

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL


FIRST CIRCUIT

NUMBER 2010 CU 1853

VALERIE PRICE DOWNEY

VERSUS

BRIAN RAY DOWNEY



Judgment Rendered: February 11, 2011

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of St. Helena, Louisiana
Trial Court Number 20,797

Honorable Bruce C. Bennett, Judge

A. Bradley Berner
Hammond, LA

Attorney for
Plaintiff – Appellee
Valerie Price Downey

David C. Hesser
Alexandria, LA

Attorney for
Defendant – Appellant
Brian Ray Downey

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.



WELCH, J.

Brian Ray Downey, a nonresident of Louisiana, appeals a trial court judgment that awarded Valerie Price Downey sole custody of their minor child. The judgment was rendered after a hearing where neither Mr. Downey nor his attorney were present, although a continuance had been requested by Mr. Downey but denied by the trial court. Because the record before us does not establish that the service of process requirements of the Louisiana long-arm statute were met prior to the hearing, we vacate the judgment of the trial court and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On November 17, 2009, Ms. Downey filed a petition for divorce. In her petition, Ms. Downey alleged that although Mr. Downey was domiciled in Missouri, he had recently informed her that he intended to relocate to Oklahoma. Ms. Downey further asserted that the parties had one child during their marriage and she requested that the parties be awarded joint custody of the child, that she be designated as the domiciliary parent, and that she be awarded child support. A rule to show cause hearing on these ancillary matters was scheduled for January 22, 2010.

According to the service instructions on the petition, Mr. Downey was to be served "**VIA LONG ARM SERVICE OF PROCESS.**" The record does not contain any information concerning service of the petition for divorce on Mr. Downey in accordance with the long-arm statute. Nonetheless, on January 19, 2010, Mr. Downey, through counsel, filed a motion to continue the January 22, 2010 hearing on the basis that his counsel had just been retained and needed time "to file his claims and send discovery."

At the hearing on January 22, 2010, the trial court denied Mr. Downey's request for a continuance and commenced a hearing on the issues of child custody

and child support. At the conclusion of the hearing, the trial court rendered judgment awarding Ms. Downey sole custody of the child, subject to supervised visitation with Mr. Downey and prohibiting Mr. Downey from removing the child from the State of Louisiana. Additionally, Mr. Downey was ordered to pay monthly child support in the amount of \$368.65, plus thirty-four percent of all uncovered medical and/or extraordinary expenses incurred on behalf of the minor child. A judgment reflecting the trial court's ruling in this regard was signed on March 3, 2010.

Mr. Downey filed a motion for new trial and reconsideration, essentially contending that the trial court should have granted his request for a continuance and that the trial court's judgment was based on insufficient evidence and obtained through ill practices. Pursuant to a judgment signed on June 1, 2010, the trial court denied the motion. Mr. Downey has appealed the March 3, 2010 judgment and the subsequent June 1, 2010 denial of the motion for new trial.

LAW AND DISCUSSION

On appeal, Mr. Downey asserts four assignments of error, which pertain to the merits of the judgment rendered by the trial court. However, before considering the merits of this appeal, we must address a procedural flaw that we have discovered in the record of the proceedings below.

As previously noted, Ms. Downey alleged in her petition for divorce that Mr. Downey was domiciled in Missouri. Mr. Downey is, therefore, a nonresident of Louisiana. See La. R.S. 13:3206. The authority to exercise jurisdiction over a nonresident defendant is granted under the Louisiana long-arm statute, La. R.S. 13:3201, as limited by the due process requirements of the Fourteenth Amendment of the United States Constitution. **Swoboda v. Hero Decks**, 2009-1303, p. 2 (La. App. 4th Cir. 3/31/2010), 36 So.3d 994, 997, writ denied, 2010-0993 (La. 6/25/10), 38 So.3d 346. Service of process upon a nonresident must be effected pursuant to

the long-arm statute. Specifically, La. R.S. 13:3204 sets forth the mandatory manner in which service of process must be made under the long-arm statute, and provides, in pertinent part:

A. In a suit under R.S. 13:3201, a certified copy of the citation or the notice in a divorce under Civil Code Article 102 and of the petition or a certified copy of a contradictory motion, rule to show cause, or other pleading filed by the plaintiff in a summary proceeding under Code of Civil Procedure Article 2592 shall be sent by counsel for the plaintiff, or by the plaintiff if not represented by counsel, to the defendant by registered or certified mail, or actually delivered to the defendant by commercial courier, when the person to be served is located outside of this state or by an individual designated by the court in which the suit is filed, or by one authorized by the law of the place where the service is made to serve the process of any of its courts of general, limited, or small claims jurisdiction.

The necessary proof for service of process and time delays under the long-arm statute are set forth in La. R.S. 13:3205, which provides:

No default judgment can be rendered against the defendant and *no hearing may be held on a contradictory motion, rule to show cause, or other summary proceeding*, except for actions pursuant to R.S. 46:2131 et seq., *until thirty days after the filing in the record of the affidavit of the individual* who either:

(1) Mailed the process to the defendant, showing that it was enclosed in an envelope properly addressed to the defendant, with sufficient postage affixed, and the date it was deposited in the United States mail, to which shall be attached the return receipt of the defendant; or

(2) Utilized the services of a commercial courier to make delivery of the process to the defendant, showing the name of the commercial courier, the date, and address at which the process was delivered to the defendant, to which shall be attached the commercial courier's confirmation of delivery; or

(3) Actually delivered the process to the defendant, showing the date, place, and manner of delivery.

(Emphasis added).

The provisions of La. R.S. 13:3205 are mandatory. **Clay v. Clay**, 389 So.2d 31, 37 (La. 1979). A judgment obtained without strict compliance with La. R.S. 13:3205 is an absolute nullity. **Moody v. Stevenson**, 43,144, p. 5 (La. App. 2nd Cir. 3/26/08), 980 So.2d 196, 199; see also **Corte v. Cash Technologies, Inc.**,

2002-0846, p. 8 (La. App. 1st Cir. 4/2/03), 843 So.2d 1162, 1166.

In this case, the record before us does not contain an affidavit of the individual who undertook any of the three enumerated actions set forth in La. R.S. 13:3205(1), (2), or (3). The record does contain an affidavit, attached to the March 3, 2010 judgment, which provides as follows:

I am the attorney of record for Valerie Price Downey in connection with the matter entitled “Valerie Price Downey versus Brian Ray Downey”, 21st JDC #20,797, Division B”. This matter came before the Court pursuant to regular assignment on January 22, 2010 on the Plaintiff’s Petition for Divorce. The Defendant, Brian Ray Downey, was served via long arm service on December 2, 2010.

However, this affidavit does not comply with or contain the information required by La. R.S. 13:3250.

Louisiana Code of Civil Procedure article 2164 provides that “[t]he appellate court shall render any judgment which is just, legal, and proper *upon the record on appeal.*” (Emphasis added). The record before us is devoid of any evidence that an affidavit of an individual who effected service of process in accordance with the long-arm statute was *filed in the record*, much less that such affidavit was filed *at least thirty days before* the January 22, 2010 rule to show cause hearing on child custody and child support. The provisions of La. R.S. 13:3205 *mandate* that *no* hearing could be held on a contradictory motion, rule to show cause, or other summary proceeding “until thirty days after the filing in the record of the affidavit of the individual” who effected service. Therefore, strict compliance with La. R.S. 13:3205 dictates that the March 3, 2010 judgment resulting from the January 22, 2010 hearing must be vacated¹ and this matter remanded for new proceedings on child custody and child support.² Furthermore, because this procedural error is dispositive of this matter, we pretermit discussion of Mr. Downey’s four

¹ **Accord** *Moody v. Stevenson*, 43,144 (La. App. 2nd Cir. 3/26/08), 980 So.2d 196; **Fisher v. Majestic Trucking, Inc.**, 2009-1398 (La. App. 4th Cir. 3/17/10), 35 So.3d 384.

² On remand, the trial court should carefully and specifically consider La. C.C. arts. 131, 132, and 134, as well as La. R.S. 9:335.

assignments of error.

CONCLUSION

Since there is no evidence in the record before us that the service of Ms. Downey's petition for divorce on Mr. Downey was in strict compliance with the long-arm statute, we vacate the March 3, 2010 judgment and remand for further proceedings.

All costs of this appeal are assessed to the plaintiff-appellee, Valerie Price Downey.

VACATED AND REMANDED.