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NOT TO BE PUBLISHED

# Commonwealth of Kentucky
# Court of Appeals

NO. 2006-CA-000720-ME

CABINET FOR HEALTH & FAMILY SERVICES, COMMONWEALTH OF KENTUCKY EX. REL. T.S. — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE GENE CLARK, JUDGE
ACTION NO. 04-J-00162

E.S.S. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal is taken from an Order Setting Aside Judgment based on a finding that the judgment was void. Acting pursuant to CR 55.02 and 60.02, E.S.S.[2] alleged that he was never served with the initiating complaint and summons. Accordingly, E.S.S. argued that without proper service of process, the default judgment

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Initials are used due to the confidential issue of paternity in this case.

entered against him was void. Finding that E.S.S. was not served with process, the lower court ordered the default judgment to be set aside. This Court affirms that decision.

Appellant, Cabinet for Health and Family Services, acting on behalf of T.S., filed a paternity and child support case against the defendant below, E.S.S. Default Judgment was granted in October of 2004. After the default judgment was entered, contempt proceedings were brought against E.S.S. for failure to pay the ordered child support. At a hearing on the contempt motion, E.S.S. asked for a reduction in the child support amount. An agreed order for lower payments was later entered into the record. About five months later, E.S.S. again fell behind in payments and another contempt hearing was held. At this hearing, E.S.S. requested another reduction in child support payments and accordingly filed a formal motion with the court. That motion was never heard due to scheduling problems. E.S.S. then filed the motion to set the default judgment aside that brings the case to this Court.

The trial court below specifically found that the complaint and summons were in fact served upon the father of E.S.S. rather than E.S.S. himself. Relying upon CR 4.04, the trial court concluded that the failure to obtain personal service on E.S.S. rendered the judgment void. The court cited *Burton & Burton Tower Co. v. Dowell*, 471 S.W.2d 708 (Ky. 1971), in finding that without personal service the judgment was void for want of personal jurisdiction. Additionally, the trial court held that the post judgment participation of E.S.S. was insufficient to grant the trial court jurisdiction. This appeal by the Cabinet followed.

The Appellant provides three arguments for why the order to set aside the default judgment should be reversed. The Appellant claims that: (1) by participating in the post-judgment proceedings, the Appellee waived any defects in the service of process, (2) the Appellee waived any defects of process by failing to raise the issue within a reasonable time, and (3) the trial court abused its discretion in setting aside the default judgment. This Court disagrees with all three of the Appellant's arguments.

First, the Appellee did not waive defects in service of process by participating in post-judgment proceedings. The Appellant argues that participating in post-judgment proceedings is just like participating in pre-judgment proceedings when dealing with faulty service of process and jurisdiction. It is Appellant's contention that by availing himself of the trial court's power to reduce the previously ordered child support, Appellee has submitted himself to the court's jurisdiction. Personal jurisdiction over a party is secured by service of notice of the impending suit or through a voluntary appearance in the proceedings. *Burton & Burton Tower Co. v. Dowell*, 471 S.W.2d 708 (Ky. 1971). Without personal jurisdiction over a party to the suit, a court cannot render a valid judgment against them. Had Appellee appeared before the court in some manner before the default judgment was entered, he would have effectively waived any defects in process and submitted himself to the jurisdiction of the court. In this case, however, the Appellee appeared only after the judgment was entered against him and under threat of contempt. A judgment rendered against a party the court does not have personal jurisdiction over is a void judgment. *Id*. A void judgment "is not entitled to any respect

or deference by the courts of the Commonwealth." *Mathews v. Mathews*, 731 S.W.2d 832, 833 (Ky. App. 1987). Because the judgment was void, any attempts to modify were likewise nullities and without effect. The Clay Family Court had no other choice but to set aside the default judgment because a "void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside." *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607, 610 (Ky. App. 1995).

Appellant contends that by participating in the post-judgment proceedings, the Appellee has waived any defects in service of process and put himself under the jurisdiction of the court. If this were true, the defects in service of process would be cured and the default judgment could stand. Unfortunately that is not the case. The cases of *Clay's Adm'r v. Edwards' Trustee*, 2 S.W. 147 (Ky. App. 1886), and *Newsome v. Hall*, 161 S.W.2d 629 (Ky. App. 1942), illustrate this point. In both of these cases, a judgment was entered that was later declared void. Before these judgments were declared void however, other proceedings and judgments took place flowing from the original void judgment. In essence, it was contended that these post-judgment proceedings validated the original void judgment. In both cases, the appellate courts held that "if the judgment was void, all proceedings thereunder were also void." *Newsome,* at 632; *Clay's Adm'r*, at 149. In the present case, the default judgment was void. All further proceedings in which Appellee participated, including those which modified and sought to modify child support, were also void. Participating in void proceedings does not constitute an appearance which would waive any defects in service of process.

Appellant next contends that the Appellee permitted too much time to pass before making his motion to set aside the judgment, thereby waiving any defect in the service of process. While it is true that Civil Rule 60.02 does require that a motion be made within a reasonable time, such determinations regarding this rule are left "to the sound discretion of the trial court." *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky.1957). If the trial court exercised its discretion by granting the C.R. 60.02 motion, then absent an arbitrary or unreasonable decision, it will stand. In *Rogers Group, Inc. v. Masterson*, 175 S.W.3d 630, 635 (Ky. App. 2005), our Court noted that while a motion for relief from a judgment on the grounds of voidness should be "filed within a reasonable time, ... even that proposition is debatable since a void judgment does not acquire validity with the passage of time." This suggests that the reasonable time standard could be longer than usual or even non-existent when setting aside a judgment for voidness.

Finally, Appellant argues that the trial court abused its discretion in setting aside the default judgment. The Appellant cites *Sunrise Turquoise, Inc. v. Chemical Design Co., Ind.*, 899 S.W.2d 856 (Ky. App. 1995) to support this contention. This case puts forth three factors a party must show in order to set aside a default judgment. These factors would be relevant if the trial court were actually setting aside a default judgment. In reality, the trial court was declaring the default judgment void. Since the default judgment was deemed void, no rights were conferred on any party and therefore there was nothing to set aside. The reasons for setting aside a default judgment as argued by the Appellant are irrelevant to this case.

For the reasons set forth herein, the judgment is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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