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Plaintiff Must Prove Service on Motion to Vacate Default Judgment

By Erin Louise Palmer, *Litigation News* Contributing Editor – May 12, 2015

Service by certified mail is insufficient to satisfy the plaintiff's burden in a motion to vacate a default judgment, according to the U.S. District Court for the Eastern District of Pennsylvania. In *Myers v. Moore*, the district court granted the defendants' motion to vacate a default judgment of more than $1 million where the plaintiff failed to demonstrate that the defendants had actual knowledge of the lawsuit and where the plaintiff failed to establish that she properly served the complaint on defendants or their authorized agents. Observers question how a plaintiff would satisfy these evidentiary hurdles.

Plaintiff Awarded $1 Million Default Judgment

The lawsuit arises out of a stage-diving incident at a music venue in Philadelphia, Pennsylvania. During a performance, the lead singer of the band Fishbone, Angelo C. Moore, dove into the crowd and knocked over the plaintiff, causing her serious injuries.

The plaintiff sued Moore, John Noorwood Fisher (Fishbone's bass player), Fishbone, Fishbone's manager, and other parties associated with the venue for negligence and civil conspiracy in producing the concert and failing to warn the audience that the concert would feature stage diving. The plaintiff also sued Moore, Fisher, and Fishbone for assault and battery. After the plaintiff reached settlements with some of the defendants, the court dismissed the plaintiff's claims against the non-settling defendants, including Moore and Fisher.

The plaintiff brought another action on February 3, 2012, against the non-settling defendants for negligence, civil conspiracy, and assault and battery. Moore and Fisher failed to respond to this complaint. The court entered a default judgment against Moore and Fisher, jointly and severally, for compensatory damages of $1,117,145.93, and against Moore for punitive damages of $250,000.

District Court Vacates Default Judgment

Moore and Fisher filed a motion requesting that the district court vacate the default judgments because they did not have knowledge of the plaintiff's second lawsuit until after entry of the judgments. Following an evidentiary hearing, the district court concluded that the plaintiff sent a copy of the complaint via certified mail to one of Moore's homes (where his mother resided) and to Fisher's home, but the restricted delivery box was not checked. The certified delivery receipt for Moore was signed "Angelo Moore," but Moore and his mother denied signing the receipt and Moore was on tour at the time. Fisher's live-in girlfriend signed Fisher's name on the receipt, but Fisher claimed that he did not open the mail and thought it pertained to the plaintiff's first lawsuit.

In their motion, Moore and Fisher argued that the court should vacate the default judgments under Federal Rule of Civil Procedure 60(b)(4) because they were not properly served with the complaint. Under Rule 60(b)(4), a court must "relieve a party . . . from a final judgment" if "the judgment is void," such as where the court lacks personal jurisdiction because service was not proper.

The district court first considered which party bears the burden of proof in the context of a motion seeking to vacate a default judgment. The district court noted that the U.S. Courts of Appeals for the Ninth, Second, and Seventh Circuits have held that the burden shifts to the defendant where he has actual notice of the action but delays asserting improper service until after entry of a default judgment. According to the district court, this "burden shifting scheme" did not apply here because the evidence was insufficient to show that Moore and Fisher had actual knowledge of the plaintiff's second lawsuit.

"Because the plaintiff chose to effect service via certified mail and the signatures for the mail were not the defendants,' it would be extremely difficult to prove that the defendants had actual knowledge," notes Cindy C. Albracht-Crogan, Phoenix, AZ, cochair of the ABA Section of Litigation's Solo & Small Firms Committee. "The plaintiff would need to present enough evidence for the court to find that the defendant was not credible in denying knowledge of the contents of documents the defendant received from the plaintiff," adds Stephen J. Siegel, Chicago, IL, cochair of the Section of Litigation's Commercial & Business Litigation Committee.

The district court next considered service by mail on an out-of-state defendant under Pennsylvania Rules of Civil Procedure 403 and 404, which require a receipt signed by the defendant or his authorized agent. The district court found that it could not conclude that service was proper without restricted delivery or sufficient evidence that the signatures of the certified mail receipts belonged to defendants or their authorized agents.

"It would be very difficult for a plaintiff to show that an individual defendant had authorized an agent specifically to receive service of process on the defendant's behalf, absent proof of an express agreement to that effect," suggests Siegel. "A professional special process server should be aware of local requirements and assure that any substitute service is made upon a person authorized to accept service of process, and so note on the proof of service affidavit," advises Jeffrey G. Close, Chicago, IL, cochair of the Section's Pretrial Practice & Discovery Committee. "Because both Moore and Fisher had counsel in the first action, the plaintiff's attorney could have contacted those lawyers, notified them about the complaint, and requested that the defendants waive service of process pursuant to Civil Rule 4(d)," adds Albracht-Crogan.