IN THE COURT OF APPEALS OF IOWA

No. 0-614 / 09-1308
Filed October 6, 2010

YELLOW BOOK SALES & DIST. CO.,
Plaintiff-Appellee,

vs.

TERRANCE WALKER
and DISH CREW CORP.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Terrance Walker appeals the district court's denial of his motion to set aside a default judgment based on insufficient service of process. **REVERSED AND REMANDED.**

Terrance Walker, Ankeny, pro se.

David Russell of Abendroth & Russell, P.C., Urbandale, for appellee.

Considered by Vogel, P.J., and Mansfield and Tabor, JJ.

MANSFIELD, J.

Terrance Walker appeals a district court order denying his motion to set aside a default judgment. Walker contends the judgment should have been vacated because he was not properly served with the petition and original notice. According to Walker, the record shows at most that his ex-girlfriend "tried to give" these papers to him. He contends that is not proper service. We agree and therefore reverse and remand.

I. Background Facts and Proceedings

On May 14, 2008, Yellow Book Sales and Distribution Company filed suit against Terrance Walker and his company, Dish Crew Corp., alleging breach of contract for failing to make payments for advertising space within one of its publications. On July 11, 2008, an affidavit of service was filed with the district court stating that the original notice and petition were served upon Walker "by serving T[h]anya, a co-occupant at the individual's house or usual place of abode." On July 17, 2008, Thanya Ruenprom filed a handwritten note with the clerk of court, which stated:

> To clerk of court,
>
> Terrance Walker does not live at this address 5200 SE 27th St., Des Moines, IA 50320 anymore. He does receive some mail here. He did not accept this petition from me when I tried to give it to him.
>
> Thank you,
>
> Thanya Ruenprom

Walker thereafter failed to answer, respond, or otherwise timely defend, so Yellow Book moved for a default judgment.[1] On September 26, 2008, the district court entered judgment against Walker and Dish Crew Corp. for $14,415.60 plus interest, attorney fees, and court costs.

On May 21, 2009, Yellow Book applied to take a debtor examination of Walker in aid of its efforts to collect the judgment. The application was granted June 9, 2009. The order to appear at the examination was personally served on Walker at his residence in Ankeny on June 30, 2009.

Following service of the examination order, Walker moved to set aside the default judgment against him. Walker alleged he had "never been personally served anything else [beside the examination order] in this Matter: no filings, petitions, or motions." Walker subsequently filed an affidavit in which he stated that he has "resided exclusively at [his residence in Ankeny] since December 2006" and that "no process server has ever given Defendants anything in this above case number; no filings, petitions, motions, nor any documents. Nor had Defendants received any mail in relation to this case number above before."

The district court held a hearing on the motion to set aside the default judgment on July 24, 2009. Thereafter, the district court entered a ruling denying Walker's motion. The district court accepted as accurate Walker's sworn statement that the Des Moines residence was not his dwelling house or usual place of abode when the papers were delivered to Ruenprom. Nonetheless, the court determined that Ruenprom's attempt to provide the original notice and

[1] The notice of intent to file a written application for default, *see* Iowa R. Civ. Pro. 1.972(3)(*a*), was sent by mail to the same Des Moines address.

petition to him constituted "sufficient compliance with the 'subservice' requirements of Iowa Rule of Civil Procedure 1.305(1)." Walker now appeals.

II. Standard of Review

We review proceedings to set aside default judgments under Iowa R. Civ. P. 1.977 for correction of errors at law. *Central Nat'l Ins. Co. of Omaha v. Ins. Co. of North America*, 513 N.W.2d 750, 753 (Iowa 1994).

III. Analysis

Failure to effect proper service renders a judgment void and subject to attack outside the normal time limits for vacating a judgment. *Rosenberg v. Jackson*, 247 N.W.2d 216, 218 (Iowa 1976). According to Walker's unrebutted affidavit, 5200 SE 27th St. was not his residence at the time Ruenprom was served there. Thus, serving her at this address was not enough. Yellow Book could not rely on the provision of Iowa Rule of Civil Procedure 1.305(1) that allows service to be made "at the individual's dwelling house or usual place of abode" by serving "any person residing therein who is at least 18 years old."

Yet the district court found Walker had been properly served when Ruenprom forwarded the original notice and petition to him. We assume for the sake of argument that such a chain of service is potentially valid. We also assume Ruenprom's note may be treated as valid evidence. Still, we cannot agree with the district court's analysis.

Under this branch of rule 1.305(1), Walker had to be served "personally." "[T]he copy of the notice must be delivered, merely offering to deliver it will not suffice." *Snyder v. Abel*, 235 Iowa 724, 729, 17 N.W.2d 401, 404 (1945). In

Snyder, the court observed that the language now incorporated in rule 1.305(1) changed the law. Previously, service was valid if the process-server "deliver[s] him personally a copy thereof, or, if he refuses to receive it, offer[s] to do so." *Id*. Rule 1.305(1)'s predecessor changed that. Hence, under Iowa law, personal service requires more than an effort to serve the papers and the defendant's refusal to accept them.

It is true that where the defendant refuses service, valid service may occur when the process server leaves the papers in or near the defendant's presence:

> The general rule is that, where a defendant on whom service of process by copy is sought to be made refuses to receive the copy offered, the person or officer making the service should inform him or her of the nature of the paper and of his or her purpose to make service thereof, and deposit it in some appropriate place in his or her presence or where it will be most likely to come into his or her possession.

72 C.J.S. *Process* § 63, at 707 (2005); *see also* 62B Am. Jur. 2d *Process* § 190, at 763 (2005) ("Delivery of a summons to the person to be served who resists service may be accomplished by leaving it in his or her general vicinity."). This general rule is followed in federal courts as well:

> [A] face to face encounter and an in hand delivery of the papers is not always essential. If the defendant attempts to evade service or refuses to accept delivery after being informed by the process server of the nature of the papers, it usually is sufficient for the process server to touch the party to be served with the papers and leave them in the defendant's presence or if touching is impossible, simply to leave them in the defendant's physical proximity. It is not crucial in these circumstances that the defendant does not take the papers into his or her possession.

4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1095, at 516-17 (3d ed. 2002).

But there is no indication that happened here. Ruenprom's note only states that Walker "did not accept this petition from me when I tried to give it to him." She does not claim to have left the petition. Runeprom does not say Walker actually learned of the petition's contents. *Cf. Harrington v. City of Keokuk*, 258 Iowa 1043, 1050, 141 N.W.2d 633, 638 (1966) ("It is the rule in this and most jurisdictions that knowledge on the part of the defendant will not supply the need for a valid, legal notice or summons, as required by rule or statute."). To carry out service of process on an individual who refuses to accept or is attempting to evade service, one must leave the documents in the defendant's presence or in some appropriate place where they will be most likely to come into his or her possession. *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1134 (9th Cir. 2009) (service was sufficient when the papers were left on front step after the defendant spoke to process server through an intercom system, but refused to answer and unlock the door); *Slaieh v. Zeineh*, 539 F. Supp. 2d 864, 867 (S.D. Miss. 2008) (service was sufficient when process server dropped papers in the front yard after defendant refused to accept them and attempted to walk away). Since there is no indication this occurred, and since Walker flatly denied ever receiving any of the relevant papers, we must conclude the service was deficient.

We find further support for this holding from the specific facts of *Snyder*, where the supreme court addressed whether notice for the termination of a farm tenancy was sufficiently given when one of the statutory methods provided that it could be done "[i]n the same manner as original notices are served." 235 Iowa at

729, 17 N.W.2d at 403-04, In *Snyder*, the landlord handed the notice to the tenant, who took it, read it, and then handed it back to the landlord and refused to sign it. *Id.* at 727, 17 N.W.2d at 403. The landlord's representative then offered the same notice to the tenant, but the tenant refused even to take it. *Id.* On appeal, the supreme court found the notice was not legally served because (1) the landlord was a party to the action and therefore could not serve process and (2) the representative's actions were "wholly insufficient to constitute delivery of the notice." *Id*. at 729-30, 17 N.W.2d at 404. The court further stated that a "copy of the notice must be delivered, merely offering to deliver it will not suffice." *Id*.

It is true a defendant may not be able to set aside a default judgment based on a mere technical failure of service if he or she fails to intervene promptly:

> If a court would have jurisdiction to render a judgment over the defendant but for a technical failure of service, and the ensuing judgment would be void (see § 6), equitable relief may be denied to a person who has failed to intervene at the proper time. Thus where an action is brought against a person in the State of his domicil and service is attempted to be made upon him by leaving a summons at his last place of residence and by an error of the sheriff the summons is left at another place, of which fact the plaintiff is ignorant but of which the defendant becomes aware, and the defendant does not enter an appearance, equitable relief may be denied him later. In such a case the defendant has not been denied a substantial opportunity of defending and a court of equity may refuse relief to one who has relied on a mere technical failure.

Restatement (First) of Judgments § 129 cmt. b. (1942); *see also In re Marriage of Ivins*, 308 N.W.2d 75, 77 (Iowa 1981) (quoting and relying on this comment). We

cannot conclude, however, that this is a mere technical failure. By not leaving the petition, Ruenprom may have prevented Walker from learning of its contents.

Accordingly, we reverse and remand with directions to set aside the default judgment against Walker and for further proceedings consistent herewith. Costs are assessed to the appellee.

REVERSED AND REMANDED.