

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

JUN 03 1987

MOLLIE C. JONES, CLERK

BY _____ DEPUTY

IN THE MATTER OF:

WILLIAM DOUGLAS OWEN

CASE NO. 8301427JC

CLAUDE BATES

vs.

WILLIAM DOUGLAS OWEN

ADVERSARY PROCEEDING NO. 830450JC

Robert R. Marshall
2603 Brookwood Drive
Jackson, MS 39212

Attorney for Plaintiff,
Claude Bates

Craig M. Geno
P. O. Box 98
Jackson, MS 39205

Attorney for Defendant,
William Douglas Owen

Edward Ellington, Bankruptcy Judge

OPINION AND ORDER DISMISSING COMPLAINT

This Chapter 7 case was initiated by William Douglas Owen filing a petition in this Court on January 25, 1983.

This adversary case was initiated by the filing of a Complaint by the Plaintiff, Claude Bates, on October 19, 1983. Generally, the Complaint alleges that the Plaintiff obtained a Default Judgment against the Debtor in the Superior Court of Warrick, Indiana, on April 24, 1978, in the amount of \$192,000.00, plus

court costs and interest. The Plaintiff seeks to have the said judgment declared nondischargeable under the provisions of 11 U.S.C. §523. The Defendant answered. Additionally, on September 9, 1986, the Defendant moved to dismiss the Complaint in this adversary proceeding, alleging that: (1) service of process in the State Court action was insufficient, and, as a result, the judgment obtained by the Plaintiff in the State Court action is null and void; and (2) that an order entered in a United States District Court for the Southern District of Indiana, Evansville Division, involving the same parties herein, held that the aforesaid default judgment was not valid because the State Court did not have personal jurisdiction over the Defendant when it entered the default judgment and that the judgment was not entitled to full faith and credit in the U. S. District Court.

Subsequent to the filing of the Motion to Dismiss the Complaint herein, the Plaintiff filed a response to the motion and counsel for the parties each filed memorandum brief in support of their respective positions.

The Court has reviewed the record in its entirety and has carefully considered the briefs of the parties.

A copy of the order of U. S. District Judge Gene E. Brooks entered on March 31, 1980, in the U. S.

District Court for the Southern District of Indiana, Evansville Division, Cause No. 78-98-C, is attached hereto as Exhibit "A" and incorporated herein by reference.

This Court finds that the said order is dispositive of the issues in this case and it effectively prohibits, bars, precludes and stops the Plaintiff from maintaining his adversary in this Court based upon the void State Court judgment.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Complaint filed herein by Claude Bates on October 19, 1983, should be, and it hereby is, dismissed with prejudice.

ORDERED AND ADJUDGED this the 3rd day of June, 1987.


U. S. BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CLAUDE BATES, pro se,)
Plaintiff)
vs.) CAUSE NO. EV 78-98-C
W. D. OWEN,)
Defendant)

O R D E R

This cause comes before this Court on Plaintiff's Motion for Summary Judgment and Defendant's Motions for Protective Order, Preliminary Injunction, and to Dismiss. These motions were fully briefed and a hearing was held January 15, 1980, in Evansville, Indiana, at which time the parties were allowed to present additional evidence and arguments.

Defendant, a resident of the State of Mississippi, was fighting extradition by the State of Indiana when Plaintiff instituted a civil action in the Warrick Superior Court for the State of Indiana. The action brought by Plaintiff in the Superior Court sounded in libel and slander. The alleged libel and slander was based on a letter and some tapes of telephone conversations between the parties.

The Superior Court attempted to obtain personal jurisdiction over Defendant pursuant to the Indiana long arm statute, Indiana Trial Rule (T.R.) 4.4 and effectuating service of process under Indiana T.R. 4.1, sending summons by certified or registered mail return receipt requested. Summonses were mailed to two different allegedly known addresses of Defendant. Both summonses were returned by the post office with nothing showing receipt by the Defendant. Plaintiff claims that he telephoned Defendant's attorney in Mississippi and told him of the Superior Court action. The evidence showed that the attorney allegedly contacted by phone represented Defendant

EXHIBIT "A"

in the extradition proceedings being held in Mississippi but that he had never been connected with the Superior Court action.

When the trial in the Superior Court began Defendant did not make an appearance. The Superior Court held that Defendant failed and refused to pick up either summons and thereby concluded that service of process was sufficient and that it had personal jurisdiction over the Defendant. The Superior Court subsequently entered a default judgment against Defendant in the amount of One Hundred Ninety Two Thousand Dollars (\$192,000.00).

Plaintiff, through a proceeding supplemental, attempted to execute on his judgment in the Superior Court. Defendant had no property in Indiana for Plaintiff to execute on so the action herein was filed. Plaintiff's complaint in this Court could be read either as an attempt to execute on his Superior Court judgment or as an attempt to use Title 28 U.S.C. §1738, full faith and credit law, to obtain a judgment against defendant in this Court.

The ambiguity of the complaint is resolved by law as the holder of a judgment recovered in a state court cannot issue execution thereon in a federal court until he has first sued on that judgment and recovered a judgment in federal court. United States v. Fairbanks Realty Corp., 50 F.Supp. 373 (D.C.N.Y. 1943); See Threlkeld v. Tucker, 496 F.2d 1101 (9th Cir. 1974) cert denied 419 U.S. 1023. Consequently, Plaintiff's complaint can only be characterized by this Court as an attempt to obtain a judgment in federal court. In this respect Plaintiff's complaint is an attempt by Plaintiff to have his Superior Court judgment given full faith and credit by this Court pursuant to Title 28 U.S.C. §1738, and thereby obtain a judgment in federal court.

Subsequent to the default judgment entered in the Superior

Court, but during the time the action in this Court was pending, Defendant lost his fight against extradition. After losing the fight against extradition, Defendant voluntarily came to Indiana under an extradition order. While in Indiana under extradition, Defendant was served with notice that his deposition would be taken at a specified date in Evansville, Indiana, for use in this Court.

Defendant has filed a motion to dismiss the action in this Court on three grounds:

1. Lack of subject matter jurisdiction,
2. A collateral attack on the validity of the Superior Court's personal jurisdiction over Defendant claiming insufficiency of service of process.
3. Failure of Plaintiff to state a claim upon which relief can be granted.

Defendant has also filed a motion for a protective order and/or injunction seeking to stop the taking of his deposition. Plaintiff has filed a motion for summary judgment alleging that there are no material issues of fact and that he is entitled to a judgment as a matter of law. The Court will examine the motion to dismiss first.

Defendant's first contention in his motion to dismiss, that this Court has no subject matter jurisdiction, is without merit. Plaintiff has alleged the requisite jurisdictional amount and diversity of citizenship that would allow this Court to exercise jurisdiction over the Defendant. Threlkeld v. Tucker, 496 F.2d 1101 (9th Cir. 1974) cert. denied 419 U.S. 1023.

The Defendant's second contention, his collateral attack on the Superior Court judgment, is found by this Court to be meritorious; therefore, this Court cannot give full faith and credit to this judgment and Plaintiff's complaint must be dismissed.

Volume 2, Moore's Federal Practice §4.02[3] provides:

A default judgment for want of appearance entered by a court which has not first secured jurisdiction over the person of the defendant or over the res sufficient for the nature of the action - in personam, quasi in rem or in rem - may be collaterally attacked, even by the party in whose favor it was entered. The decree is not entitled to res judicata effect in the state in which it was rendered, nor to full faith and credit, since a decree rendered without jurisdiction over the person or the res violates due process. (Emphasis supplied)

See Also, Volume 6, Moore's Federal Practice §55.09. Compare:

Schaffer v. Heitner, 97 S.Ct. 2569, 52 L.Ed. 2d 683 (1977);

McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed 608

(1917). Defendant had a default judgment entered against him in the Superior Court when he failed to appear and defend in the action; consequently, under the above authority, Defendant can now collaterally attack the jurisdiction of the Superior Court. Defendant has appeared in this Court and made such a collateral attack.

The Superior Court effectuated service of process on Defendant pursuant to Indiana T.R. 4.1. Said rule provides:

(A) In general. Service may be made upon an individual . . . by

(1) sending a copy of the summons and complaint by certified mail or other public means by which a written acknowledgement of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode

* * *

(Emphasis supplied)

The party responsible for having the process served has the option to use any one of the methods of service given in T.R. 4.1. The Plaintiff in this case chose to serve Defendant by certified mail. The Court specifically notes that T.R. 4.1 (A)(1)

requires a receipt to be returned showing that the process was received by the party. In the case herein the two registered letters were returned without anything showing receipt of the letters by Defendant. Therefore, this Court must conclude that neither Defendant nor anyone close to Defendant saw and/or accepted the process. Consequently, the conclusion of this Court is that service of process on Defendant was not validly effectuated pursuant to Indiana T.R. 4.1(A)(1) and the Superior Court did not have personal jurisdiction over Defendant. The Court notes that in the cases construing Indiana T.R. 4.1(A)(1), a receipt showing acceptance of the summons was always returned. The main problem was usually who could legally accept the service. See Generally, Roberts v. Watson, 359 N.E.2d 615 (Ind. 1st DCA 1977); Glenner Mercury-Lincoln, Inc. v. Riley, 338 N.E.2d 670 (Ind.2d DCA 1976)..

It should be noted that Indiana T. R. 4.11 provides for the situation in which service of process is returned without acceptance. Said rule provides:

If mailing by the Clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested by the person seeking service.

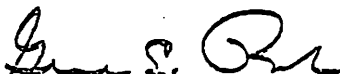
There is nothing on the record showing that Plaintiff made any attempt to have the summons reissued and served in a different manner. As shown previously, Indiana T.R. 4.1 (A)(1) is used to effectuate service at the option of the party seeking to cause service, the other sub-sections of Indiana T.R. 4.1 provide alternative methods of service, and Indiana T.R. 4.11 gives specific instructions in case a summons is returned unaccepted. Plaintiff's actions in attempting to serve Defendant simply did not conform to the requirements of these rules; consequently, this Court must conclude that service of process was not properly completed. Any argument by Plaintiff that the Defendant had notice in the Superior Court action because of a phone call to an attorney in Mississippi is without merit. The evidence shows

that the attorney in Mississippi did not represent the Defendant in the Superior Court action, and there is no evidence showing that the attorney notified the Defendant of said action. Indiana T.R. 4.1 makes no provision for this type of service of process and this Court can find no authority for such a proposition.

This Court now holds that the Superior Court's service of process on Defendant was insufficient. Consequently, the Superior Court did not have personal jurisdiction over the Defendant when it entered its default judgment. The collateral attack of Defendant on the Superior Court's jurisdiction is, therefore, valid, and the Superior Court's judgment is not entitled to full faith and credit in this Court. For the reasons given above, Defendant's motion to dismiss is hereby GRANTED. Plaintiff's motion for summary judgment is accordingly DENIED and all other motions are rendered MOOT.

IT IS SO ORDERED.

DATED at Evansville, Indiana this 31st day of March,
1980.


Gene E. Brooks, Judge
United States District Court

COPIES TO:

CLAUDE BATES
4411 Washington Avenue
Evansville, Indiana 47715

TRAVIS BUCKLEY
P.O. Box 52
Laurel, Mississippi 39440

GEORGE C. BARNETT
48 Permanent Savings Building
Evansville, Indiana 47708

CHARLES G. BLACKWELL
P.O. Box 52
Laurel, Mississippi 39440