Geico County Mutual Insurance Company v. Festus Kuye

2022 | Cited 0 times | Court of Appeals of Texas | August 18, 2022

Opinion issued August 18, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00393-CV

GEICO COUNTY MUTUAL INSURANCE COMPANY, Appellant V. FESTUS KUYE, Appellee

On Appeal from the County Civil Court at Law No. 1 Harris County, Texas Trial Court Case No. 1155293

MEMORANDUM OPINION

In this restricted appeal, appellant, GEICO County Mutual Insurance

-answer default judgment in

of implied contract, quantum meruit, and violations of the Texas Deceptive Trade

2 ree issues, GEICO

contends that the trial court erred in entering a no-answer default judgment in favor

We reverse and remand.

Background

In his petition, Kuye alleged that he held an automobile insurance policy with

bodily injury and perhaps for personal injury protection and medical payment for

any and all injur[ies] sustained by the insured or any occupant in any accident caused

Kuye, on or about August 27, 2017, while the insurance policy was in effect, Kuye

was involved in a car collision. Kuye alleged that Jaleel Syed, driver of another car

properly and adequately evaluate the claim and pay for the full value of the

un-

3 Kuye brought claims against GEICO for breach of contract, breach of implied

contract, quantum meruit, and violations of the DTPA 1 and the Texas Insurance

Code. 2 As to his breach-of-contract and breach-of-implied-contract claims, Kuye

asserted that GEICO breached its obligations under the insurance policy by refusing

to pay Kuye

Ave, Dallas, Texas, 7 Request Form filed by Kuye with the trial court clerk sought service of his petition

Avenue address.

1 See TEX. BUS. & COM. CODE ANN. §§ 17.45(5), 17.46(b)(5), (7), (12), (23). 2 See TEX. INS. CODE ANN. §§ 542A.001 .007.

4 hat the

[d]efendants, in person, . . . declaration was a chart for recording the name, date, time, and place or address of

service. Han 11:38 a.m.; and the Greenville Avenue address.

After GEICO did not answer or otherwise appear, Kuye moved for a

no-answer default judgment against GEICO and later supplemented his motion with

-answer default judgment

against GEICO and awarding Kuye $93,700.61 in damages and $40,000.00 in

-answer default judgment

day that the trial court signed

its order.

Restricted Appeal

A restricted appeal is a direct attack on a judgment. Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 721 (Tex. App. Houston [1st Dist.] 2003, pet. denied). To prevail on a restricted appeal, an appellant must show that: (1) it filed notice of the 5 restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the complained-of judgment and did not timely file any post-judgment motion or request for findings of fact and conclusions of law; and (4) error is apparent on the face of the record. Alexander v. Lynda s Boutique, 134 S.W.3d 845, 848 (Tex. 2004); see TEX. R. APP. P. 30.

Only the fourth requirement whether error is apparent on the face of the record is disputed here. Although review by restricted appeal affords review of the entire case and thus permits the same scope of review as an ordinary appeal, the face of the record must reveal the claimed error. See Norman Commc ns, Inc. v. Tex. Eastman Co., 955 S.W.2d 269, 270 (Tex. 1997). The face of the record consists of as they existed in the trial court when the trial court entered its judgment. In re

E.K.N., 24 S.W.3d 586, 590 (Tex. App. Ginn v. Forrester, 282 S.W.3d 430, 431 (Tex. 2009).

In reviewing a no-answer default judgment in a restricted appeal, an appellate court does not presume valid issuance, service, and return of citation. Hubicki v. Festina, 226 S.W.3d 405, 407 (Tex. 2007); Martell v. Tex. Concrete Enter. Readymix, Inc., 595 S.W.3d 279, 282 (Tex. App. Houston [14th Dist.] 2020, no 6 pet.). A no-answer default judgment cannot stand unless the record shows strict compliance with the rules of procedure governing issuance, service, and return of citation. See World Envtl., L.L.C. v. Wolfpack Envt l, L.L.C., No. 01-08-00561-CV, 2009 WL 618697, at *2 (Tex. App. Houston [1st Dist.] Mar. 12, 2009, no pet.) (mem. op.); see also Uvalde Country Club v. Martin Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985). Defective service constitutes error on face of the record. World Envtl., L.L.C., 2009 WL 618697, at *2; Hesser v. Hesser, 842 S.W.2d 759, 765 (Tex. App. Houston [1st Dist.] 1992, writ denied). Whether service strictly complies with the rules [of procedure] is a question of law which we review de novo. Martell, 595 S.W.3d at 282.

Service

In its first and second issues, GEICO argues that the trial court erred in entering a no- . . . was registered agent of GEICO.

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A plaintiff may move for a no-answer default judgment against a defendant at any time after an answer was required if that defendant did not previously file an 7 answer and the citation with proof of service has been on file with the trial court clerk for at least ten days. TEX. R. CIV. P. 107, 239. Before the trial court may render a no-answer default judgment, though, the record must reflect that the trial court has jurisdiction over the parties and the subject matter and the case is ripe for judgment. Marrot Commc ns, Inc. v. Town & Country P ship, 227 S.W.3d 372, 376 (Tex. App. Houston [1st Dist.] 2007, pet. denied). A trial court does not have jurisdiction to enter a no-answer default judgment against the defendant unless the record affirmatively shows that before the trial court renders the default judgment, the defendant appeared, was properly served, or waived service in writing. Id.; see TEX. R. CIV. P In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by law or these rules.

No-answer default judgments are disfavored, and a trial court lacks jurisdiction over a defendant who was not properly served with process. Spanton v. Bellah, 612 S.W.3d 314, 316 (Tex. 2020); Pro-Fire & Sprinkler, L.L.C. v. Law Co., 637 S.W.3d 843, 849 (Tex. App. Dallas 2021, no pet.). Texas courts require strict compliance with the rules for service, and a no-answer default judgment cannot stand unless strict compliance with the rules appears in the record. See Spanton, 612

S.W.3d at 316; Pro-Fire & Sprinkler, 637 S.W.3d at 849 50; Furst v. Smith, 176

8 S.W.3d 864, 869 (Tex. App. Houston [1st Dist.] 2005, no pet.); see also Frazier v.

Dikovitsky, 144 S.W.3d 146, 149 (Tex. App. any deviation from the statutory requisites for service of process will destroy a

. Strict compliance is determined by whether the exact

procedural requirements for service have been satisfied, not whether the intended

party received notice of the lawsuit. Union Pac. Corp. v. Legg, 49 S.W.3d 72, 78

(Tex. App. Austin 2001, no pet.); see also In re Z.J.W., 185 S.W.3d 905, 908 (Tex.

App. Tyler 2006, no pet.) (strict compliance means literal compliance with service

rules). It is the responsibility of the party requesting service, not the process server,

to see that service is properly accomplished. Primate Constr., Inc. v. Silver, 884

S.W.2d 151, 153 (Tex. 1994); Pro-Fire & Sprinkler, 637 S.W.3d at 850. This

responsibility extends to seeing that service is properly reflected in the record as

well. Primate Constr., 884 S.W.2d at 153; Pro-Fire & Sprinkler, 637 S.W.3d at

850. There is no presumption in favor of valid service in the face of an attack on a

default judgment by restricted appeal. Fid. & Guar. Ins. Co. v. Drewery Constr.

Co., 186 S.W.3d 571, 573 (Tex. 2006); Primate Constr., 884 S.W.2d at 152.

Pertinent here, a business entity is not a person capable of accepting process

on its own behalf; it must be served through an agent. Paramount Credit, Inc. v.

Montgomery, 420 S.W.3d 226, 230 (Tex. App. Houston [1st Dist.] 2013, no pet.).

9 See TEX. BUS. ORGS. CODE ANN.

§ 5.201(a)(1). The individual or an organization so designated is

[business] entity on whom may be served any process, notice, or demand required

Id. § 5.201(b)(1), (b)(2). To change

its registered agent, the business entity must file a statement of the change. See id.

§ 5.202(a), Texas Secretary of State. See id. §§ 1.002(24)(A), 5.202(c).

Because strict compliance with the rules governing issuance, service, and

return of citation is required, even minor discrepancies between the citation and

return as to the address or name of a defendant or its registered agent can render

service invalid. See Spanton, 612 S.W.3d at 317; Uvalde Country Club v. Martin

Linen Supply Co., 690 S.W.2d 884, 885 (Tex. 1985). For instance, in Uvalde

Country Club Id. Id. The Texas Supreme Court held that

was authorized to receive service for t compliance with the rules of . . . procedure relating to the issuance, service, and

Id.; see also , 97

S.W.3d 723, 727 (Tex. App Fort Worth 2003, no pet.) (plaintiff failed to strictly

10 receive service by certified mail for defendant but return receipt was signed by

Bronze & Beautiful, Inc. v. Mahone, 750 S.W.2d

28, 29 (Tex. App. Texarkana 1988, no writ) (reversing no-answer default judgment

n receipt was signed by

Am. Univ. Ins. Co. v. D.B. & B., 725 S.W.2d 764, 765

(Tex. App. Corpus Christi- for defendant); Pharmakinetics Labs., Inc. v. Katz, 717 S.W.2d 704, 706 (Tex.

App. San Antonio 1986, no writ) (holding service of process invalid where

individual designated to receive service for business

GEICO could be served with

Request Form filed by Kuye with the trial court clerk sought service of his petition

11 COUNTY MUTUAL INSURANCE COMPANY, REGISTERED AGENT:

a.m. As a result, in this

case the record is contradictory as to whether Mathew J. Zuraw or Kenny Seay was

the registered agent authorized to accept service for GEICO. See Hubicki, 226

S.W.3d at 407 (appellate court does not presume valid issuance, service, and return

of citation); World Envt l, 2009 WL 618697, at *2. Because the record does not

affirmatively show that the individual served in this case was the registered agent

for GEICO, it does not reflect strict compliance with the rules of procedure

governing service. See Frazier, 144 S.W.3d at 149.

Defective service constitutes error on the face of the record. See World Envt l,

2009 WL 618697, at *2; Hesser, 842 S.W.2d at 765. attempt to serve GEICO was invalid in this case. Thus, the trial court lacked personal

jurisdiction over GEICO, and the trial court lacked jurisdiction to grant the

no-answer default judgment against GEICO. , 227 S.W.3d at

376 (before trial court may render default judgment, record must reflect it had

jurisdiction over parties); see also Pro-Fire & Sprinkler, 637 S.W.3d at 849 (trial

court lacks jurisdiction over defendant who was not properly served with process).

12 Accordingly, we hold that the trial court erred in entering a no-answer default judgment in favor of Kuye against GEICO. See Spanton, 612 S.W.3d at 316 (no-answer default judgment cannot stand unless strict compliance with rules appears in record); Pro-Fire & Sprinkler, 637 S.W.3d at 849 50; Furst, 176 S.W.3d at 869.

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Conclusion

We reverse the -answer default judgment against GEICO and remand the case for further proceedings consistent with this opinion.

Julie Countiss Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.

3 See TEX. R. APP. P. 47.1.