

**IN THE COURT OF APPEALS 03/26/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00538 COA**

**ELDER MCCLENDON**

**APPELLANT**

**v.**

**EDGAR L. FOREMAN**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD L. PATTERSON, JR.

COURT FROM WHICH APPEALED: FORREST COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

REX K. JONES

ATTORNEY FOR APPELLEE:

PERCY W. WATSON

NATURE OF THE CASE: CIVIL: SUIT FOR SPECIFIC PERFORMANCE

TRIAL COURT DISPOSITION: MOTION TO SET ASIDE DEFAULT JUDGMENT AGAINST  
APPELLANT MCCLENDON DENIED

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Elder McClendon's motion to set aside a default judgment entered by the Forrest County Circuit Court in favor of Edgar Foreman was denied. He appeals to this Court contending that he did not

receive service of process for the original suit, that he received no notice of the impending default judgment, that the complaint fails to state a cause of action, and that the trial court failed to properly calculate damages awarded in the judgment. We affirm.

## FACTS

Elder McClendon entered into a contract with Edgar Foreman on May 9, 1989, to purchase Foreman's property and to assume an obligation owed to Magnolia Federal Bank secured by the property. On October 30, 1990, Foreman brought suit for specific performance. A returned summons appears in the record showing that McClendon was personally served with process. Nevertheless, McClendon failed to respond to the suit and a default judgment was entered on May 16, 1991.

McClendon filed a motion on May 7, 1992, seeking to set aside the default judgment. He alleged a failure of service and that he was entitled to receive notice prior to the entry of a default judgment. A hearing was held on May 10, 1994, which resulted in a denial of this motion.

## DISCUSSION

### *1. Waiver of Issues on Appeal*

In the trial court, McClendon never argued that Foreman's original complaint had failed to state a cause of action, nor did he argue that damages were improperly calculated or that a hearing was first necessary before assessing damages. In his motion to set aside and at the hearing on that motion, the only allegation was that McClendon had never been served with a summons prior to the entry of default. We cannot find a trial judge to be in error concerning matters never raised before him. We will not review these issues on appeal. *Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385, 389 (Miss. 1994); *Methodist Hosp. v. Guardianship of Marsh*, 518 So. 2d 1227, 1228 (Miss. 1988) (citations omitted).

### *2. Process and Notice*

McClendon claims that he did not receive service of the complaint. This contention is in direct opposition to the return of service and testimony presented to the trial court showing that personal service of process had been made. The trial judge accepted this testimony in concluding that service had properly been made so that a default judgment could be entered. This finding is not clearly erroneous and, accordingly, the issue is unavailing for McClendon. *Dynasteel Corp. v. Aztec Indus., Inc.*, 611 So. 2d 977, 981 (Miss. 1992); *see Robb v. Ward*, 266 So. 2d 133, 133-34 (Miss. 1972); *see also Willenbrock v. Brown*, 239 So. 2d 922, 924-25 (Miss. 1970) (return of process is presumed to be correct under prior Mississippi Code).

As to whether McClendon should have received notice prior to entry of the default judgment, we find the position asserted by McClendon to be without merit. Only a defendant who has made an appearance is entitled to receive notice three days prior to a hearing on the application for default judgment. M.R.C.P. 55(b); *see Dynasteel Corp.*, 611 So. 2d at 981. McClendon does not allege he made an appearance. In fact, in attempting to prove why the default judgment should be set aside, McClendon testified he had no notice of the suit until after the default judgment was entered.

**THE JUDGMENT OF THE FORREST COUNTY CHANCERY COURT IS AFFIRMED.  
ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING,  
McMILLIN, AND PAYNE, JJ., CONCUR.**