

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEAL PANEL
AT MEMPHIS
June 18, 2018 Session

SUSIE PLUNK v. PROFESSIONAL HOME HEALTH CARE SERVICES

**Appeal from the Circuit Court for Hardin County
No. CT-4738-15 C. Creed McGinley, Judge**

**No. W2018-00025-SC-WCM-WC - Mailed July 30, 2018
Filed October 10, 2018**

Susie Plunk (“Employee”) alleged that she sustained a compensable injury in the course and scope of her employment with Professional Home Health Care Services (“Employer”). Employer filed a motion for summary judgment asserting that Employee’s claim should be dismissed for lack of service of process or insufficient process. The trial court granted Employer’s motion finding that Employer was not served with process, Employer had sufficiently raised failure of service of process as a defense, and Employer had not waived that defense by participating in the litigation. Employee has appealed that decision. The appeal has been referred to the Special Workers’ Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We reverse the decision of the trial court and remand the case for a trial on the issues.

**Tenn. Code Ann. § 50-6-225(e) (2014) (applicable to injuries
occurring prior to July 1, 2014) Appeal as of Right;
Judgment of the Circuit Court Reversed and Remanded**

WILLIAM B. ACREE, JR., SR.J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and DON R. ASH, SR.J., joined.

Jeffrey P. Boyd, Jackson, Tennessee, for the appellant, Susie Plunk.

John Thomas Feeney, Nashville, Tennessee, for the appellee, Professional Home Health Care Services.

OPINION

Factual and Procedural Background

The facts relevant to this appeal are not in dispute. The underlying claims involve Employee's alleged injury to her back and body as a whole on September 9, 2012, during her employment with Employer. After exhausting the benefit review process, Employee timely filed her complaint for worker's compensation benefits on April 14, 2015.

Leading process was issued April 14, 2015, but was returned unserved. An alias summons was issued on May 29, 2015, and was returned with the designation that it had been served June 4, 2015, as follows: "Lea (illegible) Baxter accepted on behalf of Anne Stewart." No additional process was issued after the May 29, 2015, summons. On August 3, 2015, Employer answered the Complaint asserting, in part: "THIRD DEFENSE [Employer] relies upon the lack of service of process and the insufficiency of process as serving to bar the prosecution of this cause of action."¹

The parties engaged in discovery over the following two years, and Employer ultimately filed a motion for summary judgment on June 23, 2017, arguing that due to insufficient service of process, Employee's claims had become time-barred. On August 30, 2017,² the trial court

¹ Employer also stated when filing a wage statement on August 4, 2015, that the filing was made "by special appearance only so as to preserve any defenses regarding service of process." In addition, in a letter to Employee's counsel dated December 29, 2015, Counsel for Employer stated, "please note we preserve any defenses we have regarding service of process."

² The motion was heard on August 7, 2017. However, a transcript of that hearing is not in

granted Employer's motion for summary judgment. The trial court found that Employer had not been served with process, Employer had raised failure of service of process as a defense, and Employer had not waived that defense by participating in the litigation. Subsequently, Employee filed a motion to alter or amend the judgment, which the trial court denied. Employee appealed.

Analysis

The standard of review for a trial court's ruling on a motion for summary judgment is de novo with no presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

The crux of the issue before this Court is whether Employer adequately preserved the affirmative defense of insufficient service of process when it stated in its answer "[Employer] relies upon the lack of service of process and the insufficiency of process as serving to bar the prosecution of this cause of action." If Employer adequately preserved this defense, then it is entitled to a dismissal for lack of service of process, and the statute of limitations precludes the refile of the suit pursuant to Tennessee Code Annotated section 50-6-203(g).

To adequately preserve an affirmative defense, Tennessee Rule of Civil Procedure 8.03 states:

In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to

the record.

constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense....

Tenn. R. Civ. P. 8.03.

Employee asserts that Employer's "generic" statement without factual allegations or details was insufficient to preserve the defense. We agree. A review of the case law indicates that the Employer did not adequately preserve its defense. In *Barker v. Heekin Can Co.*, 804 S.W.2d 442 (Tenn. 1991), the Supreme Court held under similar circumstances that a defendant had waived its affirmative defense of insufficient process by failing to set forth in its responsive pleading the supporting facts as required by Tennessee Rule of Civil Procedure 8.03.

In *Barker*, the defendant had stated in its responsive pleading that "there has been an insufficiency of service of process in this cause," but did not set forth any of the underlying facts supporting that defense. *Id.* at 443. This is quite similar to Employer's statement in its answer in this case that "[Employer] relies upon the lack of service of process and the insufficiency of process as serving to bar the prosecution of this cause of action," without the inclusion of any facts regarding why service of process was lacking or insufficient.³ See also *Allgood v.*

³ Employer also points to its statement in a wage filing that the filing was made "by special appearance only so as to preserve any defenses regarding service of process," as well as a letter to Employee's counsel stating "please note we preserve any defenses we have regarding service of process." These statements, however, do not contain any additional facts regarding the basis of the defense, and cannot be used to cure the

Gateway Health Systems, 309 S.W.3d 918, 923-26 (Tenn. Ct. App. 2010) (Kirby, J.) (applying *Barker* and holding that affirmative defense was waived under Rule 8.03 where defendant did not plead specific facts supporting defense); *Fisher v. Ankton*, No. W2016-02089-COA-R3-CV, 2017 WL 3611035 at *9-10 (Tenn. Ct. App. 2017) (same).

As the Supreme Court explained, the reason for the requirement in Rule 8.03 that a party asserting an affirmative defense set forth the facts relied upon “is obvious”: if a defendant pleads the supporting facts as required, it will “likely result in a prompt curative” action by a plaintiff, “thus preventing the dismissal of an otherwise meritorious claim on purely technical grounds.” *Barker*, 804 S.W.2d at 443. The Supreme Court reasoned that “[t]he Rules of Civil Procedure are not intended as a trap for the unwary, but as a means of ‘securing the just, speedy and inexpensive determination of every action.’” *Id.* (quoting Tenn. R. Civ. P. 1). The Supreme Court observed that “the two and one-half year delay in notifying the plaintiff of the technical defect in [*Barker*] added nothing to the prompt dispensation of justice.” *Id.* at 444-45. Similarly here, the parties proceeded through two years of discovery before the Employer made any factual allegations regarding why service of process was inadequate. Had the issue been properly raised at the inception of the case, Employee would have had an opportunity to obtain service of process and avoid the extinguishment of her claim due to the statute of limitations.

In response, Employer argues that it did not waive its affirmative defense by participating in the litigation. Had Employer *appropriately* raised the defense in its answer, this would be correct. In *Hall v. Haynes*, 319 S.W.3d 564, 584 (Tenn. 2010), the Supreme Court held that defendants had adequately raised improper service and insufficiency of process as an affirmative defense when they “specifically pled that the

deficiency in the responsive pleading under Rule 8.03.

summons, complaint, and amended complaint ‘were not delivered personally to [personal defendant] or the authorized agent for service of process for [corporate defendant].’” Because defendants in that case satisfied the pleading standard for affirmative defenses in Rule 8.03, the Supreme Court held that they had not waived the defense by their continued participation in the litigation. *Id.* at 584-85. However, the Supreme Court distinguished *Hall* from *Barker* where “the defendant waived its insufficiency of process defense because its [responsive pleading] failed to recite the supporting facts in short and plain terms.” *Id.* at 585 (internal quotations omitted). Here, like in *Barker*, because Employer did not adequately assert the defense to begin with, its continued participation in the litigation is irrelevant.

Employer further argues that Plaintiff cannot now be heard to complain because she did not file a motion to strike the purportedly insufficient defense under Tennessee Rule of Civil Procedure 12.06. Employer did not raise this argument with the trial court. Regardless, Plaintiff was under no affirmative obligation to move to strike an inadequately pled defense. *See* Tenn. R. Civ. P. 12.06 (court may strike from a pleading an insufficient defense).

Conclusion

The judgment of the trial court is reversed and remanded to the trial court for proceedings on the merits. Costs are taxed to Professional Home Health Care Services, for which execution may issue if necessary.

WILLIAM B. ACREE, JR., SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

SUSIE PLUNK v. PROFESSIONAL HOME HEALTH CARE SERVICES

Circuit Court for Hardin County
No. 4738

No. W2018-00025-SC-WCM-WC – Filed October 10, 2018

ORDER

This case is before the Court upon the motion for review filed by Professional Home Health Care Services pursuant to Tennessee Code Annotated section 50-6-225(a)(5)(A)(ii), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well taken and is, therefore, denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to Professional Home Health Care Services, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

HOLLY KIRBY, J., not participating.