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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001634-MR

DONALD R. SNIDER, JR.,
D/B/A LAKE CHARLES ON THE WEB — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 12-CI-01073

TERRY MCINTOSH,
D/B/A FREEPRESCRIPTIONCARD.COM
APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Donald Snider, Jr. appeals the trial court's entry of a default judgment against him and the corresponding order granting damages to Terry McIntosh. Snider argues that he was improperly served and, thus, the court erred in its calculation as to when his answer was due. We agree with Snider that

service of the complaint to his wife was insufficient to bring Snider before the court; thus, the court erred in stating that Snider was required to file an answer within twenty days thereof. Accordingly, we vacate and remand to the circuit court for either a hearing, at the trial court's discretion, to determine the date of service by the postal employee or, absent a hearing or sufficient proof at the hearing of the date of service, acceptance of the date of November 20th as the date of service.

The facts of this matter are not in dispute. McIntosh filed his pro se complaint on October 24, 2012, against Snider, a resident of Louisiana. The complaint and summons was served by the Calcasieu Parish, Louisiana Sheriff's Department to Snider's wife, on October 31, 2012, as evidenced by the officer's signature on the civil summons returned to the court. The complaint was also sent via certified mail, which Snider signed for and received. However, there was no date indicated on the receipt as to when Snider received the complaint from the post office; the only dates on the return receipt stated: "Sulpher, Post Office 11/14/12" and November 20, 2012, which was when the receipt was filed with the McCracken Circuit Clerk's Office.

McIntosh filed a motion for default judgment pursuant to Kentucky Rules of Civil Procedure (CR) 55.01 on December 5, 2012. Counsel for Snider filed his answer on the same day. The court held a hearing on the motion on December 14, 2012. Thereafter, the court entered its order granting McIntosh's

motion for default judgment on December 20, 2012, and an order awarding damages on June 28, 2013.[1]

In granting the motion for default judgment, the court found that service was completed by leaving the summons with Snider's wife on October 31, 2012; as per CR 5.02,[2] service can be made by leaving a copy at the defendant's dwelling with a person of suitable age. Thus, the court reasoned that Snider had twenty days to file his answer from October 31, 2012, per CR 4.02. The court explicitly rejected Snider's argument that the date of service was November 20, 2012, because that was the date the clerk's office filed the return receipt and that was not the date that service was received. It is from these orders granting the motion for default judgment and the corresponding entry of damages that Snider now appeals.

On appeal, Snider argues that the trial court incorrectly determined that the date of service was October 31, 2012, when the complaint and summons was served upon Snider's wife; and thus, default judgment was inappropriate.

[1] The court also entered an order denying reconsideration of its grant of default judgment in addition to amending its orders relating to damages and the default judgment.

[2] We believe that the court incorrectly relied upon CR 5.02 in calculating the time that commences the period for the filing of the answer. Certainly, a default motion could be filed and served pursuant to CR 5, but not the original complaint. A complaint must be served pursuant to CR 4.

McIntosh argues that the court properly granted default judgment.[3] With these arguments in mind, we turn to the applicable law.

At issue, CR 4.04(8) sets forth service on an individual out of this Commonwealth:

> (8) Service may be made upon an individual out of this state, other than an unmarried infant, a person of unsound mind or a prisoner, either by certified mail in the manner prescribed in Rule 4.01(1)(a) or by personal delivery of a copy of the summons and of the complaint (or other initiating document) by a person over 18 years of age. Proof of service shall be made either by the return receipt mentioned in Rule 4.01(1)(a) or by affidavit of the person making such service, upon or appended to the summons, stating the time and place of service and the fact that the individual served was personally known to him. Such service without an appearance shall not authorize a personal judgment, but for all other purposes the individual summoned shall be before the courts as in other cases of personal service.

It is clear from this rule that service on an individual outside of this Commonwealth may be accomplished in one of two ways, either personal service or by certified mail as set forth in CR 4.01(1)(a), which states:

> (1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either:
> (a) Place a copy of the summons and complaint (or other initiating document) to be served in an envelope, address the envelope to the person to be served at the address set

[3] We recognize that McIntosh is a pro se plaintiff and appellant. While it is often true that allegations of a pro se complaint are to be construed liberally, and held to less stringent standards than formal pleadings drafted by lawyers, we do not find this to be relevant to the matter at hand. In the matter currently under review, the issue is not the allegations or the substance of the complaint itself, but rather the manner in which service was attempted and identifying the event which triggered the time for the filing of the answer to the complaint.

> forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. The clerk shall forthwith enter the facts of mailing on the docket and make a similar entry when the return receipt is received by him or her. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall enter that fact on the docket. The clerk shall file the return receipt or returned envelope in the record. Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service. To the extent that the United States postal regulations permit authorized representatives of local, state, or federal governmental offices to accept and sign for "addressee only" mail, signature by such authorized representative shall constitute service on the officer. All postage shall be advanced by the initiating party and be recoverable as costs.

As resolution of this issue involves interpretation of the Kentucky Rules of Civil Procedure, our review precedes *de novo*. *Sub judice* the court below erred in concluding that service upon Snider's wife was equal to service upon Snider:

> The argument that leaving process with the wife was adequate service is without merit. CR 4.04 directs that 'Service shall be made by delivering a copy of the summons personally to the person to be served * * *' (Underscoring supplied). Kentucky has long followed a strict adherence to the rule of 'In-hand Service of Process.' In *Case v. Colston*, 58 Ky. 145 (1858), we held that reading the summons to the defendant was not valid service; the officer must deliver it personally, and if refused he must offer personal delivery to the person to be served. In *Newsome v. Hall*, 290 Ky. 486, 161 S.W.2d

> 629, 140 A.L.R. 818 (1942), the sheriff attempted to serve the defendant by delivering a copy of the summons to his wife, and we declared that this did not constitute valid service. We wrote in *Rosenberg v. Bricken,* 302 Ky. 124, 194 S.W.2d 60 (1946), that '* * * mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction, and, in the absence of an appearance, there must be a service of process.' Although our rules generally follow the Federal Rules, we did not adopt FRCP 4(d)(1), which permits the serving officer to leave a copy of the summons at the defendant's dwelling. See 6 Ky. Practice, Clay 28. We continue to require personal service except in those instances in which non-personal service is authorized by statute or rule.

R. F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co., 471 S.W.2d 708, 710-11 (Ky. 1971).

In light of *R.F. Burton,* we must conclude that the court below erred in concluding that Snider had twenty days to file his answer from October 31, 2012.[4] Accordingly, we vacate and remand to the circuit court for this matter to proceed to trial, as default judgment was improperly entered.

In light of the aforementioned, we vacate and remand this matter for further proceedings.

COMBS, JUDGE, CONCURS.

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[4] We acknowledge that:

> CR 55.02 provides that a court may set aside a default judgment in accordance with CR 60.02 for good cause shown. Factors to consider in deciding whether to set aside a judgment are: (1) valid excuse for default, (2) meritorious defense, and (3) absence of prejudice to the other party. 7 W. Bertelsman and K. Philipps, Kentucky Practice, CR 55.02, comment 2 (4th ed.1984) [hereinafter "Ky.Prac."].

Perry v. Central Bank & Trust Co., 812 S.W.2d 166, 170 (Ky. App. 1991).

However, we believe the matter on appeal to be whether the default judgment should have ever been entered instead of whether the court should have set it aside.

VANMETER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING: I concur in vacating the default judgment by the trial court, especially since default judgments are disfavored. *Dressler v. Barlow*, 729 s.w.2d 464, 465 (Ky. App. 1987). Rather than remand for further hearing on service of process, I note that the defendant has now filed his answer and would permit the case to proceed.

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