the same conclusion after the amendment. *In re Isaiah F.*, No. M2023-00660-COA-R3-PT, 2024 WL 1765247, at *6 (Tenn. Ct. App. Apr. 24, 2024). We see no reason to depart from our prior precedent. As the statute indicates, fees may be awarded "in any suit or action concerning the adjudication of the custody or change of custody of any children, *both upon the original divorce hearing and at any subsequent hearing*." Tenn. Code Ann. § 36-5-103(c) (emphasis added). This language limits the type of custody case in which attorney's fees may be awarded to cases in which a permanent parenting plan is adopted or where a modification is sought that might change the primary residential parent or parenting time. So, we deny Father's request for attorney's fees under the statute, even though termination of parental rights "sever[s] forever all legal rights and obligations of the parent ... of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent." *Id.* § 36-1-113(*l*)(1).

III.

Because the petitioners did not obtain effective service of process, we vacate the judgment terminating Father's parental rights. We deny Father's request for an award of attorney's fees incurred on appeal. This case is remanded to the trial court for further proceedings consistent with this opinion.

All Citations

Slip Copy, 2025 WL 2673874

Footnotes

1 In 2016, Tennessee Rules of Civil Procedure 4.04 and 4.05 "were amended ... by deleting a former sentence in each rule which stated, in summary, that the United States Postal Service's notation on a return receipt that a properly addressed registered or certified letter was 'unclaimed,' or other similar notation, was sufficient evidence of the defendant's refusal to accept delivery." TENN. R. CIV. P. 4.05 advisory comm'n cmt. to 2019 revision; *see also id.* advisory comm'n cmt. to 2016 revision. This provision was deleted "because the Postal Service's notation that a registered or certified letter is 'unclaimed' is not sufficient, by itself, to prove that service was 'refused.' " TENN. R. CIV. P. 4.04 advisory comm'n cmt. to 2016 revision; TENN. R. CIV. P. 4.05 advisory comm'n cmt. to 2016 revision.

2 The "Petition for Step-Parent Adoption and Termination of Parental Rights" alleged only two statutory grounds for terminating Father's parental rights. On appeal, Stepfather and Mother acknowledge that one of the grounds for terminating parental rights was inapplicable, but not on the basis that the ground was not alleged. *See In re Tristyn K.*, No. E2010-00109-COA-R3-PT, 2010 WL 2867179, at *5 (Tenn. Ct. App. July 22, 2010) (recognizing that, absent evidence showing that a parent was properly apprised of additional grounds, "[a] trial court cannot terminate parental rights based on a ground that is not alleged in the complaint").

3 Rule 4.04(1) excludes individuals who are either an "unmarried infant" or "incompetent." *See* TENN. R. CIV. P. 4.04(1), (2).

4 The record includes no returns of service. *See* TENN. R. CIV. P. 4.03(1) (requiring "[t]he person serving the summons" to "promptly make proof of service to the court[,] ... identify the person served[,] and ... describe the manner of service").

2019 WL 5306883
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT KNOXVILLE.

SMARTBANK
v.
Sandra STEPHENS

No. E2018-01900-COA-R3-CV
|
August 20, 2019 Session
|
FILED 10/21/2019

Appeal from the Chancery Court for Hamilton County, No. 08-0976, Jeffrey M. Atherton, Chancellor

Attorneys and Law Firms

Adam U. Holland, Chattanooga, Tennessee, for the appellant, Sandra Stephens.

Brian P. Mickles and S. Chase Smith, Chattanooga, Tennessee, for the appellee, Smartbank.

Kenny Armstrong, J., delivered the opinion of the court, in which Charles D. Susano, Jr. and Thomas R. Frierson, II, JJ., joined.

OPINION

Kenny Armstrong, J.

Appellant appeals the trial court's denial of her Tennessee Rule of Civil Procedure 60.02(3) motion for relief from a default judgment. Appellant argues that she was not properly served, thus rendering the default judgment void *ab initio*. Appellant also appeals the trial court's order allowing Appellee to execute its judgment on Appellant's right of survivorship interest in real property held as a tenancy by the entirety. Discerning no error, we affirm and remand.

I. Background

***1** On January 25, 2008, Appellant Sandra Stephens executed a promissory note in favor of Cornerstone Community Bank ("Cornerstone"), the predecessor in interest to Appellee SmartBank. The note was in the principal amount of $50,000 and was secured by a deed of trust on Ms. Stephens' property located at 116 Hendricks Boulevard in Chattanooga. Ms. Stephens defaulted on the note, and Cornerstone initiated foreclosure proceedings on the Hendricks property. The property was sold at foreclosure on or about October 24, 2008, but the sale price did not cover the full amount of the debt owed by Ms. Stephens.

On or about December 5, 2008, Cornerstone filed a complaint to recover the deficiency on the note (approximately $32,000). The summons issued on January 20, 2009. According to the summons return, process server William Vance Rose "[d]ropped service [at] 6211 Pine Marr after identifying [Ms. Stephens] from attached photo." In his affidavit, Mr. Rose states that he served the summons on Saturday, February 7, 2009. Ms. Stephens did not file an answer to the complaint; on March 12, 2009, Cornerstone moved for a default judgment. On March 23, 2009, the trial court entered an order granting the default and entered a judgment against Ms. Stephens for $32,532 plus interest and attorney fees. The judgment was recorded in Hamilton County. Ms. Stephens did not pay on the judgment.

On April 15, 2016, Kathryn Faulkner conveyed to Ms. Stephens and her then-husband, Richard, as tenants by the entirety, real property located at 1315 Duncan Avenue in Chattanooga.[1] On January 30, 2018, SmartBank, as Cornerstone's successor in interest, filed a "Motion for Order of Sale of Interest in Real Property," seeking to foreclose on Ms. Stephens' survivorship interest in the Duncan Avenue property to satisfy the default judgment, *supra*.

On March 21, 2018, Ms. Stephens filed a response in opposition to SmartBank's motion for order of sale. In her response, Ms. Stephens made two substantive arguments. First, she argued that she was not properly served in the default judgment action, *supra*. Second, Ms. Stephens argued that SmartBank could not execute

its lien on her survivorship interest in the Duncan Avenue property. On March 22, 2018, Ms. Stephens filed a Tennessee Rule of Civil Procedure 60.02(3) motion to set aside the March 23, 2009 default judgment based on the alleged failure of service. On March 23, 2018, SmartBank filed a response in opposition to Ms. Stephens' motion.

On March 26, 2018, the trial court heard arguments on SmartBank's motion for order of sale on Ms. Stephens' survivorship interest in the Duncan Avenue property. The court reserved ruling pending the hearing on Ms. Stephens' Rule 60.02(3) motion to set aside the default judgment. The court heard the Rule 60.02 motion on August 13, 2018. By order of September 19, 2018, the trial court denied Ms. Stephens' motion. By separate order of September 19, 2018, the trial court granted SmartBank's motion. Ms. Stephens appeals.

II. Issues

***2** Ms. Stephens raises three issues as stated in her brief:

> 1. Does the evidence preponderate against the trial court's finding that substitute service of process was effective pursuant to Tenn. R. Civ. P. 4 *et seq*.
>
> 2. Did the trial court abuse its discretion when it denied Appellant's motion to set aside the default judgment pursuant to Tenn. R. Civ. P. 60.02 where service of process was ineffective, and the underlying judgment obtained by default was void *ab initio*.
>
> 3. If service was effective, may a creditor levy against a debtor's right of survivorship in a tenancy by the entirety that was created after the judgment lien against one spouse was recorded.

III. Standard of Review

We review the trial court's decision to grant or deny a Rule 60.02 motion under the abuse of discretion standard. ***Federated Ins. Co. v. Lethcoe***, 18 S.W.3d 621, 624 (Tenn. 2000); ***Underwood v. Zurich Ins. Co.***, 854 S.W.2d 94, 97 (Tenn. 1993). In ***Eldridge v. Eldridge***, 42 S.W.3d 82 (Tenn. 2001), the Tennessee Supreme Court discussed the abuse of discretion standard, stating:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000); ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

Eldridge, 42 S.W.3d at 85. Appellate courts ordinarily permit discretionary decisions to stand even though reasonable judicial minds can differ concerning their soundness. ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). When reviewing a discretionary decision by the trial court, the "appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." ***Silliman v. City of Memphis***, 449 S.W.3d 440, 447-48 (Tenn. Ct. App. 2014) (citations omitted).

The question of whether SmartBank was entitled to levy against Ms. Stephen's right of survivorship in a tenancy by the entirety was tried by the court sitting without a jury. As such, we review the trial court's findings of fact *de novo* on the record with the presumption that those findings are correct, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We review the trial court's conclusions of law *de novo* with no presumption of correctness. ***Gonsewski v. Gonsewski***, 350 S.W.3d 99, 105-106 (Tenn. 2011); ***Hyneman v. Hyneman***, 152 S.W.3d 549, 553 (Tenn. Ct. App. 2003).

Furthermore, in this case, the trial court made findings that Ms. Stephens' testimony was not credible and that Mr. Rose's testimony was credible. Specifically,

in its statements from the bench, the trial court noted that Ms. Stephens' testimony that she did not reside at the Pine Marr Drive property (where Mr. Rose served the summons) proved to be false based on SmartBank's entry of exhibits showing that, at all relevant times, Ms. Stephens' vehicle was registered to the Pine Marr address, and this address was listed, with the Secretary of State, as the mailing address for Ms. Stephens' business. In its order denying Ms. Stephens' Rule 60.02(3) motion, the trial court notes the discrepancies in her testimony and states that "the facts and circumstances support the testimony of Vance Rose .... The facts do not support [Ms. Stephens'] testimony ...." Based on the foregoing inconsistencies in Ms. Stephens' testimony, the trial court specifically held that, "This Court believes the testimony of Vance Rose ... over the testimony of [Ms. Stephens] ...."

***3** With regard to credibility determinations, this Court has stated:

> When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. Further, "[o]n an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings."

In re M.L.P., 228 S.W.3d 139, 143 (Tenn. Ct. App. 2007) (citing ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.***, 984 S.W.2d 912, 915 (Tenn. 1999)); ***In re Estate of Leath***, 294 S.W.3d 571, 574-75 (Tenn. Ct. App. 2008). Accordingly, where issues of credibility and weight of testimony are involved, this Court will accord considerable deference to the trial court's factual findings. ***Id.***

IV. Rule 60.02(3) Relief

In issues one and two, Ms. Stephens argues that the March 23, 2009 default judgment was void *ab initio* for lack of personal jurisdiction because she was never served by Cornerstone. Thus, she contends that the trial court erred in denying her relief under Tennessee Rule of Civil Procedure 60.02, which provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: ... (3) the judgment is void ... The motion shall be made within a reasonable time ....

In ***Turner v. Turner***, 473 S.W.3d. 257 (Tenn. 2015), the Tennessee Supreme Court explained that a judgment may be void *ab initio* based on ineffective service of process, to-wit:

> "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. The list of such infirmities is exceedingly short; otherwise, [the] exception to finality would swallow the rule." ***United Student Aid Funds, Inc. v. Espinosa***, 559 U.S. 260, 270, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010) (internal citation omitted). A judgment rendered by a court lacking either personal or subject matter jurisdiction is void. ***Ins. Corp. of Ireland***, 456 U.S. at 694, 102 S.Ct. 2099; ***Hood v. Jenkins***, 432 S.W.3d 814, 825 (Tenn.2013); ***Gentry v. Gentry***, 924 S.W.2d 678, 680 (Tenn.1996).
>
> * * *
>
> A court obtains personal jurisdiction over a party defendant by service of process. ***Ramsay v. Custer***, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012); *see also* ***Johnson v. McKinney***, 32 Tenn. App. 484, 222 S.W.2d 879, 883 (1948) ("The general rule is that notice by service of process *or in some other manner provided by law* is essential to give the court jurisdiction of the parties; and judgment rendered without such jurisdiction is void and subject to attack from any angle." (emphasis added)). "The record must establish that the plaintiff complied

with the requisite procedural rules, and the fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve process in accordance with the rules." ***Ramsay***, 387 S.W.3d at 568; *see also* ***Overby v. Overby***, 224 Tenn. 523, 457 S.W.2d 851, 852 (1970) ("That a judgment [i]n personam against a defendant who is not before the court either by service of process or by entry of appearance is void there can be no question. It is well settled that a judgment rendered against a defendant in any kind of a case, when process has never been served on him ... *in the way provided by law* ...; and where there has been no voluntary appearance of the defendant, is clearly void." (emphasis added) (citation and internal quotation marks omitted)). A court "without personal jurisdiction of the defendant" is wholly "without power to proceed to an adjudication" binding on that defendant, regardless of the specific reason such jurisdiction is lacking. ***Employers Reinsurance Corp. v. Bryant***, 299 U.S. 374, 381, 57 S.Ct. 273, 81 L.Ed. 289 (1937).

4** ***Turner, 473 S.W.3d at 270 (footnote omitted) (emphases in original).

Tennessee Rule of Civil Procedure 4.04 addresses service of process on an in-state defendant and provides, in pertinent part, as follows:

Service shall be made as follows:

> (1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service ....

In his affidavit, Mr. Rose states, in relevant part, that

> [a]fter identifying Sandra [Stephens] in [the] yard at 6211 Pine Marr Dr. Hixson Tn. Who ran into the residence after seeing me approach in her yard. I identified her by photo attached to Affidavit. I then handed the summons to a person named Amanda who claimed to be a business assistant.

At the hearing on Ms. Stephens' Rule 60.02 motion, Mr. Rose testified that he had gone to the Pine Marr address "25, 30 times" but had not made service Concerning the evening he served the summons, Mr. Rose explained:

> It was about 7:00 [when I] went by [Ms. Stephens'] house [at 6211 Pine Marr Dr.] as the last stop on the way home .... I got out of the car. There w[ere] two gentlemen. There was Mrs. [Stephens] and another lady. By the time I got out of the car and started walking toward the yard, the two gentlemen were escorting Mrs. [Stephens] back towards the house. I said, Mrs. [Stephens], I'm Mr. Rose. I've got a court summons for you. They continued into the house. I was in the yard. I started filling the document out in the yard. The other lady didn't go into the house with them. They went in and closed the door. I was filling

> the document out to take it to the door, knock on the door...

Mr. Rose went on to state that as he was filling out the summons return, the "other lady," identified herself as "Amanda" and requested that Mr. Rose give her the summons. Mr. Rose stated that he gave the summons to Amanda, who then "went toward the house. I thanked her. I went toward the car. She went in the house with the document." Mr. Rose explained that, on his numerous trips to the Pine Marr address, he had seen Amanda "on the property or in the vehicle going to or coming from the property on several occasions."

Based largely on Mr. Rose's testimony, the trial court made the following relevant findings in its order denying Ms. Stephens' motion for Rule 60.02(3) relief:

> 30. The proof shows that on the date of service, Vance Rose announced himself to the Defendant. That was not rebutted by Defendant.
>
> 31. The proof shows that on the date of service, Vance Rose announced his intent to serve Defendant in the presence of Defendant. That was not rebutted.
>
> 32. The facts show that on the date of service, Mr. Rose identified the Defendant and once he said he was there to serve her papers, she ran into the residence at 6211 Pine Marr Drive ....
>
> ***5** 33. Vance Rose testified and the Vance Rose Affidavit supports that Vance Rose delivered process to Amanda, a resident of the Property, after Defendant attempted to evade service of process.

As noted above, the trial court specifically found that Mr. Rose's testimony was credible and that Ms. Stephens' testimony "that she did not recognize Vance Rose, that she was not served with process," and any dispute concerning "facts alleged in [Mr. Rose's] affidavit" was not supported "by the facts and circumstances." As such, the trial court held that Ms. Stephens was served under Tennessee Rule of Civil Procedure 4.04 and denied her relief from the default judgment. As discussed above, "[o]n an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings." ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.***, 984 S.W.2d at 915. From our review of the record, and in view of the trial court's credibility findings, we conclude that there is sufficient evidence to support the trial court's conclusion that Ms. Stephens was served with process such that she is not entitled to relief from the default judgment under Tennessee Rule of Civil Procedure 60.02(3).

V. Execution on Ms. Stephens' Right of Survivorship in Real Property

In her third issue, Ms. Stephens' argues that SmartBank cannot execute its judgment by sale of her survivorship interest in the 1315 Duncan Avenue property, which is held as a tenancy by the entirety. By order of September 19, 2018, the trial court granted SmartBank's motion to sell Ms. Stephens' survivorship interest in the Duncan Avenue property. On appeal, Ms. Stephen's specifically argues: (1) that SmartBank cannot execute on a right of survivorship in real property; and (2) because the Stephens commenced divorce proceedings during the pendency of this case, the trial court lacked jurisdiction over the Duncan Avenue property because it was an asset in the marital estate.

In granting SmartBank's motion, the trial court relied on the Tennessee Supreme Court case of ***Weaver v. Hamrick***, 907 S.W.2d 385 (Tenn. 1995), wherein the Court explained:

> Under tenancy by the entirety, the husband and wife as a unit have the right to the current use and enjoyment of the property. As individuals, they each possess a right of survivorship: if one spouse dies, then the other spouse takes the property in fee simple absolute. **Each spouse may convey his or her right of survivorship without the consent of the other**. However, the husband

> and wife's present right to use and enjoy the property may be transferred only by consent of both the husband and the wife. **Therefore, a third party, such as a lien creditor, may own one spouse's right of survivorship without the consent of the other spouse**, but a third party may not own a present possessory interest in the property without the approval of both spouses. Accordingly, a creditor of only one spouse may execute a judgment against only that spouse's right of survivorship but not against the spouse's present possessory interest.

6** *Weaver*, 907 S.W.2d at 388 (quoting *In re Arango*, 992 F.2d 611, 613-14 (6th Cir.1993)) (emphases added). In arguing that SmartBank may not execute on her interest in the Duncan Avenue property, Ms. Stephens' appears to ignore the distinction between a possessory interest in real property and a survivorship interest in real property. While SmartBank may not execute on Ms. Stephens' current possessory interest, it may, under the holding in ***Weaver, execute on her survivorship interest. In *In re Hawkins*, 53 B.R. 18 (Bank. M.D. Tenn. 1985), the court succinctly explained:

> What is the effect of one spouse's attempt to transfer an interest in an estate by the entirety without the consent of the other spouse? This question has been previously addressed by our courts. A spouse's attempt to transfer or encumber a tenancy by the entirety without the consent of the other does not affect the interest of the nonconsenting spouse. ***Robinson v. Trousdale*** County, 516 S.W.2d 626, 632 (Tenn. 1974); ***Covington*[*v. Murray*], 416 S.W.2d [761,] at 764 [(Tenn. 1967)]; ***Clark v. Clark***, 620 S.W.2d 536, 537-38 (Tenn.Ct.App.1981). A spouse "cannot sell or encumber anything but [his or her] own interest in an estate owned by the entireties." ***Clark***, 620 S.W.2d at 538 (citing ***Irwin v. Dawson***, 197 Tenn. 314, 273 S.W.2d 6, 7 (Tenn.1954)). Thus, a spouse's transfer or encumbrance of property owned by tenancy by the entirety without the consent of the other spouse transfers or encumbers only the first spouse's right of survivorship. ***In re Crim***, 81 S.W.3d 764, 770 (Tenn. 2002); ***Robinson***, 516 S.W.2d at 632. Furthermore, it has been held that a divorce that destroyed a tenancy by the entirety had no effect on the rights of a purchaser of a survivorship interest. ***Third Nat'l Bank v. Knobler***, 789 S.W.2d 254, 255 (Tenn.1990) (citing ***Ames*** [***v. Norman***,] 36 Tenn. [(4 Sneed) 683,] at 696-97[, 1857 WL 2544, at *5 (Tenn.1857))].

Id. at 19. As such, Tennessee courts have consistently held that a secured creditor may execute on a debtor's survivorship interest in a tenancy by the entirety. *See, e.g.*, ***Third National Bank v. Knobler***, 789 S.W.2d 254 (Tenn. 1990); ***In re Stephenson***, 19 B.R. 185 (Bankr. M.D. Tenn. 1982) ("Tennessee accords ... creditors the right to levy on the spouse's survivorship interest."). In support of her argument that SmartBank may not execute on her survivorship interest in the Duncan Avenue property without usurping her then-spouse's interest in same, Ms. Stephens relies on the case of ***Bryant v. Bryant***, 522 S.W.3d 392 (Tenn. 2017) for the proposition that "there is no right of survivorship in a tenancy by the entireties." The ***Bryant*** case, however, is readily distinguishable from the instant appeal. ***Bryant*** involved a property interest dispute between two spouses as tenants by the entirety, and there was no third-party secured creditor as there is in this case. The issue before the ***Bryant*** court was whether a joint tenancy with an express right of survivorship may be severed by the unilateral actions of one of the co-tenants. In distinguishing a joint tenancy from a tenancy by the entireties, the ***Bryant*** court held that:

> When property is held in a tenancy by the entirety, upon the death of one spouse, the survivor continues to own the whole in fee simple. Technically, then, the surviving spouse does not acquire the fee simple interest through a right of survivorship; the survivor "enjoys the whole [after the death of the other spouse], ... not because any new or further estate or interest becomes vested, but because of the

> original conveyance, and of the same estate and same quantity of estate as at the time the conveyance was perfected." ***Id.*** (quoting Den, 10 N.J.L. at 45) (explaining that **"[b]etween husband and wife**, the *jus accrescendi* [right of survivorship] does not exist"); *see* ***Cole Mfg. Co. v. Collier***, 95 Tenn. 115, 31 S.W. 1000, 1001 (1895); ***Moore v. Cole***, 200 Tenn. 43, 289 S.W.2d 695, 698 (1956) ....

7** ***Bryant, 522 S.W.3d at 400 (emphasis added). Contrary to Ms. Stephens' reading of the case, the ***Bryant*** Court did not hold that a tenancy by the entirety does not create a right of survivorship **in each spouse**; rather, the court merely held that a survivorship right is not created **between the spouses**. As noted by the ***Weaver*** Court, *supra*, "as individuals, each [spouse] possess[s] a right of survivorship." However, no such right of survivorship is necessary when the dispute concerning ownership is between only the spouses; this is because each owns the whole property in fee simple and does not acquire the property through the right of survivorship. The ***Bryant*** Court did not address the question urged in this appeal, which is whether one spouse's survivorship interest may be encumbered by a third-party creditor. This question was answered by the ***Weaver*** Court, to-wit:

> [e]ach spouse may convey his or her right of survivorship without the consent of the other. However, the husband and wife's present right to use and enjoy the property may be transferred only by consent of both the husband and the wife. Therefore, a third party, such as a lien creditor, may own one spouse's right of survivorship without the consent of the other spouse, but a third party may not own a present possessory interest in the property without the approval of both spouses.

Weaver, 907 S.W.2d at 388. Accordingly, SmartBank may hold a lien on Ms. Stephens' survivorship interest in the Duncan Avenue property, but may not force a sale of the property, which action would usurp her co-tenant's ownership and possessory right in the property. The trial court did not err in so finding.

Ms. Stephens next argues that jurisdiction over the Duncan Avenue property lies with the divorce court because it is part of the marital estate. Thus, she contends that the trial court had no jurisdiction to grant SmartBank execution of its lien against the property. We disagree. The ***Knobler*** case presents a factually similar situation to the one at bar. In ***Knobler***, prior to their divorce, the Knoblers owned real property by the entirety. Before the dissolution of that tenancy, but during the pendency of their divorce action, a creditor bank levied on Mr. Knobler's right of survivorship in one of the properties. ***Knobler***, 789 S.W.2d at 254. The Tennessee Supreme Court, in reversing the Court of Appeals' holding that "the sale of the property destroyed the survivorship interest of Mr. Knobler," stated that "the right of survivorship, previously conveyed or attached by a judgment creditor, is not destroyed by the dissolution of the tenancy by the entireties." ***Id.*** at 255. The ***Knobler*** Court allowed the judgment creditor to have the survivorship interest sold and the proceeds applied to satisfy its lien. This Court reached the same conclusion in ***Tom Denton Ford, Inc. v. Stoehr***, No. 01A01-9406-CH0-00288, 1995 WL 3684, at *2 (Tenn. Ct. App., Jan. 4, 1995) ("The judgment lien binds the survivorship interest of [husband] ... in the property. The right of survivorship which has been attached by a judgment creditor is not destroyed by the dissolution of the tenancy by the entireties."). Likewise, in ***Weaks v. Gress***, 225 Tenn. 593, 474 S.W.2d 424 (Tenn. 1971), a case involving a transfer of property owned by the entirety and encumbered by a judgment lien against only the husband, the Tennessee Supreme Court stated that

> "the assignee of the husband, or purchaser at execution sale, can acquire no other or greater interest than was vested in the husband; and, consequently, he holds in subordination to the contingent right of the wife, who, in case she survives the husband, becomes the absolute owner of the whole estate."

Id. at 426 (quoting *Ames v. Norman*, 36 Tenn. (4 Sneed) 683, 1857 WL 2544, at *5 (Tenn.1857)). Although the trial court has no authority to either order the sale of the Duncan Avenue property, or to divide the property between Ms. Stephens' and her husband, the trial court has clear authority to allow SmartBank to execute its judgment lien on Ms. Stephens' survivorship interest in the property. The trial court's jurisdiction to do so is not usurped by the jurisdiction of the divorce court to award this asset.

VI. Conclusion

***8** For the foregoing reasons, we affirm the trial court's orders. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed to the Appellant, Sandra Stephens, for all of which execution may issue if necessary.

All Citations

Not Reported in S.W. Rptr., 2019 WL 5306883

Footnotes

1 At several points in the record, this conveyance is mislabeled as a joint tenancy with right of survivorship.

2011 WL 1584426
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

BANK OF NEW YORK for the BENEFIT OF the ASSET BACKED CERTIFICATES SERIES 2007–2, Plaintiff–Respondent,
v.
VERTA TROSS, Defendant–Appellant.
and
Mortgage Electronic Registration Systems Inc. as Nominee for America's Wholesale Lender, Defendant.

Submitted March 21, 2011.
|
Decided April 28, 2011.

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. F–31902–07.

Attorneys and Law Firms

David M. Schlachter, attorney for appellant.

Stern, Lavinthal, Frankenberg & Norgaard, attorneys for respondent (Mark S. Winter, on the brief).

Before Judges SABATINO and OSTRER.

Opinion

PER CURIAM.

***1** The trial court denied defendant's motion to vacate a default judgment of foreclosure. On appeal, defendant argues that (1) the judgment is void because there was inadequate service of process; and (2) default judgment should have been vacated under *Rule* 4:50–1(a) ("excusable neglect") and *Rule* 4:50–1(f) ("any other reason justifying relief"). We are unpersuaded and affirm.

I.

According to the mortgage note and other record evidence, defendant Verta Tross borrowed $436,000, secured by a mortgage from America's Wholesale Lender with an 8.9 percent rate, to buy a house in Englewood in January 2007. The monthly payment was $3,476.83. She certified that she was laid off and collecting unemployment compensation at the time, but, apparently, she previously had been earning $54,000 a year. Defense counsel represented to the trial court that defendant put no equity into the home. According to the loan documents, she represented that the property would be her principal residence. Along with the $436,000 mortgage, she allegedly executed a second mortgage for $109,000. In argument before the trial court, defense counsel represented, over plaintiff's objection, that the $109,000 was withheld as closing costs. However, the record before us does not include the settlement statement. The second mortgagee was named as a co-defendant in the foreclosure suit.

Defendant defaulted in July 2007. She claimed that she was attempting to reach a work-out with the first mortgagee, [1] but there is no documentary proof of that in the record. Bank of New York (BNY) brought a foreclosure action in December 2007. BNY had been assigned the note and mortgage in November 2007, according to the complaint. As we discuss at greater length below, the trial court found that personal service was made at the Englewood residence on defendant's brother, Spencer Tross, on December 8, 2007.

No answer was filed, and default was entered January 17, 2008. Notice of the entry of default was mailed to the residence on January 29, 2008. There was no evidence of its return as undelivered.

A notice to cure was sent certified, return receipt requested, to the Englewood residence in January 2008. Defendant herself signed for it on February 13, 2008. The notice referred to the pending foreclosure suit and warned defendant that plaintiff would seek entry of final judgment if she did not cure. Defendant did not respond.

Plaintiff obtained a default judgment on May 21, 2008 in the amount of $466,414.70, plus interest and

fees. The judgment was mailed to defendant at the Englewood residence on June 27, 2008. On September 23, 2008, plaintiff sent defendant, again to the same Englewood address, notice of a Sheriff's sale scheduled for October 10, 2008. It was sent by regular mail, and by certified mail, which was unclaimed. The sale proceeded.

On March 11, 2009, defendant admittedly received notice of eviction, which was scheduled to occur on April 28, 2009. On April 26, 2009, she retained counsel. On April 27, 2009, one day before execution of the writ of eviction, and almost a year-and-a-half after service of the summons and complaint, defendant sought a stay. Judge Koblitz granted the application the same day, staying execution of the writ until May 26, 2009.

***2** On or about May 8, 2009, defendant moved for relief from the default judgment. In support of her motion, she certified to the following facts: she "never received notification of this action" until served on March 11, 2009 with notice of eviction; she did not reside "full-time" at the property because she was staying with her ailing mother; her brother, who "did visit [the mortgaged premises] from time to time," never told her that he received service of the summons and complaint and never showed those documents to her; and her brother "never set up permanent residence" at the home.

Spencer Tross stated in an affidavit dated May 8, 2009 that: he was never personally served with "legal papers"; he never gave the papers to his sister; and he recalled throwing away papers that were tacked to the front door "during the middle part of 2007." Although he did "go by the house ... from time to time" in mid- and late–2007, and "did visit the property on occasion," he "did not reside at the property full or part-time." As of the date of the affidavit, he claimed to reside at another address in Englewood with his ailing mother.

On May 26, 2009, Judge Koblitz entered an order to show cause presented by defendant with a return date of June 26, 2009. The order compelled BNY to show cause why the court should not vacate the default judgment and cancel the sheriff's sale. Defendant apparently also sought to stay the eviction, but it proceeded nonetheless.

On June 8, 2009, the court heard defendant's emergent request to undo the eviction. Defense counsel represented that Spencer Tross "was now living in the property" and indicated that both he and his sister had belongings and a dog at the property, which were removed during eviction. The court denied plaintiff's motion for emergent relief, which consisted of releasing defendant's property and allowing her to return to the home. Rather, Judge Koblitz compelled BNY to show cause on June 26, 2009 why defendant should not be allowed to return to the home, retrieve belongings, and be granted other relief.

At the ensuing non-testimonial hearing on June 26, 2009, the court confronted defense counsel with the affidavit of service that plaintiff had presented in response to defendant's application. The affidavit stated that service was accomplished at 6:00 p.m. on December 8, 2007 on Spencer Tross, who the affiant stated was a competent member of the household residing there. The affidavit described Mr. Tross as a thirty-year-old black man with black hair, six-foot-two-inches tall, and weighing 170 pounds. The court reasoned that the process server likely obtained that personal information in the course of effectuating service, belying Mr. Tross's denial of service.

> [DEFENSE COUNSEL]: He never informed Miss Tross of the matter. He—first of all, Miss Tross was ill at the time, she was diagnosed with a brain tumor. Either he didn't want to disturb her, and also he just thought it was for him, because if he received papers, if he saw something, he just thought it had to do with him, nothing to do with her.
>
> ***3** THE COURT: So now he admits that he received it?
>
> [DEFENSE COUNSEL]: He doesn't recall either way, but he definitely did not say anything to his sister, because he knew he would remember if he did that, your Honor.
>
> THE COURT: Well, originally his position was he didn't receive it, and then when it became clear that the process server knew his approximate height, weight and name, it appears that he changed his

version to he didn't receive from—he didn't receive it to he didn't tell his sister about it.

[DEFENSE COUNSEL]: Your Honor, that was eighteen months ago, and there is a very big difference when knowing when a person is going here or there, when eventually he received something that he thought was served in the process and whether he acknowledged that there was a complaint and he informed his sister by the way, the house is in trouble.

THE COURT: He signed a certification saying he did not receive it.

[DEFENSE COUNSEL]: To the best of his knowledge, your Honor. [2]

The court also reminded defense counsel that he had represented that Mr. Tross resided at the house when he sought to reverse the eviction (although that occurred over a year after service of the complaint). Defense counsel conceded that Mr. Tross "did have some belongings" at the house at the time of service. Counsel claimed, without evidential support, *see Rule* 1:6–6, that at the time of alleged service, Mr. Tross "had another residence, he was actually living with a girlfriend at the time as well, and sometimes he actually stayed by his mother's."

Judge Koblitz denied defendant relief from the judgment. The court relied on the affidavit of service and rejected Mr. Tross's denial of service. The court also relied on defendant's personal receipt of the notice to cure, which informed her that a foreclosure suit was pending and that a default judgment could be entered if she did not respond. The court rejected defendant's claim that her failure to answer the complaint resulted from excusable neglect. The court did not expressly address whether defendant had a meritorious defense to the suit.

II.

We will first address whether service was proper. We will then turn to whether default judgment should have been vacated based on "excusable neglect" under *Rule* 4:50–1(a), or exceptional circumstances under the "catch-all" subsection, *Rule* 4:50–1(f).

A.

A motion to vacate a default judgment for lack of service is governed by *Rule* 4:50–1(d), which authorizes a court to relieve a party from a final judgment if "the judgment or order is void." "A default judgment will be considered void when a substantial deviation from service of process rules has occurred, casting reasonable doubt on proper notice." *Jameson v. Great Atl. & Pac. Tea Co.,* 363 *N.J.Super.* 419, 425 (App.Div.2003), *certif. denied,* 179 *N.J.* 309 (2004). Even if there is actual notice of the suit comporting with due process, the default judgment must be set aside if there is a substantial deviation from rules. *Sobel v. Long Island Entm't Prods., Inc.,* 329 *N.J.Super.* 285, 292–94 (App.Div.2000). "If defective service renders the judgment void, a meritorious defense is not required to vacate the judgment under *R.* 4:50–1(d)." *Jameson v. Great Atl. & Pac. Tea Co., supra,* 363 *N.J.Super.* at 425. A motion under *Rule* 4:50–1(d) must be made within a "reasonable time," but is not subject to the absolute one-year time bar. *Rule* 4:50–2.

***4** The trial court correctly determined that service was accomplished. Substituted service on Spencer Tross was made pursuant to *Rule* 4:4–4(a)(1), which authorizes service by personally delivering the summons and complaint to a competent individual, at least fourteen years old, who is a "member of the household ... then residing" at the defendant's "dwelling place or usual place of abode."

A "dwelling place or usual place of abode" includes a person's permanent home, even if he or she is temporarily staying elsewhere. *See Missell v. Hayes,* 84 *N.J.L.* 196, 196–97 (Sup.Ct.1913), *aff'd,* 86 *N.J.L.* 348 (E. & A.1914) (finding "usual place of abode" includes family home where residential college student returned on vacation); *Vredenburgh v. Weidmann,* 14 *N.J. Misc.* 285, 286–87 (Sup.Ct.1936) (New Jersey family home to which defendant, a Yale Law student, returned on vacation, was "usual place of abode"). By contrast, "usual place of abode" excludes a house from which defendant is absent for an extended and continuous period of time. *See Fid. & Deposit Co.*

of Md. v. Abagnale, 97 *N.J.Super.* 132, 146 (Law Div.1967) ("dwelling place or usual place of abode" did not include house of wife of defendant who was incarcerated); *Warfield v. Fischer,* 94 *N.J.Super.* 142, 146–47 (Law Div.1967) (defendant who was studying in Germany and did not return regularly to parental home in New Jersey did not maintain "usual place of abode" there).

As for the recipient of substituted service, the rule requires that he or she be a "member of the household" who is "then residing" at the defendant's usual place of abode. The test for who qualifies as a household member is a flexible one, to accommodate non-conventional family arrangements. *Resolution Trust Corp. v. Associated Gulf Contractors, Inc.,* 263 *N.J. Super* . 332, 343 (App.Div.), *certif. denied,* 134 *N.J.* 480 (1993). The member of "household" formulation was intended to be more expansive than the previous member of the "family" standard. *Ibid.; see also Garley v. Waddington,* 177 *N.J.Super.* 173, 180 n. 1 (App.Div.1981).

Moreover, the plain language "then residing" implies that the recipient of service need not be a permanent resident of the household; the recipient need only be residing in the household when service is made. The key is whether the person present in the household is sufficiently connected to the defendant, such that actual notice is reasonably assured. "The likelihood of prompt notice of the suit to defendant is the basis for permitting the substituted service." *Warfield v. Fischer, supra,* 94 *N.J.Super.* at 147. In other contexts, we have accepted the notion that a person can be a resident of more than one household, particularly in light of contemporary living patterns. *See Sjoberg v. Rutgers Cas. Ins. Co.,* 260 *N.J.Super.* 159, 163 (App.Div.1992) (construing concepts of residence and household in insurance law).

***5** We find persuasive the following synthesis of the law on what constitutes "then residing":

> "In deciding whether an individual is 'then residing therein' for purposes of service of process, there must be a nexus between the individual and the defendant that establishes some reasonable assurance that notice would reach the defendant." *O'Sell v. Peterson,* 595 *N.W.*2d 870, 872 (Minn.App.1999). For example, a relationship of confidence, including, but not limited to, a familial relationship, might establish a nexus to support the conclusion that notice would reach the defendant. *See, Nowell v. Nowell,* 384 *F.*2d 951, 953 (5th Cir.1967) (distinguishing nexus between tenant and landlord, from absence of nexus between tenants in same building); *Plushner v. Mills,* 429 *A.*2d 444, 446 (R.I.1981) (concluding service on defendant's daughter was valid because she was a trusted member of household and had a substantial nexus with defendant).
>
> In addition, the duration of an individual's presence, the frequency of the presence, or the intent to return may also establish a nexus between the individual, then residing in the defendant's residence, and that defendant. *See, O'Sell v. Peterson, supra* at 872, citing *Sangmeister v. McElnea,* 278 *So.*2d 675, 676–77 (Fla.Dist.App.1973) (stating one who resides or visits home of relative for sufficient period of time may reside therein); *Holtberg v. Bommersbach,* 236 *Minn.* 335, 52 *N.W.*2d 766, 768 (Minn.1952) (concluding intent to return may be of "extreme importance" in determining place of abode).
>
> [*United States v. House,* 100 *F.Supp.*2d 967, 973–74 (D.Minn.2000)].

Applying those factors, the court in *House* found that an adult woman who was a daily visitor and periodic overnight guest during the summer was "then residing." *Id.* at 975; *see also Magazine v. Bedoya,* 475 *So.*2d 1035, 1035–36 (Fla.Dist.Ct.1985) (mother-in-law staying at defendant's home for six weeks while recuperating was "residing therein"); *Drury v. Zingarelli,* 180 *A.*2d 104, 106 (Pa.Super.Ct.1962) (service proper on mother-in-law who was "in charge of the premises" although she did not live there permanently); *Wichert v. Cardwell,* 812 *P.*2d 858, 860 (Wash.1991) (defendant's adult child staying overnight alone in defendant's usual abode was "then resident"). *But see Salts v. Estes,* 943 *P.*2d 275, 280

(Wash.1997) (requiring that a person "then resident" actually live in the particular home).

We are also guided by the principle that the sheriff's return of service is presumed correct, and may be rebutted only by clear and convincing evidence. *Jameson v. Great Atl. & Pac. Tea Co., supra,* 363 *N.J.Super.* at 426; *Resolution Trust Corp. v. Associated Gulf Contractors, Inc., supra,* 263 *N.J.Super.* at 344; *Goldfarb v. Roeger,* 54 *N.J.Super.* 85, 90 (App.Div.1959). "[U]ncorroborated testimony of the defendant alone is not sufficient to impeach the return." *Goldfarb v. Roeger, supra,* 54 *N.J.Super.* at 90. Thus, a defendant's bald assertion that the sheriff's return is false does not overcome the presumption. *Resolution Trust Corp. v. Associated Gulf Contractors, Inc., supra,* 263 *N.J.Super.* at 344. *Rule* 4:4–3 was amended in 2000 to permit service by private process servers who do not have an interest in the litigation. *See* Pressler, *Current N.J. Court Rules,* comment on *R.* 4:4–3 (2002). Consistent with the policy decision to entrust disinterested persons with the responsibility to serve process, we find that the presumption of correctness extends to their affidavits of service as well.

***6** Applying these principles, the trial court correctly found that substituted service was accomplished. In this case, defendant did not deny that the mortgaged property was her "usual place of abode." She also had represented to the lender that she would use the house as her principal residence. Although she certified that she was not living there "full-time" because she was caring for her ailing mother, she did not deny that she lived there "part-time" or frequently returned there. Indeed, in the effort to reverse the eviction, counsel asserted that defendant's and her brother's belongings remained at the mortgaged premises, and defendant intended to live there.

The record also established that Spencer Tross was a member of the household then residing at defendant's usual abode. First, we rely on the presumption of correctness of the affidavit of service. The affidavit of service asserted that defendant's brother was a resident of the household, and he received the summons and complaint.

Second, Mr. Tross's denial of residence was essentially uncorroborated and entitled to no weight. Although Mr. Tross alleged that he did not reside at the Englewood residence "full or part-time," his denial was conclusory. He did specify how often he stayed at the Englewood residence around the date of service set forth in the affidavit of service. Had the brother exclusively resided elsewhere, defendant presumably could have marshaled proofs from him, in the form of rent or utility bill receipts, or the affidavits of co-tenants. She did not. There is no cognizable evidence of where Mr. Tross was living. Counsel's claim in argument that Mr. Tross was living at three other places —"another residence," his girlfriend's place, and his mother's home—was not competent evidence.

Nor did defendant specify how often her brother stayed at the residence in the relevant time period. Although she claimed that he did not establish "permanent residence," she did not exclude "temporary" or "part-time" residence.[3] She conceded that he visited there from "time to time." He had belongings there, indicating that he stayed there overnight.

There certainly was a nexus between defendant and her brother to establish "some reasonable assurance that notice would reach the defendant." *United States v. House, supra,* 100 *F.Supp.*2d at 973. They were brother and sister. Moreover, when defendant was not sleeping at the mortgaged premises, she was nearby, at her mother's house in Englewood. That nexus, coupled with the apparent frequency of Mr. Tross's visits, support a finding that he was a member of the household "then residing" at the property.

Having determined that the mortgaged premises were defendant's "dwelling place or usual place of abode," and defendant's brother was "a member of the household ... then residing" therein, the only remaining issue is whether the process server actually delivered the summons and complaint to Mr. Tross. As to that, we conclude that the process server's affidavit is persuasive and effectively unrebutted. The process server was able to report Mr. Tross's name, age, weight, and height because the process server personally delivered the papers to him.

***7** Mr. Tross's denial of receipt was essentially uncorroborated and unpersuasive. The colloquy

between Judge Koblitz and defense counsel, which we quoted above, was illuminating. Confronted with the affidavit of service, defense counsel retreated to the position that Mr. Tross denied receipt "to the best of his knowledge," and he "doesn't recall either way" whether he was served. In sum, substituted service was accomplished.

B.

Turning to whether the default judgment should be vacated notwithstanding service, we concur with the trial court's decision that defendant has failed to establish "excusable neglect" or exceptional circumstances warranting relief under subsection (a) or (f) of *Rule* 4:50–1.

The decision whether to grant relief from a default judgment is "left to the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion." *Mancini v. EDS,* 132 *N.J.* 330, 334 (1993). We find no mistaken exercise of discretion here. We recognize that requests for relief are viewed with liberality, to accomplish a just result. *Ibid.* Yet, balanced against that liberality is the court's and a plaintiff's interest in finality. *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n,* 74 *N.J.* 113, 120 (1977).

In order to obtain relief under *Rule* 4:50–1(a), the movant must show both excusable neglect and a meritorious defense. *Marder v. Realty Constr. Co.,* 84 *N.J.Super.* 313, 318 (App.Div.), *aff'd,* 43 *N.J.* 508 (1964). Generally speaking, "[c]arelessness may be excusable when attributable to an honest mistake that is compatible with due diligence or reasonable prudence ." *Mancini v. EDS, supra,* 132 *N.J.* at 335. " 'Obviously the greater the negligence involved, or the more willful the conduct, the less "excusable" it is....' " *Manning Eng'g, Inc. v. Hudson Cnty. Park Comm'n, supra,* 74 *N.J.* at 125 n. 5 (quoting 7 James W. Moore et al., *Moore's Federal Practice,* ¶ 60.27 [2] (2d ed.1975)).

Even if a request for relief is within the one year time bar under *Rule* 4:50–2, the length of the time between entry of judgment and the defendant's motion to vacate is a factor in deciding whether to grant relief. *Reg'l Constr. Corp. v. Ray,* 364 *N.J.Super.* 534, 541 (App.Div.2003) (affirming finding of excusable neglect "when examined against the very short time period between the entry of default judgment and the motion to vacate"); *Jameson v. Great Atl. & Pac. Tea Co., supra,* 363 *N.J.Super.* at 428 (noting the "speed and diligence with which A & P moved to attempt to vacate the default judgment").

As for the showing of a meritorious defense, a bald denial of a plaintiff's complaint is usually insufficient to demonstrate that a meritorious defense exists. *See* 10 James W. Moore et al., *Moore's Federal Practice —Civil* ¶ 55.70 [2] (3d ed.2011). There is little point in setting aside a default judgment, sacrificing interests in repose and burdening plaintiff and the court with additional litigation, if the ultimate result will inevitably be the same. *See Schulwitz v. Shuster,* 27 *N.J.Super.* 554, 561 (App.Div.1953) (requiring the showing of a meritorious defense so "[t]he time of the courts, counsel and litigants [is] not ... taken up by ... a futile proceeding").

***8** In this case, the defendant's neglect to answer the complaint was not excusable. Defendant's brother accepted service. Even assuming for argument's sake that Mr. Tross never conveyed the papers to his sister or informed her that he had received them, she was actually notified of the suit when she signed for the notice to cure. She was warned of the risk of a default judgment. She did nothing.

In the meantime, the mortgagee continued to take the steps necessary to vindicate its rights under the mortgage. Notices were sent to the mortgaged premises. Regular mail was not returned as undelivered. Certified mail was unclaimed. Even after defendant received a notice of eviction, she waited six weeks to act. She hired a lawyer just two days before the scheduled eviction. In the meantime, the delinquency under the note increased. In sum, the record does not establish excusable neglect justifying relief under *Rule* 4:50–1(a).

Defendant also relies on *Rule* 4:50–1(f), which permits a court to vacate a default judgment for "any other reason justifying relief." A court should grant relief under *Rule* 4:50–1(f) only "when truly

exceptional circumstances are present and only when the court is presented with a reason not included among any of the reasons subject to the one year limitation." *Baumann v. Marinaro,* 95 *N.J.* 380, 395 (1984). Relief under subsection (f) should be granted sparingly, only to avoid "a grave injustice." *Hous. Auth. of Morristown v. Little,* 135 *N.J.* 274, 289 (1994).

We recognize, as did the trial court, the personal hardship associated with the loss of one's home in foreclosure. However, that alone does not warrant relief from the judgment. *See Del Vecchio v. Hemberger,* 388 *N.J.Super.* 179, 188 (App.Div.2006) (noting that the defendant's tragic personal circumstances did not justify setting aside judgment of foreclosure). Doubts about service of process have led us to view a motion to vacate under *Rule* 4:50–1(f) with comparatively greater liberality. *Davis v. DND/Fidoreo, Inc.,* 317 *N.J.Super.* 92, 100 (App.Div.1998), *certif. denied,* 158 *N.J.* 686 (1999). However, *Davis* does not compel a different result here, since (1) we are not as uncertain as the court in *Davis* about the "actual receipt of the process," and (2) defendant here, unlike the defendant in *Davis,* did not promptly seek relief from the judgment.

Defendant suggests that the terms of the original loan in this case may raise questions about whether defendant was a victim of predatory lending practices, in view of the apparently unaffordable monthly payment, the high interest rate, and, the allegedly high closing costs. *See Nowosleska v. Steele,* 400 *N.J.Super.* 297, 304–05 (App.Div.2008) (reversing default judgment of foreclosure under *Rule* 4:50–1(f) where defendants may have been victims of predatory lending practices). We have no record evidence about the circumstances of the original transaction, nor the representations made to defendant, nor her understanding of the agreements.

***9** Yet, the equities in this case are unlike those in *Nowosleska.* Marjorie Steele, who was eighty-three years old, faced ejectment from the house where she had lived for forty-three years. *Nowosleska, supra,* 400 *N.J.Super.* at 300. Defendant here occupied the house for seven months before she defaulted on the note.

Ms. Steele, her daughter, and son-in-law owned a house worth over $400,000, but they had fallen on rough times and faced roughly $145,000 in mortgage debt, liens and judgments. *Id.* at 302. As a result of an apparently predatory transaction, they faced the prospect of losing the house and all of their more than $250,000 in equity. [4] *Id.* at 305. By contrast, defendant in the instant case put no money down and had no equity in the property. By the time her application to vacate default judgment was heard, defendant had possessed the house for two-and-a-half years, but had not made payments for roughly two years.

Lastly, the plaintiff in *Nowosleska* was a transferee of the deed who allegedly was connected to the principal of Equity Solutions. *Id.* at 302. By contrast, in the instant case, plaintiff is a financial institution that was apparently uninvolved in the original transaction.

In sum, despite the questionable nature of the original transaction, no "grave injustice" would apparently result if the default judgment of foreclosure were allowed to stand. The trial court appropriately exercised its discretion in denying relief under *Rule* 4:50–1(f).

Affirmed.

All Citations

Not Reported in A.3d, 2011 WL 1584426

Footnotes

1 All further references to the "mortgage" shall mean the first mortgage, unless otherwise indicated.

2 Mr. Tross's certification did not include a “best of my knowledge” qualifier. If, as counsel asserted, Mr. Tross's statements were made only “to the best of his knowledge,” then they were not competent evidence on the motion for relief and should have been disregarded. *See R.* 1:6–6 (on motions, court may consider affidavits “on personal knowledge”); *Claypotch v. Heller, Inc.,* 360 *N.J.Super.* 472, 489 (App.Div.2003).

3 The concepts of “full-time” and “part-time” residence differ from the concepts of “permanent” and “temporary” residence. The former refer to the proportion of one's time spent in residence at a place; the latter refer to the arrangement's duration.

4 Ms. Steele, her daughter and son-in-law entered into an apparently predatory transaction with Equity Solutions, LLC. *Nowosleska, supra,* 400 *N.J.Super.* at 301. They claimed they did not understand the deal, and it was misrepresented to them. *Ibid.* Equity Solutions paid off the $145,000 in obligations; in return, Ms. Steele and her children signed away their deed. *Ibid.* They were permitted to remain in their home for one year, provided they made monthly payments almost twice as large as their previous mortgage payments; after one year, they could buy back their home for $202,400. They defaulted on the monthly payments, and Equity Solutions sought possession. *Id.* at 302.

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

CITY OF MEMPHIS, Tennessee
v.
BEALE STREET
DEVELOPMENT CORPORATION

No. W2020-00523-COA-R3-CV
|
Assigned on Briefs January 4, 2021
|
FILED 09/21/2021

Appeal from the Chancery Court for Shelby County, No. 99-0612, Jim Kyle, Chancellor

Attorneys and Law Firms

Larry E. Parrish, Memphis, Tennessee, for the appellant, Beale Street Development Corporation.

Casey Shannon and Brian S. Faughnan, Memphis, Tennessee, for the appellee, City of Memphis, Tennessee.

W. Neal McBrayer, J., delivered the opinion of the court, in which Kenny W. Armstrong and Kristi M. Davis, JJ., joined.

OPINION

W. Neal McBrayer, J.

***1** After counsel announced that the parties had settled their differences, the trial court entered a consent judgment dismissing all claims with prejudice. One year later, one of the litigants moved to set aside the judgment arguing lack of consent and fraud. The moving party claimed that it never approved the settlement or consented to entry of the dismissal order. The trial court denied the motion. Because the trial court's decision was not an abuse of discretion, we affirm.

I.

Litigation between the City of Memphis and Beale Street Development Corporation began in 1999. Sixteen years later, the parties, through counsel, announced to the court that they had "compromised and settled all matters at issue between them ..., as evidenced by a written settlement agreement, and that all claims ... should be dismissed with prejudice." On February 17, 2015, the court entered a Consent Order of Dismissal with Prejudice.

One year later, on February 16, 2016, under Tennessee Rule of Civil Procedure 60.02, Beale Street moved to set aside the final judgment. The corporation claimed that its governing board never approved the settlement agreement and that the signature on the settlement agreement was a forgery.

The City of Memphis argued that Beale Street was not entitled to Rule 60.02 relief. The City pointed out that a Beale Street representative participated in the settlement discussions and Randle Catron, the corporation's executive director, signed the settlement agreement on February 3, 2015. And Beale Street had accepted the City's settlement payments for five months before abruptly changing course.

Both sides submitted affidavits and other documentary evidence in support of their claims. Beale Street submitted sworn statements from the individual members of its governing board and its current executive director, Lucille Catron. The board members acknowledged that attorney John Candy had represented the corporation throughout this protracted legal battle. They also agreed that Randle Catron, the corporation's long time executive director, was authorized to speak for the corporation during the settlement negotiations. But they maintained that the board never approved the final settlement.

The board named Lucille Catron, the widow of Randle Catron, executive director shortly before her husband's passing in July 2015. Mr. Catron's health had been failing for some time. According to Mrs. Catron, her late husband's signature on the settlement agreement was forged. He was hospitalized on the day he

supposedly signed the agreement. She acknowledged that Mr. Candy visited the hospital on February 3 with settlement papers in hand. But when he tried to obtain her husband's signature, Mrs. Catron ripped the signature page away. A forensic document examiner also opined that the signature on the settlement agreement did not belong to Randle Catron.

The City filed affidavits from Jesse Lee, Beale Street's former accountant, and Mr. Candy. Mr. Lee explained that Mr. Catron hired him in 2008 to provide financial services for the corporation. In that role, he often reviewed the financial aspects of various settlement offers from the City. In 2014, Mr. Catron appointed him to represent the corporation in the ongoing settlement negotiations. His participation culminated in a written settlement agreement in early 2015. Throughout the settlement process, he maintained open communication with both Mr. Catron and individual board members.

Mr. Candy confirmed Mr. Lee's description of events. He also explained the circumstances surrounding the execution of the settlement agreement. On February 3, 2015, Mr. Candy took the agreement to the hospital for Mr. Catron to review. Mr. Catron, although in pain, appeared to be competent. After reviewing the agreement, Mr. Catron signaled that he was ready to sign it. But when Mr. Candy gave him the agreement, Mrs. Catron physically assaulted him and tore the agreement. Mr. Catron admonished his wife. And Mr. Candy gave Mr. Catron another copy of the settlement agreement, which he signed.

***2** The City also submitted other documentary evidence including a newspaper article, the executed settlement agreement, and copies of seven cancelled checks. In January 2015, the Memphis Commercial Appeal ran a front-page article featuring the impending settlement. And, in compliance with the settlement terms, the City paid Beale Street $65,000 between February and June of 2015.

According to Mrs. Catron, Mr. Candy never informed her of the settlement. She heard rumors. But she did not know that a settlement agreement had been executed until June or July of 2015. She was equally unaware of the City's settlement payments. As she explained, Mr. Lee deposited the funds in Beale Street's corporate account without the corporation's knowledge. She noted that Mr. Lee paid Mr. Candy's fee with the deposited funds. And he transferred some of the funds to Randle Catron's personal account.

After reviewing the evidence in the record, the court found that Beale Street failed to prove that it was entitled to Rule 60 relief. Proof that the board did not expressly approve the settlement agreement did not warrant setting aside the final judgment. And the record did not support Beale Street's fraud claims.

II.

A.

Beale Street argues that the Consent Order must be set aside because the board never expressly approved the settlement agreement. In Tennessee, an attorney cannot agree to dismiss litigation with prejudice "without the express authority of the client." *Absar v. Jones*, 833 S.W.2d 86, 89 (Tenn. Ct. App. 1992). Even so, once "a consent decree becomes final[,] it can only be attacked either by a suit against counsel who consented to it, or by a bill of review or some original action." *Kelly v. Walker*, 346 S.W.2d 253, 256 (Tenn. 1961).[1] Rule 60.02 has replaced former remedies for setting aside a final judgment. TENN. R. CIV. P. 60.02. Now, a "party who waits more than thirty days after entry of an order to seek relief must do so under Rule 60.02." *Hussey v. Woods*, 538 S.W.3d 476, 482 (Tenn. 2017); *see Silliman v. City of Memphis*, 449 S.W.3d 440, 451 (Tenn. Ct. App. 2014) (noting that Rule 60.02 applies with equal force to consent orders).

We review a trial court's ruling on a Rule 60.02 motion under the abuse of discretion standard. *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012). We consider whether "the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that cause[d] an injustice to the complaining party." *Id.* (quoting *State v. Jordan*, 325 S.W.3d 1, 39 (Tenn. 2010)). This is not an opportunity for the appellate court to substitute its judgment for that of the trial court. *Eldridge v.*

Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001). The "trial court's ruling 'will be upheld as long as reasonable minds can disagree as to [the] propriety of the decision made.' " *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000)).

***3** Relief under Rule 60.02 is "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992). The rule "was designed to strike a proper balance between the competing principles of finality and justice." *Jerkins*, 533 S.W.2d 275, 280 (Tenn. 1976). It "acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principal of finality imbedded in our procedural rules." *Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). "This escape valve 'should not be easily opened.' " *Hussey*, 538 S.W.3d at 483 (quoting *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 127 (Tenn. 2013)). So the moving party must prove "that it is entitled to relief by clear and convincing evidence." *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 336 (Tenn. 2010).

Rule 60.02 permits a trial court to set aside a final judgment for four specified reasons plus a catch-all provision. TENN. R. CIV. P. 60.02. Beale Street asked the trial court to set aside the Consent Order based on fraud and its contention that the judgment was void. *See* TENN. R. CIV. P. 60.02(2), (3). We conclude that the trial court's refusal to set aside the final judgment for these reasons was not an abuse of discretion.

Beale Street's fraud argument focuses exclusively on the alleged fraudulent conduct of its former attorney. Under Rule 60.02(2), a court may set aside a final judgment for "fraud ..., misrepresentation, or other misconduct **of an adverse party**." TENN. R. CIV. P. 60.02(2) (emphasis added). To obtain relief based on Rule 60.02(2), the moving party must come forward with proof connecting an adverse party to the fraud. *See* *Everett v. Morgan*, No. E2007-01491-COA-R3-CV, 2009 WL 113262, at *7-8 (Tenn. Ct. App. Jan. 16, 2009) (affirming the trial court's decision to set aside a final order for fraud perpetrated by a friend of the adverse party when there was evidence connecting the adverse party to the fraud). Federal courts have reached the same conclusion when applying the identical federal rule. *See* *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1102 (9th Cir. 2006) (holding that moving party was not entitled to set aside a final judgment based on her own attorney's fraudulent conduct); 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2860 (3d ed. 1998) (explaining that fraud meriting relief under federal Rule 60(b)(3) "must be chargeable to an adverse party").

Beale Street failed to prove that it was entitled to set aside the Consent Order based on fraud. This record contains no evidence that the City of Memphis or its counsel engaged in any fraudulent activity. The express requirements of Rule 60.02(2) have not been met. *See* *Henderson*, 318 S.W.3d at 336 (noting that Rule 60 relief "is appropriate only in those relatively few instances that meet the criteria of the rule").

Beale Street also argues that the lack of express client consent rendered the Consent Order void *ab initio*. *See* TENN. R. CIV. P. 60.02(3) (permitting a court to set aside a void judgment). We disagree. "A judgment is not void ... because it is or may have been erroneous." *Hussey*, 538 S.W.3d at 485 (alteration in original) (quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010)). Lack of client consent may void a settlement agreement, but it will not void a judgment. *See* *United States v. Krilich*, 152 F. Supp. 2d 983, 991 (N.D. Ill. 2001), *aff'd*, 303 F.3d 784 (7th Cir. 2002). A judgment is void only if the court lacked jurisdiction over the subject matter or the parties or if it concerned an issue wholly outside of the pleadings. *Turner v. Turner*, 473 S.W.3d 257, 270 (Tenn. 2015). That is not the case here.

***4** We recognize that under different circumstances the conduct of a moving party's attorney may provide grounds for relief under section (1) of Rule 60.02. *See* *Terminix Int'l Co., L.P. v. Tapley*, No. 02A01-9701-CH-00028, 1997 WL 437222 at *4 (Tenn. Ct. App. Aug. 4, 1997) (fraudulent conduct of moving party's attorney met criteria for excusable neglect); *see also* *Krilich*, 152 F. Supp. 2d at 991-92 ("Modern cases denominate a motion to vacate based on an attorney lacking authority to enter into a settlement

agreement as a Rule 60(b)(1) motion based on mistake or inadvertence."). But here, Beale Street failed to come forward with facts justifying its failure to avoid the mistake. *See Travis v. City of Murfreesboro*, 686 S.W.2d 68, 69-70 (Tenn. 1985). The Beale Street board was aware of the ongoing settlement discussions. The impending settlement was announced on the front page of the local newspaper. Seven settlement payments were deposited in Beale Street's corporate account. We find no evidence that Mr. Candy lied to his client about the status of the case. This record is silent as to Beale Street's efforts, if any, to remain abreast of the progress of the litigation or the settlement discussions.

And Beale Street failed to file its motion within a reasonable time. Rule 60 motions seeking relief from a judgment on the basis of excusable neglect or fraud must be brought within a reasonable time, no more than one year after entry of the judgment. Tenn. R. Civ. P. 60.02. "[O]ne year is the 'outer limit on the time allowed for filing the motion.' " *Furlough*, 397 S.W.3d at 128 (quoting *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn. Ct. App. 2001)). Although Beale Street filed its initial Rule 60 motion within the one-year limit, on these facts, the motion was untimely. *See Rogers*, 50 S.W.3d at 445. Beale Street was admittedly aware of the settlement by late June or early July of 2015. And yet the corporation inexplicably waited another six months or more to file its Rule 60 motion. "Rule 60.02 does not 'permit a litigant to slumber on [its] claims and then belatedly attempt to relitigate issues long since laid to rest.' " *Furlough*, 397 S.W.3d at 128 (quoting *Thompson*, 798 S.W.2d at 238).

B.

The City asserts that this appeal is frivolous, entitling it to damages, including attorney's fees and expenses incurred on appeal. Under Tennessee Code Annotated § 27-1-122 (2017), an appellate court may award damages for a frivolous appeal. This statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." *See Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977) (citing the predecessor to Tennessee Code Annotated § 27-1-122). A frivolous appeal is one "utterly devoid of merit," *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978), or "taken solely for delay," *Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009). This was not a frivolous appeal.

III.

The trial court did not abuse its discretion in declining to set aside the Consent Order. Beale Street failed to prove that this is one of the exceptional cases meriting relief from a final judgment. So we affirm.

All Citations

Not Reported in S.W. Rptr., 2021 WL 4282736

Footnotes

1 Beale Street's reliance on *Kelly v. Walker*, 346 S.W.2d 253 (Tenn. 1961), as authority for setting aside the Consent Order is misplaced. *Kelly* was decided before adoption of the Tennessee Rules of Civil Procedure. *See Thomas v. Oldfield*, 279 S.W.3d 259, 262 (Tenn. 2009) ("The Tennessee Rules of Civil Procedure were adopted in 1970."). And it concerned a litigant's efforts to set aside a consent order before it became final. *Kelly*, 346 S.W.2d at 256; *see also Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976) ("Courts have always had the authority to modify, alter, amend or revoke judgments and decrees before they become final.").

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