

Judgment rendered August 17, 2005
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 40,029-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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SUMMIT CONSTRUCTION, INC.

Plaintiff-Appellee

versus

ROBINSON CONTRACTING AND
EQUIPMENT RENTAL, INC.

Defendant-Appellant

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 04-4425

Honorable J. N. Dimos, Judge

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HUDSON, POTTS & BERNSTEIN
By: Brady D. King, II

Counsel for
Appellant

LEO A. MILLER, JR.

Counsel for
Appellee

* * * * *

Before BROWN, CARAWAY and MOORE, JJ.

MOORE, J., concurs with written reasons.

CARAWAY, J.

Defendant appeals the trial court's rendition of a default judgment against it. Finding that the record is devoid of evidence of the sheriff's return for service of citation, we nullify the default judgment and remand.

Facts

In July 2000, Summit Construction, Inc. ("Summit"), as lessor, and Robinson Contracting and Equipment Rental, Inc. ("Robinson"), as lessee, entered into a lease of industrial facilities. Subsequently, in October 2004, Summit filed suit against Robinson alleging that the lease was terminated in September 2004, and that at the time of termination, Robinson owed Summit unpaid rent of \$40,000, and equipment rentals of \$15,000. The record reflects that the citation prepared by the Ouachita Parish Clerk of Court was to be served on Robinson through its agent, CT Corporation System, located in East Baton Rouge Parish.

Summit also sought a writ of sequestration for equipment belonging to Robinson located on the leased premises and in the possession of Summit. On October 13, 2004, the same day the petition was filed, the trial court signed an order issuing a writ of sequestration. On October 14, 2004, the clerk of court directed the sheriff of Ouachita Parish to seize Robinson's equipment. After the seizure, the sheriff prepared and filed a notice of seizure.

The citation and notice of seizure were both addressed to CT Corporation System, as agent for Robinson. Later, the notice of seizure was stamped and signed by a deputy sheriff in East Baton Rouge Parish

indicating that “[u]pon receiving a certified copy of the within Process,” the deputy served a copy on CT Corporation System on November 1, 2004. However, there is no sheriff’s return endorsement contained on the copy of the citation.

After entering a preliminary default on November 16, 2004, the trial court confirmed the default and signed a default judgment in favor of Summit on November 22, 2004. The judgment indicated that:

This cause came on this day to be heard upon confirmation of default after service and citation on the Defendant in the form and manner prescribed by law, and the legal delays for answering having expired, and the Defendant having failed to appear and answer, a preliminary default having been taken and entered, and two judicial days having elapsed since the entry of said default and the Defendant still having failed to appear and answer

Robinson now appeals this default judgment.

Discussion

Although Robinson has assigned eight errors, we address only the assignment of error alleging the lack of service of citation.

The present action was an ordinary proceeding for the collection of unpaid rent. Attendant to this action, Summit instituted the special proceeding for sequestration. See La. C.C.P. art. 3571, *et seq.*

Citation is defined under La. C.C.P. art. 1202 as “[a] statement that the person cited must either comply with the demand contained in the petition or make an appearance, either by filing a pleading or otherwise, in the court issuing the citation within the delay provided in Article 1001 under penalty of default.” Citation and service thereof are essential in ordinary civil proceedings and without them all proceedings are absolutely

null. La. C.C.P. art. 1201; *Rando v. Rando*, 31,366 (La. App. 2d Cir. 12/9/98), 722 So. 2d 1165; *Rivers v. Groth Corp.*, 95-2509 (La. App. 1st Cir. 9/27/96), 680 So. 2d 762; *Succession of Barron*, 345 So. 2d 995 (La. App. 2d Cir. 1977).

Louisiana Code of Civil Procedure Article 1292 provides the following with regard to service of process and the sheriff's return:

The sheriff shall endorse on a copy of the citation or other process the date, place, and method of service and sufficient other data to show service in compliance with law. He shall sign and return the copy promptly after the service to the clerk of court who issued it. The return, when received by the clerk, shall form part of the record, and shall be considered prima facie correct. The court, at any time and upon such terms as are just, may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

In this case, while a citation was issued by the clerk in Ouachita Parish, there is no endorsement on a copy of the citation by the sheriff of East Baton Rouge Parish showing return of service. The notice of seizure issued to CT Corporation System as the defendant's agent recites which movables were seized pursuant to the writ of sequestration issued in Ouachita Parish. It therefore reflects the related sequestration proceeding, but does not give notice of the requisite period for answering the demands of the primary suit for unpaid rent. The stamped endorsement of the sheriff on the copy of the notice of seizure is evidence of its service but not service of citation. Without a sheriff's return endorsed on a copy of the citation in accordance with La. C.C.P. art. 1292, lack of any record of proof of service

of citation renders the present default judgment a nullity. La. C.C.P. arts. 2002(A)(2) and 1201(A).

Accordingly, the default judgment is hereby reversed, and the case is remanded for further proceedings. Costs are assessed to appellee.

REVERSED AND REMANDED.

MOORE, J, concurring.

I respectfully concur. In my view, the proof of service of citation is not as conspicuously absent as the majority suggests. The certified copy of “the within Process,” served by an East Baton Rouge Parish deputy on November 1, 2004, included both the petition and the notice of seizure. The fact that the notice of seizure was stamped, but not the citation, may well have been an oversight.

Nevertheless, the preliminary default was plainly premature. Service was effected on November 1; Robinson had 15 days to answer. La. C.C.P. art. 1001. Failure to answer within this time exposed him to default. La. C.C.P. art. 1701 A. The first day (November 1) is not included in the delay. La. C.C.P. art. 5059. Robinson therefore had through November 16 to file an answer. The preliminary default entered on that day is premature by one day, and the resulting default judgment is absolutely null. *Cardone v. G & R Service Center Inc.*, 360 So. 2d 244 (La. App. 1 Cir. 1978). The courts also routinely nullify judgments based on preliminary defaults that predate the 30 days allowed to answer long-arm service. *Davis v. Tele-Total Inc.*, 465 So. 2d 948 (La. App. 2 Cir. 1985); *Houssiere Properties v. Precision Casing Int’l Inc.*, 535 So. 2d 1265 (La. App. 3 Cir. 1988); *Glessner v. Hyatt*, 380 So. 2d 222 (La. App. 3 Cir. 1980). *See also Alphonso v. Cement Product Services Inc.*, 499 So. 2d 305 (La. App. 1 Cir. 1986), writ denied 502 So. 2d 112 (1987).

Because the record is clear that Summit’s preliminary default was premature, and the law is settled that the judgment arising from such a default is absolutely null, I would reverse and remand on that basis.