

11-0430

S. Shinner

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

**KERRY SAVARD, as Personal
Representative of the ESTATE OF
VICKI SAVARD,
Plaintiff,**

v.

Civil Action No. 10-C-94

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**CHEAT RIVER OUTFITTERS, INC.,
BRENT MATTHEW EVERSON,
TRAVIS COBB,
SIMON BUCKLAND, and
PAUL HART
Defendants.**

**ORDER GRANTING TRAVIS COBB'S MOTION TO DISMISS
AND DISMISSING CASE FOR LACK OF VENUE**

This matter came before the Court for consideration on this 8th day of February 2011, upon the defendants' combined Motions to Dismiss and Answer with Affirmative Defenses filed, by counsel, on April 13, 2010. The collective Motions to Dismiss consist of: (1) a Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(2) by Defendant Travis Cobb; (2) a Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(3) for lack of venue by all defendants; and (3) a Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(6) by Defendant Paul Hart. The plaintiff, by counsel, filed his response on December 28, 2010, and the defendants filed their reply to the plaintiff's response on January 18, 2011. There is also a Motion to Strike the Preliminary Statement in the Complaint incorporated into the defendants' reply memorandum.

Upon review of the various memoranda of the parties in support of and in opposition to said Motion and the record contained within the case file, the Court does make the following findings for the reasons set forth below.

I. BACKGROUND

Plaintiff Kerry Savard, Personal Representative of the Estate of Vicki Savard, is a

resident of Manchester, New York. On May 17, 2008, the plaintiff's decedent wife drowned while on a whitewater rafting trip arranged and guided by Defendant Cheat River Outfitters, Inc. (hereinafter "CRO"), a West Virginia corporation located in Albright, West Virginia in Preston County. Each of the three guides on the trip has been named as a defendant in this action, as has Paul Hart, an officer of CRO who is alleged to have participated in the incident giving rise to this action.

A critical issue to the defendants' Motion is whether Defendant Travis Cobb was properly served in accordance with the West Virginia Rules of Civil Procedure. The plaintiff attempted service on Travis Cobb by delivering a copy of the summons and complaint to Gregory Cobb, on March 24, 2010. The return of service filed on March 25, 2010 confirms that the day before the private process server attempted substituted personal service upon Travis Cobb by delivering the summons and complaint to "Gregory Cobb, a member of his/her family above the age of 16 years" at 705 S. Samuel Street, Charles Town, West Virginia. Gregory Cobb is Travis Cobb's father, and the home located at 705 S. Samuel Street, Charles Town, West Virginia is owned by Travis Cobb's parents. Travis Cobb was not at his parents' home when the private process server delivered the summons and complaint. Gregory Cobb accepted service on his son's behalf and indicated that Travis Cobb was "away on a trip." He further stated that he would deliver the documents served to the attorneys handling the matter.

II. STANDARD OF REVIEW

"Generally, a motion to dismiss should be granted only where 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Forshey v. Jackson*, 222 W.Va. 743, 749, 671 S.E.2d 748, 754 (2008) (quoting *Murphy v. Smalridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (further citations omitted)). Stated

differently, circuit courts should refrain from granting a motion to dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). “For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).

III. DISCUSSION

As stated above, the current Motions before the Court include three separate Motions all raised under Rule 12(b) of the West Virginia Rules of Civil Procedure. The Court will take up the Motion raised by Defendant Travis Cobb first, as this Motion could dispose of the case. Specifically, Defendant Cobb argues that under Rule 12(b)(2) the Court should dismiss the case because the Court lacks personal jurisdiction over Defendant Cobb due to a defect in service of process. Travis Cobb is also the only defendant that can establish venue in Jefferson County. Before the Court addresses the issue of venue, it must determine whether there is personal jurisdiction over Defendant Cobb, as conferred by proper service of process.

- a. **Substituted service in accordance with the West Virginia Rules of Civil Procedure requires that a copy of the summons and complaint be delivered to the individual's dwelling place or usual place of abode**

“To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” *West Virginia Secondary School Activities Commission v. Wagner*, 143 W.Va. 508, 521, 102 S.E.2d 901, 909 (1958) (citing *Morris v. Calhoun*, 119 W.Va. 603, 195 S.E. 341 (1938)). It is well established that proper service is

necessary to confer jurisdiction of the parties upon a circuit court. *Bowers v. Wurzburg*, 205 W.Va. 450, 458, 519 S.E.2d 148, 156, n. 5 (1999) (citation omitted) (“It is well settled that the issuance and service of process in the manner prescribed by law, unless waived, is essential to the jurisdiction of all courts. It is the fact of service which gives the court jurisdiction.”).

In this case, Defendant Cobb was served allegedly in accordance with Rule 4(d)(1)(B) of the West Virginia Rules of Civil Procedure, which says,

Manner of service.—Personal or substituted service shall be made in the following manner: (1) Individuals. — Service upon an individual other than an infant, incompetent person, or convict may be made by: . . . (B) Delivering a copy of the summons and complaint at the individual’s dwelling place or usual place of abode to a member of the individual’s family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint.

W.Va. R. Civ. P. 4(d)(1)(B) (2010). On March 24, 2010, private process server Robbie Robertson attempted to serve Travis Cobb at 705 S. Samuel Street, Charles Town, West Virginia - the home of his parents. The return of service executed by Mr. Robertson, filed on March 25, 2010 and contained within the case file, states,

“I executed the within 10-C-94 in Jefferson County on the 24th day of March, 2010 as follows: The within named Travis Cobb not being found as his/her usual place of abode, I executed the within summons/complaint by delivering to Gregory Cobb, a member of his/her family above the age of 16 years, and then and there gave information of the purport copy.”

According to a sworn affidavit provided by Mr. Robertson, when Gregory Cobb answered the door, he indicated Travis Cobb “was out of the State ‘on a trip.’” After Mr. Robertson advised Mr. Cobb of the subject matter of the summons and complaint, Mr. Cobb told Mr. Robertson that “he would deliver it to the attorneys who represented Travis Cobb in the matter,” according to Mr. Robertson’s affidavit.

Defendant Travis Cobb argues that the service of process attempted on March 24, 2010 was improper because the address to which the summons and complaint were delivered was not Travis Cobb’s dwelling or usual place of abode at the time service was attempted. Instead,

Travis Cobb claims his usual place of abode was aboard a sailboat he purchased in 2009. He had lived aboard the sailboat for six months, and in November 2009, he docked the boat in East Greenwich, Rhode Island. Travis Cobb was not staying as a visitor at his parents' home when the summons and complaint were delivered there, and in the six months preceding March of 2010, Travis Cobb spent less than one week in total time at his parents' home. Mr. Cobb has been a seasonal employee of Cheat River Outfitters, Inc. since 2005, and during the spring rafting season, Mr. Cobb lived in Albright, Preston County, West Virginia.

To support his contentions that his usual place of abode was aboard his sailboat in East Greenwich, Rhode Island, Mr. Cobb submitted a number of documents for the months preceding and following March of 2010. Those documents contain receipts for the rental of a boat slip and electricity, a copy of a Rhode Island library card, membership to the local YMCA, and bank statements showing a large volume of transactions in East Greenwich, Rhode Island before and after the date of service on March 24, 2010.

The plaintiff argues that Mr. Cobb's usual place of abode is at his parents' Jefferson County address because Mr. Cobb maintains a West Virginia driver's license that indicates 705 S. Samuel Street, Charles Town, West Virginia is his residence. Specifically, Mr. Cobb has held this license at all times relevant to this action, including the time of the incident giving rise to this action and the time of service of process, and has renewed that license as recently as October 10, 2010. The plaintiff further argues that when registering as a river guide with the West Virginia Department of Natural Resources, Travis Cobb gave his address as 705 S. Charles Street, Charles Town, West Virginia. Therefore, the plaintiff asserts that Travis Cobb purposefully used and claimed 705 S. Samuel Street in Charles Town as his abode, and substituted service at this address was proper.

The Court does not find the plaintiff's argument persuasive that Mr. Cobb's use of the Charles Town address when registering as a river guide with the West Virginia Department of Natural Resources is proof of Mr. Cobb's dwelling or usual place of abode in Jefferson County. This document is dated April 16, 2005, which is almost five years before service was attempted. This document has no relevance as to whether the address listed on it was Mr. Cobb's dwelling or usual place of abode in March of 2010. The remaining question is whether Mr. Cobb's renewal of a driver's license that listed the Jefferson County address as his residence before and after service was attempted is sufficient to show that Jefferson County was Mr. Cobb's dwelling or usual place of abode. To answer this question, the Court turns to case law interpreting the meaning of an individual's "dwelling or usual place of abode" as contemplated by the West Virginia Rules of Civil Procedure.

There are a long line of cases in this State and others that review whether substituted service was proper within the meaning of the governing rule or statute. Those cases, however, provide limited instruction as each one has a unique set of facts under which the court made its decision. It is agreed that the purpose of service of process is to give the defendant notice of the action against him, so that he may take steps to protect his rights and interests. *Williamson v. Taylor*, 96 W.Va. 264, 122 S.E. 530, 531 (1924) (quoting *Capehart v. Cunningham*, 12 W.Va. 750, 1878 WL 3117 (1878) ("[T]he object of the statute was to enable the defendant to know, or have notice, of the action against him, that he might protect his rights therein."). The United States Supreme Court has further set forth the requirements of substituted service, so as to meet the constitutional mandate of due process. "[Substituted service's] adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings

and an opportunity to be heard. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

With those boundaries in mind, this Court is asked to decide whether the facts of this case demonstrate successful substituted service; service can only be successful if the Jefferson County address is found to be Mr. Cobb's "dwelling or usual place of abode" as set forth in Rule 4(d)(1)(B). A popular treatise gives the following guidance,

The question as to what . . . is a person's "usual place of abode" is not always free from doubt. Most courts agree, however, that it is *the place where the person is living at the particular time when the service is made* . . . The purpose of the use of the term "usual place of abode" is primarily to refer to *the place where the defendant is usually found*. The requirement of service at the person's "usual place of abode" is not accomplished by service at the defendant's last known address.

62B AM. JUR. PROCESS § 194 (2010) (emphasis added). The West Virginia Supreme Court has stated that an individual's "usual place of abode" is "not a place of casual abode, but one of present abiding." *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848, 853 (2010) (quoting *Williamson v. Taylor*, 96 W.Va. 246, 247, 122 S.E. 530, 531 (1924)) (further citations omitted).

In *Beane v. Dailey*, the plaintiff filed a complaint against the defendant for injuries sustained during an automobile accident. The plaintiff's summons was served on the defendant at the defendant's mother's house. The defendant did not file an answer, and the plaintiff was awarded default judgment and damages. The defendant appealed the judgment against him on the basis that the substituted service was insufficient. The defendant argued that he did not receive notice of the civil action against him and that he was not a resident of West Virginia during the time of service. The Supreme Court ultimately concluded that the defendant was not properly served notice of the summons and complaint against him and that the default judgment was therefore void. *See generally Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848, 853 (2010).

The present case has two important differences from *Beane v. Dailey*. First, in *Beane v. Dailey*, there was no evidence in the record showing that the defendant resided at his mother's

home. *Id.* at 852. In this case, the plaintiff has presented evidence that Mr. Cobb maintained a West Virginia driver's license and that this license indicated his address was 705 S. Charles Street, Charles Town, West Virginia at the time of service. Second, in *Beane v. Dailey*, the defendant did not make any appearance in the case whatsoever at the trial court level. In this case, Mr. Cobb filed an Answer as well as the current Motion, indicating that he did in fact receive some notice of this civil action.

While the Court does not take the evidence provided by the plaintiff lightly, showing that Mr. Cobb maintained a West Virginia license with a Jefferson County address, the great weight of the evidence shows that Mr. Cobb did not maintain his usual place of abode in Jefferson County at the time of service. Mr. Cobb provided the Court with receipts for the rental of a boat slip and electricity in Rhode Island before and after the time of service. His bank records indicate a voluminous number of continuous transactions in Rhode Island from January of 2010 to August of 2010. The bank records do indicate that Mr. Cobb travelled to other states, including West Virginia, during that period; however, the vast majority of transactions took place in Rhode Island, supporting Mr. Cobb's argument that in March of 2010 he was living in East Greenwich, Rhode Island.

The Court finds that the renewal of a West Virginia driver's license, without further evidence, is not sufficient to rebut the multiplicity of records that show Mr. Cobb was maintaining his dwelling or usual place of abode in Rhode Island at the time of service.¹ Further, the fact that Mr. Cobb did appear in this litigation, indicating that he received some notice of this action, does not remedy the defects in service of process. The West Virginia Supreme Court has clearly stated, "In order that substituted service of original process shall have

¹ This Court makes no judgment as to whether there was any violation of W.Va. Code § 17B-4-1, and this Court has not considered that statute in reaching its decision in this case. Nothing in this Order should be interpreted as a ruling on whether Defendant Cobb violated § 17B-4-1 since that issue is not properly before this Court.

the effect of actual service upon the party in person, the return must show that all essential provisions of the statute authorizing such substituted service have been strictly complied with." Syl., *Jones v. Crim*, 66 W.Va. 301, 66 S.E. 367 (1909). In this case, Rule 4(d)(1)(B) was not complied with insofar as the Gregory Cobb did not receive the summons and complaint at Travis Cobb's present dwelling or usual place of abode. In addition, prior Supreme Court findings lead this Court to believe that even though Mr. Cobb learned of this litigation at some point as evidenced by his appearance in this case, such knowledge does not constitute formal notice to which he is entitled by proper service of process. See *Beane v. Dalley*, 701 S.E.2d at 853 (quoting *Myers v. Myers*, 128 W.Va. 160, 35 S.E.2d 847 (1945)) ("The *Myers* Court further explained that '[c]ounsel for Earl F. Myers seems to have had knowledge of the pending motion, but there is no evidence in the record that such knowledge had been imparted to Earl F. Myers, or that formal notice had been served on him[.]' and explained that the knowledge of Mr. Myers' counsel was not sufficient to provide notice to Mr. Myers.").

Based on the discussion above, Defendant Travis Cobb was not properly served according to Rule 4(d)(1)(B) of the West Virginia Rules of Civil Procedure. Accordingly, the Court finds that it lacks personal jurisdiction over Travis Cobb in this matter. Defendant Cobb's Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(2) is GRANTED.

b. W.Va. Code § 56-1-1 establishes venue with the circuit court of any county where any of the defendants may reside

Venue for an action appropriately lies where any of the defendants may reside. W.Va.

Code § 56-1-1 establishes venue in the circuit courts as follows:

Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

- (1) Wherein any of the defendants may reside or the cause of action arose . . . or
- (2) If a corporation be a defendant, wherein its principal office is, or wherein its mayor, president or other chief officer resides . . .

W.Va. Code § 56-1-1 (2010). If one defendant is properly subject to venue in a particular county, all other defendants in the action are likewise subject to venue in that county. *McGuire v. Fitzsimmons*, 197 W.Va. 132, 137, 475 S.E.2d 132, 137 (1996) (quoting Syl. Pt. 1, *Staats v. Co-Operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943)) (“This Court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.”). This principle applies equally to individual and corporate defendants. Syl. Pt. 1, *Staats v. Co-Operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943).

The plaintiff does not deny that Defendant Cobb was the jurisdiction-conferring party in this case, alleging that Mr. Cobb was properly served as a resident of Jefferson County. Nor is it disputed that the cause of action in this case arose on the Cheat River in Preston County, West Virginia. The defendant corporation, CRO, is a West Virginia corporation with its principle place of business and only office in Preston County. The chief officer of CRO, Defendant Paul Hart who serves as CRO’s president, also resides in Preston County. Lastly, the remaining defendants, Brent Everson and Simon Buckland, are not residents of Jefferson County.

The Court has no choice but to find that venue is not properly established in Jefferson County in light of its earlier findings that the jurisdiction-conferring party, Travis Cobb, is not within the personal jurisdiction of this Court. No other party establishes venue in Jefferson County, and the cause of action did not arise in Jefferson County. Therefore, the joint Motion by all defendants to dismiss this case pursuant to W.Va. R. Civ. P. 12(b)(3) for lack of venue is GRANTED.

IV. CONCLUSION AND RULING

Based on the foregoing, the Court finds that Defendant Cobb did not maintain his dwelling or usual place of abode in Jefferson County on March 24, 2010. Therefore, the service

effectuated on his father pursuant to Rule 4(d)(1)(B) of the West Virginia Rules of Civil Procedure was improper, and this Court lacks personal jurisdiction over Defendant Cobb. Accordingly, it is hereby **ORDERED** and **ADJUDGED** that Defendant Travis Cobb's Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(2) is **GRANTED**. Since Defendant Cobb was the jurisdiction-conferring party, the Court must dismiss this case for lack of venue. The defendants joint Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(3) is **GRANTED** and this case is **DISMISSED WITHOUT PREJUDICE**. Since the foregoing Motions remove this case from the jurisdiction of this Court, no rulings are made with regards to the Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(6) filed by Defendant Paul Hart and the Motion to Strike the Preliminary Statement from the Complaint.

The Court notes the timely objection and exception of all parties to adverse rulings.

The Clerk is directed to enter this Order as of the day and date herein written below and mail attested copies to all counsel of record. This case shall be removed from the Court's active docket and placed among causes ended.

ENTERED this 8th day of February, 2011.

A TRUE COPY

ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY [Signature]
DEPUTY CLERK

[Signature]
John C. Yoder, Judge
Circuit Court of Jefferson County

2cc
- S. Skinner
- D. DeCoursey
2/8/11
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JEFFREY M. COOPER
CLERK OF COURT
U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA