

RENDERED: JUNE 6, 2014; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000282-MR

TERRY WILLIAMS

APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT  
v. HONORABLE JAMES L. BOWLING, JR., SPECIAL JUDGE  
ACTION NO. 12-CI-00175

RALPH WILLIAM TURNER, Individually and  
in his capacity as EXECUTOR OF THE ESTATE  
OF JAMES FRANK TURNER; RALPH WILLIAM  
TURNER, Individually and in his capacity as EXECUTOR/  
ADMINISTRATOR OF THE ESTATE OF  
EVELYN TURNER; THE ESTATE OF JAMES FRANK  
TURNER; and THE ESTATE OF EVELYN TURNER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

STUMBO, JUDGE: Terry Williams appeals from Findings of Fact, Conclusions  
of Law and Judgment of the Harlan Circuit Court dismissing as untimely his

Complaint to Enforce a Claim Against Decedent's Estate. Williams sought to enforce against the Estate of James Frank Turner a Land Contract to purchase a parcel of real property situated in Harlan County, Kentucky. In dismissing the action, Special Judge James L. Bowling, Jr. determined that Williams' Complaint was not filed within 60 days after the mailing of a Notice of Disallowance as required by KRS 396.055(1). We conclude that Williams never served the Estate or its Executor, and find as ineffectual his service on an attorney who represented the Executor in a separate proceeding in District Court. Accordingly, we Affirm the Judgment on appeal.

On September 16, 2009, Terry Williams filed a claim in Harlan District Court as creditor against the Estate of James Frank Turner. The claim alleged that Williams entered into a Land Contract to purchase a parcel of real property from James Turner (“Mr. Turner”) and his wife Evelyn Turner (“Mrs. Turner”). The Turners died about one week apart in January, 2009.

On January 26, 2012, Ralph William Turner, in his capacity as Executor of Mr. Turner's Estate, moved for leave to deny the claim. After Williams did not appear or otherwise respond to the motion, the Harlan District Court granted the motion and Williams' claim was denied. Williams did not file a claim against the Estate of Mrs. Turner.

Williams' claim against the Estate was denied by way of a letter mailed to him on January 26, 2012. On March 23, 2012, Williams filed the instant Complaint to Enforce a Claim Against Decedent's Estate against Ralph Turner,

both individually and as Executor, and against the James Frank Turner Estate. Williams alleged that in consideration for valued work he performed for Mr. and Mrs. Turner, Williams was to receive various payments including one lot of land owned by the decedents as well as various water rights. Williams sought a Judgment in the amount of \$47,000 as well as specific performance of the Land Contract and attorney fees.

On April 12, 2012, Ralph Turner, et al., moved to Dismiss the Complaint. As a basis for the motion, Turner argued that Williams had provided insufficient process, insufficient service of process, failure to state a claim upon which relief may be granted, and non-compliance with KRS 396.055(1). With respect to the statutory argument, Turner maintained that Williams did not commence the action within 60 days of the written notice denying the claim. Specifically, Turner argued that commencement of an action occurs only with the filing of the Complaint *and* the issuance of a proper summons and delivery by the sheriff. Turner maintained the delivery of the Complaint, by a constable and without a summons, upon Hon. Sidney B. Douglass, attorney for the Estate of James Frank Turner in the prior District Court proceeding, was not proper service. Additionally, Turner maintained that Mr. Douglass was without authority to accept service for the Estate or its Executor, and that a Complaint may be served only by the sheriff or certified mail and not by a constable.

After hearing arguments on the motion, the Harlan Circuit Court rendered its Findings of Fact, Conclusions of Law and Judgment sustaining the

motion on January 11, 2013. In support of the Judgment, the court determined that when Williams filed the Complaint on March 23, 2012, four summons were issued at that time by the Harlan Circuit Court Clerk's office and given to Plaintiff's counsel. The court found that delivery of the Complaint was attempted on Mr. Douglass by constable and was not accompanied by a summons. It further found that it was only on April 17, 2012, and after the Motion to Dismiss and Motion to Quash Service of Process were filed, that Plaintiff's counsel served the Complaint and summons on Mr. Douglass by utilizing the sheriff. Additionally, the court determined that at no time was the Defendant, Ralph William Turner, personally served by any means in either his individual capacity or in his capacity as Executor.

In applying KRS 396.055(1) to the foregoing, the Harlan Circuit Court determined that the action was not commenced within the 60 day statutory period and therefore was time-barred. The action was dismissed and this appeal followed.

Williams now argues that the Harlan Circuit Court erred in sustaining the Appellees' Motion to Dismiss. He first maintains that service upon Hon. Sidney Douglass was proper as Douglass was the attorney of record for the Estate of James Frank Turner and for Executor Ralph William Turner. Williams also argues that KRS 395.015 does not designate any other individual as agent for service of process in this circumstance. He notes that as Executor Ralph William Turner is a resident of Raleigh, North Carolina, and because KRS 395.015 requires

a designated agent in the Kentucky county where the probate administration is pending, service upon Douglass was proper and the trial court erred in failing to so conclude.

We find no error in the Harlan Circuit Court's conclusion that attorney Douglass was not a proper agent to receive process on behalf of the Estate, or for Ralph William Turner either individually or in his capacity as Executor. KRS 395.015 governs the appointment of a personal representative in probate matters and states in relevant part that,

[t]he application of a nonresident shall include the designation of a resident of the county where administration is pending as his agent for the service of process in any action against him as personal representative or personally, provided that such personal action must have accrued in the administration of the estate.

Williams acknowledges that Douglass was not designated as agent for the service of process. He contends, however, that Douglass "became" the agent because no agent was otherwise designated as required by the statute, and because Executor Ralph William Turner resided in Raleigh, North Carolina. We do not find this argument persuasive, and cannot conclude that a party's counsel becomes the de facto service agent by default when the statutory designation has not been met. Williams points to no case law or other authority that transforms legal counsel into a legal representative for service of process as required by KRS 395.015.

Furthermore, Douglass represented Turner and the Estate in Harlan District Court probate proceedings, but not in the instant action. This means that Williams sought to accomplish service on Turner and the Estate in the instant action by serving Turner's counsel in a separate action in a different court. We find no basis in the law for accomplishing service in this manner.

"An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action." KRS 413.250. See also Kentucky Rules of Civil Procedure (CR) 3.01, which provides that a "civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith."<sup>1</sup> In the absence of a showing of a valid excuse for a delay, a summons issued by the clerk and delivered to the plaintiff is not deemed to have been "issued in good faith" within meaning of KRS 413.250 and CR 3.01 until the summons is given to the sheriff or other proper officer to be served. *Wooton v. Begley*, 305 S.W.2d 270 (Ky. 1957). In the matter at bar, however, *Turner was never served either individually nor in his capacity as Executor, and no warning order was issued*. The good faith analysis described in *Wooton* is implicated when there is a *delay* in serving the defendant. ("The question, then, is whether Wooton can be considered as having caused the summons to be issued in good faith, when he held

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<sup>1</sup> CR 4.05 addresses constructive service. It provides that, "If a party sought to be summoned is: (a) an individual who is a nonresident of this state and known or believed to be absent therefrom . . . the clerk shall forthwith, subject to the provisions of Rule 4.06, make an order upon the complaint warning the party to appear and defend the action within 50 days."

it for three days, beyond the limitation period, without delivering it to the sheriff for service." *Wooton*, 305 S.W.2d at 271.).

In the matter before us, however, we never reach the question of whether a delay in delivering the summons was made in good faith, as Turner was never served (because he was out of state) and no warning order was issued. Implicit in the statute and civil rule, we believe, is the notion that the summons must be directed to the defendant and to a place he can be served. That did not happen herein, as the summons were directed to the office of attorney Douglass. Thus, and *arguendo*, even if the instant action were properly commenced by operation of KRS 413.250 and CR 3.01, Turner was never served, no warning order was issued, and for the reasons stated above we cannot conclude that Douglass was Turner's process agent.

The Appellees' Motion to Dismiss was grounded on CR 12.02 and their claim that the action failed to state a claim upon which relief may be granted.<sup>2</sup> Since such a motion is a pure question of law, a reviewing court owes no deference to a trial court's determination and reviews the issue *de novo*. *Littleton v. Plybon*, 395 S.W.3d 505, 507 (Ky. App. 2012). Even when considering the pleadings in a light most favorable to Williams, *id.*, we find no error in the Harlan Circuit Court's determination that Williams did not commence the underlying action within the statutory period. As the defendant in this action was never served directly or through an agent, nor brought within the jurisdiction of the court by the issuance of

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<sup>2</sup> Record at p. 7.

a warning order, the matter was properly dismissed. For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law and Judgment of the Harlan Circuit Court.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I believe the timely filing of a complaint, good faith issuance of summons and delivery to a constable for service of process upon Douglass was sufficient to commence the cause of action. In this case, all occurred within 60 days after the mailing of the notice of disallowance of Williams' claim.

After filing the complaint on March 23, 2012, and the issuance of the summonses, Williams' counsel's office immediately tendered the complaint to a constable who then immediately served the complaint upon Mr. Douglass. Inadvertently, the summonses were not served with the complaint. Turner contends service was improper because it was served by a constable, no summons was served, and Douglass was not designated to receive service of process.

Although the result reached by the majority is premised only on the conclusion that Douglass was not Turner's process agent, I briefly address Turner's remaining contentions and first clarify a constable is authorized by statute to serve process. KRS 70.350(1) provides:



Constables may execute warrants, summons, subpoenas, attachments, notices, rules and orders of court in all criminal, penal and civil cases, and shall return all process placed in his hands to the courts or persons issuing them, on or before the return day, noting the time of execution on them.

Moreover, a nonresident applicant petitioning to be appointed as personal representative of a probate estate must designate a resident of the county where administration of the estate is pending as agent for service of process in any action against him as personal representative or personally. KRS 395.015(1). Here, Turner did not designate an agent for service of process. Therefore, I am convinced that Douglass, as counsel of record and resident of the county of administration, became the proper agent for service of process for matters relating to the estate.

Kentucky Rules of Civil Procedure (CR) 3 provides “a civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.” Good faith in the rule’s context indicates “something less than perfection or complete accuracy. Above all, it means not to take advantage of, not to deceive, not to be underhanded.” *Roehrig v. Merchants & Businessmen’s Mut. Ins. Co.*, 391 S.W.2d 369, 370 (Ky. 1965). “[I]f, when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment, the summons was issued in good faith.” *Id.* at 371.

There is no evidence that Turner lacked good faith. Under the facts presented, I would reverse.

BRIEFS FOR APPELLANT:

Jonathon C. Lee  
Harlan, Kentucky

BRIEF FOR APPELLEES:

Otis Doan, Jr.  
Harlan, Kentucky