

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED
March 28, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

DONALD E. OVERTON)
Plaintiff - Appellant) KNOX COUNTY
) 03A01-9510-CV-00375
)
v.)
) HON. HAROLD B. WIMBERLY,
) JUDGE
)
RON CUNNINGHAM)
GAIL SHELBY, and)
WACHOVIA BANK CARD SERVICES)
Defendants - Appellees) AFFIRMED AND REMANDED

DONALD E. OVERTON, Pro Se

JAMES E. FOGLESONG OF KNOXVILLE FOR APPELLEES

O P I N I O N

Goddard, P. J.

Donald E. Overton appeals a dismissal of his complaint against Ron Cunningham, an attorney, Gail Shelby, his legal assistant, and Wachovia Bank Card Services, his client, which sought damages, both compensatory and punitive, as a result of the Defendants' fraud:

10. Plaintiff alleges that the specific acts of fraud are that a judgment was obtained against Plaintiff by these Defendants without any service of process on Plaintiff in the General Sessions Court action. Defendants knew this, they perpetrated this fraud on the General Sessions Court, and upon Plaintiff. The additional act of fraud was the letter sent to Mr. Overton by Mr. Shelby [see appendix] affirming that Defendants ("we") had obtained this "final judgment", which was false, and threatening Mr. Overton to execute on this judgment.

The genesis of the suit presently on appeal was a prior suit filed by Mr. Cunningham in the General Sessions Court for Knox County on behalf of Wachovia Bank Card Services, predicated upon the following allegation:

FOR services and/or merchandise delivered to defendant for which payment has not been received as evidenced by the Sworn Account attached hereto in the sum of \$2,361.74 together with all legal interest, attorney fees and the costs of this action.

The present complaint alleges Mr. Overton was never served with process and that a judgment was improperly entered by the General Sessions Court against him on July 21, 1992, in the amount of \$2730.65. Thereafter, Mr. Shelby sent a letter on behalf of Finkelstein, Kern, Steinberg & Cunningham, dated July 30 advising Mr. Overton that a final judgment had been entered against him in the amount of \$2730.65.

Whereupon, Mr. Overton appealed the case to the Circuit Court which found adversely to him. This case was then appealed to this Court and his defense as to service was sustained. The

case was accordingly dismissed. Wachovia Bank Card Services v. Donald E. Overton, an unpublished opinion of this Court filed in Knoxville on February 15, 1996.

In the present case the Defendants filed a "MOTION TO DISMISS AND/OR FOR MOTION FOR SUMMARY JUDGMENT" which was accompanied by an affidavit of Mr. Cunningham stating inter alia the following:

3. The undersigned further states that on the 21st day of July, 1992, the date of entry of a judgment against Donald E. Overton in Knox County General Sessions Court, this case was presented on a sworn account and that a letter from the process server was attached to the complaint and the court read the letter. That the undersigned advised the court there may be a question as to service of process and the Judge after due deliberation decided that valid service had in fact been obtained in the cause and subsequently entered a judgment against Donald E. Overton. That the undersigned caused notice of the entry of this judgment to be sent to Donald Overton. Donald E. Overton personally appeared and personally filed an appeal of this judgment within the time provided by law to the Circuit Court. The appealed case was duly set for trial and judgment in that proceeding has been entered against Donald E. Overton and in favor of Wachovia Bank Card Services for the amount of \$4,509.26.

No counter-affidavit was filed by Mr. Overton, although he did file the following affidavit on April 28, 1993, which was before Mr. Cunningham's affidavit was filed on June 7, 1995:

Comes the Affiant Donald E. Overton and states that the factual allegations in the Complaint filed in this case are true and exact to the best of his knowledge, information and belief.

It is apparent from Mr. Cunningham's affidavit that there was no attempt to defraud Mr. Overton. At the outset and in the finest tradition of members of the Bar, Mr. Cunningham called to the attention of the General Sessions Judge the questionable service of process.¹ Indeed, Mr. Overton was able to re-assert this defense upon appeal to the Circuit Court and thereafter to this Court where he ultimately prevailed.

The affidavit which Mr. Overton did file does not meet the requirements of Rule 56.03 of the Tennessee Rules of Civil Procedure, because it was not made on his personal knowledge, but rather "to the best of his knowledge, information and belief."

It is true that Mr. Overton was incorrectly advised that the judgment of the General Sessions Court had become final, but this in no way prejudiced him but, indeed, if his and his

¹ The officer's return stated "executed as commanded on Don Overton evading service. . . . This the 6 day of May, 1992."

counsel's statements are to be believed,² enabled him to make a timely appeal and--as already noted--ultimately to prevail.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against Mr. Overton.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.

² Upon taking judicial notice of the former proceeding, Wachovia Bank Card Services v. Overton, which we are entitled to do, we note the affidavit of Mr. Overton in that case states the following:

3. Affiant states that he had no notice that any Warrant had been filed by Wachovia Bank Card Services against him in Knox County General Sessions Court and no notice that there was a trial set on July 21, 1992 or any other date against him in Knox County General Sessions Court until he received Exhibit "2" [see appendix] from Plaintiff's legal assistant.

Moreover, in oral argument in the prior case his counsel told the Circuit Judge, "[T]he first notice that Mr. Overton had was when he received a letter from Mr. Cunningham stating we have a judgment."

We find the foregoing curious in light of the fact that the letter referred to is dated July 30, 1992, and the appeal bond in the General Sessions Court was filed on July 29, 1992.