IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2009 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 34712

LESLIE EQUIPMENT COMPANY, A WEST VIRGINIA CORPORATION,
Plaintiff Below, Appellee

v.

W00D RESOURCES COMPANY, L.L.C.., CHRISTOPHER TODD ZACK INDIVIDUALLY AND D/B/A WOOD RESOURCES COMPANY, L.L.C., RAMONA C. GOEKE, INDIVIDUALLY AND D/B/A WOOD RESOURCES COMPANY, L..L.C., AND WENDELL L. KOPREK, INDIVIDUALLY AND D/B/A WOOD RESOURCES COMPANY, L.L.C.
Defendants Below,

CHRISTOPHER TODD ZACK AND RAMONA C. GOEKE,
Appellants

Appeal from the Circuit Court of Wirt County
The Honorable Robert A. Waters, Circuit Judge
Civil Action No. 07-C-35

REVERSED

Submitted: September 9, 2009
Filed: October 29, 2009

P. Todd Phillips,
Morgantown, West Virginia
Counsel for the Appellants

David H. Wilmoth,
Elkins, West Virginia
Counsel for the Appellee

JUSTICE McHUGH delivered the Opinion of the Court.

JUSTICE DAVIS dissents in part and concurs in part and reserves the right to file a dissenting and/or concurring opinion.
JUSTICE WORKMAN concurs and reserves the right to file a concurring opinion.
JUSTICE KETCHUM concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "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." Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W.Va. 753, 117 S.E.2d 610 (1960).

2. "The Due Process Clause of the Fourteenth Amendment to the United States Constitution operates to limit the jurisdiction of a state court to enter a judgment affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant." Syl. Pt. 1, *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991).

3. Under West Virginia Code § 56-3-33 (Supp. 2009), the acceptance by the Secretary of State of service of process as the attorney-in-fact for a nonresident defendant who has committed one of the enumerated statutory acts is the legal equivalent of personally serving that nonresident within this state.

4. In contrast to the legislative schema of West Virginia Code § 56-3-33 (Supp. 2009), Rule 4 of the West Virginia Rules of Civil Procedure does not provide that constructive service on a nonresident defendant has the same force of law as personal service effected in state. As a result, *in personam* jurisdiction does not arise by operation of law when a nonresident defendant is constructively served with process pursuant to the provisions of Rule 4 of the West Virginia Rules of Civil Procedure.

5. A movant seeking relief under Rule 60(b)(4) of the West Virginia Rules of Civil Procedure must show that the judgement sought to be vacated is void and that the motion to vacate the judgment was filed within a reasonable period of time.

McHugh, Justice:

Appellants Christopher Todd Zach and Ramona C. Goeke appeal from the May 27, 2008, order of the Circuit Court of Wirt County denying their motion to set aside a default judgment previously entered against them.[1] As grounds for both the motion to set aside and the appeal, Appellants argue that the default judgment is a void order based on the absence of *in personam* jurisdiction. Appellee Leslie Equipment Company contends that the trial court did have personal jurisdiction over the nonresident Appellants based on the constructive service provisions of the West Virginia Rules of Civil Procedure.[2] After a careful review of the applicable law and rules governing this issue, we conclude that the trial court committed error in refusing to set aside the default judgment for lack of *in personam* jurisdiction.

I. Factual and Procedural Background

On October 18, 2007, Leslie Equipment filed a complaint in the Circuit Court of Wirt County against Wood Resources Company, L.L.C, and Appellants,[3] as officers of the

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[1]The default judgment at issue was entered by the trial court on February 1, 2008.

[2]*See* W.Va.R.Civ.P. 4(e)(2).

[3]Also named as a defendant in the suit was Wendell L. Koprek, the president of Wood Resources.

company. Through the lawsuit, Leslie Equipment sought to recover an alleged debt arising from Wood Resources' purchase of goods and services on credit.[4] To serve process on Appellants, Leslie Equipment looked to Rule 4(e)(2) of the West Virginia Rules of Civil Procedure, which authorizes the use of constructive service on nonresident defendants by means of certified mail[5] in certain instances.

When Appellants did not file a responsive pleading following notification of the lawsuit, Leslie Equipment moved for a default judgment on or about January 25, 2008. The trial court granted Leslie Equipment's motion for a default judgment by order entered on February 1, 2008, finding Appellants jointly and severally liable for the amount of $22, 459.70.[6]

When he attempted to schedule a hearing on a motion to dismiss the complaint for lack of *in personam* jurisdiction,[7] Appellants' counsel discovered that a default judgment had been entered against his clients. After obtaining a copy of the default judgment by

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[4]Wood Resources is a foreign limited company not authorized to do business in this state.

[5]The record in this matter includes return receipt cards reflecting Mr. Zach's acceptance of the complaint and summons on October 22, 2007, at his New Mexico residence. Seven days later, Mr. Zach accepted delivery at his residence for service of legal process intended for Ms. Goeke at her Iowa residence.

[6]By order entered in March 2008, Leslie Equipment obtained a summary judgment ruling against Wendell Koprek in connection with this same debt obligation. *See supra* note 3.

[7]This contact with the trial court was made on March 17 or 18, 2008.

means of facsimile, Appellants' counsel filed a motion to set aside the default judgment and dismiss the action on grounds that the judgment was void for lack of personal jurisdiction.[8] Following a hearing on this motion on May 12, 2008, the trial court denied the relief sought by Appellants. Through its order of May 27, 2008, the trial court ruled that: (1) Appellants had actual notice of the pendency of the legal action that resulted in the entry of a default judgment against them; (2) the manner in which service of process was effected under Rule 4(e)(2) is similarly authorized by West Virginia Code § 56-3-33 (2005); (3) the rules of civil procedure control where there is a conflict with statutory law; and (4) Appellants have failed to show good cause or excusable neglect entitling them to set aside the default judgment. Through this appeal, Appellants seek to reverse the trial court's decision that the default judgment entered against them is a valid and enforceable judgment.

II. Standard of Review

We review a decision by a trial court to award a default judgment pursuant to an abuse of discretion standard. *See* Syl. Pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). Where, however, "the issue on appeal from the circuit court is clearly a question of law . . ., we apply a *de novo* standard of review. Syl. Pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). With these standards in mind, we

[8]The certificate of service reflects that this motion was mailed to Leslie Equipment's counsel on March 25, 2008.

proceed to consider whether the trial court committed error in refusing to vacate the default judgment at issue.

III. Discussion

A. *In Personam* Jurisdiction

The validity of any court ruling is dependent on two jurisdictional predicates: "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." Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W.Va. 753, 117 S.E.2d 610 (1960). With regard to the need for personal jurisdiction over a nonresident defendant we have recognized:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution operates to limit the jurisdiction of a state court to enter a judgment affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant.

Syl. Pt. 1, *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991). Consequently, a determination that the trial court lacked *in personam* jurisdiction will render the default judgment at issue void and unenforceable. *See* Syl. Pt. 1, *Schweppes U.S.A. Ltd. v. Kiger*, 158 W.Va. 794, 214 S.E.2d 867 (1975) (holding that order rendered without personal and subject matter jurisdiction renders decree "utterly void"); *see also Smith v. Smith*, 140 W.Va.

298, 302-03, 83 S.E.2d 923, 925-26 (1954) (recognizing necessity of personal jurisdiction for judgments founded upon personal liability).

Appellants contend that the manner in which Leslie Equipment sought to effect service of process on them deprived the trial court of the necessary personal jurisdiction to enter an enforceable default judgment. Relying solely on the provisions of Rule 4 of the West Virginia Rules of Civil Procedure, Leslie Equipment had the clerk of the circuit court transmit the complaint and summons to the nonresident Appellants by means of certified mail. The pertinent provisions of Rule 4 provide for constructive service by means of "certified mail, return receipt requested, and delivery restricted to the addressee" "when plaintiff knows the residence of a nonresident defendant or the principal office of a nonresident defendant foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State. . . ." W.Va. Code §§ 4(d)(1)(D); 4(e)(2).

While Rule 4 specifies the manner in which constructive service may be effected upon a nonresident defendant,[9] Appellants assert that the rule does not address the issue of personal jurisdiction. In marked contrast to Rule 4, Appellants observe that West

[9]Appellants argue that Leslie Equipment did not fully comply with the provisions of Rule 4 because the certified mail was not delivery restricted as Mr. Zach signed for the process intended for Ms. Goeke. *See supra* note 5.

Virginia Code § 56-3-33 – our long-arm statute – expressly contemplates and mandates that when a nonresident or his duly authorized agent commits one or more of seven delineated acts[10] the Secretary of State, by operation of law, becomes the nonresident's attorney-in-fact. And, when lawful service is effected on the Secretary of State in connection with an action arising from the nonresident's commission of an act specified in West Virginia Code § 56-3-33, that service of process "shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state." *Id.*

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[10]Those acts are:

> (1) Transacting any business in this state;
> (2) Contracting to supply services or things in this state;
> (3) Causing tortious injury by an act or omission in this state;
> (4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (6) Having an interest in, using or possessing real property in this state; or
> (7) Contracting to insure any person, property or risk located within this state at the time of contracting.

W.Va. Code § 56-3-33(a).

In *Lozinski v. Lonzinki*, 185 W.Va. 558, 408 S.E.2d 310 (1991), we recognized how the adoption of our long-arm statute was a legislative device by which the trial courts of this state could obtain personal jurisdiction over nonresident defendants within the bounds of due process. *Accord Harman v. Pauley*, 522 F.Supp. 1130, 1135 (S.D. W.Va. 1981). After discussing how "West Virginia's extraterritorial 'reach' of jurisdiction over nonresidents is obtained through what are commonly-referred to as 'single-acts,'"[11] we determined that the failure to pay child support was a qualifying tortious act for purposes of obtaining personal jurisdiction over a Florida resident via the West Virginia Secretary of State. *Lozinski,* 185 W.Va. at 561, 563, 408 S.E.2d at 313, 315. Articulating the import of West Virginia Code § 56-3-33, we stated: "The intent and benefit of any long-arm statute is to permit the secretary of state to accept process on behalf of a nonresident *and to view such substituted acceptance as conferring personal jurisdiction over the nonresident*." *Lozinski,* 185 W.Va. at 563, 408 S.E.2d at 315 (emphasis supplied).

Proper exercise of jurisdiction over a nonresident defendant by a trial court exists when: "(1) a statute . . .authorize[s] service of process on the nonresident defendant, and (2) the service of process . . . comport[s] with the Due Process Clause." *In re Celotex Corp.*, 124 F.3d 619, 627 (4th Cir. 1997); *see also* Syl. Pt. 5, *Abbot v. Owens-Corning Fiberglass Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (1994) (adopting two-step approach for

[11]*See supra* note 10.

examining personal jurisdiction over nonresident: (1) whether defendant's actions satisfy "our personal jurisdiction statutes"[12] and (2) whether defendant's contacts with West Virginia satisfy federal due process). Typically, the first step in determining whether a trial court validly exercised personal jurisdiction over a nonresident defendant involves applying the provisions of our long-arm statute – West Virginia Code § 56-3-33.[13] See *Easterling v. American Optical Corp.*, 207 W.Va. 123,130, 529 S.E.2d 588, 595 (2000) (applying test adopted in *Abbot, supra*).[14]

Critical to this case, however, is the fact that Leslie Equipment chose not to employ the provisions of West Virginia Code § 56-3-33 to obtain service of process on two nonresident defendants.[15] Foregoing the Secretary of State's substituted acceptance that is

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[12]Although we identified the relevant "personal jurisdiction" statutes in *Abbott* as W.Va. Code §§ 31-1-15 and 56-3-33, the former statute, which pertained to corporations, was repealed effective October 1, 2002. And, while the manner of serving foreign corporations is currently set forth in W.Va. Code § 31D-15-1510 (2009) as part of the West Virginia Business Corporation Act, W.Va. Code §§ 31D-1-101 to -17-1703 (2009), subsection f. specifically provides that this section is not the exclusive means of serving a foreign corporation. *See* W.Va. Code § 31D-15-1510(f); *accord Vass v. Volvo Trucks North America, Inc.*, 304 F.Supp.2d 851, 854 n.1 (S.D. W.Va. 2004).

[13]*See supra* note 12.

[14]Because Leslie Equipment opted not to follow the provisions for substituted service by the Secretary State set forth in West Virginia Code § 56-3-33, there is no need to examine either the application of our long-arm statute or the consequent minimum contacts analysis that typically follows. *See Celotex*, 124 F.3d at 627 (observing that "the West Virginia long-arm statute is coextensive with the full reach of due process).

[15]Leslie Equipment did utilize the Secretary of State to obtain service of (continued...)

expressly authorized by the long-arm statute, Leslie Equipment opted to serve Appellants pursuant to the constructive service provisions of Rule 4. And, despite the absence of any authority, Leslie Equipment argues that personal jurisdiction can be obtained over a nonresident defendant through means of constructive service.

Characterizing Appellants' position that compliance with the long-arm statute is necessary to establish personal jurisdiction over a nonresident defendant as a "technical argument," Leslie Equipment contends that a trial court automatically obtains personal jurisdiction over a nonresident defendant when it complies with the constructive service provisions set forth in Rule 4. *See* W.Va.R.Civ.P. 4(e)(2). This contention lacks merit as the provisions of Rule 4 address service of process and not the underlying jurisdictional prerequisites necessary for a trial court's exercise of jurisdiction. *See* 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1061 at p. 319 (3rd ed. 2002) (observing that "although valid service under Rule 4 provides appropriate notice to persons against whom claims are made, it does not ensure that the defendant is also within the in personam jurisdiction power of the . . . court"); *accord Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 715 n.6 (1982) (Powell, J., concurring) (stating that "Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites"). Moreover, courts have uniformly rejected the argument that *in personam* jurisdiction can be

[15](...continued)
process on Wood Resources. *See* W.Va. Code § 56-3-33.

obtained over a nonresident defendant by means of personal or constructive service. *See Smith v. Smith*, 140 W.Va. 298, 303-04, 83 S.E.2d 923, 926-27 (1954) (reasoning that because personal service of process on nonresident defendant has same effect as order of publication, *in personam* jurisdiction cannot be obtained in this manner); *accord Honegger v. Coastal Fertilizer & Supply, Inc.*, 712 So.2d 1161, 1162 (Fla. 2nd Dist. App. 1998) (holding that constructive service was insufficient to confer requisite personal jurisdiction necessary to enforce judgment for monetary damages); *Ford Motor Credit Co. v. Shaw*, 108 F.R.D. 218, 220 (N.D. Ala. 1985) (recognizing that valid personal judgment cannot be obtained against nonresident defendant upon constructive service of process).

As the Fourth Circuit recognized in *Central Operating Company v. Utility Workers*, 491 F.2d 245 (4th Cir. 1974), [u]nder West Virginia law, a judgment that operates *in personam* cannot be rendered against a defendant upon whom only constructive service has been executed." *Id.* at 251 (citing *Fabian v. Kennedy*, 333 F.Supp. 1001 (N.D. W.Va. 1971)). In *Fabian*, the district court examined whether the West Virginia courts acquired personal jurisdiction over a nonresident defendant through delivery of process to the Florida residence of the defendant.[16] In reaching its conclusion the trial court reasoned:

> No statute or rule of the State of West Virginia, pursuant to Rule 4(e), Federal Rules of Civil Procedure, provides that in personam jurisdiction can be had over a non-resident served

[16]A copy of the summons was left with defendant's sixteen-year-old son at the Florida residence.

> outside the state. Personal service of process on a non-resident of West Virginia outside the state has the same effect, and no other, as an order of publication.
>
> Rule 4(f), West Virginia Rules of Civil Procedure, provides that personal service outside the state on a non-resident shall have the same effect as constructive service. It is held in *Grant v. Swank*, 74 W.Va. 93, 81 S.E.967, that a personal decree against a non-resident defendant, not served otherwise than by publication, and not appearing to the proceeding, is erroneous.

333 F.Supp. at 1005 (some citations omitted). Based on the absence of either federal or state law (statute or rule) granting the trial court *in personam* jurisdiction by means of extraterritorial service, the court determined in *Fabian* that it lacked the necessary personal jurisdiction over the nonresident defendant. *Id.*

Leslie Equipment wrongly equates service of process with the trial court's acquisition of the necessary personal jurisdiction over Appellants. The fact that service of process was effected on the nonresident defendant in *Fabian* was inconsequential.[17] Of significance in *Fabian* and in the case *sub judice* is whether the necessary *in personam* jurisdiction arose pursuant to a statute or rule. *See* 333 F.Supp. at 1005. As discussed above, the purpose of our long-arm statute's adoption was to create a legal mechanism by which personal jurisdiction could be obtained over nonresident defendants in compliance

[17]Courts have repeatedly held that actual notice of the suit by a nonresident defendant has no bearing on the issue of personal jurisdiction. *See, e.g., Buggs v. Ehrnschwender*, 968 F.2d 1544, 1548 (2nd Cir. 1992); *Sieg v. Karnes*, 693 F.2d 803, 807 (8th Cir. 1982); *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So.2d 1225, 1227 (Fla. 1986).

with the minimum contacts analysis inherent to an individual's rights of due process. Under West Virginia Code § 56-3-33, the acceptance by the Secretary of State of service of process as the attorney-in-fact for a nonresident defendant who has committed one of the enumerated statutory acts is the legal equivalent of personally serving that nonresident within this state. *See* W.Va. Code § 56-3-33. By statutory design, compliance with the service of process procedures set forth in West Virginia Code § 56-3-33 expressly authorizes the exercise of personal jurisdiction over nonresident defendants by the courts of this state.

In contrast to the legislative schema of West Virginia Code § 56-3-33, Rule 4 of the West Virginia Rules of Civil Procedure does not provide that constructive service on a nonresident defendant has the same force of law as personal service effected in state.[18] As a result, *in personam* jurisdiction does not arise by operation of law when a nonresident defendant is constructively served with process pursuant to the provisions of Rule 4 of the West Virginia Rules of Civil Procedure.

Simply put, Leslie Equipment has not identified any West Virginia law under which constructive service of process on a non-resident defendant gives the trial courts of

[18]*Cf.* W.Va.R.Civ.P. 4(f) (rendering personal service effected extraterritorially on West Virginia resident as equivalent of personal service effected in state).

this state personal jurisdiction.[19] By failing to avail itself of the statutory method that vests our trial courts with *in personam* jurisdiction over nonresident defendants,[20] the constructive service effected upon Appellants led to a default judgment that is void and unenforceable as against Mr.Zach and Ms. Goeke. *See* Syl. Pt.1, *Kiger*, 158 W.Va. 794, 214 S.E.2d 867. Because there is no conflict between the provisions of Rule 4 and West Virginia Code § 56-3-33, there is no basis for concluding, as did the trial court, that the provisions of Rule 4 supplant the provisions of the long-arm statute. *See State v. Davis*, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987), *overruled on other grounds, State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994) (recognizing that court rules will supersede procedural statutes where they are in conflict).[21] Thus, the trial court erred in concluding that it had personal jurisdiction over Appellants based on the constructive service effected pursuant to Rule 4.[22]

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[19]Our decision in this matter is limited to recognizing that the personal jurisdiction that arises by operation of law pursuant to the provisions of West Virginia Code § 56-3-33 does not similarly arise when constructive service is effected under Rule 4. Because Leslie Equipment sought to establish personal jurisdiction based on the constructive service provisions of Rule 4, there is no factual development in the record that would permit the minimum contacts analysis typically employed when the issue of personal jurisdiction is raised. *See Pries*, 186 W.Va. at 50, 410 S.E.2d at 286, syl. pts. 2, 3.

[20]*See Schweppes*, 158 W.Va. at 800, 214 S.E.2d at 871 (recognizing that strict compliance is generally required where manner of service of process is specified statutorily).

[21]*See* W.Va.R.Civ.Pro. 82 (recognizing that rules of procedure should not be construed to extend or limit jurisdiction).

[22]Because we determine in subsection B. of this opinion that Appellants timely moved to set aside the default judgment, they did not waive their right to asset the lack of personal jurisdiction.

B. Void Judgment

As this Court recognized in *Evans v. Holt*, 193 W.Va. 578, 457 S.E.2d 515 (1995), a movant seeking relief under Rule 60(b)(4) of the West Virginia Rules of Civil Procedure must show that the judgment sought to be vacated is void and that the motion to vacate the judgment was filed within a reasonable period of time. *Id.* at 587, 457 S.E.2d at 524. Because we have determined that the default judgment entered against Appellants was void for lack of personal jurisdiction, Appellants have only one other hurdle to meet in seeking relief under Rule 60(b)(4). They are required to establish that they sought to vacate the default judgment within a reasonable time. *See Evans*, 193 W.Va. at 587, 457 S.E.2d at 524. The record in this case indicates that Appellants' motion to set aside the default judgment was filed with the trial court on March 27, 2008. That motion was filed within ten days of counsel's discovery that a default judgment was entered[23] against his clients on February 1, 2008.

In *Evans*, we found a motion to set aside a void judgment to be timely filed when the filing occurred thirty days after the defendant received notice of the judgment and fourteen months after the judgment's entry. *See* 193 W.Va. at 587, 457 S.E.2d at 524. Significantly less time transpired in this case than in *Evans* as Appellants moved to set aside the default judgment less than two months after its entry and only ten days after learning of

[23]Appellants' counsel discovered the default judgment on March 17, 2008.

the judgment. We would be hard pressed to rule against Appellants on the issue of whether they sought to vacate the default judgment within a reasonable period of time under the facts of this case. Accordingly, we determine that the trial court erred in refusing to set aside the default judgment as void under Rule 60(b)(4).

Based on the foregoing, the decision of the Circuit Court of Wirt County is reversed.

Reversed.