

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

NO. 2013-CA-001549-MR

BRADFORD WHITE CORPORATION

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 12-CI-02315

KENTUCKY FARM BUREAU  
MUTUAL INSURANCE COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, JONES, AND MOORE, JUDGES.

MOORE, JUDGE: Kentucky Farm Bureau Mutual Insurance Company obtained a default judgment in Fayette Circuit Court based upon a subrogation claim it had filed against appellant, Bradford White Corporation; its claim was based upon an allegedly defective water heater that Bradford White manufactured, which allegedly caused approximately \$27,000 in damages to the property of one of Farm

Bureau's insureds. Bradford White filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to have the default judgment set aside. However, the circuit court refused to set it aside after determining that Bradford White's failure to answer Farm Bureau's complaint was not the result of excusable neglect.

Accordingly, the issue presented in this appeal is whether the circuit court's determination was an abuse of its discretion. *See Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 609 S.W.2d 393, 395-96 (Ky. 1985). Upon review, we conclude that it was not.

The facts surrounding the circuit court's determination are uncontested. Farm Bureau filed its complaint on May 16, 2012. On the same date, the summons and its complaint were issued to "Bradford White Corporation, Michael R. Deluca at 323 Norristown Road, Ambler, Pennsylvania 19002." Bradford White's headquarters are in Ambler, Pennsylvania; Michael R. Deluca was identified as its President; and, this address was designated as its "Registered Office Address" as provided in the applicable records of the Pennsylvania Department of State.

As of August 20, 2012, however, Bradford White had not responded. Therefore, on this later date, Farm Bureau served Bradford White again. This time, per Farm Bureau's instruction, the circuit court clerk issued summons to "Bradford White Corporation, Kentucky Secretary of State, 2401 Ellsworth Street, Philadelphia, Pennsylvania 19146." This was consistent with the information Bradford White had provided in its business filings with the Kentucky Secretary of

State; Bradford White does significant business in Kentucky. In compliance with Kentucky law, it has filed a certificate of authority to transact business and registered with the Secretary of State.

But, the information that Bradford White had supplied to the Secretary of State was incorrect. Consequently, when the Secretary of State made its return to the circuit court clerk, its return included the unopened letter containing the complaint and summons, which the post office had labeled “return to sender vacant unable to forward.”

On September 20, 2012, Farm Bureau then caused the circuit court clerk to issue a third summons, this time to “Bradford White Corporation, Michael R. Deluca, President, 725 Talamore Drive, Ambler, Pennsylvania, 19002.” Bradford White’s website listed the Talamore Drive address as its corporate headquarters. Again, the unopened letter bearing the complaint and summons was returned; the post office had labeled it “not deliverable as addressed unable to forward.”

Finally, on or about January 25, 2013, Farm Bureau caused the circuit clerk to issue another summons to “Bradford White Corporation, Michael R. Deluca, President, 323 Norristown Road, Ambler, Pennsylvania 19002.” Rather than having it sent it directly this time, Farm Bureau had service completed through the Kentucky Secretary of State, per Kentucky Revised Statutes (KRS) 454.210. Nevertheless, the letter bearing the complaint and summons was again returned as “not deliverable as addressed/unable to forward.”

Bradford White concedes that actual notice of a lawsuit is not a prerequisite for personal jurisdiction where service is properly completed through the Secretary of State, per KRS 454.210. *See, e.g., Davis v. Wilson*, 619 S.W.2d 709, 710-711 (Ky. App. 1980) (service is effective if the certified mail containing the summons and complaint goes unclaimed); *see also Deskins v. Estep*, 314 S.W.3d 300, 303 (Ky. App. 2010) (service was completed even despite the fact that “[the defendant] refused to accept the certified mail containing the summons and complaint”). It does not contest that it was validly served through the Kentucky Secretary of State, or that the circuit court acquired personal jurisdiction over it through this process. It also does not dispute that the circuit court eventually entered a valid default judgment against it on the basis of Farm Bureau’s complaint; as an aside, the judgment in question was entered April 2, 2013.

Bradford White only argues that its lack of actual notice demonstrated excusable neglect, which, in turn, should have warranted setting the default judgment aside. In this vein, Bradford White relies heavily upon the following quote from *Cox v. Rueff Lighting Co.*, 589 S.W.2d 606, 607 (Ky. App. 1979):

Accepting that in personam jurisdiction can be acquired without actual notice to a defendant does not a fortiori create a rule that a showing of no actual notice may not constitute good cause sufficient to warrant the setting aside of a default judgment. The facts and circumstances of each individual case should be weighed. We think that in a case such as the instant one which is a simple one-on-one action for debt, a trial judge would be hard pressed to refuse to set aside a default judgment if he

were truly convinced that the movant had no actual notice in fact and was possessed of an arguably meritorious defense.

The problem with Bradford White's argument, however, is it assumes that lack of actual notice, by itself, demonstrates excusable neglect. It does not. To the contrary, the dispositive inquiry is *why* there was no actual notice. In *Cox*, for example, the defendant ultimately did not have a default judgment set aside because, even assuming that he did not have actual notice of the lawsuit filed against him, evidence nevertheless supported that his lack of actual notice had resulted from his "fail[ure] to take available steps which could have protected his interests[.]" *Id.* at 607. There, the defendant had ignored what had at least amounted to inquiry notice about the lawsuit. Specifically, a business associate had opened a registered letter from the Kentucky Secretary of State addressed to the defendant; had regarded it as junk mail and discarded it; had told the defendant about how he had discarded the letter; and, rather than determining what the contents of the registered letter actually were, the defendant did nothing other than also assume the letter was junk mail. *Id.*

Several other cases also illustrate that courts act well within their discretion in refusing to vacate a default judgment where, when a lack of actual knowledge of a lawsuit is asserted as excusable neglect, the excusable neglect was due to the defendant's own willful ignorance or negligence. *See Deskins*, 314 S.W.3d 300 (default judgment not vacated because lack of actual knowledge was due to the defendant repeatedly refusing service of process from the Secretary of

State); *Lexington-Fayette Urban County Human Rights Com'n v. Wal-Mart Stores, Inc.*, 111 S.W.3d 886 (Ky. App. 2003) (tribunal did not abuse discretion in refusing to vacate default judgment because evidence indicated the defendant's lack of actual notice, if any, regarding default judgment proceedings resulted from defendant's own internal corporate problems); *Haven Point Enterprises, Inc.*, 690 S.W.2d at 395 (Defendant's misinterpretation of the law of service, and argument that "due process requires the kind of service which is most likely to result in actual notice," did not amount to excusable neglect).

This necessarily leads to why Bradford White did not have actual notice in this case. As the above would indicate, Bradford White supplied incorrect information to both the Kentucky Secretary of State and the Pennsylvania Department of State. As it has explained over the course of its pleadings, Bradford White had vacated its Norristown Road and Ellsworth Street addresses many years before Farm Bureau filed its suit; and, while the Talmore Drive address (which Farm Bureau had discovered on its own) was correct, it still did not receive the complaint and summons because delivery had been restricted to "Michael R. Deluca," and Mr. Deluca had retired from the company some twenty years ago. Stated differently, Bradford White's lack of actual knowledge was not caused by the plaintiff, the Secretary of State, or the post office. Rather, it was caused by Bradford White's willful ignorance or negligence. Its conduct that resulted in its

lack of actual notice is also considered criminal and grounds for revoking its certificate of authority to do business in Kentucky.<sup>1</sup>

This Court has affirmed a circuit court's refusal to set aside a default judgment under similar but somewhat less egregious circumstances. In *Dakota Enterprises, Inc. v. Carter*, No. 2001-CA-002417-MR, 2003 WL 21241656 (Ky. App. May 30, 2003),<sup>2</sup> the process served by the Secretary of State was returned unopened and marked "unclaimed." The intended recipient of the process, against whom a default judgment was subsequently entered, filed an affidavit swearing that he "was never served with a summons or complaint in this suit." *Id.* at \*1. Additionally, the defendant relied upon exactly the same language from *Cox*, quoted above, to support that his lack of actual notice demonstrated a level of excusable neglect sufficient to set aside the default judgment. In addition to affirming that the circuit court had acquired personal jurisdiction over the defendant, however, this Court also determined that the circuit court had not abused its discretion in determining that the defendant's lack of actual knowledge did not amount to excusable neglect, explaining:

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<sup>1</sup> Foreign entities doing business in Kentucky are required to maintain a registered agent or a registered office in the Commonwealth, and they are required to file current information with the Kentucky Secretary of State regarding them. This information must be accurate; KRS 14A.2-030(1) provides: "A person who executes a document with intent that the document be delivered to the Secretary of State for filing shall be deemed to have declared under penalty of perjury that to that person's knowledge the contents of the document are true." KRS 14A.2-030(2) provides: "An offense under this section shall be a misdemeanor punishable by a fine not to exceed one hundred dollars (\$100)." Inaccurate information is also grounds for revoking the foreign entity's certificate of authority. See KRS 14A.9-070(3) and (4).

<sup>2</sup> For the proposition of law discussed herein, we find *Carter* to be persuasive authority in this case and proper to cite as it fulfills the criteria of CR 76.28(4)(c).

[The defendant's] listed agent for the service of process was absent from home when the post office attempted to serve process. As noted above, Kevin Nolan [the President of the defendant corporation] indicated by affidavit that he is absent from home on business each year from March to October, that the mail at his house is occasionally collected by his father, and that he occasionally sends a driver to pick up the mail at his father's house. It is clear from these statements that although Nolan is appellant's named statutory agent for the service of process, *there is no reliable and regular method in place for serving process upon Nolan or anyone else* during the eight months when Nolan is away from his home each year. Obviously, the trial court concluded that Nolan's limited availability for the service of process did not constitute a valid excuse for appellant's failure to timely respond to an action filed against it. Having carefully reviewed the record, we

cannot say that the trial court abused its discretion by reaching this conclusion.

*Id.* at \*3 (emphasis added).

Like *Carter*, there was no reliable and regular method in place for serving process upon Bradford White. And, as this Court similarly held in *Carter*, it was not an abuse of discretion for the circuit court to conclude that Bradford White's failure to have such a method in place provided no excuse for its failure to timely respond to a legal action filed against it.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.



BRIEF FOR APPELLANT:

Robert R. DeGolian  
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BRIEF FOR APPELLEE:

John C. Miller  
Joseph A. Bott  
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