A.J.J. Enterprises v. Ngirchechol, 4 ROP Intrm. 347 (1994)

A.J.J. ENTERPRISES,
Plaintiff,

v.

APPOLONIA NGIRCHECHOL and JOHN MOISEVE,
Defendants.

CIVIL ACTION NO. 92-94

Supreme Court, Trial Division
Republic of Palau

Order
Decided: May 5, 1994

Counsel for Plaintiff: David F. Shadel
Counsel for Defendant Ngirchechol: Christina M. Ragle
Counsel for Defendant Moiseve: Gerald G. Marugg

PETER T. HOFFMAN, Justice:

The Defendant John Moiseve has moved to set aside the default judgment previously entered against him in this matter and for Rule 11 sanctions against Plaintiff's counsel for obtaining the judgment.

The facts supporting these motions are not in dispute. The complaint, seeking judgment on an alleged debt, was filed on March 4, 1994, and summons were issued against both of the co-defendants on the same date. Four days later, on March 8, 1994, an amended summons was issued against the Defendant Moiseve. The amended summons contained an answer date of "30 days after service of this summons upon you."

The Plaintiff filed a proof of service on April 13, 1994 which stated that the complaint and summons were mailed on March 9, 1994. The attached certified mail return receipts show the mailing was ⊥348 to John Moiseve on two separate days, March 9 and March 12, 1994, and to two separate addresses in Guam. One receipt was signed on March 12, 1994 and the second one was signed on March 15, 1994. Although the signatures on the two receipts are different, it is impossible to determine which one purports to be that of Moiseve.

The Plaintiff filed a motion for default and judgment on April 14, 1994 along with a supporting affidavit. A default judgment was entered against Moiseve on April 15, 1994. The motion states that the summons and complaint were served on Moiseve on March 9 and 12, 1994, and that the Defendant has failed to appear, plead or otherwise defend.

The questions of whether the default judgment should be set aside and whether Rule 11

sanctions should be applied are intertwined. The questions boil down to deciding when service occurred. If, as Plaintiff's counsel contends and as was stated in the motion for default judgment, service occurred on the dates of mailing, March 9 and March 12, 1994, then the setting aside of the default judgment is entrusted to the sound discretion of the Court. If, however, service occurred on the date of receipt by the Defendant, then the motion for default judgment was filed prematurely, before 30 days had elapsed, and the default and judgment were based on an erroneous and misleading motion signed by Plaintiff's counsel.

Paragraph one of the complaint states that jurisdiction over the defendants is claimed pursuant to 14 PNC §§141-47, Palau's Long Arm Statute. Section 145 of that act states that no default ⊥349 shall be entered against a defendant "until the expiration of at least 30 days after service." Rule 4(e) of the ROP Rules of Procedure permits service of process on a party not found within Palau, whenever authorized by statute, so long as service is accomplished in conformity with the authorizing statute. Section 143 of the Long Arm Statute permits service outside of Palau by certified mail.

In his initial memorandum, Plaintiff also claims compliance with the provisions of ROP Rules of Procedure 4(i)(1)(D). This provision requires that mail service be "addressed and dispatched by the clerk of the court to the party to be served." The clerk did not address or dispatch the summons in the instant case thus leaving the Plaintiff to depend on 14 PNC §145 for the adequacy of service.

Absent statutory language to the contrary, the plain meaning of service is the receipt by the defendant of the summons and original complaint in an action. The definition of service of process is "[t]he service of writs, complaints, summons, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and when they are so delivered, they are then said to be served." Black's Law Dictionary 1368 (6th ed. 1990). Nothing in 14 PNC §145 suggests a different meaning should be accorded the term when service is by mail.

Nor is there anything in the language of § 145 which would suggest that when service is accomplished by certified mail it is ⊥350 complete upon mailing. On the contrary, such a result would be incompatible with the intent and language of the remainder of the Long Arm Statute and the ROP Rules of Procedure. For example, 14 PNC §143 requires that the mailing be by certified mail. Requiring receipted mail would be superfluous if service occurred upon mailing. Similarly, the requirements of ROP Rules of Procedure 12(a) would be misleading, as would the summons issued under ROP Rules of Procedure 4(b), if the reference in the summons to "service of this summons upon you" referred not to when it was delivered to the defendant, but to when it was deposited in the mail.

The authority the Plaintiff relies on in the three memoranda submitted in opposition does not support his contention that service is complete upon mailing. Instead, they illustrate the Plaintiff's confusion about the procedures to be followed.

Several of the cases cited by Plaintiff concern the scope and application of F.R.Civ. P. 5 which is substantially similar to ROP Rules of Procedure 5. This rule defines the procedures to

be followed in serving papers following service of the original complaint and summons. By the express language of the rule, service under Rule 5 is complete upon mailing. ROP Rules of Procedure 5(b). The rationale of Rule 5(b) is based on the obligation of parties, once they have been served with process, to keep the Court and opposing counsel apprised of any change in address. If a party fails to inform the Court and opposing counsel of any change in address, then that party will bear the ⊥351 consequences of the failure.

Other authorities cited by the Plaintiff and which interpret Rule 5 are Anthony v. Marion County General Hospital, 617 F. 2d 1164 (5th Cir. 1980) and J. Moore, 2 Federal Practice ¶5.07, at 1356 (1991); 58 Am. Jur. 2d Notice §§33, 34 (1989) (concerning all notices). Since the instant case concerns the service of the summons and original complaint, Rule 5 has no application.

A second set of authorities cited by the Plaintiff involve a refusal by the Defendant to accept mail service. These authorities stand for the proposition that service is accomplished upon the refusal to accept the summons and original complaint; they do not in any way suggest that service is complete upon mailing. See *Bersch v. Drexel Firestone, Inc.* , 389 F. Supp. 446, 463 (S.D.N.Y. 1974) ("[T]he Court is convinced that delivery was in fact made to the New Brunswick address."); *Nikwei v. Ross School of Aviation, Inc.* , 822 F.2D 939, 945 (10th Cir. 1987) ("Thus, Courts view service by registered or certified mail as being complete when such is refused though [sic] the act of the defendant."); 28 Fed. Proc. L. Ed. ¶ 65.125 (1984). These cases have no application to the instant case. There is no question raised about the receipt of the certified mail service, only when that service occurred.

Finally, Plaintiff cites to three cases in the Trial Division of the Supreme Court of Palau: *Becheserrak d/b/a Becheserrak v. Clemonas* , Civil Action No. 3-92; *Ngirausui v. Clemonas* , Civil Action No. 455-91; and *Palau Federation of Fishing Association v. Fejeran and Fejeran* , Civil Action No. 495-91. In each of these ⊥352 cases the Plaintiff mailed process to the defendant or defendants by certified mail. In all three cases, the defendants were not found. And in all three cases, default judgment was entered against the defendants. While these cases raise interesting constitutional issues, they do not stand for the proposition that service occurs upon the date of mailing. In each case a form order for entry of default and default judgment, prepared by Plaintiff's counsel, was signed by the court, but with no indication that the issue of the date upon which service occurred was ever considered.[1]

One of the citations supplied by the Plaintiff appears on its face to support his contention. But, on closer examination, this support evaporates. Section 228 of 62B Am. Jur. Process (1990) states, "Service of process by mail is deemed complete when the summons or writ is deposited in the post office, properly addressed, with the proper amount of postage." A reading of the only case available in Palau of those cited in the footnote accompanying this statement reveals that it

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[1] The Court understands the intended analogy between the instant case and the three cited cases, but questions whether the orders rest on sound reasoning. It would be strange indeed to state that service occurs on the date of a mailing to a defendant who cannot be found, but the plaintiff must wait 30 days before taking a default judgment. The purpose of waiting the 30 days in such a situation eludes this court. The requirement of a 30 day waiting period only makes sense if the defendant actually receives the summons and complaint.

concerns the interpretation of specific statutory language. *Johnson & Johnson v. Superior Court (Lawton)*, 695 P. 2d 1058 (Supp. Ct. Calif. 1985). The only federal authority cited in this section, *Freed v. Plastic Packaging Materials, Inc.* , supra, concerns the service of requests ⊥353 for admission under F.R.Civ.P. 5 rather than the service of process. The pocket part contains the citation of a further federal case, *Audio Enterprises, Inc. v. B&W Loudspeakers of America* , 957 F. 2d 406 (7th Cir. 1992), which interprets the California service by mail statute and relies on *Johnson & Johnson v. Superior Court (Lawton)*, supra.

In conclusion, service as contemplated by 14 PNC §145, when accomplished by certified mail, occurs upon receipt by the defendant. Thus, the motion in the instant case was premature and the default judgment previously entered on April 15, 1994 is vacated and the defendant given 20 days in which to answer or otherwise respond to the Plaintiff's complaint. Because Plaintiff's counsel could reasonably have relied on the quoted language of 62B Am. Jur. Process § 228, even though the language is not well founded, and because of his prior experience in obtaining default judgments in the Trial Division of the Supreme Court, Rule 11 sanctions will not be imposed.

SO ORDERED.