UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FRANK G. SAMPSON	*	
	*	**CIVIL ACTION NO. 04-1052**
Plaintiff	*	
	*	
VERSUS	*	**SECTION: "N-3"**
	*	
CITY OF NEW ORLEANS, NOPD, et. al.;		
	*	
Defendants	*	
	*	
	*	

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT AND MOTION FOR SUMMARY JUDGMENT ON RELIEF FROM JUDGMENT

Defendant, Mr. Michael Whetstone, urges this Honorable Court to grant him relief under Rule 60 (b) from the absolutely void "default" judgment entered in this proceeding against him, upon just terms consisting of the basic lack of service of process of the original and amended complaints filed in this matter, and further, to grant summary judgment to Mr. Whetstone under Rule 56 on this issue, inasmuch as it is an undisputed fact that Mr. Whetstone was never properly served with the original or amended Complaints filed in this matter, and was not employed by the City of New Orleans on April 14th, 2004, the alleged date of "service", since he resigned from the NOPD on April 4th, 2004, as shown by the Exhibits and Affidavits attached to this Motion. Further, and as will be shown below, it is clear that the so called "default" judgment for $106,000 obtained in this case was based upon gross misstatements in several sworn pleadings made to the Federal Courts. Such

practices undermine the integrity of the judiciary and cannot be tolerated. All of the mistaken or false affidavits filed by Plaintiff Sampson detailed below also combine to constitute both "just terms" for purposes of F.R.C.P. 60 (b) to grant relief from the void judgment, as well as constitute "fraud and ill practices" for purposes of setting aside the void "default" judgment. Otherwise, judicial fair play and due process cease to exist. Fundamental fairness, fair play, and proper due process of law demand nothing less than granting relief from this void "default" judgment.

Plaintiff Sampson throughout this proceeding has merely resorted to demonizing Mr. Whetstone, and has made serious misstatements, but has failed to adequately address the pertinent issue of the lack of valid service upon Mr. Whetstone. Again, Mr. and Ms. Whetstone seek only fundamental fairness, fair play, and proper due process of law in these proceedings.

The Plaintiff Sampson has completely failed to address the central, simple, and fatal flaw with Plaintiff's case, i.e., that Mr. Whetstone was never properly served with the original or amended Complaints filed in this matter, and was not employed by the City of New Orleans on April 14th, 2004, the alleged date of "service", since he resigned from the NOPD on April 4th, 2004. The Plaintiff does not even address the crucial and dispositive fact that Mr. Whetstone was not a "public officer, or a "public official", on April 14th, 2004. This undisputed fact has nothing to do with "credibility". Instead, the Plaintiff Sampson's Opposition filed in this matter (Rec. Doc. #56, 04-1052), actually misquoted the language of a state service statute, CCP Art. 1265, and also filed a third mistaken or false affidavit, in his continued attempts to enforce the absolutely null judgment in this case. This dispositive motion for summary judgment to grant relief from this absolutely null "default" judgment should simply be granted. Further, Plaintiffs' minimum forty five (45) day grace period in which to seek relief in 04-1052 has not yet begun to run, due to the filing by Mr. and Ms.

Whetstone of a timely Motion for New Trial in 09-6589. See Order, Rec. Doc. #6, 09-6589, wherein Mr. Whetstone was granted a minimum forty five (45) day grace period by Judge Engelhardt in which to seek relief in this underlying action. These Motions seek such relief.

Plaintiff Sampson crucially ignores the indisputable and dispositive fact that Mr. Whetstone was not a public officer or public employee when this suit was filed, and when the purported service was attempted, and also misquoted the language of Louisiana Code of Civil Procedure Art. 1265 as follows. Plaintiff Sampson first erroneously states: "art. 1265 specifically states that an officer or employee of such a municipality 'may be served on the officer personally, or in his absence, by service upon any employees of suitable age and discretion". Plaintiff's Opposition, (Rec. Doc. # 56, 04-1052, filed 12/26/09, pg. 2, and Rec. Doc. #9, 09-6589, filed 12/26/09, pg. 1). However, that is not what La. C.C.P. Art. 1265 actually states. La. C.C.P. Art. 1265 actually states:

C.C.P. Art. 1265. Political entity; public officer

> Service of citation or other process on any political subdivision, public corporation, or state, parochial or municipal board or commission is made at its office by personal service upon the chief executive officer thereof, or in his absence upon any employee thereof of suitable age and discretion. **A public officer, sued as such, may be served at his office either personally, or in his absence, by service upon any of his employees of suitable age and discretion.**
>
> If the political entity or public officer has no established office, then service may be made at any place where the chief executive officer of the political entity or the public officer to be served may be found.

The correct provision of Federal Rule 4 applicable to an individual former employee defendant who is not an employee of the United States (which is Rule 4 (i) (3)), is Rule 4 (e), and not Rule 4 (j). Rule 4(e) expressly requires lawful service, of either personal, domiciliary, or service

upon an authorized agent. None of these conditions of Rule 4 (e) were met in the service attempted by Plaintiff Sampson. **It is basic that a former employer is not an agent authorized by law to accept service of process for a former employee**. Mr. Whetstone resigned from the New Orleans Police Department on April 4th , 2004, (Rec. Doc. #1-2, Exhibits, 09-6589, filed 9/29/09; Rec. Doc. #53, Exhibits, 04-1052, filed 12/18/09), and therefore could not be legally served through the City Attorney on April 14th, 2004, even if an employee of the City Attorney "accepted" service. The City Attorney had no authority to "accept" service for a former employee. The Plaintiff, Mr. Whetstone, a former public officer, had no employees of his own on April 14th, 2004, for purposes of the precise language of La. C.C.P. Art. 1265. Mr. Whetstone was a private individual on April 14th, 2004. Plaintiff Sampson's argument that "he must have known about the suit" is frivolous. Compare the somewhat different **State ex rel. Fatter v. City of New Orleans**, 209 So.2d 141 (La. App. 4 Cir.1968).

Furthermore, Plaintiff Sampson has now filed a demonstrably false affidavit of Chris Yount, which is actually the third[1] mistaken or false affidavit filed by Mr. Sampson in these proceedings,

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[1]The first two mistaken or false affidavits which were filed in 04-1052 to obtain the "default" judgment are described in Rec. Doc. #1, 09-6589, Paragraph 9, as follows: "(B). The Motion filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 states a date of service upon the City Attorney of April 14th, 2004, even though Mr. Whetstone's last day of employment with the City of New Orleans was April 4th, 2004. (Doc. #18, Exhibit "1-A", Exhibit "1-B", Exhibit "1-C", Exhibit "2", Exhibit "3", and Exhibit "4").

(C). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, 04-1052, Exhibit "1-B"), erroneously states in Paragraph #2 that "defendant Michael Whetstone was served with the original complaint".

(D). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"), admits in Paragraph #3 that service was purportedly only made on the City Attorney.

(E). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"), contains blatant hearsay content in Paragraph #4, and therefore is not based upon personal knowledge.

in his attempt to enforce this absolutely null "default" judgment for $106,000.00 . In that affidavit, filed by Plaintiff Sampson on 12/26/09 in this proceeding, Chris Yount swears that he served Mr. Whetstone through the City Attorney on April 14th, 2004. However, then Plaintiff Sampson's Supplemental Memorandum admits on 12/31/2009, that this mistaken or false affidavit was a "mistake" attributable to Hurricane Katrina. No mention of the undisputed fact that Mr. Whetstone was not employed by the City at the time of the attempted service is made. The newly scanned Record Document Numbers 2 and 8 in 04-1052 show that Mr. Yount did not go to the City Attorney's office on April 14th, 2004 as he swore on 12/26/2009 under penalty of perjury, but Mr. Abel went to the City Attorney's Office instead, as he acknowledges in his 12/31/09 supplemental memorandum. That these purported returns were recently located by the Clerk's office merely shows that the purported returns on the City Attorney on April 14, 2004 do exist; however they do not alter the indisputable fact that valid service could not be accomplished upon Mr. Whetstone through the City on that date (04/14/2004), since Mr. Whetstone did not work for the City on that date.

(F). The Motion filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states that "the summons and citation were duly served on defendant MICHAEL WHETSTONE on 11 February 2005". This statement is not true, and it also conflicts with the date of service purportedly upon the City Attorney of April 14th, 2004, given by the other Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"). Thus, the two motions and affidavits filed in support of the confirmation of default are inconsistent with, and conflict with, each other.

(G). The Affidavit filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states in Paragraph 2 that "Whetstone was an officer of the NOPD at all pertinent times hereto".

(H). The Affidavit filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states in Paragraph 4 that "service was made on Whetstone, returned, and entered in the docket."

(I). On the original Complaint filed in 04-1052 (Doc. #1), an incorrect service address is listed for Mr. Whetstone.

This dispositive motion for summary judgment, set for January 27th, 2010, before Judge Engelhardt, to set aside the demonstrably false "default" judgment in 04-1052, should be granted.

This claim arises because of violations of the Federal Rules of Civil Procedure, in causing this Federal Court to issue null and void judgments, without any service upon the "judgment debtor", Defendant Michael Whetstone, in contravention of F. R.C.P. 4, the federal and state Constitutions, and the Defendants' fundamental rights.

Defendant Michael Whetstone resigned from his employment with the New Orleans Police Department effective on April 4th, 2004. See Exhibit 1, attached: Exhibits marked "Rec. Doc 1-2" including "1-2-Exhibit-1", "1-2,-Exhibit 1-A", Affidavit of Amy Trepagnier marked as "1-2, Exhibit-2", Affidavit of Eva Whetstone, "1-2-Exhibit 3", Declaration of Michael Whetstone, Exhibit "1-2-Exhibit-4[2]", and Affidavit of Michael Whetstone marked as Exhibit "2" to the instant Motions, all attached. However, Plaintiff Sampson through his attorneys, Daniel Abel and Carl Finley, purported to serve a Complaint (Sampson v. City of New Orleans, 04-1052, E.D. La.), against Defendant Michael Whetstone through the City Attorney's Office, on April 14th, 2004. See "1-2-Exhibit 1-B". No service of said Complaint was ever made at any time upon Defendant Michael Whetstone. Michael Whetstone first learned of this judgment when Mr. Whetstone was recently served with a "Judgment Debtor Examination", which was originally set for Wednesday, September 30th, 2009. (Doc. #45), in 04-1052, and which was recently reset by Plaintiff Sampson to January 6th, 2010, in contravention of the orders of this Court (Rec. Doc. # 6, 09-6589, finality deferred pending motion for new trial, 10/13/2009).

[2] Exhibit "1-4" in 09-6589 was originally a fax copy, due to the temporary absence from New Orleans by Mr. Whetstone, and original signatures are being substituted. The attached Affidavit of Mr. Whetstone supporting the instant Motions (attached Exhibit "2"), is an original.

It is fundamental that no provision of F.R.C.P. 4, indeed, no provision of any state or federal procedural law, authorizes service of process of a Complaint upon a person's former employer. **See Miner v. Punch**, 838 F.2d 1407 (C.A.5th Cir.1988):

> "There being no valid service of process, the default judgment against Proprietors is an absolute nullity and must be vacated." **Aetna Business Credit v. Universal Decor**, 635 F.2d 434 (5th Cir.1981) ("In the absence of valid service of process, proceedings against a party are void.")";
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> **Miner v. Punch**, 838 F.2d 1407,1410 (C.A.5th Cir.1988).

Also see **World-Wide Volkswagen Corp. v. Woodson**, 444 U.S. 286 (1980).

Despite telephonic and written notice and demand upon Plaintiff Sampson through his attorney, Daniel Abel, (see Exhibit "1", letter), Plaintiff Sampson continues to pursue the enforcement of a null and void default judgment for $106,000.00 against Defendant Michael Whetstone. (Exhibit "5"). This enforcement action also threatens to jeopardize the community property and the community property rights of the co-plaintiff in 09-6589, Eva Whetstone, the spouse of Michael Whetstone.

Further, a new summons of the Complaint in this matter, 04-1052, was requested by Plaintiff on 9/28/2009 (Rec. Docs# 47, 48, 04-1052). This indicates that Plaintiff understands that there is no valid service in this case.

At no time did Defendant Michael Whetstone ever give his authorization, either verbal or in writing, to the City Attorney to accept service of process for Defendant Michael Whetstone.

"It is fundamental to our system that an ordinary proceeding begun without proper citation is a nullity." **Succession of Barron**, 345 So.2d 995 (La. App. 2 Cir., 1977). See also **Power Marketing Direct, Inc. v. Foster**, 938 So.2d 662 (La. 2006), **Barnes v. Williams**, 997 So.2d 898

(La. App. 4th Cir. 2008), **Whitehurst v. A-1 Affordable Siding, Inc**., 953 So.2d 111 (La. App. 3rd. Cir. 2007), **Mitchell v. Bass**, 2002 LA 1609 (2001-CA-2217), (La. App. 1st. Cir. 2002), and **Powell v. Grocery**, No. 07-1234 (La. App. 4/30/2008) (La. App., 3rd Cir. 2008). The jurisprudence further says that the client and his attorneys as well may be held liable for all attorneys fees and costs incurred by Mr. Whetstone attributed to the vacating and setting aside of this default judgment, should an absolutely null judgment be pursued by Defendant Sampson anyway, because this would also be a violation of F.R.C.P. Rule 11. See also **Filson v. Windsor Court Hotel**, 990 So.2d 63 (La. App. 4th Cir. 2008), awarding substantial attorneys fees for the overturning of an invalid default judgment. **Absence of valid service is a fatal defect**. "A void judgment which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court." **Long v. Shorebank Development** Corp., 182 F.3d 548 (C.A. 7th Cir. 1999), **Jackson v. Fie Corporation**, 2002 C05 373, (01-30679), fn46,47 (C.A. 5th Cir. 2002), **Roach v. Pearl**, 673 So.2d 691, 693 (La. App. 1 Cir. 1996).

In addition to the fundamentally fatal defect of the absence of valid service of process, further numerous defects in the proceedings in 04-1052 are as follows:

(A). There are no valid returns of service on Mr. Whetstone present in the record. The online document purporting to contain the return merely show service upon the City Attorney, after defendant Whetstone was no longer employed there. (Rec. Doc. # 2, 8, in 04-1052).

(B). The Motion filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 states a date of service upon the City Attorney of April 14th, 2004, even though Mr.

Whetstone's last day of employment with the City of New Orleans was April 4th, 2004. (Doc. #18, and See Exhibit 1, attached: Exhibits marked "Rec. Doc 1-2" including "1-2-Exhibit-1", "1-2,-Exhibit 1-A", "1-2,-Exhibit 1-B", "1-2,-Exhibit 1-C", Affidavit of Amy Trepagnier marked as "1-2, Exhibit-2", Affidavit of Eva Whetstone, "1-2-Exhibit 3", Declaration of Michael Whetstone, Exhibit "1-2-Exhibit-4", and Affidavit of Michael Whetstone marked as Exhibit "2", and all attached to the instant Motions.

(C). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, 04-1052, Exhibit "1-B"), erroneously states in Paragraph #2 that "defendant Michael Whetstone was served with the original complaint".

(D). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"), admits in Paragraph #3 that service was purportedly only made on the City Attorney.

(E). The Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"), contains blatant hearsay content in Paragraph #4, and therefore is not based upon personal knowledge.

(F). The Motion filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states that "the summons and citation were duly served on defendant MICHAEL WHETSTONE on 11 February 2005". This statement is not true, and it also conflicts with the date of service purportedly upon the City Attorney of April 14th, 2004, given by the other Affidavit filed by attorney Daniel Abel in support of the Preliminary Default on July 22, 2005 (Doc. # 18, Exhibit "1-B"). Thus, the two motions and affidavits filed in support of the confirmation of default are inconsistent with, and conflict with, each other.

(G). The Affidavit filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states in Paragraph 2 that "Whetstone was an officer of the NOPD at all pertinent times hereto".

(H). The Affidavit filed by attorney Daniel Abel in support of the Confirmation of Default on December 19th, 2006, (Doc. # 36, Exhibit "1-C"), erroneously states in Paragraph 4 that "service was made on Whetstone, returned, and entered in the docket."

(I). On the original Complaint filed in 04-1052 (Doc. #1), an incorrect service address is listed for Mr. Whetstone.

All of these mistaken or false affidavits filed by Plaintiff Sampson combine to constitute both "just terms" to grant relief from the void judgment for purposes of F.R.C.P. 60 (b), as well as constitute "fraud and ill practices" for purposes of setting aside the void "default" judgment.

It is clear from these documents that the so called "default" judgment was obtained based upon gross misstatements made in sworn pleadings presented to the Federal Court. Such practices compromise the integrity of the judicial system, and cannot be tolerated.

Defendant Michael Whetstone first learned of this action when Mr. Whetstone was served with a "Judgment Debtor Examination", which was originally set for September 30th, 2009. (Doc. #45) in 04-1052.. Despite being advised both telephonically and by faxed letter (Exhibit "1", with its attachments), of the fatal defects in this default judgment, and the fact that the default judgment is an absolute nullity, null, and void on account of the complete lack of valid service on Mr. Whetstone, Defendant Sampson through his attorneys are continuing the pursuit of the enforcement of this absolutely null and void judgment against Mr. Whetstone.

Defendant Michael Whetstone and his entire family face extreme injury in the unfair and

unjust threat to enforce this void judgment, which is severely detrimental to Mr. Whetstone's legal rights, in an attempt by plaintiff Sampson to garnish wages, seize their assets and real and personal property, seize their home, seize funds which were not due, destroy their credit, take property through the manipulation of judicial processes absent due process and fair notice, and possibly force them into an unwarranted bankruptcy. It is ironic that Plaintiff demonizes Mr. Whetstone for the alleged theft of $300.00, yet attempts the wrongful conversion of $106,000.00 plus interest from Mr. Whetstone and his family in this proceeding.

It is clearly established law that a judgment is null and void in the absence of service of the initial Complaint upon the defendant (Mr. Whetstone in Civil Action 04-1052, E.D. La.). See the authorities cited above, as well as Exhibit "1", "1-A", and Exhibits "2-4" in 09-6589, all attached and incorporated herein by reference as well. Additionally, notice of these fatal defects have been brought to the attention of Mr. Sampson's attorneys via faxed letter (see Exhibit "1", attached). Therefore, the further pursuit of this matter by Mr. Sampson and by his attorneys are done in contravention of F.R.C.P. 11, for which all attorneys fees and costs incurred by Mr. and Ms. Whetstone as sanctions are sought from Mr. Sampson and from his attorneys.

The above described illegal actions of the Plaintiff, Frank Sampson, through his attorneys, constitute an abuse of process, and constitute fraud and ill practices, for which the Plaintiff Sampson through his attorneys are liable for all such damages as are reasonable in the premises, including damages to credit ratings, mental anguish, emotional distress, any wrongful filing of liens, any wrongful seizures, and all attorneys fees and costs incurred by Mr. Whetstone.

Because the underlying judgment is an absolute nullity and void due to the lack of valid service of both the original and amended complaints, and because of all of the mistaken and false

affidavits filed by Plaintiff Sampson, which undermine the integrity of the judiciary, this Honorable Court should grant Mr. Whetstone relief under Rule 60 (b) from the absolutely void "default" judgment entered in this proceeding against him, upon just terms consisting of the basic lack of service of process of the original and amended complaints filed in this matter, and further, should grant summary judgment to Mr. Whetstone under Rule 56 on this issue Plaintiff Sampson cannot now be allowed to wrongfully convert $106,000.00 from Mr. and Ms. Whetstone under the vigilant and watchful eyes of the federal courts. Fundamental fairness, fair play, and proper due process of law require no less.

WHEREFORE, IT IS PRAYED that relief from this absolutely void judgment (Record Doc. #43, 04-1052) be granted herein, and that summary judgment be granted on this issue, pursuant to the Constitution of the United States, the authorities cited herein and in the accompanying memorandum in support of this motion, and on account of the Exhibits and Affidavits attached to this motion and incorporated herein by reference.

RESPECTFULLY SUBMITTED,

s/ David A. Dalia
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ATTORNEY FOR DEFENDANT

Certificate of Service

I hereby certify that on the 5th day of January, 2010, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, and notice of this filing was sent electronically to all counsel of record, using the CM/ECF system, this 5th day of January, 2010. There are no manual recipients identified to receive this filing.

s/ David A. Dalia
David A. Dalia