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[Medtek Lighting Corp. v. Jackson](#)

Court of Appeals of Texas, Fifth District, Dallas

August 22, 2005, Opinion Filed

No. 05-04-00335-CV

Reporter

2005 Tex. App. LEXIS 6802; 2005 WL 2002159

MEDTEK LIGHTING CORPORATION f/k/a AVEX INDUSTRIES, LTD., Appellant v. HEIDI JACKSON d/b/a NOVA CREATIONS, Appellee

Subsequent History: [*1]

Rehearing overruled by [Medtek Lighting Corp. v. Jackson, 2005 Tex. App. LEXIS 8375 \(Tex. App. Dallas, Oct. 3, 2005\)](#) Petition for review denied by [Jackson v. Medtek Lighting, Inc., 2006 Tex. LEXIS 356 \(Tex., Apr. 21, 2006\)](#)

Motion for rehearing on petition for review denied by [Jackson v. Medtek Lighting, Inc., 2006 Tex. LEXIS 539 \(Tex., June 9, 2006\)](#)

Prior History: On Appeal from the County Court at Law No. 4. Dallas County, Texas. Trial Court Cause No. cc-03-13834-d.

Disposition: REVERSED and REMANDED.

Core Terms

service of process, default judgment, trial court, secretary of state, issues, motion for a new trial, special appearance, tanning, booth, requirements, nonresident

Case Summary

Procedural Posture

Appellee customer sued appellant company in the County Court at Law No. 4, Dallas County, Texas, alleging breach of contract and breach of warranty stemming from the sale of a tanning booth. The trial court entered a default judgment against the company and later denied its motion for a new trial. The company appealed.

Overview

Finding that the company had been served through the secretary of state and that it had failed to file an answer, the

trial court entered a default judgment against it. The trial court also awarded the customer \$ 1,560,000 in damages. On appeal, the company argued that the trial court erred in denying its motion for new trial and in entering default judgment because of defects in service of process. The appellate court noted that although the customer alleged that the company was a New York corporation doing business in Texas, she did not allege that it maintained a regular place of business in Texas or a registered agent for service of process; thus, she failed to properly invoke jurisdiction under [Tex. Civ. Prac. & Rem. Code Ann. § 17.044\(b\)](#) (1997). The appellate court held that because the customer alleged that the address she provided the Secretary of State for service of process was the company's mailing address, but not its home or home office address, service was invalid under [Tex. Civ. Prac. & Rem. Code Ann. § 17.045\(a\)](#). The appellate court concluded that the trial court did not acquire jurisdiction over the company and that its default judgment was void.

Outcome

The judgment of the trial court was reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Proof of Service > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

HNI A default judgment entered following substituted service is improper against a defendant who has not been

served in strict compliance with the rules relating to service of citation, even if the defendant had actual notice of the lawsuit. When a default judgment is attacked on direct appeal, every step of the proceeding is open to examination. There must be proof in the record of service of process on the defendant in the manner required by the applicable long-arm statute. This requires that the pleadings must allege facts which, if true, would make the defendant amenable to service of process by the use of the long-arm statute and that there must be proof in the record that the defendant was, in fact, served in the manner required by the statute.

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Proof of Service > General Overview

Civil Procedure > Judgments > Pretrial Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > General Overview

Civil Procedure > ... > Pretrial Judgments > Default & Default Judgments > Default Judgments

Evidence > Inferences & Presumptions > General Overview

Evidence > Inferences & Presumptions > Presumptions > Effects

Evidence > Burdens of Proof > General Overview

HN2 A plaintiff must strictly comply with the requirements of the statute authorizing substituted service. The plaintiff has the burden of affirmatively showing strict compliance with the statute. The plaintiff's failure to affirmatively show strict compliance with the provided mode of service makes the attempted service of process invalid and without effect. There are no presumptions favoring valid issuance, service, and return of citation in the face of a direct attack on a default judgment. The same rule applies to inferences of jurisdictional facts in a direct attack.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Agents

HN3 See [Tex. Civ. Prac. & Rem. Code Ann. § 17.044\(b\)](#) (1997).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Service on Agents

HN4 The omission of an allegation that a defendant does not maintain a regular place of business in Texas or a designated agent for service of process indicates a lack of jurisdiction over the defendant that is apparent on the face of the record.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN5 See [Tex. Civ. Prac. & Rem. Code Ann. § 17.045\(a\)](#) (Supp. 2004-05).

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > Mail

HN6 If a plaintiff does not allege that the address it provides to the Texas Secretary of State for service is the defendant's home or home office address, it does not strictly comply with the statutory requirements of [Tex. Civ. Prac. & Rem. Code Ann. § 17.045\(a\)](#).

Counsel: For APPELLANT: Baxter W. Banowsky, BANOWSKY BETZ & LEVINE, P.C., Dallas, TX.; Lawrence L. Mealer, Dallas, TX.

For APPELLEE: Richard J. Dobbyn, Mesquite, TX.

Judges: Before Justices Wright, FitzGerald, and Lang-Miers. Opinion by Justice Lang-Miers.

Opinion by: ELIZABETH LANG-MIERS

Opinion

MEMORANDUM OPINION

Medtek Lighting Corporation f/k/a Avex Industries, Ltd. ("Medtek") appeals a final judgment against it for breach of contract and breach of warranty. In six issues, Medtek contends that the trial court erred in overruling its special appearance, entering default judgment against Medtek after Medtek answered, overruling Medtek's motion for new trial

and entering default judgment against Medtek because of an alleged defect in service of process, and overruling Medtek's second motion for new trial. It also argues that there was insufficient evidence to support the trial court's award of damages. We reverse the judgment and remand the matter to the trial court because we conclude the trial court did not acquire jurisdiction over Medtek and that its default judgment is void.

BACKGROUND

Heidi Jackson, [*2] owner and operator of a hair salon, filed suit against Medtek for breach of warranty and breach of contract on November 17, 2003. Medtek is a New York corporation that manufactures tanning booths. In her original petition she alleged she had reviewed materials sent to her by Medtek about its "safe and easy to use tanning booths." She alleged that she entered into an agreement with Medtek to provide a tanning booth. According to the petition, in order to pay for the tanning booth, she entered into a financing contract with Lease Corporation of America, at Medtek's recommendation. After the tanning booth was installed, she discovered the tanning booth reached high temperatures and contacted Medtek regarding the severe heat. Medtek ignored her concerns, and this suit followed.

Finding that Medtek had been served through the Texas Secretary of State and that it had failed to file a written answer or response, the trial court entered a default judgment against Medtek on January 6, 2004. On that same day, the court heard Jackson's testimony regarding damages and awarded a judgment for \$ 1,560,000 for lost profits and an additional amount for prejudgment interest and attorney's fees.

[*3] On February 4, 2004, Medtek filed a special appearance and a motion for new trial subject to the special appearance. A hearing was held on the special appearance and the trial court concluded that it had jurisdiction over Medtek, denied its special appearance, and denied the motion for new trial regarding the default judgment on February 24, 2004.

On February 26, 2004, Medtek filed a second motion for new trial. On March 12, 2004, it filed a general denial. Thereafter, on March 16, 2004, the trial court denied the second motion for new trial as untimely, but amended its judgment. On March 23, 2004, Medtek requested findings of fact and conclusions of law, which the court filed on March 30, 2004. On April 9, 2004, the trial court vacated the previous judgments and entered a "Second Amended Final Judgment." Medtek appealed the trial court's denial of its special appearance and the April 9, 2004 final judgment.

SUBSTITUTED SERVICE

Medtek has briefed six issues. The third and fourth issues are dispositive of the appeal; consequently, we need not address the other issues. In its third and fourth issues, Medtek contends that the trial court erred in denying its motion for new [*4] trial and in entering default judgment because of defects in service of process. In her petition, Jackson alleged as follows:

Defendant MedTek Lighting Corporation f/k/a Avex Industries, Ltd. is a New York corporation which conducts business in Dallas County, Texas. Defendant can be served through the Texas Secretary of State. Defendant's mailing address is P.O. Box 230 Hudson Falls, NY 12839.

Medtek argues that (1) Jackson failed to properly invoke jurisdiction under [Texas Civil Practice and Remedies Code section 17.044\(b\)](#) because Jackson did not allege facts sufficient to make Medtek amenable to substituted service of process and (2) service of process was invalid under [section 17.045\(a\)](#) because Jackson did not allege that the address she provided the Secretary of State was Medtek's home or home office address.

HNI A default judgment entered following substituted service is improper against a defendant who has not been served in strict compliance with the rules relating to service of citation, even if the defendant had actual notice of the lawsuit. [Wilson v. Dunn, 800 S.W.2d 833, 836, 34 Tex. Sup. Ct. J. 60 \(Tex. 1990\)](#); [Seeley v. KCI USA, Inc., 100 S.W.3d 276, 278-79 \[*5\] \(Tex. App.-San Antonio 2001, no pet.\)](#). When a default judgment is attacked on direct appeal, every step of the proceeding is open to examination. [Phifer v. Nacogdoches County Cent. Appraisal Dist., 45 S.W.3d 159, 172 \(Tex. App.-Tyler 2000, pet. denied\)](#). There must be proof in the record of service of process on the defendant in the manner required by the applicable long-arm statute. See [Whitney v. L & L Realty Corp., 500 S.W.2d 94, 95-96, 17 Tex. Sup. Ct. J. 39 \(Tex.1973\)](#); [Boreham v. Hartsell, 826 S.W.2d 193, 195 \(Tex. App.-Dallas 1992, no writ\)](#). This requires that the pleadings must allege facts which, if true, would make the defendant amenable to service of process by the use of the long-arm statute and that there must be proof in the record that the defendant was, in fact, served in the manner required by the statute. See [Lozano v. Hayes Wheels Int'l, Inc., 933 S.W.2d 245, 247 \(Tex. App.-Corpus Christi 1996, no writ\)](#).

HN2 A plaintiff must strictly comply with the requirements of the statute authorizing substituted service. [Boreham, 826](#)

S.W.2d at 195. The plaintiff has the burden of affirmatively showing strict compliance [*6] with the statute. *McKanna v. Edgar*, 388 S.W.2d 927, 930, 8 Tex. Sup. Ct. J. 294 (Tex. 1965); *Boreham*, 826 S.W.2d at 195. The plaintiff's failure to affirmatively show strict compliance with the provided mode of service makes the attempted service of process invalid and without effect. *Higginbotham v. General Life & Acci. Ins. Co.*, 796 S.W.2d 695, 697, 34 Tex. Sup. Ct. J. 16 (Tex.1990); *Boreham*, 826 S.W.2d at 195. There are no presumptions favoring valid issuance, service, and return of citation in the face of a direct attack on a default judgment. See *Higginbotham*, 796 S.W.2d at 697; *Boreham*, 826 S.W.2d at 195. The same rule applies to inferences of jurisdictional facts in a direct attack. *Boreham*, 826 S.W.2d at 195.

The applicable long-arm statute, *Texas Civil Practice and Remedies Code section 17.044(b)*, provides as follows:

HN3 The secretary of state is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises [*7] out of the business done in this state and to which the nonresident is a party.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1997). **HN4** The omission of an allegation that a defendant does not maintain a regular place of business in Texas or a designated agent for service of process indicates a lack of jurisdiction over the defendant that is apparent on the face of the record. See *Lozano*, 933 S.W.2d at 247; *Gourmet Inc. v. Hurley*, 552 S.W.2d 509, 511 (Tex. Civ. App.-Dallas 1977, no writ). Although Jackson alleged that Medtek is a New York corporation doing business in Texas, she did not allege that Medtek does not maintain a regular place of business in Texas or a registered agent for service of process. As a result, Jackson failed to properly invoke jurisdiction under *section 17.044(b)*. See *Lozano*, 933 S.W.2d at 247.

Additionally, even if Jackson alleged sufficient facts to show that Medtek was amenable to service of process under *section 17.044(b)*, she was still required to strictly comply with *section 17.045(a)*, which provides that:

HN5 If the secretary of state is served with duplicate [*8] copies of process for a nonresident, the documents shall contain a statement of the name and address of the nonresident's home or home office and the secretary of state shall immediately mail a copy of the process to the nonresident at the address provided.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a) (Vernon Supp. 2004-05). **HN6** If a plaintiff does not allege that the address it provides to the Secretary of State for service is the defendant's home or home office address, it does not strictly comply with the statutory requirements of 17.045(a). See *Boreham*, 826 S.W.2d at 196-97. Because Jackson alleged the address she provided the Secretary of State for service of process was Medtek's mailing address, but not its home or home office address, service was invalid under *section 17.045(a)*. See *Boreham*, 826 S.W.2d at 196-97.

Because we determine that Jackson failed to properly invoke the trial court's jurisdiction under *section 17.044(b)* and that service was invalid under *section 17.045(a)*, we conclude that the trial court did not acquire personal jurisdiction over Medtek. As a result, the trial court's default [*9] judgment is void. See *Lozano*, 933 S.W.2d at 247; *Houtex Managing Gen. Agency, Inc. v. Hardcastle*, 735 S.W.2d 520, 522 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.).¹ We sustain Medtek's third and fourth issues. Due to our disposition on Medtek's third and fourth issues, we need not address its remaining issues. *TEX. R. APP. P. 47.1*.

[*10] CONCLUSION

We conclude that the trial court did not acquire jurisdiction over Medtek and that its default judgment is void. As a result, the judgment of the trial court is reversed and this matter is remanded to the trial court for further proceedings in accordance with this opinion.

ELIZABETH LANG-MIERS

JUSTICE

¹ Jackson argues that because Medtek did not allege or prove the requirements of *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (Tex. 1939), the trial court had no choice but to deny Medtek's motion for new trial. But Jackson does not address Medtek's fourth issue directly attacking the default judgment because of defective service of process. Additionally, because the record does not affirmatively show that Medtek was served in strict compliance with the rules relating to service of citation and the trial court's default judgment was void, Medtek was entitled to a new trial without having to meet the requirements of *Craddock*. See *Plains Chevrolet, Inc. v. Thorne*, 656 S.W.2d 631, 633 (Tex. App.-Waco 1983, no pet.).