

IN THE SUPREME COURT OF MISSISSIPPI
NO.2010-CA-01996

ROGER OLIVE

APPELLANT

VS.

ROBERT A. MALOUF

APPELLEE

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 Justices of the Mississippi Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Roger Olive, Defendant/Appellant
2. Robert A. Malouf, Esq., Plaintiff/Appellee
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3. Jephtha F. Barbour, IV, Esq.
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6. James E. Smith, Jr.
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Attorney for Defendant/Appellee
5. Honorable Cynthia Brewer
Chancery Court Judge, Madison County
P.O. Box 404
Canton, Mississippi 39046.

SO CERTIFIED, this the 27th day of June, 2011.

BY:

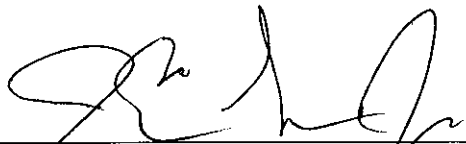


JAMES E. SMITH, JR. (MSB )

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TABLE OF AUTHORITIES

Cases

FLETCHER V. LIMECO CORPORATION, 996 So. 2d 773, 2007-CA-01247-SCT-CONSOLIDATED WITH NO. 2007-CA-01249-SCT, CONSOLIDATED WITH NO. 2007-CA-01262-SCT (MISS.2008)

TUCKER V. WILLIAMS, 7 So. 3d 961, No. 2007-CA-02223-COA (MISS. 2009)

Other

RULE 4, (b), M.R.C.P.

RULE 55, (b), M.R.C.P.

FORM 1A. SUMMONS, M.R.C.P.

STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT HAD JURISDICTION OVER DEFENDANT, OLIVE, DUE TO DEFECTIVE PROCESS ISSUED BY THE PLAINTIFF/APPELLEE, MALOUF.
- II. WHETHER AN APPEARANCE BY DEFENDANT, OLIVE AT THE HEARING ON OCTOBER 30, 2007, REQUIRED FURTHER NOTICE TO HIM BEFORE A DEFAULT COULD BE TAKEN.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND ITS DISPOSITION IN THE COURT BELOW.

The case was filed by Malouf against Olive and others to set aside a deed in which Olive was the Grantee. (R.1) The original summons that was received was fatally defective in that it did not comply with Rule 4 (b) M.R.C.P. (R. 36-37) Olive received no other notice and default was entered against him, contrary to the provisions of Rule 55(b) M.R.C.P. (R. 93-96) At the trial, on October 15, 2009, the Chancery Court Judge set aside the deed and ordered that Olive be notified. (Transcript 39-43) He was notified the next day. (R.128-129) Olive hired counsel, filed a Complaint to Set Aside Final Judgment and a Motion to Set Aside Final Judgment. (R. 131-142) The Chancellor declined to give him any relief and this appeal ensued. (Transcript 65-69)

II. STATEMENT OF THE FACTS

The original complaint was filed in this action by Robert A. Malouf, the Plaintiff, on October 16, 2007. (R. 1) Process was issued to each defendant, including Roger Olive, the Appellant herein on October 22, 2007. (R. 36-37) The process on was served on Olive on October 29, 2007, noticing him for a hearing to be held in the Madison County Chancery Court Building on October 30, 2007. (R. 45) Olive appeared that day. The original process issued by the Trial Court directed Olive to "appear before the Honorable Cynthia L. Brewer, Chancery Judge, and defend against the Plaintiff's request for temporary/preliminary injunctive relief at 3:00 o'clock p.m.

on the 30th day of October, 2007, in courtroom #2 of the Madison County Chancery Court located at 146 West Center Street, Canton, Mississippi, 39046. In case of your failure to appear and defend, a judgment will be entered against you for money or other things demanded in the complaint. You are not required to file an answer or other pleading prior to October 30, 2007 hearing, but you may do so if you desire". (R. 36)

The beginning of the second page of the Summons states:

"You are required to file an answer or other pleading to the complaint within thirty (30) days of service. (R. 37)

"Issued under my hand and the seal of said Court, this the 22nd day of October, 2007. Arthur Johnston, Chancery Clerk Madison County, Mississippi P.O. Box 404, Canton, MS 39046." (R. 37)

The original Summons, on its face, did not state the name and address of the Plaintiff's attorney, if any, otherwise the Plaintiff's address. (R. 36-37)

On October 30, 2007, The Chancery Court of Madison County, Mississippi entered its order setting a hearing on the Amended Complaint to be held at 9:30 a.m. on the 4th day of January, 2008, at the Madison County Chancery/Administrative Building in Canton, Mississippi. This order was filed with the Clerk of the Court on November 5, 2007. (R. 46) There is no record of a hearing in this case taking place on January 4, 2008.

On December 7, 2007, the Chancery Clerk of Madison County Mississippi issued an additional Summons to each of the Defendants including Olive. (R. 50) The Summons of December 7, 2007 was never served upon Olive.

On December 12, 2007, a document styled, "FIRST AMENDED COMPLAINT" was filed by the Plaintiff in this action. (R.52) No Summons was issued to any of the Defendants subsequent to the filing of the "FIRST AMENDED COMPLAINT".

A letter bearing the date of January 28, 2008, from Robert A. Malouf to the Defendants: Ms. Juanita N. Taylor, 3625 John F. Kennedy Blvd, Jackson, Mississippi 39213; Ms Gwendolyn Gilner, 4649 Norway Drive, Jackson, Mississippi 39206; Ms. Myrtis Shine, 441 East 87th Street, Chicago, Illinois 60619; and Mr. Roger Olive, 162 Nichols Quarters, Camden, Mississippi 39045, which indicates Malouf's intention to take a default against each of the Defendants, was filed for record in this action on January 30, 2008. (R. 88) The correct address for Olive is 192 Nichols, Camden, Mississippi 39045. (Exhibit List 1) There is nothing in the record that indicates that Olive received this communication, which was erroneously addressed. No other attempt was made by Malouf to have Olive served or to communicate further with him.

An "APPLICATION TO CLERK FOR ENTRY OF DEFAULT" was filed in this action on March 27, 2008. (R. 93) This Application is supported by an "AFFIDAVIT FOR DEFAULT" signed by Jephtha F Barbour, IV, on March 26, 2008, filed with the Clerk of the Chancery Court on March 27, 2008, which makes reference

to the service on Olive of the Summons which took place on October 29, 2007. (R. 94-95) On March 27, 2008, the Chancery Clerk of Madison County entered a Default against Olive. (R. 96)

On the 3rd day of June, 2008, BankPlus, by and through counsel, filed and “ANSWER AND AFFIRMATIVE DEFENSES OF BANKPLUS”. This pleading stated no claim or cause of action against Olive and no summons was issued for Olive based upon this pleading. (R. 111-117)

The Chancery Court of Madison County, Mississippi, entered a Final Judgment in this Action on the 15th day of October, 2009. In the Final Judgment, the Court held that “the deed wherein Juanita N. Taylor, Gwendolyn Gilner, and Myrtis Shine are grantors and Roger Olive is Grantee recorded in Book 2208 at Page 0401 of the Deed Book of the Chancery Clerk of Madison County, Mississippi, is hereby set aside, voided, and held for naught”. (R.122-127)

The Court ordered that Olive be served with a copy of the Final Judgment. Olive was served personally with a copy of the Final Judgment on October 16, 2009. The address set forth on the Process was the correct address of Olive, 192 Nichols Quarters, Camden, MS 39045. (R. 128-129)

A “COMPLAINT TO SET ASIDE FINAL JUDGMENT” was filed in this action on the 10th day of November, 2009, (R. 131-135) and a “MOTION TO SET ASIDE FINAL JUDGMENT” in this action was filed on the 12th day of November, 2009. (R. 136-142) A hearing was held by the Court on the 27th day of October, 2010. The Court ruled that the Court had Jurisdiction of Olive and that the relief

sought by Olive was not well taken as to either Malouf or BankPlus. (Transcript 65-69) The Court was mistaken as to Olive's appearance at the October 13, 2009 hearing. The Parties appearing on that date were listed on the Transcript of the hearing and Olive did not appear. (Transcript 1) There is no transcript in the record of the hearing of October 30, 2007, the hearing that Olive was originally summonsed to appear. On the 8th day of November, 2010, the Court entered its order dismissing the Complaint of Olive. (R. 164) The Court entered an Order Nunc Pro Tunc clarifying its ruling of October 27, 2010, on November 16, 2010. (R. 165)

SUMMARY OF THE ARGUMENT

The Chancery Court on Madison County, Mississippi, did not, at any time have Jurisdiction of the Defendant/Appellee, Roger Olive. The Plaintiff's original Summons did not comply with Rule 4 (b) M.R.C.P. or Form 1A. Summons. The Summons is, on its face, incomplete in that it did not state the name and address of the attorney to whom a response was to be mailed or delivered, therefore, the Summons is fatally defective. (Rule 4 (b) M.R.C.P.)

In the alternative, the matter was reset from October 30, 2007, the date of the original hearing, to January 4, 2008. No hearing was held that date. There is no Order of the Chancery Court of Madison County, Mississippi, continuing the matter beyond the date to which it was reset and there is no notice which was delivered to Olive giving him actual notice that a default would be taken against him as required by Rule 55 (b) M.R.C.P., which requires that a party who has made an appearance in an action "shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice." (Rule 55 (b) M.R.C.P.)

ARGUMENT

I. The Requirements of Rule 4 (b) M.R.C.P. Form.

Rule 4 (b) M.R.C.P. clearly sets forth the procedural requirements for the effective issuance of a Summons; that the Summons should contain the name and address of the attorney or other person to whom a response is directed should be mailed or delivered. (Rule 4(b) M.R.C.P.), (Form 1A, M.R.C.P.) The record is clear that the original Summons issued to Olive by the Chancery Clerk of Madison County for the Plaintiff/Appellee, Malouf did not meet the criteria set forth in this rule and in the form set forth in Appendix A. (R. 36-37) A subsequently issued Summons was properly prepared: however, this Summons was never served upon Olive. (R. 50.)

The Summons that is the basis of this Appeal combined the language of Rule 4 with the language of Rule 81. Olive was not given the information on the face of the Summons that was necessary for the completion of the filing and serving of his answer and defenses in the lower Court action. This Court has held that a Summons which does not substantially comply with the requirements of Rule 4 is deficient on its face and a dismissal of the action is proper. *FLETCHER V. LIMECO CORPORATION*, 996 So. 2d 773, 2007-CA-01247-SCT-CONSOLIDATED WITH NO. 2007-CA-01249-SCT, CONSOLIDATED WITH NO. 2007-CA-01262-SCT (MISS.2008) (citing *JOHNSON V. THOMAS EX REL. POLATSIDIS*, 982 So 2d 405 (MISS. 2008)

II. The Requirements of Rule 55 (b) M.R.C.P. Judgment.

Olive would plead, in the alternative, that this action was originally set for October 30, 2007. (R. 36-37) He was served with the original Summons issued by the Chancery Clerk of Madison County, Mississippi of October 29, 2007. (R. 45) Although there is no record of the hearing scheduled for October 30, 2007, he did appear at the hearing. The Chancery Court Judge noted his appearance in the action which actually occurred on October 30, 2007, at the hearing, when considering the Complaint to Set Aside Final Judgment and the and the Motion to Set Aside Final Judgment filed by Olive, the Chancellor erroneously stated the date of Olive's appearance. (Transcript 45-47, 65-69) The appearances listed by the Court Reporter for the October 13, 2009, hearing clearly shows that Olive was not present on that date. (Transcript 1)

On October 30, 2007, the Chancery Court Judge entered an "ORDER SETTING TIME AND PLACE FOR HEARING". This order set the hearing on January 4, 2008, and was filed with the Clerk of the Chancery Court of Madison County on November 5, 2007. (R. 46) There is no record of a hearing taking place on January 4, 2008, nor is there any record of the setting of another hearing in this action until August 28, 2009, when the matter was set for October 13 and 16, 2009. (R. 120-121)

A letter bearing the date of January 28, 2008, from Robert A. Malouf to the Defendants: Ms. Juanita N. Taylor, 3625 John F. Kennedy Blvd, Jackson, Mississippi 39213; Ms Gwendolyn Gilner, 4649 Norway Drive, Jackson, Mississippi 39206; Ms.

Myrtis Shine, 441 East 87th Street, Chicago, Illinois 60619; and Mr. Roger Olive, 162 Nichols Quarters, Camden, Mississippi 39045, which indicates Malouf's intention to take a default against each of the Defendants, was filed for record in this action on January 30, 2008. (R. 88) The correct address for Olive is 192 Nichols, Camden, Mississippi 39045. (Exhibit List 1) There is nothing in the record that indicates that Olive received this communication, which was erroneously addressed. No other attempt was made by Malouf to have Olive served or to communicate further with him. (R. 88)

Rule 55 (b) M.R.C.P. Judgment. States, in part, "If the party against whom judgment by default has appeared in the action, he...shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice". There was no showing by Malouf of service on Olive of three days' written notice of the application for judgment, nor was there any other attempt by Malouf to contact or to serve Olive until the service on Olive of a copy of the Final Judgment of the Court, at his correct address on October 16, 2009, the day after the Final Judgment was entered. (R. 128-129)

It is strongly argued that the appearance of Olive at the October 30, 2007, hearing was not enough to confer personal jurisdiction to the Chancery Court of Madison County, it was certainly enough of an appearance to justify the requirement of Rule 55(b) that he be served with at least three days' written notice prior to the

CONCLUSION

The Chancery Court of Madison County, Mississippi, did not have personal jurisdiction over Roger Olive and a Judgment against him was improper for the reason that the original Summons issued by the Chancery Clerk in this action was fatally defective under Rule 4 (b). In the alternative, the entry of a default against Roger Olive should be overturned for the reason that Olive either made no appearance in this action or, in the event the Court holds that he did make an appearance, he should have been served with at least three days' written notice prior to the entry of the default hearing in this action; therefore, this action should be reversed and remanded for further consideration by the Chancery Court of Madison County.

RESPECTFULLY SUBMITTED, this the 27th day of June, 2011.

ROGER OLIVE



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Roger Olive

CERTIFICATE OF SERVICE

I, James E. Smith, Jr, the attorney for Appellant, Roger Olive, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT, ROGER OLIVE, to the following:

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Honorable Cynthia Brewer
Chancery Court Judge, Madison County
P.O. Box 404
Canton, Mississippi 39046.

This the 27th day of June, 2011.



JAMES E. SMITH, JR. (MSB [REDACTED])