

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)
) NO. 3-83-00372
SOUTHERN INDUSTRIAL BANKING)
CORPORATION, d.b.a. DAVECO)
) Chapter 11
Debtor)

THOMAS E. DuVOISIN,)
Liquidating Trustee)
)
Plaintiff)
)
v.) ADV. NO. 3-85-0830
)
HOWARD LEE SENTELL III; SANDRA)
LEE SENTELL CHRISTIAN; MARTHA)
NOELLE VALDES; and BEVERLY J.)
VALDES, TRUSTEE)
)
Defendants)

M E M O R A N D U M

This adversary proceeding is before the court upon a motion for relief from judgment and/or to quash execution filed on behalf of defendants Howard Lee Sentell III, Sandra Lee Sentell Christian, and Martha Noelle Valdes. Pursuant to an agreed order entered October 28, 1992, execution and garnishment to collect the judgment was stayed pending further order of the court.

I.

The record reveals this adversary proceeding was commenced on March 8, 1985, to recover alleged preferential transfers arising from the redemption of SIBC investment certificates within ninety

days of SIBC's bankruptcy. The return on the summons indicates the movant defendants were served by the plaintiff placing a copy of the summons and complaint in the United States mail addressed to all the defendants at 308 E. Heritage Drive, Knoxville, Tennessee. Uncontroverted affidavits filed by the movant defendants establish that at the time of the purported service, the movant defendants resided at addresses other than 308 E. Heritage Drive, Knoxville, Tennessee. An uncontroverted affidavit filed by defendant Martha Noelle Valdes establishes that at the time of attempted service she was thirteen years old and resided with Barbara Valdes, her custodial parent, at 11636 Williamsburg Drive S., Concord, Tennessee.

On June 10, 1985, attorney Kenneth E. Morrow filed a motion to dismiss, purportedly on behalf of all the defendants. On July 14, 1987, attorney Morrow filed a motion to withdraw as attorney of record for the movant defendants and defendant Beverly J. Valdes, Trustee, on the grounds that his purported clients had been totally unresponsive to attempts to contact them. By order entered on September 30, 1987, Morrow was allowed to withdraw as counsel for the defendants.

On April 19, 1990, the plaintiff filed a motion for summary judgment against the movant defendants. He purported to serve a copy of the motion on these defendants by mailing it to 308 E. Heritage Drive, Knoxville, Tennessee. Apparently through over-

sight, the plaintiff's motion for summary judgment failed to include the defendant, Beverly Valdes.

On December 23, 1991, the court entered an order granting the plaintiff's motion for summary judgment against defendants Howard Lee Sentell III, Sandra Lee Sentell Christian, and Martha Noelle Valdes, in the amount of \$100,130.93.

Uncontroverted affidavits filed by the movant defendants establish they did not know of this lawsuit until after judgment had been entered against them and time for appeal had expired. Further, these affidavits recite the movant defendants did not retain or otherwise authorize attorney Kenneth E. Morrow to represent them in this action nor did they ever speak to or receive correspondence from Morrow in regard to this litigation or any other matter. The affidavits also state the movant defendants did not withdraw any funds from SIBC as alleged in the complaint and that the movant defendants have no knowledge of the disposition of the funds withdrawn from SIBC as alleged in the complaint.

At the conclusion of the hearing on the defendants' motion for relief from judgment, the court gave the parties additional time to submit supplemental affidavits concerning whether or not attorney Morrow was authorized to represent the movants. The movant defendants filed supplemental affidavits; the plaintiff did not.

II.

Relying on the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure, made applicable to bankruptcy cases by Bankruptcy Rule 9024, the movant defendants seek to set aside the judgment on the ground it is void because the plaintiff failed to obtain personal jurisdiction over the movants by proper service of process.

Rule 60(b)(4) authorizes relief from void judgments. A judgment is void if the plaintiff failed to obtain personal jurisdiction over a defendant through proper service of process unless, of course, a defendant has waived a defect in service. *Combs v. Nick Garin Trucking*, 825 F.2d 437 (D.C. Cir. 1987); 11 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862, at 200 (1973).

In this case the uncontroverted affidavits of the movant defendants establish the plaintiff failed to obtain proper service so that this court would have personal jurisdiction over these defendants to render a valid judgment. The plaintiff contends, however, these defendants made an appearance in this action through attorney Morrow and thus any defect in service was waived. The court disagrees.

The movants' uncontroverted affidavits also establish attorney Morrow was never authorized to act as movants' attorney in this action. No person has the right to appear as another's attorney without the other's authority. *Broyles v. Califano*, 495 F. Supp.

4 (E.D. Tenn. 1979). While there is said to be a rebuttable presumption that an attorney who files a notice of appearance on a party's behalf has done so with the authority of such party, that presumption may be overcome. *Id.* The movants' uncontroverted affidavits overcome the presumption in this case. The court allowed the plaintiff additional time to submit a controverting affidavit, but no such affidavit was filed.

The plaintiff relies upon *Broadcast Music v. MTS Enters.*, 811 F.2d 278 (5th Cir. 1987), in arguing the movant defendants are bound by the appearance of attorney Morrow on their behalf. The facts in *Broadcast Music* are distinguishable from the instant case. There, the two individual defendants were shareholders in the defendant corporation which was represented before and throughout the relevant proceedings by an attorney who was the brother and son, respectively, of the individual defendants. The attorney took actions throughout the proceeding which indicated he was representing all defendants. After a default judgment was entered against the two individual defendants, the attorney on behalf of the two individual defendants moved for Rule 60(b) relief suggesting that the individual defendants had not been properly served.

The court of appeals stated the issue was whether the attorney was authorized to enter an appearance for the individual defendants, thus waiving any defect in the service of process. The court noted there was nothing in the record to indicate the individual defendants were unaware of the suit against them. Rather,

these defendants filed affidavits that merely stated they were not served with process. The court concluded based upon all the circumstances in that case that the individual defendants, through the actions of their counsel, voluntarily appeared in the case and waived the defense of insufficiency or failure of service of process.

Unlike the movant defendants in this case, the individual defendants in *Broadcast Music* did not assert the attorney who acted on their behalf in the litigation was unauthorized to do so. They merely stated they had not been served with process. Implicit in the court's ruling in *Broadcast Music* was that the attorney acting on behalf of the individual defendants was authorized to act as their attorney.

In the instant case, the movant defendants through their affidavits have established they had no knowledge of the lawsuit against them and have never authorized attorney Morrow to represent them in this proceeding. Because Morrow was not authorized to enter an appearance on behalf of the movants, and because service of process was never accomplished on the movant defendants, the judgment entered against these defendants is void for lack of personal jurisdiction.

With respect to defendant Martha Noelle Valdes, she was a minor at the time of service and therefore subject to the service

requirements of Bankruptcy Rule 7004(b)(2). That Rule provides in relevant part:

In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) FR Civ P, service may be made within the United States by first class mail postage prepaid as follows:

. . . .

(2) Upon an infant . . . by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at his dwelling house or usual place of abode or at the place where he regularly conducts his business of profession.

FED. R. BANKR. P. 7004(b)(2).

In Tennessee, service on a minor is accomplished under Rule 4.04(2) of the Tennessee Rules of Civil Procedure which provides in relevant part:

Service shall be made as follows:

. . . .

(2) Upon an unmarried infant . . . by delivering a copy of the summons and complaint to his resident guardian or conservator if there is one known to the plaintiff; or if no guardian or conservator is known, by delivering the copies to the individual's parent having custody within this state; or if no such parent is within this state, then by delivering the copies to the person within this state having control of the individual.

TENN. R. CIV. PRO. 4.04(2).

The uncontroverted affidavit of Martha Noelle Valdes states that at the time of attempted service she resided with Barbara Valdes, who was her custodial parent, at 11636 Williamsburg Drive S., Concord, Tennessee. Hence, the attempted service of the complaint and summons upon Martha Noelle Valdes at the E. Heritage Drive address was ineffectual.

In opposing the defendants' motion, the plaintiff argues that if the motion is granted he will lose his cause of action even though he was led to believe by the actions of attorney Morrow that all defendants had entered an appearance. The limitations' period for preference actions is tolled by the filing of the complaint. *Boyd v. Briarwood Ford (In re Check Reporting Servs.)*, 133 B.R. 392 (Bankr. W.D. Mich. 1991). If the plaintiff now serves the movant defendants, and this action is not dismissed, it does not appear the action would be barred by the limitations' period. This issue, however, is not presently before the court. Where as here it is made to appear that a void judgment has been entered because of lack of personal jurisdiction, the court has no discretion in determining whether it should be set aside. *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (1973). Accordingly, an order will enter granting the movant defendants' motion.

JOHN C. COOK
United States Bankruptcy Judge