TABLE OF CONTENTS

SCT
2007-IA-01286
E

Table of Cases, Statutes and Other Authorities

Cases:

Statutes:

Other Authorities:

Statement of the Case

Nature of the Action and Underlying Facts

Plaintiff would adopt the statement of the case as set forth by the defendants with the following additional matters.

The Circuit Court of Hancock County issued two agreed Orders addressing the defendants' Motion to Set Aside Default and addressing the plaintiff's Motion for Extension of Time to Serve defendants. [C.P. 28-29; 27]. Both Orders are signed by the attorneys for all the parties and indicate that the parties "APPROVE" the Orders.

When arguing the defendants' Motion to Dismiss, the following colloquy occurred between the trial court and counsel:

Transcript page 23, line 17- page 24, line 21:

> MR. CUNNINGHAM: Yes, sir. Then the second time he appeared here and we put him on the stand and you heard the evidence and entered the default judgment. Subsequently then Mr. Parsons filed a motion to set aside the default, and that came to me, and Mr. Parson and I worked out a way to resolve or attempt to resolve the default issue, and we submitted that order to you for your signature. I filed - - he filed the motion to set aside the default. I filed a motion to extend the time to serve. We worked on an order and submitted an order to you that you signed, Your Honor.
>
> THE COURT: Ya'll reached an agreement resolving both motions?
>
> MR. CUNNINGHAM: Yes, sir.
>
> THE COURT: Is that correct?
>
> MR. CUNNINGHAM: Yes, sir. It set aside the default and retained jurisdiction and ordered me to serve the defendant in 60 days.
>
> THE COURT: Which you did?

MR. CUNNINGHAM: Which we did, yes, sir. And so our argument is that he's too late. This is a collateral attack on the order that the Court has already entered, that he agreed to, and a collateral attack on an agreed order is not proper, but he'd have to allege - - as to Rule 60 he would have to allege some kind of fraud or something, some improper action on the part - - misconduct on the part of one of the other parties. He has not done that. I've filed a brief, Your Honor, and cited case law in that brief.

Transcript page 29, line 7:

MR. GRANT: What effect does it have on the statute of limitations to give the plaintiff additional time to answer? Does that toll the statute of limitations? If it has already been over three years since the date of the accident, and it's already been tolled for 120 days from the filing of the lawsuit, and my argument would be that it doesn't, Your Honor. That's all that I would have in rebuttal unless you have some question.

THE COURT: But technically he could have - - he's been in between a rock and a hard place because if he would have disposed of the matter and set aside the default over his objections then he'd have an assignment of error that he could protect whatever judgment there was, but by agreeing with Mr. Parsons to go ahead and cure what he called in this thing - - the defendant by agreeing to this I think he's barred from appealing any default issue; do you agree?

MR. GRANT: I think you are correct, Your Honor. I have sympathy for Mr. Cunningham's position.

Summary of the Argument

A party cannot re-litigate an issue when he has agreed to orders which involve the same issue submitted to the trial court for approval. Collateral attacks on judgments are not allowed to in the absence of fraud and collusion. This is especially true when a party has agreed to the order being attacked.

Statement of the Issues

Whether a party who requests the trial court to enter an agreed order can then collaterally attack the order and the issue underlying the basis of the agreed order?

Argument

The trial court directly addressed the issue of service of process when it stated "Defendants are attempting to re-litigate an issue which has already been addressed by this Court and *agreed* upon by the parties – the issue of service of process." [emphasis added C.P.53]. The defendants attempt to deflect the issue by saying that "...while somewhat inter-related, service of process is an issue distinct from the more germane question of whether the statute of limitation had expired." Appellant's Brief, page 9.

The issues of service of process, as well as the issue of how the trial court came to set aside the default and grant the motion to extend the time to serve were not done in a vacuum. The defendants in their motion to set aside the default judgment raised the issue of potential improper service of process. The plaintiff in his motion to extend the time to serve the defendants recognized that the defendants were attempting to set aside the default on the basis that they were not served or were improperly served. Faced with these issues, the parties through their attorneys agreed and submitted to the court two orders which the court entered [C.P. 27; 28-29]. The plaintiff then complied with the court's order, issued new summons and served the defendants within the sixty days allowed by the trial court.

It is important in our judicial system for the court to rely on parties and their counsel who submit proposed, approved orders to the court for consideration. If the court

then finds the proposal to be proper and enters the approved order, all parties should be expected to honor it absent fraud or other extraordinary matters.

The Courts should not permit litigants to use contrary positions when it best suits them. In *Thomas v. State Farm*, 856 So.2d 63 (Miss. App. 2003), the Court of Appeals clearly stated that it will not permit litigants to solidly affirm that a given state of facts exists to which they are entitled to a particular relief and then later affirm a contrary state of facts from which they are entitled to inconsistent relief. This is exactly what the defendants are trying to do in this case.

The defendants' efforts are a collateral attack on the Court's January 24, 2005 order and are improper. *Newsome v. Federal Land Bank*, 184 Miss. 218 (Miss.1939). End runs collaterally attacking a judgment should not be allowed. Collateral attacks will be sustained only in cases where a fatal defect, such as lack of jurisdiction, is facially apparent. Mere irregularities in the appointment or proceedings are immune from collateral attack. *Krebs v. Bradley*, 190 So. 2d 886 (Miss. 1996). The January 24, 2005 Order is regular on its face, demonstrating that the court had jurisdiction of the subject matter and parties involved. In *In re Estate of Moreland,* 537 So. 2d 1337 (Miss.1989), the mother of a son killed in a helicopter crash appealed an order removing her as administratrix of his estate and appointing her son's ex-wife as the guardian of his only heir, a minor son. The mother's appeal sought to attack the validity of the ex-wife's appointment as legal guardian. The Mississippi Supreme Court found the appeal a collateral attack. Because the order was regular on its face and the trial court had jurisdiction of the parties and the subject matter, the Mississippi Supreme Court found

that it could not be set aside in the absence of fraud or collusion. See also *Reed v. General Motors Acceptance Corp.*, 228 Miss. 121, 87 So. 2d 95 (1956); *Scott County v. Dubois*, 158 Miss. 245, 130 So. 106 (1930). The motion to dismiss before the trial court does not charge fraud or collusion. The motion to dismiss could not charge fraud or collusion because the defendants, themselves acted with plaintiff in drafting and approving order.

Defendants rely heavily on two cases, *Heard v. Remy*, 937 So.2d 939 (Miss. 2005) and *Williams v. Fornett*, 906 So.2d 810 (Miss. 2004). Neither case says that a party who consents to service of process after the statute has run has not waived the limitations period as an affirmative defense. In *Heard*, the plaintiff failed to ask for an extension of time in which to serve defendant until the 120-day period had expired (i.e., the 120-days after a complaint is filed). *Heard v. Remy*, 937 So.2d at 943. In the instant case, plaintiff requested an extension of time in which to serve defendants, defendants agreed to the extension, the trial court ordered it, and defendants were timely served. In *Williams*, the plaintiff failed to serve the defendant within 120 days of the filing of the complaint or to re-file the complaint within that time period. When the statute of limitations had run and plaintiff had not filed a request for an extension of time in which to serve the defendant, the trial court dismissed the complaint and the Mississippi Supreme Court affirmed its decision. These facts do not apply to the case at bar either, because plaintiff requested an extension, to which defendants agreed, and service was perfected.

If the defendants wished to set aside the January 24, 2005 order, Rule 60(b), M.R.C.P. would have been the proper mechanism to present the issue. The defendants

would have been required to show fraud, misrepresentation or other misconduct of an adverse party, or an accident, or a mistake. Defendants could not do that since they agreed and approved the order.

Had the trial court not issued the order of January 24, 2005, Plaintiff may have proceeded under Miss. Code Ann. § 15-1-69:

> If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein, and his executor or administrator may, in case of the plaintiff's death, commence such new action, within the said one year.

When the trial court set aside this judgment, Miss. Code Ann. § 15-1-69 gave the plaintiff the additional option of recommencing the action. The January 24, 2005 order setting aside the judgment essentially arrested an adverse judgment. Plaintiff did not need to take that course of action because the trial court addressed the issuance of service of process with its order granting the motion to extend the time to serve. Our court system cannot be founded on methodology that tells a litigant that he is okay to proceed with service of process, allow the one year time period to recommence an action under § 15-1-69 to expire and then leave that litigant without a remedy.

CONCLUSION

The agreed, approved orders of the trial court should be affirmed by this Court in the interest of justice – not just to the parties in the case but also because the judicial

system mandates it. Defendants' attacks on the orders it agreed to are too late. The trial court's denial of the motion to dismiss was proper.

RESPECTFULLY SUBMITTED, this the 7th day of April, 2008.

ROBERT JOSEPH PONTI, JR., Appellee

BY: BURNS, CUNNINGHAM & MACKEY, PLLC

BY: _____

William M. Cunningham, Jr. (MB[redacted])

CERTIFICATE OF SERVICE

COMES NOW the undersigned William M. Cunningham, Jr., who hereby certifies that has this day served, via United States Postal Service, First Class, Postage pre-paid, a true and correct copy of the above and foregoing **Brief of Appellee** to the Honorable Kenneth S. Womack, Attorney for defendant, at his regular mailing address of Anderson, Crawley & Burke, PLLC, P.O. Box 2540, Ridgeland, Mississippi 39158-2540., sent via facsimile 601-977-9975, and to the Honorable Roger T. Clark, Circuit Court Judge, Post Office Box 1461, Gulfport, Mississippi 39502.

So Certified, this the 9th day of April, 2008.

William M. Cunningham, Jr. (MB #[redacted])

WILLIAM M. CUNNINGHAM, JR.
BURNS, CUNNINGHAM & MACKEY, PC
P.O. BOX 1583
MOBILE, ALABAMA 36602
251-432-0612 – Office
251-432-0625 – Facsimile
Email: WMCunningham@BCMLawyers.com