

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

October 31, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

MBNA AMERICAN BANK, N. A.,)	C/ A NO. 03A01-9508-CH-00249
)	
Plaintiff/Counter-)	KNOX CHANCERY
Defendant/Appellee)	
v.)	HON. WILLIAM H. INMAN,
)	CHANCELLOR
)	
DONALD E. OVERTON,)	VACATED
)	AND
Defendant/Counter-)	REMANDED
Plaintiff/Appellant.)	

RON CUNNINGHAM Knoxville, for Appellee.

GLENN W OVERTON, Knoxville, for Appellant.

O P I N I O N

Franks. J.

The issue on appeal is whether the defendant had notice of the trial date where a judgment on the merits of the case was entered.

The Trial Court entered judgment based on an alleged debt against defendant, and within thirty days defendant filed

a motion for relief from judgment. He filed his affidavit stating that he had no notice that the case would be heard on the merits, and the notice he had was from the clerk of the court that the motion for summary judgment would be heard on that date. Plaintiff responded with affidavits to the effect that defendant was sent copies of letters setting forth the trial date and facsimile documents were transmitted to defendant also notifying of the trial date. The Trial Court overruled the motion and said "the defendant/counter-plaintiff was given sufficient notice in advance of the trial date".

The Trial Court obviously made his factfinding from the affidavits and other documents in the record. In *Turner v. Turner*, 776 S.W2d 888 (Tenn. App. 1988), we said the Tennessee Rules of Civil Procedure §43 do not provide for the use of an affidavit as evidence at trial. *Accord Berke v. Chattanooga Bar Association*, 436 S.W2d 296, 58 Tenn. App. 636 (1968).

Generally, affidavits are not admissible in the trial as independent evidence to establish a fact. 3 Am Jur.2d, Affidavits §30. Moreover, affidavits of witnesses who are available for trial are not admissible. 2A C.J.S. Affidavits, §56. Affidavits, when admissible, may be accorded probative value but are only considered prima facie evidence. 32A C.J.S. Evidence, §1032. Absent rule or statute they are not conclusive of the facts stated therein, even if they are not contradicted by counter-affidavits. *Id.*

Here, the Trial Court was confronted with contradictory affidavits on the issue of notice, and it was inappropriate to make a factfinding on affidavits.

Accordingly, we vacate the Trial Court's final judgment and remand for a factual determination as to whether defendant had notice of the trial date. If the Court finds he did not, then he is entitled to a new trial on the merits of the case.

The cost of the appeal is assessed to appellee, and the cause remanded.

Herschel P. Franks, J.

CONCUR:

Don T. Murray, J.

Charles D. Susano, Jr., J.