



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00255-CV

**MARK PLUMMER AND TEXAS E & P FUNDING, INC., Appellants
V.
ENTERRA CAPITAL INVESTOR TRUST, Appellee**

**On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-15847**

MEMORANDUM OPINION

**Before Justices Osborne, Partida-Kipness, and Pedersen, III
Opinion by Justice Osborne**

This is a restricted appeal from a default judgment signed by the trial court in favor of Enterra Capital Investor Trust (“Enterra”) against Mark Plummer and Texas E&P Funding, Inc. (“E&P”) in a suit alleging fraud and violations of the Texas Theft Liability Act. In three issues, appellants claim the trial court’s judgment must be reversed because the face of the record shows that Enterra (1) failed to demonstrate strict compliance with the Texas Rules of Civil Procedure for service of process; (2) failed to state a valid cause of action in its petition; and (3) failed to provide legally and factually sufficient evidence of its damages. Concluding that appellants have shown error on the face of the record, we reverse the trial court’s judgment and remand the case for further proceedings.

BACKGROUND

Enterra filed its original petition against Plummer and E&P on October 19, 2018. Enterra alleged that its principal Bill Griffith and Plummer entered into an agreement under which Griffith would form his own company, obtain “FINRA¹ licensing,” and raise money for Plummer’s oil and gas projects. Enterra pleaded that in accordance with this agreement, it raised \$1,165,770.00 for an oil and gas project, the Bronco 1 & 2 Joint Venture, and sent the money to Plummer. Enterra alleged that Plummer did not use any of the money for the Bronco 1 & 2 Joint Venture, but rather “improperly used the funds to further his own purposes and goals.” Enterra alleged causes of action for violations of the Texas Theft Liability Act, fraud under section 27.01 of the Texas Business and Commerce Code, common law fraud, and misrepresentation.

Service by certified mail was unsuccessful. The district clerk complied with Enterra’s request to reissue the citations for Plummer and E&P, and returns of service were filed on November 19, 2019. The citations recited in part:

You have been sued. . . .

For Suit, said suit being numbered **DC-18-15847**, the nature of which demand is as follows: Suit on **CNTR CNSMR COM DEBT** etc. as shown on said petition **REQUEST FOR DISCLOSURE**, a copy of which accompanies this citation. If this citation is not served, it shall be returned unexecuted.

The E&P citation was to be served on Plummer as E&P’s registered agent on Ridgeview Drive in Richardson, but handwriting next to the printed address showed an address on Arapaho Road in Richardson for a different entity, Richmond Engineering, Inc. Both of the returns show service at the Arapaho Road address. The Officer’s Return on each citation showed service on November 16, 2018, but the blank following “by delivering to the within named” was not filled in on either return.

¹ “FINRA” is the Financial Industry National Regulatory Authority.

Neither Plummer nor E&P appeared or answered. On December 11, 2018, Enterra moved for a default judgment against both Plummer and E&P. There is nothing in the record to indicate that any hearing was held on the motion or that Enterra proffered any evidence of its damages to the trial court. The trial court rendered a default judgment against Plummer and E&P on December 18, 2019. The judgment awards Enterra the amount of \$1,165,770.00 against Plummer and E&P, jointly and severally, as well as interest and costs. Plummer and E&P timely filed this restricted appeal.

DISCUSSION

A restricted appeal is a direct attack on the judgment. *See Daigrepoint v. Preuss*, No. 05-18-01271-CV, 2019 WL 2150916, at *2 (Tex. App.—Dallas May 17, 2019, no pet.) (mem. op.). The default judgment against Plummer and E&P can be sustained only if the record before the trial court affirmatively shows service of process in strict compliance with the Texas Rules of Civil Procedure. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). If the record before the trial court does not affirmatively show, at the time that default judgment is requested, that the defendant has appeared, was properly served, or waived service in writing, the trial court lacks personal jurisdiction over the defendant. *Marrot Commc'ns, Inc. v. Town & Country P'ship*, 227 S.W.3d 372, 376 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). “Strict compliance with the rules governing service of citation is mandatory if a default judgment is to withstand an attack on appeal.” *Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 256 (Tex. 2009) (per curiam). “In contrast to the usual rule that all presumptions will be made in support of a judgment, there are no presumptions of valid issuance, service, and return of citation when examining a default judgment.” *Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 792 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Failure to comply strictly with the rules of civil

procedure constitutes reversible error on the face of the record. *Ins. Co. of State of Pa.*, 297 S.W.3d at 256.

To prevail on their restricted appeal, Plummer and E&P must establish that (1) they filed notice of the restricted appeal within six months after the judgment was signed; (2) they were parties to the underlying lawsuit; (3) they did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law, and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). Plummer and E&P timely filed their notice of restricted appeal. They were parties to the underlying lawsuit. They did not file any postjudgment motions or requests, and there is no indication in the record that any hearing was held before judgment was rendered. Consequently, only the fourth element, error apparent on the face of the record, is at issue in this appeal.

The face of the record includes all papers on file in the appeal, including the clerk's record and any reporter's record. *Odelo Grp., LLC v. Double-R Walnut Mgmt., L.L.C.*, No. 05-16-00206-CV, 2017 WL 1360209, at *2 (Tex. App.—Dallas Apr. 12, 2017, no pet.) (mem. op.). In a restricted appeal, we afford the appellant the same scope of review as an ordinary appeal, that is, review of the entire case, with the restriction that error must appear on the face of the record. *Id.* A review of the entire case includes review of legal and factual insufficiency claims. *Id.*

The officer executing the citation must complete a return of service. TEX. R. CIV. P. 107(a). The return “must include,” among other requirements, “a description of what was served” and “the person or entity served.” TEX. R. CIV. P. 107(b)(3), (5). The returns for Plummer and E&P recite that “a true copy of this Citation together with the accompanying copy of this pleading” were delivered. But the appellate record does not include any attachments to either return, and the pleading described in both citations is “said petition **REQUEST FOR DISCLOSURE**, a copy of

which accompanies this citation.” (Emphasis in original). In addition, neither return shows “the person or entity served.” The blank lines following “by delivering to the within named” are not filled in. Further, the handwriting on the returns shows that service was made at the address of a company that is not a party to the lawsuit.

Because the returns do not strictly comply with rule 107, there is error on the face of the record. *See Ins. Co. of State of Pa.*, 297 S.W.3d at 256. The default judgment cannot stand. *Id.* We sustain Plummer’s and E&P’s first issue. Given this disposition, we need not consider their remaining issues.

CONCLUSION

We reverse the trial court’s judgment and remand the case to the trial court for further proceedings consistent with this opinion. *See id.*

/Leslie Osborne/

LESLIE OSBORNE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

MARK PLUMMER AND TEXAS E & P
FUNDING, INC., Appellants

No. 05-19-00255-CV V.

ENTERRA CAPITAL INVESTOR
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Opinion delivered by Justice Osborne;
Justices Partida-Kipness and Pedersen, III
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants Mark Plummer and Texas E & P Funding, Inc. recover their costs of this appeal from appellee Enterra Capital Investor Trust.

Judgment entered February 20, 2020