IN THE SUPREME COURT OF MISSISSIPPI

2007-CA-02223

HERBERT TUCKER, INDIVIDUALLY and
d/b/a H&G CONSTRUCTION
Appellant

vs.

TYRONE WILLIAMS AND SHARON WILLIAMS
Appellees

BRIEF OF APPELLEES

On Appeal from the Chancery Court of Hinds County

S. Malcolm O. Harrison, MSB[redacted]
HARRISON & FLOWERS
P.O. Box 483
Jackson, MS 39205-0483
(601) 948-5030

COUNSEL FOR TYRONE WILLIAMS
AND SHARON WILLIAMS

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Mississippi Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal.

Herbert Tucker
Defendant/Appellant

H&G Construction, Inc.
Defendant/Appellant

K.F. Boakle
Trial and Appellate Attorney for Appellant

Tyrone Williams
Plaintiff/Appellee

Sharon Williams
Plaintiff/Appellee

S. Malcolm O. Harrison
Trial and Appellate Attorney for Appellees

William H. Singletary
Chancery Court Judge

SO CERTIFIED BY ME, this the 8th day of September 2008.

S. Malcolm O. Harrison

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STATEMENT OF THE CASE

Tyrone and Sharon Williams purchased a lot in Levon Owens Estates. In March, 2006, they hired Herbert Tucker d/b/a H&G Construction to build a house on this property. The seven page contract (CP. 19), signed on March 30, 3006, was quite specific as to the agreement between the parties and called for the builder to exercise his best efforts to complete the house within nine months. CP. 20.

During construction, H&G Construction breached the contract by failing to follow the contract plans. Tyrone Williams discussed the problems with Herbert Tucker on numerous occasions. On November 2, 2006, Tyrone Williams informed Tucker that he was being fired from the project because he was failing to follow the plans, he was using substandard material, and he was making changes in the plans that were not authorized by the Williams. Tyrone Williams also informed Tucker that he had placed a stop payment on the last check tendered to Tucker. The check was in the amount of $49,317.00.

The day after he was fired from the project, Tucker, through his attorney K.F. Boackle, filed a series of construction liens on the property in the Chancery Court of Hinds County. CP. 13, 17, 26, 35. Thereafter, Boackle and undersigned counsel exchanged numerous letters regarding the dispute and the liens. CP. 197-217. On November 22, 2006, the Williams, through counsel, informed Tucker, through Boackle, that if the dispute could not be settled, the Williams would be forced to file a complaint to remove the liens. CP. 206. Meanwhile, Boackle wrote that if such a complaint were filed, "it will be met with a counterclaim for the amount requested above, the bank charges incurred because of the stop-payment order and attorneys' fees as provided in paragraph 11(c) of the contract." CP. 201.

On December 14, 2006, the Williams filed a Complaint for Slander of Title and for Removal of Cloud Upon Title. CP. 1. They requested that the sheriff effect service on the defendant. Tucker, however, was evading service and on January 8, 2008, the sheriff's agent posted the summons and complaint for Mr. Tucker as well as the one for H&G Construction on Tucker's property at 500 Cobblestone Court, Suite B, Madison, MS 39100, which is the address of H&G Construction Company as it appears on the contract. CP. 42-44. (H&G's address listed with the Secretary of State is 1186 North Old Canton Road, Canton, MS 39046). The Williams by and through undersigned counsel also mailed a copy of the summons and complaint to the Cobblestone address via regular mail. CP. 39-41.

The Williams also tried to send a copy of the summons and complaint to Tucker via certified mail to both the Cobblestone Court address and the Old Canton Road address but both mailings were returned. CP. 45. Additionally, on January 10, 2007, the Williams mailed a copy of the summons and complaint via certified mail to K.F. Boackle (the attorney who prepared and filed the construction liens and with whom counsel for the Williams had been corresponding about the dispute) on January 10, 2007. This letter was delivered. CP. 45.

Tucker did not file an answer to the lawsuit. On February 12, 2007, the Williams applied to the clerk for entry of default judgment. CP. 47. The Application was accompanied by an affidavit from the Williams' counsel stating that thirty days had elapsed since the complaint had been served and that there had been no answer on the part of the defendants. CP. 48.

On February 15, 2007, the Chancellor entered Final Judgment removing the construction liens placed by Tucker. CP. 50. The Judgment noted that Herbert Tucker was served with process on January 8, 2007, and thereafter, Tucker's attorney was mailed a copy of the summons and complaint via certified mail on January 10, 2007. *Id.*

On March 27, 2007, Tucker, through Boackle, filed an answer and counterclaim. Tucker later claimed that he was served with the lawsuit on February 25, 2007. CP. 85. (The record does not reveal how it is that Tucker is claiming he received service). Nevertheless, it was not until August 9, 2007, that Tucker's attorney K.F. Boackle filed a Motion to Set Aside the Default Judgment. CP. 82. In that Motion, Boackle admits that he was sent two summons along with the complaint against his client Tucker. CP. 82-83, ¶ 2. The Motion also admits that the summonses were sent via certified mail to Tucker and H&G Construction but were returned. CP. 83, ¶ 3.

After a hearing on November 20, 2007, the Chancellor refused to set aside the default judgment holding that under the circumstances, "counsel for plaintiff was entitled to treat K.F. Boackle, Esquire, as counsel for defendants from and after filing the Complaint for Slander of Title and for Removal of Cloud Upon Title" and that since the defendants failed to appear to defend the complaint against them, the default judgment was valid. CP. 218. It is from this order that Tucker d/b/a H&G Construction appeals. CP. 219.

SUMMARY OF ARGUMENT

Notions of due process require that a defendant be given notice of a lawsuit and an opportunity to be heard. In this case, the defendant was evading service of process. He could not be found at either his personal or business address and he refused to accept certified mail sent to both addresses. Nonetheless, the facts are undisputed that Tucker was represented by counsel in this dispute over a construction lien. Tucker filed the construction liens; letters between counsel for both parties were exchanged in which Tucker's lawyer asserted that if a complaint were filed to remove the lien, Tucker would file a counterclaim. Under these circumstances, the Chancellor was correct to determine that Tucker had notice and an opportunity to be heard and,

thus, that the default was validly entered. Furthermore, Tucker waited six months after he admits he received service of process to file a motion to set aside the default. In that motion, Tucker failed to allege, much less prove, that he had a valid defense to the complaint. The Chancellor's refusal to set aside the default judgment was not error.

LAW AND ARGUMENT

1. The Chancellor did not err in granting the default judgment.

Standard of review:

A trial court's decision to enter a default judgment is reviewed for abuse of discretion. *State Highway Com'n of Mississippi v. Hyman*, 592 So.2d 952, 955 (Miss. 1991).

Law and Argument:

In this case, Tucker hired a lawyer, K. F. Boackle, to file construction liens on the Williams' house. This he could accomplish without effecting personal service on the Williams. M.C.A. § 85-7-197 (requiring notice of lien to owner either by giving notice in person **or** by certified mail). But when the Williams turned around and hired a lawyer to remove the liens, Tucker evaded service of process. He now argues that while he hired Boackle to file the liens, Boackle was not his attorney on the complaint to remove the liens until Tucker hired him **after** the default judgment was entered. This argument, however, is disingenuous given the circumstances and the pile of letters exchanged between Boackle and counsel for the Williams. The Chancellor in this case was correct in finding that under the circumstances, Boackle was representing Tucker when Boackle was given notice of the lawsuit and that this was sufficient to provide notice to Tucker given that Tucker was evading service of process.

Tucker argues that service was improper and, thus, that the court did not have personal jurisdiction over him when it entered the default judgment. The Due Process Clause of the Fourteenth Amendment operates to limit the jurisdiction of state courts to enter judgments affecting rights or interests on defendants. *Noble v. Noble,* 502 So.2d 317, 319-20 (Miss.1987) (quoting *Kulko v. California Superior Court,* 436 U.S. 84, 91, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978). "The concept of personal jurisdiction comprises two distinct components: amenability to

jurisdiction and service of process." *James v. McMullen,* 733 So.2d 358 (Miss.Ct.App.1999). "Service of process is simply the physical means by which [personal] jurisdiction is asserted." *Id.* (citations omitted). "The existence of personal jurisdiction ... depends upon the presence of **reasonable notice to the defendant** that an action has been brought." *Noble v. Noble,* 502 So.2d 317, 320 (Miss.1987) (emphasis added).

Notice of a complaint coupled with good faith attempted service is sufficient to confer jurisdiction where a party is evading service of process. *Avianca, Inc. v. Corriea,* 705 F.Supp. 666, 685 (D.D.C.1989) aff'd sub nom. *Avianca, Inc. v. Harrison,* 70 F.3d 637, (D.C.App. 1995); *Banco Latino, S.A.C.A. v. Gomez Lopez,* 53 F.Supp.2d 1273, 1281 (S.D.Fla. 1999). Where a defendant actively avoids service of process, as in this case, service on the defendant's attorney will suffice. *Eureka Lake & Yuba Canal Co. v. Superior Court of Yuba County* 116 U.S. 410, 6 S.Ct. 429, 29 L.Ed. 671 (1886). In *Eureka Lake*, the United States Supreme Court stated that the avoidance of service of process by a corporation's agents put the corporation in the position where "it cannot justly complain if service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. [T]he privilege [of proper service of process] cannot be insisted on." *Eureka Lake,* 116 U.S. at 418, 6 S.Ct. 429.

Tucker cites *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999), for the proposition that a defendant is not obligated to engage in litigation until he has been notified of the action by formal process. *Murphy Brothers,* however, was not a case about whether service of process was effective. The case involved the removal of state court actions to federal court. Specifically, the issue before the Court was whether the thirty-day period for the defendant to remove the case was triggered by notice of the lawsuit. The United States Supreme Court held that the thirty-day period for removal does not

run until the defendant has been properly served. *Murphy Bros.*, 526 U.S. at 350, 119 S.Ct. at 1327. *Murphy Bros.* does not define proper service. *See also International Controls Corp. v. Vesco,* 593 F.2d 166, 175 (2d Cir.1979) (allowing service by regular mail where bodyguard at residence prevented personal service); *Levin v. Ruby Trading Corp.*, 248 F.Supp. 537, 541 (S.D.N.Y.1965) (service by mail to defendant and two of his attorneys sufficient); *New England Merchants Nat'l Bank v. Iran*, 508 F.Supp. 49, 52 (S.D.N.Y.1980) (substituted service by telex permitted).

In his Motion to Set Aside the Default Judgment, Tucker insisted that "Boackle was not an attorney of record for Herbert Tucker or H&G Construction in this case." CP. 85-85 ¶ 10. However, as the correspondence between the attorneys demonstrates, Tucker made it clear that when and if the Williams filed suit to remove the construction liens, Tucker, through Boackle, would file a counterclaim. CP. 201. Tucker's assertion that Boackle was not his attorney in this case is on a par with Tucker's avoiding service. Throughout this action, Tucker was not acting in good faith. He filed the liens and then ducked service of the complaint to remove the liens. And while the record leaves no doubt that Tucker's attorney received a copy of the complaint in early January, Tucker chose to ignore the lawsuit and failed to move to set aside the judgment for another seven months.

Under these circumstances, where Tucker evaded service but had notice of the lawsuit and an opportunity to appear, the default judgment entered by the Chancellor was not error.

2. The Chancellor did not err in denying Tucker's Motion to Set Aside Default Judgment.

Standard of review:

The decision of whether set aside a default judgment is addressed to the sound discretion of the trial court. *Soriano v. Gillespie*, 857 So.2d 64, 67 (Miss.Ct.App. 2003). If the chancellor's

discretion is exercised in conformity with M.R.C.P. 55(b), the appellate court will affirm the ruling absent an abuse of discretion. *Guar. Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 388 (Miss. 1987).

Law and Argument:

In determining whether a trial court has abused its discretion by issuing a judgment by default, an appellate court is to consider three factors: (1) whether a defendant has good cause for default; (2) whether a defendant has a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice to the plaintiff if the default judgment is set aside. *King v. Sigrest,* 641 So.2d 1158, 1162-63 (Miss.1994).

In this case, Tucker claims that he was first served in February 2007 yet he did not file a motion to set aside the default until August 2007. However, his attorney, who was handling this dispute for Tucker, had a copy of the lawsuit in January 2007. Tucker, then, did not have good cause for the default. If anything, his actions were done willfully in an attempt to avoid any legal challenge to the liens he placed on the Williams' property. *See, e.g., Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238, 243-44 (2d Cir. 1994) (failure to answer was wilfull where defendants had "purposely evaded service for months").

Moreover, Tucker did not provide the court with facts showing that he had a defense to the complaint. One seeking to avoid entry of a default judgment must set forth the nature and substance of a colorable defense to the merits of the case. *H & W Transfer and Cartage Serv., Inc. v. Griffin,* 511 So.2d 895, 899 (Miss.1987). As the Court of Appeals stated in *American Cable Corp. v. Trilogy Communications, Inc.,* 754 So.2d 545, 554 (Miss.Ct.App.2000), in order to set aside a default judgment a party must show facts, not conclusions, and these facts must be in the form of affidavits or other sworn forms of evidence. *Gober v. Chase Manhattan Bank,* 918

So.2d 840, 844 (Miss.App. 2005). An unsubstantiated allegation that a meritorious defense exists is insufficient as a matter of law to sustain the burden under Rule 60(b). *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So.2d 545, 554 (Miss.App. 2000). In this case, Tucker failed to even allege that he had a meritorious defense to the complaint to remove title. He certainly failed to provide sufficient facts regarding same.

Nor did Tucker act expeditiously to set aside the default judgment. He claims that he was served on February 27, 2007. He filed an answer and a counterclaim a month later but did not ask the court to set aside the default judgment until August 9, 2007, which was six months after he was allegedly served.

In *Capital One Services, Inc. v. Rawls,* 904 So.2d 1010 (Miss. 2004), the Mississippi Supreme Court held that the trial court did not abuse its discretion in failing to set aside a default judgment where the defendant did not explain why it failed to appear and there was an unexplained 21-day delay between defendant's entry of appearance and the motion to set aside judgment. *Capital One*, 904 So.2d at 1016.

In this case, the delay was far in excess of 21 days. Tucker never explained why he made an appearance in the lawsuit in February but did not move to set aside the default judgment until August especially in light of the fact that he was able to file the first of the construction liens the day after he was fired from the Williams' job.

The Williams have certainly been prejudiced by Tucker's delay. At this point, it has been almost two years since the construction liens were placed on their property. Prejudice may occur where there is a delay in the proceedings in terms of loss of memory of witnesses and the fact that the plaintiff is without a resolution for a long period of time. *Guar. Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 388 (Miss. 1987). In *Pittman*, the Mississippi Supreme Court found that the

possibility of a year or more delay in submitting a matter to a jury demonstrated prejudice in that witnesses and evidence could be lost to the plaintiff. *Id. See also Leach v. Shelter Ins. Co.*, 909 So.2d 1283, 1288 (Miss.App. 2005) (finding unpersuasive defendant's claim that plaintiff suffered no prejudice because she filed her motion to set aside the default judgment less than one month after the entry of default).

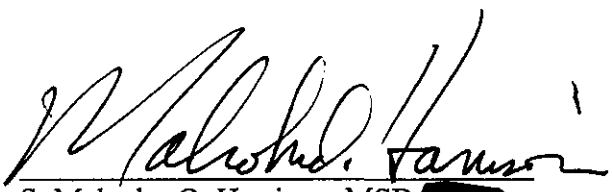
Tucker was unable to persuade the Chancellor to set aside the default judgment entered against him. This is because he presented no basis for such relief. The Chancellor was correct to deny the Motion and his decision should be affirmed on appeal.

Conclusion:

The Chancellor in this case was correct in both granting the default judgment and in refusing to set it aside and, thus, his decision should be affirmed on appeal.

Respectfully submitted,

TYRONE WILLIAMS
SHARON WILLIAMS



S. Malcolm O. Harrison, MSB [redacted]
HARRISON & FLOWERS
P.O. Box 483
Jackson, MS 39205-0483
(601) 948-5030

COUNSEL FOR TYRONE WILLIAMS
AND SHARON WILLIAMS

CERTIFICATE OF SERVICE

I, S. Malcolm O. Harrison, Attorney for Appellees, certify that I have this day served a copy of Appellees' Brief by United States mail, first class postage prepaid, to:

K. F. Boackle
Boackle Law Firm, PLLC
1020 NorthPark Drive, Suite B
Ridgeland, MS 39157-5299

William H Singletary
Chancery Court Judge
P O Box 686
Jackson, MS 39205

THIS, the 8th day of September, 2008.

S. Malcolm Harrison