IN THE

Supreme Court Of Virginia

RECORD NO. 171117

SCV: Submitted on 01-31-2018 09:27:29 EST for filing on 01-31-2018

COLIN McCULLEY,

Appellant,

v.

BROOKS & COMPANY GENERAL CONTRACTORS, INC.,

Appellee.

OPENING BRIEF OF APPELLANT

Richard T. Booker, Esquire
(Virginia State Bar. No. 83435)
McDONALD, SUTTON
& DuVAL, PLC
5516 Falmouth Street
VISTAS II – Suite 108
Richmond, Virginia 22320
(804) 643-0000 (Telephone)
(804) 788-4427 (Facsimile)
rbooker@mcdonaldsutton.com

Counsel for Appellant

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II. The trial court erred in using the Appellant's participation in debtor's interrogatories as the sole basis for its jurisdiction over the Appellant, after the Appellee represented to both the Appellant and the debtor's interrogatories Commissioner that the debtor's interrogatories could not be stayed until the Appellant's Motion to Vacate could be heard, and that the Appellant had no choice but to participate under penalty of show cause being issued against the Appellant. (J.A. at 95–97; J.A. at 94; J.A. at 78–82; J.A. at 83–92.)

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the trial court was to vacate the void judgment, not to allow an attempt to cure the defective service.

II. The trial court erred by using the Appellant's participation in debtor's interrogatories as the sole basis for obtaining jurisdiction over the Appellant, after representations by the Appellee to the Appellant that he had no choice but to participate in those debtor's interrogatories before his Motion to Vacate could be heard. Such conduct by the Appellee is prohibited by Abel v. Smith, and Norfolk & O. v. R. Co. v. Consolidated Turnpike Co.

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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 171117

COLIN MCCULLEY,

APPELLANT

V.

BROOKS & CO. GENERAL CONTRACTORS, INC.,

APPELLEE

OPENING BRIEF OF APPELLANT

MATERIAL PROCEEDINGS BELOW

On July 7, 2016, in the Circuit Court for the City of Richmond, before the Honorable William R. Marchant, the Appellee, Brooks & Co. General Contractors, Inc., was awarded a default judgment against the Appellant, Colin McCulley. (J.A. at 101.) On September 19, 2016, the Appellant, by counsel filed a Motion to Vacate the default judgment on the grounds that the Appellant had not been properly served with notice of the underlying action. (J.A. at 65–68.) A hearing on the Motion to Vacate was heard on February 10, 2017, and the parties were asked to brief the matter. (J.A. at

101.) On March 23, 2017, the trial court issued a Letter Opinion denying the Appellant's Motion to Vacate. (J.A. at 78–82.) The Appellant filed a Motion to Reconsider on April 10, 2017. (J.A. at 83–92.) On May 10, 2017, the Motion to Reconsider was denied. (J.A. at 94.) The Final Order denying the Appellant's Motion to Vacate was entered on May 23, 2017. (J.A. 95–97.) The Appellant appealed the Final Order to this Honorable Court.

On October 3, 2017, while the Appellant's Petition for Appeal was pending before this Court, the Commissioner Marley issued a show cause against the Appellant. (J.A. at 110.)

ASSIGNMENTS OF ERROR

I. The trial court erred in finding that the Appellant's participation, even under protest, in post judgment debtor's interrogatories, waived the defective service of process, and thereby validated an otherwise void judgment, and further erred in finding that it had the authority to do anything other than vacate that void judgment more than twenty-one days after it had been entered. (J.A. at 95–97; J.A. at 94; J.A. at 78–82; J.A. at 83–92.)

II. The trial court erred in using the Appellant's participation in debtor's interrogatories as the sole basis for its jurisdiction over the Appellant, after the Appellee represented to both the

Appellant and the debtor's interrogatories Commissioner that the debtor's interrogatories could not be stayed until the Appellant's Motion to Vacate could be heard, and that the Appellant had no choice but to participate under penalty of show cause being issued against the Appellant. (J.A. at 95–97; J.A. at 94; J.A. at 78–82; J.A. at 83–92.)

STATEMENT OF FACTS

On July 7, 2016, the Appellee obtained a default judgment against the Appellant and initiated collections proceedings. (J.A. at 101.) The Appellant received a summons to appear at debtor's interrogatories on September 15, 2016, and obtained counsel. (J.A. at 79.)
Counsel for the Appellant reviewed the file at the Richmond City Circuit Court and found what he believed to be a defect in the service of process upon the Appellant in connection with the underlying judgment. (J.A. at 65-66.) With this information, counsel for the Appellant called the office of the Commissioner in Chancery, at the time William Grogan, Esquire, to reschedule the interrogatories until he could file and be heard on a Motion to Vacate on behalf of the Appellant; as a result, the matter was continued until September 27, 2016. (J.A. at 65–68, 79.) The matter having been continued, subject to a special appearance, counsel for the Appellant filed

a Motion to Vacate the underlying judgment on September 19, 2016. (J.A. at 65–68, 79.)

Prior to attending the debtor's interrogatories, now scheduled before Commissioner Howard Marley, Esquire, on September 26, 2017, Appellant's counsel notified Appellee's counsel of his intention to ask the Commissioner to suspend the proceedings until the Motion to Vacate could be heard, and attempted to reach a settlement agreement as to the underlying judgment to save both parties the expense of trial. (J.A. at 90.) The parties had not reached an agreement by the time of the rescheduled debtor's interrogatories, and counsel for the Appellant suggested via electronic mail that the parties meet early to either come to an agreement, or for Appellee's counsel to provide his available dates for the Motion to Vacate. (J.A. at 90.)

The parties arrived at the debtor's interrogatories. (J.A. at 79.) Counsel for the Appellant informed Commissioner Marley of the Motion to Vacate, counsel for the Appellee argued that the Commissioner did not have the authority to suspend the proceedings until the Motion to Vacate could be heard, and the debtor's interrogatories proceeded over the objection of the Appellant. (J.A. at 91–92.) A court reporter was not present at the debtor's interrogatories and the audio from the debtor's

interrogatories was not recorded. Under the threat of potential show cause the Appellant participated in the debtor's interrogatories. (J.A. at 102.) Counsel for the Appellant never withdrew the Motion to Vacate and, after it became apparent that a settlement agreement was not possible, a hearing on the Motion to Vacate was conducted on February 10, 2017. (J.A. at 101.)

There was no court reporter on February 10, 2017, as the court reporter ordered by the Appellant was relieved by the Court prior to the hearing. Counsel for both parties, a representative for the Appellee, David Brooks, who was present at the debtor's interrogatories, and the Appellant were present at the hearing on the Motion to Vacate. (J.A. at 101.) Mr. Brooks and Mr. McCulley testified before the trial court. (J.A. at 102.)

Based on the pleadings that were the basis of the default judgment and the testimony of the parties at the hearing on the Motion to Vacate, the trial court found that the Appellee had not mailed a copy of the service of process to the Appellant not less than ten days before the hearing for the entry of the default judgment as required by Section 8.01-296 of the Code of Virginia. (J.A. at 95–97.)

At the close of the evidence, counsel for the Appellee raised the argument that Appellant's appearance at the debtor's interrogatories

waived the special appearance and the Motion to Vacate. (J.A. at 78.) The trial court requested that the parties brief his distinct issue. (J.A. at 78.)

By Letter Opinion dated March 23, 2017, the trial court denied the Appellant's Motion to Vacate. (J.A. at 78–79.) The Appellant filed a Motion to Reconsider on April 10, 2017, and requested a hearing. (J.A. at 83–92.) The trial refused to have a hearing on the Motion to Reconsider, it denied the motion, and the Final Order was entered on May 23, 2017. (J.A. at 94–97.)

On October 3, 2017, while the Appellant's Petition for Appeal was pending before this Court, the Commissioner Marley issued a show cause against the Appellant. (J.A. at 110.)

STANDARD OF REVIEW

In an appeal before the Supreme Court of Virginia questions of the trial court's application of the law to the facts and circumstances of a case law are subject to *de novo* review. Commonwealth Transportation Commissioner v. Windsor Industries, Inc., 272 Va. 64, 71, 630 S.E.2d 514, 516 (2006). The Appellant's Assignments of Error involve pure questions of law.

ARGUMENT

I. The trial court erred in denying the Appellant's Motion to Vacate. The trial court found on the record that the Appellee had not mailed a copy of the service of process to the Appellant as required by law. As the service of process was defective, the trial court never had jurisdiction over the Appellant, making the judgment void *ab intitio*, not voidable but void. After twenty-one days from the entry of the judgment, the only authority vested in the trial court was to vacate the void judgment, not to allow an attempt to cure the defective service.

The trial court did not have jurisdiction over the Appellant at the time the default judgment was entered against him. A trial court does not have jurisdiction over a party when that party has not been served properly pursuant to the law. Lifestar Response of Md., Inc. v. Vegosen, 267 Va. 720, 724, 594 S.E.2d 589, 591 (2004); Finkel Outdoor Prods. v. Bell, 205 Va. 927, 931, 140 S.E.2d 695, 698 (1965). Virginia Code Section 8.01-296 sets forth the proper methods for personal and substituted service in the Commonwealth. Va. Code Ann. § 8.01-296. When a party is unable to obtain personal service, he may post a copy of the service of process on the door of the person to be served, "provided that not less than 10 days before judgment by default may be entered, the party causing service or his attorney or agent mails to the party served a copy of such process and thereafter files in the office of the clerk of the court a certificate of such mailing." Va. Code Ann. § 8.01-296 (2) (b).

In this case the Appellee did not obtain personal service on the Appellant and attempted substituted service under Virginia Code Section 8.01-296 (2) (b). The trial court found that the Appellee had not mailed the copy of the service of process not less than ten (10) days before the entry of the default judgment as required by the statute, and accordingly, that the service of process was defective upon the Appellant. Because the service of process was defective upon the Appellant, the trial court never obtained personal jurisdiction over the Appellant. Lifestar Response of Md., Inc., 267 Va. at 724, 594 S.E.2d at 591.

As the trial court did not obtain personal jurisdiction over the Appellant at the time of the entry of the default judgment, that judgment was void. "A void judgment is one that has been procured by extrinsic or collateral fraud, or entered by a court that did not have jurisdiction over the subject matter or the parties." Rook v. Rook, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987) (internal citations omitted); Slaughter v. Commonwealth, 222 Va. 787, 284 S.E.2d 824, (1981) ("a jurisdictional defect in the adjudication proceeding itself, [] such a defect renders the order of adjudication void *ab initio*."); Finkel Outdoor Prods., 205 Va. at 931, 140 S.E.2d at 698; Broyhill v. Dawson, 168 Va. 321, 191 S.E. 779 (1937).

Under Rule 1:1 of the Rules of the Supreme Court of Virginia, a trial court loses the authority to do anything to an existing judgment more than twenty-one days after the entry of that judgment. Rule 1:1 of the Rules of the Virginia Supreme Court states that a final judgment of the trial court may be "modified, vacated, or suspended for twenty-one days after the date of entry, and *no longer*." Va. Sup. Ct. Rule 1:1 (emphasis added). After the expiration of that twenty-one day time period the trial court loses jurisdiction over the case. Va. Sup. Ct. Rule 1:1; Super Fresh Food Mkts. of Va., Inc. v. Ruffin, 263 Va. 555, 563-64, 561 S.E.2d 734, 739 (2002); Hirschkop v. Commonwealth, 209 Va. 678, 679-80, 166 S.E.2d 322, 323-24 (1969).

There is one exception to Rule 1:1 and that is that a void judgment "may be attacked in any court at any time." Rook, 233 Va. at 95, 353 S.E.2d at 758. In Broyhill v. Dawson, the foundational case on void judgments, this Court found that:

> It is conceded by all the authorities that if a judgment is void, it may be assailed anywhere, at any time, in any way, by anybody. It is immaterial whether the assault be direct or collateral. It is a nullity and may be treated as such. "If the service or appearance was illegal, a decision of the trial court to the contrary could not make it legal. If

> such were true, then the trial court could never, under any circumstances, enter a void judgment. "There are many cases in which the trial court has adjudged that it had jurisdiction of the subject matter and of the parties but did not, and yet its judgment has been held to be void and subject to collateral attack."

Broyhill, 168 Va. at 326, 191 S.E. at 781-782.

The default judgment was entered on July 7, 2016, and on July 28, 2016, the trial court lost jurisdiction over the case, divesting it of the authority to do anything other than vacate a void judgment. Despite Rule 1:1 of the Rules of the Virginia Supreme Court of Virginia and Broyhill, based on a hearing on the Appellant's Motion to Vacate on February 10, 2017, and subsequent pleadings, the trial court effectively attempted to exercise jurisdiction over the case more than twenty-one days after the entry of the judgment. The trial court violated the twenty-one day rule by reopening the case to cure the defect in service upon the Appellant in an attempt to validate the void judgment. In so doing, the trial court committed reversible error.

The trial court's reasoning was based upon Appellee's argument and application of Florida law regarding the difference between a special appearance and a general appearance. According to the Letter Opinion,

the trial court found that while the service upon Appellant was defective, the Appellant waived his ability to challenge the defect by appearing at post-judgment debtor's interrogatories, thus retroactively curing the defective service and validating the void judgment. This logic is flawed, reliant upon inapplicable precedent, and is in contravention to Rule 1:1, the Broyhill discussion, and other Virginia precedent. As stated in Lifestar and Finkel, the default judgment entered against the Appellant was void and illegal, as the trial court never had jurisdiction over the Appellant. Accordingly, the debtor's interrogatories were void and illegal as they were based upon a judgment that the trial court never had the jurisdiction to enter. The language in Broyhill is clear, if the service or appearance is illegal, a trial court does not have the authority to retroactively make that service or appearance legal. After making the finding that the judgment was void, the trial had no choice but to vacate the default judgment and any other action was an abuse of discretion.

The distinction between a special appearance and general appearance is irrelevant as after July 28, 2016, the trial court lost the jurisdiction to do anything but vacate a void judgment. Even so, the Appellant's participation in debtor's interrogatories did not constitute a general appearance. The Appellant filed the Motion to Vacate on

September 19, 2016, and did not participate in debtor's interrogatories until September 27, 2016. Under Lyren v. Ohr, a defendant who has made a special appearance and filed a Motion to Vacate based on defective service of process, has not waived that special appearance and made a general appearance if that Motion was filed prior to, or simultaneously with the filing of any pleadings on the merits of the case. Lyren v. Ohr, 271 Va. 155, 160, 623 S.E.2d 883, 885 (2006); Va. Code Ann. § 8.01-277. In this case, no further pleadings were filed by the Appellant, and the Appellant appeared before the Commissioner of Chancery pursuant to lawfully issued process and under the threat of show cause and criminal prosecution if he did not appear. The Appellant's fears were well founded, as despite the appeal before this Court, the Appellant is facing a hearing to show cause where he faces the possibility of incarceration.

Because the trial court did not have jurisdiction over the case, none of the cases relied upon in its Letter Opinion are applicable. In each and every case cited by the trial court, the aggrieved parties actively participated in the merits of their case, and the trial court was not divested of jurisdiction under Rule 1:1. *See* Lyren, 271 Va. 155, 623 S.E.2d 883 (defendant filed Answer and Grounds of Defense prior to filing a Motion to Dismiss but the Court found that if the defendant had filed the Motion to Dismiss prior to or

simultaneous with his Answer and Grounds of Defense it would not have constituted a general appearance); Gilpin v. Joyce, 257 Va. 579, 515 S.E.2d 124 (1999) (defendant filed grounds of defense and counterclaim in the trial court); Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 591, 194 S.E. 727, 734 (1938) ("This contention is baseless because the defendant appeared at the trial, made a motion to quash, lodged its demurrer to the petition and filed its grounds which embodied the outline of a full and complete defense. There is nothing in the record to suggest that the defendant appeared specially for the purpose of making objections to any defects in the process or pleadings."); Maryland Casualty Co. v. Clintwood Bank, 155 Va. 181, 154 S.E. 492 (1930) (petition for removal was filed and heard in the trial court); Norfolk & O. v. R. Co. v. Consolidated Turnpike Co., 111 Va. 131, 68 S.E. 346 (1910) (Court found that defendant effectively filed a demurrer in the trial court.); Salomonsky v. Brandaid Mktg. Corp., 66 Va. Cir. 24 (2004) (defendant filed a motion for removal in the trial court); New Life Christian Church v. Dynabilt Tech. Int'l Corp., 59 Va. Cir. 399 (2002) (defendant filed a motion for extension of time to file late pleadings and this motion was granted by the trial court); Emeritus Communs. v. Benedictine College, 58 Va. Cir. 61 (2001)

(defendant filed discovery and a Motion to Compel which was heard by the trial court).

The Rules of the Supreme Court of Virginia and the long established precedent of the Supreme Court of Virginia leave no room for confusion. In order to find for the Appellee and affirm the trial court's decision, this Court must disregard Rule 1:1 of the Rules of the Virginia Supreme Court, and overrule years of established precedent including Broyhill v. Dawson, Finkel Outdoor Products v. Bell, Slaughter v. Commonwealth, Rook v. Rook, and Lifestar Response of Maryland, Incorporated v. Vegosen, resulting in a dramatic departure from existing Virginia law. In addition to erasing the separation of powers between the Virginia Legislature and the Judiciary and violating principles of *stare decisis*, such a finding creates a disincentive for future plaintiffs to comply with the service provisions of Virginia Code Section 8.01-296 and prejudices all future defendants. Under the law erroneously created by the trial court, a plaintiff need not properly serve a defendant during the trial phase of a law suit. Instead, he may improperly serve the defendant during those proceedings and obtain his default judgment against a defendant who was never afforded the opportunity to argue the merits of his case. After the judgment has been obtained, the plaintiff then makes sure that the defendant is properly served

for debtor's interrogatories. The defendant, now under the threat of criminal prosecution for failing to appear, shows up to the debtor's interrogatories, at the office of a private attorney who is powerless to do anything about the default judgment entered against the defendant, and the void judgment, no matter how baseless, is automatically validated with the defendant never getting his day in court. Because the trial court erred in finding that it had jurisdiction over the case more than twenty-one days after the entry of the judgment, the decision of the trial court must be reversed, and the default judgment against the Appellant must be vacated.

II. The trial court erred by using the Appellant's participation in debtor's interrogatories as the sole basis for obtaining jurisdiction over the Appellant, after representations by the Appellee to the Appellant that he had no choice but to participate in those debtor's interrogatories before his Motion to Vacate could be heard. Such conduct by the Appellee is prohibited by Abel v. Smith, and Norfolk & O. v. R. Co. v. Consolidated Turnpike Co.

The trial court erred by allowing the Appellee to use the Appellant's participation in debtor's interrogatories as the sole basis to obtain jurisdiction over the Appellant. Consistent throughout the debtor's interrogatories proceedings, the Appellee maintained that the Commissioner in Chancery did not have the authority to suspend those proceedings until the Appellant's Motion to Vacate could be heard. Under Virginia law, the Appellee is not entitled to benefit from his representations

to Appellant and the Commissioner. Norfolk & O. v. R. Co. v. Consolidated Turnpike Co., a case cited in the trial court's Letter Opinion states that "a litigant will not be allowed in a subsequent judicial proceeding to take a position in conflict with a position taken by him in a former judicial proceeding, which latter position is to the prejudice of the adverse party, where the parties are the same and the same questions are involved." Norfolk & O. v. R. Co. v. Consolidated Turnpike Co., 111 Va. 131, 135-136, 68 S.E. 346, 347 (1910). In an attachment case involving a non-resident defendant, Abel v. Smith, the Court found that "it is well established as a general rule that in a civil case a court will not take jurisdiction based on a service of process on a defendant who was brought within the reach of its process wrongfully or fraudulently, or by deceit or any other improper device, provided, of course, the wrong or deceit is chargeable to plaintiff. This view is based not on a lack of jurisdiction, but on the view that it is improper for a court to exercise a jurisdiction so obtained." Abel v. Smith, 151 Va. 568, 576, 144 S.E. 616, 618 (1928) (quoting 15 Corpus Juris, page 800).

In this case counsel for the Appellant communicated to counsel for the Appellee that he had filed a Motion to Vacate and that he intended to have the debtor's interrogatories postponed until the Motion to Vacate

could be heard. By electronic mail dated September 26, 2016, counsel for the Appellee stated that the Commissioner did not have the authority to suspend the debtor's interrogatories, and made this same representation to the Appellant and the Commissioner in Chancery on September 27, 2016. Counsel for the Appellant again attempted to have the debtor's interrogatories proceedings suspended until the Motion to Vacate could be heard and by electronic mail dated January 20, 2017, counsel for the Appellee restated his position that the Commissioner did not have the authority to stay the proceedings and reflected the Commissioner's prior decision that he did not have the authority to suspend the proceedings. If the Appellant refused to participate in the debtor's interrogatories to which he was lawfully summoned, Virginia Code Section 8.01-508 states that:

> [T]he commissioner or court shall issue (i) a capias directed to any sheriff requiring such sheriff to take the person in default and deliver him to the commissioner or court so that he may be compelled to make proper answers, or such conveyance or delivery, as the case may be or (ii) a rule to show cause why the person summoned should not appear and make proper answer or make conveyance and delivery. If the person in default fails to answer or convey and deliver

> he may be incarcerated until he makes such answers or conveyance and delivery.

Va. Code Ann. § 8.01-508. After making multiple representations to the Appellant and the Commissioner that he had to participate in the debtor's interrogatories, the Appellee then used this very participation as the sole basis to cure the defect in the service of process upon the Appellant and obtain jurisdiction over the Appellant. Under Abel v. Smith, and Norfolk & O. v. R. Co. v. Consolidated Turnpike Co, the Appellee is not entitled to benefit from this type of misconduct. Accordingly, the decision of the trial court must be reversed, and the default judgment against the Appellant must be vacated.

CONCLUSION

For the foregoing reasons, the Appellant moves this Court to grant his Petition for Appeal, reverse the decision of the trial court, and vacate the default judgment entered against him.

COLIN MCCULLEY

By /s/
Of Counsel

Richard T. Booker, Esquire
VSB # 83435
McDONALD, SUTTON & DuVAL, PLC
5516 Falmouth Street
VISTAS II – Suite 108
Richmond, Virginia 23230
(804) 643-0000
(804) 788-4427 fax

CERTIFICATE

(a) The names of the parties and the names and addresses of their counsel are as follows:

Richard T. Booker, Esquire
McDONALD, SUTTON & DuVAL, PLC
5516 Falmouth Street
VISTAS II – Suite 108
Richmond, Virginia 23230
(804) 643-0000
(804) 788-4427 fax
email: rbooker@mcdonaldsutton.com
Counsel for Appellant, Colin McCulley

Patrick C. Henry, II, Esquire
Marrs & Henry
7202 Glen Forest Drive, Suite 307
Richmond, VA 23226
(804) 662-5715
(804) 662-5712
email: phenry@marrs-henry.com
Counsel for Appellee, Brooks & Co. General Contractors, Inc.

(c) The undersigned hereby certifies pursuant to Rule 5:26(b) of the Rules of the Virginia Supreme Court that this Opening Brief of Appellant does not exceed 50 pages.

(d) The undersigned hereby certifies that Rule 5:26(e) of the Rules of the Virginia Supreme Court has been complied with and pursuant to the Rule, a PDF version of this Opening Brief of Appellant has been filed through VACES, and ten paper copies delivered to the Clerk's Office. An electronic version has also been delivered to Counsel for Appellee, Patrick C. Henry, II, Esquire, Marrs & Henry, 7202 Glen Forest Drive, Suite 307, Richmond, VA 23226, via electronic mail to phenry@marrs-henry.com, on this 29th day of January, 2018.

/s/
Richard T. Booker