

IN THE CIRCUIT COURT OF HARDIN COUNTY, TENNESSEE  
AT SAVANNAH

CLARK JONES,

Plaintiff,

vs.

TONY HAYS, et al.,

Defendants.

No. 3414

FILED 28th DAY OF Dec 2001 AT 10:15 AM PM  
DIANE POLK, CLERK  
BY J. Smith CLERK

MEMORANDUM OF FACTS AND LAW  
IN RESPONSE TO DEFENDANT THOMPSON'S  
MOTION TO DISMISS FOR ALLEGED DEFECTS IN SERVICE OF PROCESS

Acting by and through counsel of record, plaintiff, Clark Jones, responds as follows to the Motion to Dismiss filed by defendant Charles C. Thompson, II,<sup>1</sup> based on the argument that Thompson has not been served with process.<sup>2</sup>

**STATEMENT OF THE CASE**

Plaintiff filed the complaint in this case on March 12, 2001. On the day of the filing of the complaint, a summons was issued from the state court to all defendants, including Charles C. Thompson, II (hereinafter "Thompson").

On April 16, 2001, defendants Tony Hays, WorldNetDaily.com, and Rebecca Hagelin filed a notice of removal of this case to federal court. Plaintiff filed a motion to remand on April 26, 2001.

Prior to removal of the case, service had not yet been completed on defendant Thompson.

On May 15, 2001, Joe Coneys, private process server, served an Alias Summons and

<sup>1</sup>Defendant's motion refers to "Charles E. Thompson, II." Plaintiff's complaint names Charles C. Thompson, II, being the person described as a reporter for Defendant, WorldNetDaily.com.

<sup>2</sup>Plaintiff addresses Thompson's motion to dismiss based on lack of contacts with Tennessee in a separate memorandum filed simultaneously herewith.

Complaint on Charles C. Thompson, II, at 10:05 a.m., at 1808 Briar Ridge Court, McLean, Virginia.

This return of summons has been filed in this Court.

Plaintiff's motion to remand was granted on May 24, 2001. The federal court ruled that "because defendants have failed to establish federal jurisdiction on the face of the complaint, plaintiff's motion to remand is granted." The federal court further found that the defendants' position in the removal petition was not supported by law and was contrary to well established law. The federal court awarded fees and costs to the plaintiff's attorney. See Order remanding case to state court dated May 24, 2001, pages 8-9. Once the federal court issued a ruling on the amount of fees and costs to be awarded to plaintiff, the federal court entered a decision remanding the case to state court on June 28, 2001.

When defendant Thompson made statements acknowledging that he had been served with the Complaint but that he considered the personal service on May 15 not to be valid, plaintiff's counsel undertook to have Thompson served again. Filed in this cause is the Affidavit of Attempted Service signed by Clark Reynolds, private process server. That Affidavit establishes that Mr. Reynolds attempted to serve Thompson on August 14, August 16, August 19, August 21, August 22, and August 24, 2001, but Thompson avoided service.

On September 27, 2001, the Clerk of this Court issued a third Alias Summons to Thompson. Counsel for plaintiff, J. Houston Gordon, served a certified copy of this summons and a certified copy of the complaint by registered, return receipt mail to defendant Thompson. See Affidavit of Gordon, filed herewith. The post office returned the envelope stamped "Refused."

On October 26, 2001, the Clerk of this Court issued a fourth Alias Summons to Thompson. Counsel for plaintiff, J. Houston Gordon, mailed this summons and a copy of the Complaint to the Sheriff of Fairfax County. See Affidavit filed herewith. The occupant refused to verify any information.

A fifth Alias Summons was issued and a certified copy of the summons and complaint were mailed to the Secretary of State of Tennessee and received on November 1, 2001. On Monday, November 5, 2001, the Secretary of State of Tennessee mailed by registered or certified return receipt mail certified copies of the summons and complaint to Thompson's known address and the same was returned "unclaimed" on December 3, 2001. See affidavit of Mayme R. Brown filed herewith

## RELEVANT RULES OF CIVIL PROCEDURE

**Tennessee Rule of Civil Procedure 4.04. Service Upon Defendants within the State** – The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

(1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, . . .

. . .

(10) Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

**Tennessee Rule of Civil Procedure 4.05. Service Upon Defendant Outside This State** – (1) Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(a) by any form of service authorized for service within this state pursuant to Rule 4.04;

. . .

(5) When service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Tennessee, and the addressee, or the addressee's agent, refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery.

(Emphasis added.)

## RELEVANT FEDERAL STATUTE

28 U.S.C. § 1448. **Process after removal.** In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in

which the service has not been perfected prior to removal . . . such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court. . . .

## LAW AND ARGUMENT

### I. Standard of review of motion to dismiss.

Defendant Thompson filed a motion to dismiss Rule 12.02 (2) for lack of jurisdiction over the person. Under Tennessee law the complaint should be construed liberally in favor of the plaintiff. Waller v. Bryan, 16 S.W.3d 7070 (Tenn. App. 1999). Facts relating to service of process appear in the record before this Court, and are established by the Affidavit of Joe Coneys in return of service filed with this court, the earlier affidavits filed herein, the Affidavit of Houston Gordon filed herewith and the affidavit of the office of the Tennessee Secretary of State filed herein.

### II. Thompson's motion to dismiss should be denied because Thompson has been served personally and has been served by mail.

Three defendants filed a notice of removal in this case on April 16, 2001. Once the case was removed to federal court, the provisions of 28 U.S.C. § 1448 applied to this case. That statute provides that in any case removed to federal court in which any of the defendants has not yet been served, process that had been initiated in the state court but not yet perfected "may be completed." 28 U.S.C. § 1448. In the present case, process had been issued by the state court to all defendants when the complaint was filed on March 12, 2001. Thompson had not yet been served by process from the state court when this case was removed. Under federal law, plaintiff had the option to complete service of process on Thompson through the state court.

Service has been accomplished on defendant Thompson. On May 15, 2001, a private process server delivered the alias summons and complaint to Thompson personally. This is proper service within the meaning of Rule 4.04(1) of the Tennessee Rules of Civil Procedure. The affidavit of the private process server, filed with this Court, establishes that the private process server delivered the summons and complaint to Thompson personally. This is good service.

Courts considering this issue have concluded that service not completed prior to removal may be completed through the state court, even though the case has been removed to federal court. See Listle v. Milwaukee County, 926 F.Supp. 826,827-28 (E.D.Wis. 1996); Rajan v. Shepard-Knapp, 965 S.W.2d 47 (Tex.App. 1998). In the present case, Judge Todd of the federal District Court for the Western District of Tennessee ruled that defendants' argument that there was any federal jurisdiction over this case was not supported by law and in fact was contrary to well established law. The defendant should not be allowed to use the improvident removal of this case as a technicality to argue that the service of defendant Thompson in person was not proper.

Out of an abundance of caution, plaintiff had further service issued by the state court after this case was remanded. Tennessee Rule of Civil Procedure 4.05 provides that a defendant outside the state may be served by any form of service allowed within the state, including service by mail as provided in Rule 4.04(10) of the Tennessee Rules of Civil Procedure. The Affidavits of J. Houston Gordon and of the office of the Tennessee Secretary of State, filed herewith, establishes that plaintiff's counsel sent a certified copy of the summons and a copy of the complaint by registered return receipt, certified return receipt requested, to Thompson. The Affidavit of Houston Gordon establishes that the United States Postal Service returned that mail marked "Refused." Rule 4.05(5) of the Tennessee Rules of Civil Procedure provides that when such mail is refused, service by mail "shall be deemed an actual and valid service of the summons, process or notice." In the present case, defendant was served by mail. The United States Post Office has noted that the Defendant "refused" delivery of that piece of mail. Similarly, the Secretary of State's service on the Defendant by certified return receipt mail was returned "unclaimed." Thus, again, Thompson was served in accordance with the law. Under the Tennessee Rules of Civil Procedure, both were "actual and valid service."

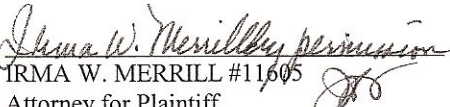
There can be no argument that defendant Thompson has not actually received the complaint filed in this cause. He received it by personal delivery on May 15, 2001. He has publicly acknowledged such and has publicly asserted that the service was not proper. He was given two further opportunities to receive service by return receipt, certified return receipt requested mail mailed on October 1, 2001 and on November 5, 2001. There is absolutely no prejudice to defendant Thompson in this cause. In fact, plaintiff has made efforts beyond that required by the Rules to achieve service of process on defendant Thompson.

CONCLUSION

Based on the foregoing facts and authorities, defendant Thompson has been served with process in this case, both by personal service and service by mail. Thompson's motion to dismiss for lack of jurisdiction because of any alleged failure of service of process should be denied.

RESPECTFULLY SUBMITTED this the 27<sup>th</sup> day of December, 2001.

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