

IN THE COURT OF APPEALS 1/28/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00914 COA

RONALD G. YARBOROUGH

APPELLANT

v.

STEVE WINSTEAD

APPELLEE

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

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NEWTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

SUSANNE A. MERCHANT

ATTORNEY FOR APPELLEE:

CHRISTOPHER A. COLLINS

NATURE OF THE CASE: CONVERSION

TRIAL COURT DISPOSITION: COURT DECLINED TO SET ASIDE DEFAULT JUDGMENT
FOR PLAINTIFF

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

FRAISER, C.J., FOR THE COURT:

Ronald Yarborough's motion to set aside a default judgment entered by the Newton County Circuit Court in favor of Steve Winstead was denied. Yarborough appeals contending that the circuit court erred in finding that process was properly served, and that the court erred in not setting aside the default judgment. We affirm.

FACTS

On February 17, 1995, Winstead filed a complaint against Yarborough for the conversion and destruction of 85 bales of hay. On February 21, 1995, Billy McCune served process on Yarborough personally. Yarborough did not respond, and on March 28, 1995, Winstead was granted a default judgment for \$2,607.25 with interest and court costs. On April 10, 1995, Winstead filed a garnishment proceeding against Yarborough and suggested that the Citizens Bank of Philadelphia was indebted to or had effects or property of Yarborough. On April 12, 1995, the bank responded to the writ of garnishment admitting an indebtedness to Yarborough.

On April 17, 1995, Yarborough filed a motion for relief from judgment and a motion to set aside entry of default. He asserted that process in the original action was not personally served upon him, that he had no knowledge a complaint was filed against him, and that the process server, Billy McClunes fraudulently misrepresented that the process had been served. After hearing and considering the motions, the trial court overruled them and entered the following order:

Plaintiff, Steve Winstead, sought to satisfy his Default Judgment through a Garnishment on the accounts of Defendant with Citizens Bank of Philadelphia, Mississippi, and the Garnishee, Citizens Bank of Philadelphia, Mississippi, filed their Answer to Garnishment with the Circuit Clerk of Newton County on April 12, 1995, depositing with said Clerk funds sufficient to satisfy the judgment.

That in support of Defendant's Motion For Relief From Judgment, Defendant offered the testimony of Mr. Bruce Kennedy, who testified that on February 21, 1995, he and Defendant Yarborough went to Jackson, Mississippi to obtain a license for Mr. Kennedy. Mr. Kennedy stated that they returned from Jackson at approximately 3:30 o'clock p.m. After Mr. Kennedy helped feed livestock, Defendant Yarborough drove him to his home in the Dixon community, arriving at approximately 5:30 o'clock p.m. That the Court heard additional testimony from Defendant's witness, Mrs. Mattie Yarborough, wife of Defendant, that she was not employed on February 21, 1995 and was at home that day on which she paid bills. That Jake Yarborough, son of Defendant Yarborough, testified that he was substitute teaching in Union on February 21, 1995 and further worked that day as a coach at East Central Community College until 5:30 o'clock p.m. that evening when he returned home, and he was unaware of his father being served with Process in this cause. Defendant Yarborough, himself, testified that he was not served with Process in this cause.

Further, Billy McCune testified on behalf of Plaintiff that he personally served Defendant Yarborough on February 21, 1995 and testified as to the location of Mr. Yarborough's house just past Bluff Springs Church of God and described the appearance of the house,

noting that it was split level with a garage underneath the house.

That the Court found the issue on the Motion For Relief From Judgment to be a question of fact requiring determination of the credibility of the testimony of Defendant Yarborough and the Process Server, Billy McCune.

The Court did not find persuasive the argument of Plaintiff that Defendant, in addition to establishing grounds under *Miss. R. Civ. P. 60 (b)*, for Relief from the Judgment, he must also establish a meritorious defense; further, the Court found unpersuasive, Defendant's Argument For Relief From Judgment due to fraud and misconduct of the adverse Party, and that the conduct of the Process Server could not be attributed to Plaintiff

If the subject Judgment is to stand or be set aside depends on whether there was valid process. The court has no jurisdiction unless there was process. Jurisdiction must be based on process, otherwise it would be a nullity. Based on the evidence that I have I decline to set aside the Judgment and I am going to dismiss the Motion for Relief from Judgment as being overruled for failure to meet the burden of proof necessary to set aside the Judgment..

Regarding Defendant's Motion to Set Aside Entry of Default, the Court finds that Plaintiff did plead for additional types of relief in addition to a stated monetary amount, and that said motion should be denied.

Yarborough appeals presenting the following issues:

I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT PROCESS WAS PROPERLY SERVED; AND

II. WHETHER THE CIRCUIT COURT ERRED IN NOT SETTING ASIDE THE DEFAULT JUDGMENT.

DISCUSSION

I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT PROCESS WAS PROPERLY SERVED

Yarborough claims that he did not receive service of the complaint. When examining whether process has been made and there is a return of process, there is a presumption that service was made. *Atterberry v. State*, 667 So. 2d 622, 625 (Miss. 1995); *Willenbrock v. Brown*, 239 So. 2d 922, 924-25 (Miss. 1970). The trial court held an evidentiary hearing at which both sides presented witnesses. As the trial court stated, the key to determining whether Winstead was served is a question of credibility of witnesses. "When the trial judge sits as the finder of fact, he has the sole authority for determining the credibility of the witnesses." *Yarbrough v. Camphor*, 645 So. 2d 867, 869 (Miss. 1994). The trial judge found the process server, McCune's testimony that he served Yarborough

credible. This finding is not clearly erroneous. *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).

II. WHETHER THE CIRCUIT COURT ERRED IN NOT SETTING ASIDE THE DEFAULT JUDGMENT

A. FRAUD OR MISTAKE

Application for default judgment is addressed to the sound discretion of the trial court. *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 387-88 (Miss. 1987); *Shannon v. Henson*, 499 So. 2d 758, 763 (Miss. 1986); *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss. 1986); *Pointer v. Huffman*, 509 So. 2d 870, 874 (Miss. 1987). We have no authority to disturb the trial court's exercise of its discretion, absent a firm conclusion on our part that discretion has been abused. *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992); *Wilson v. South Cent. Mississippi Farmers, Inc.*, 494 So. 2d 358, 360 (Miss. 1986).

The test for setting aside a default judgment is as follows:

A motion to set aside a default judgment or an order may be made under Miss. R. Civ. P. 60(b). Relief may be granted upon a sufficient showing of fraud, mistake, or other justifiable reason. Generally a Rule 60(b) motion will not be granted unless a three-prong "balancing" test is satisfied. Under this test, one must determine: (1) Whether the movant's basis for requesting relief is legitimate (e.g. Whether a justifiable reason is evidenced)? (2) Whether the movant has a colorable defense to the merits of the adjudged case: and (3) Whether the non-movant will be unduly prejudiced if the motion is granted?

Brown v. Nevels, 578 So. 2d 609, 613 (Miss. 1991) (citing *King v. King*, 556 So. 2d 716, 719 (Miss. 1990)).

Yarborough argues that the default judgment should be set aside because McCune mistakenly or fraudulently rendered a false return of process. Applying the three part test, we conclude that trial court did not abuse its discretion. First, there is substantial evidence to support the trial court's conclusion that McCune did indeed serve Yarborough with process. Second, Yarborough presented no evidence that he has a colorable defense on the merits to the adjudged case. Third, Winstead would not be unduly prejudiced by granting this motion; however, the first two factors are of a greater weight in this case. We conclude that the trial court did not abuse its discretion.

B. MORE RELIEF WAS GRANTED THAN ASKED FOR IN THE COMPLAINT.

Yarborough argues that the default judgment is void as a matter of law because it grants more relief than was requested in the complaint. Specifically, the trial court awarded \$70.00 in court costs and \$162.25 of interest which Yarborough claims Winstead did not claim in his pleadings.

Winstead need not plead for costs or interest as both are allowed to the prevailing party of right. The Mississippi Supreme Court has recognized that unless otherwise provided for by statute, costs shall

be allowed to the prevailing party "as of course." *Crowe v. Smith*, 603 So. 2d 301, 303 (Miss. 1992) (citing Miss. R. Civ. Pro. 54(d)). Further, Mississippi acknowledges the inherent judicial authority to award the prevailing party interest. *Sunburst Bank v. Keith*, 648 So. 2d 1147,1153 Miss. 1995) (citing Miss. Code Ann. § 75-17-7 (1972)).

Thus, the default judgment did not grant more relief than permitted, and the default judgment is valid.

THE DEFAULT JUDGMENT OF THE NEWTON COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO YARBOROUGH.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.