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November 21, 2019

Re: Unconstitutionality of default money judgments rendered pursuant to Section 24.0051(a) of the Texas Property Code (using alternative service.)

Dear Judge:

The purpose of this letter is to bring to your attention a recent opinion which concerns the practice of issuing default judgments in eviction cases - specifically, the award of default money judgments granted in eviction cases (i.e. claims for unpaid rent and court costs.) In the attached opinion, the district court concluded that the practice of alternative service (otherwise known as "nail-and-mail service") under Texas Rule of Civil Procedure 510.4(c) does not satisfy constitutional due process requirements with regard to monetary claims, and that a default money judgment issued pursuant to such alternative service is void for lack of jurisdiction. Moreover, the court also held that the JP judge's issuance of a default money judgment (utilizing Section 24.0051(a) of the Texas Property Code) constituted an *ultra vires* act because the act was done pursuant to an unconstitutional law.

While normally it would be the job of individual litigants to bring relevant legal authority to the attention of the court, the central point of the opinion is that eviction defendants are sometimes not provided with notice of proceedings in a manner adequate to satisfy due process. In other words, this opinion speaks directly to the rights of those who are otherwise deprived of an opportunity to speak for themselves.

The undersigned attorneys were each involved in the litigation which procured the attached opinion and we can affirmatively state that the State of Texas, the Attorney General, and the named Justice of the Peace court have all expressly declined to defend the legality of the rule and statute which were declared unconstitutional, despite the fact that they were parties to the litigation. Thus, it is highly unlikely that the district court's order will be reversed on appeal.

If you would like to review the complete case file, you may find a copy online here: https://courtsportal.dallascounty.org/DALLASPROD/

The only issue remaining in the case is that of attorneys' fees; set to be heard on December 17, 2019. On or about that date, a final judgment will be issued which incorporates the attached Order and Opinion. Although this ruling will arguably have a *res judicata*, or "binding", effect on all JP courts (since the State of Texas is a named party subject to the judgment), such an argument is unnecessary to conclude that all JP courts should immediately cease issuing default money judgments on the basis of alternative service under Rule 510.4(c) when defendants have not otherwise appeared in those cases. Justice of the Peace judges are duty-

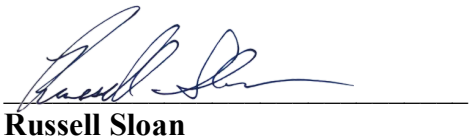
bound to uphold the U.S. and Texas Constitutions (as sworn to by every judge in his or her oath of office) and are thus obligated to reject the application of unconstitutional laws.

We hope that this letter and opinion sufficiently demonstrates the constitutional defects of default money judgments rendered pursuant to Section 24.0051(a), so that your court will immediately cease the issuance of default money judgments on the basis of alternative service. This letter is also being sent to other Justice of the Peace courts throughout Texas so that they too will amend their court's procedures and practices. For those courts that choose to continue the unconstitutional practices outlined above, we intend to initiate civil suits to declare those judicial acts to be *ultra vires* and that the resulting default money judgments are void for lack of jurisdiction. Our desire is that such challenges will be few and will not involve you.

Please let me know if you have any questions about the information shared in this letter. I am available by phone, email, or mail. We anticipate that you may want to explore this issue further and are happy to assist you in whatever way we can - including scheduling a meeting/conference with you and other local JP judges to discuss the reasoning, applicability, and effects of the new ruling.

Our goal is to ensure that due process is afforded to all Texans and we hope that you will join us in that endeavor. Thank you for your time and consideration.

Sincerely,



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Cause No. DC-18-07822

ARNIEKA SIMMONS, *Plaintiff*	§	IN THE DISTRICT COURT
v.	§	
JUSTICE MICHAEL JONES, Jr., *in his official Capacity as Justice of the Peace, Precinct Four, Place One, Dallas County, Texas;* IRVING 4600 WEST PIONEER PROPERTY OWNER, L.P., *Individually*; KEN PAXTON *in his official capacity as Attorney General of the State of Texas; and* THE STATE OF TEXAS *Defendants*	§	OF DALLAS COUNTY, TEXAS
	§	68TH JUDICIAL DISTRICT

ORDER & OPINION

Before the Court are Plaintiff's Traditional Motion for Partial Summary Judgment and Pleas to the Jurisdiction filed by Defendants Paxton, State of Texas, and Jones. All motions were heard on June 17 and July 15, 2019 and the Court announced its decision to the parties on November 11, 2019. In this apparent case of first impression, the Court will **GRANT IN PART** Plaintiff's motion and **FIND** that Section 24.0051(a) of the Texas Property Code and Texas Rule of Civil Procedure 510.4(c) violate the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution as applied to monetary claims, but not otherwise. The Court will additionally **DENY** Defendants' pleas to the jurisdiction.

I. Factual Background

The following facts were undisputed in the summary judgment record, and the Court recites them here in abbreviated form.

Plaintiff, Arnieka Simmons, rented an apartment with her children in the WaterRidge apartment complex under a one-year lease. Her lease ended in August of 2016, at which point she moved out having paid all of the rent she owed and leaving behind an empty apartment.

On November 2, 2016, the property owner filed suit for an eviction and unpaid rent against Plaintiff (presumably by mistake). The case was docketed as Cause Number JE-1702957G, and styled *WaterRidge Apartment Homes d/b/a Water Ridge Apartment Homes*

vs. Arnieka Simmons, and all other occupants. On November 7, 2016, a constable made two attempts to serve Plaintiff at the apartment she had moved out of and unsurprisingly found no one there. The constable then sought and received authorization to serve Plaintiff under Texas Rule of Civil Procedure 510.4(c) (also known as "nail-and-mail service"). The next day, pursuant to that rule, a copy of the citation was affixed to the door of the empty apartment and a second copy was mailed to it.

The trial in the eviction case was set for November 16, 2016. Because the only notice of the lawsuit was affixed and sent to the empty apartment, Plaintiff had no knowledge of the lawsuit. When she did not appear in court to defend herself, the justice of the peace rendered a default judgment against her. The default judgment included a monetary award to the landlord of $3,221.33 for unpaid rent, plus court costs. Plaintiff first learned about the default judgment after the time for an appeal had elapsed.

II. Analysis

At issue in this case is whether, for *monetary* claims that are joined to an eviction (i.e. claims for unpaid rent and court-costs), alternative service under Texas Rule of Civil Procedure 510.4(c) falls short of a defendant's right to notice under the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution.[1] The Court finds that such service is constitutionally defective, as explained below.

Before the government may award one person's property to another, the U.S. and Texas Constitutions require that due process be provided to the person whose property is to be taken. To satisfy this requirement, the government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "When notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the

[1] The parties have not asked the Court to separately analyze the issues under the Texas and United States Constitutions. Moreover, the Texas Supreme Court has explained that "[w]hile the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction. As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (internal citation omitted). Accordingly, the Court treats them as identical for the purposes of this motion.

absentee might reasonably adopt to accomplish it." *Id.* at 229. Whether notice is "reasonably calculated" is evaluated under a balancing test with the "interest of the State" on one side and "the individual interest sought to be protected by the Fourteenth Amendment" on the other. *Id.*

Texas law allows rent claims to be joined to eviction lawsuits. Tex. R. Civ. P. 510.3(d). Additionally, Texas Rule of Civil Procedure 510.4(c) provides that when a process server has made two unsuccessful attempts to personally serve a defendant in an eviction lawsuit, the justice of the peace may authorize the defendant to be served by leaving a copy on the door of the property and mailing a copy to the premises. Tex. R. Civ. P. 510.4(c). This Court must determine whether this procedure is "reasonably calculated" to give notice of money claims to defendants when there is no indication in the record of whether or not the defendant has left the subject property before alternative service is executed (and thus will not receive such notice.)

In *Greene v. Lindsey*, 456 U.S. 444 (1982), the U.S. Supreme Court determined that a nail-and-mail procedure satisfied due process for eviction cases only involving the *in rem* issue of possession, but did not consider whether that also applies to monetary claims which might be joined to an eviction. *Id.* at 449-456. Indeed, the *Greene* Court's analysis was predicated on the presumption that defendants would have *de minimis* interest in receiving notices about property they had abandoned. *Id.* at 452. Such a presumption does not apply to monetary claims.

In 1995, the Texas Attorney General issued Opinion No. DM-358 concluding that nail-and-mail service was not reasonably calculated under the Constitution to apprise eviction defendants of monetary claims absent a case-specific determination that the defendant was likely to receive the notice.[2] Tex. Att'y Gen. Op. No. DM-358 (1995), pgs. 1922-1926. But the procedure created by Rule 510.4(c) neither contemplates nor permits a justice of the peace to make a case-specific determination. The result is that for an entire class of defendants - those who have left the property before nail-and-mail service is complete - the notice provided by Rule 510.4(c) is essentially no notice at all. At the time a default judgment is rendered, the justice of the peace has no way to tell (and no duty to inquire) whether a defendant falls into this class.

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[2] Courts of at least two other states have also concluded that nail-and-mail service does not satisfy the requirements of due process when it comes to claims for rent or court costs. *See Housing Authority v. Hudson*, 296 S.E.2d 558 (Ga. 1982); *Springbrook Commons, Ltd. v. Brown*, 761 So.2d 1192 (Fla. Ct. App. 2000).

In 1999, as an explicit and direct response to the Attorney General's opinion, the Texas Legislature enacted what is now Section 24.0051(a) of the Texas Property Code, which specifically authorizes justice of the peace courts to render default judgments for rent on the basis of nail-and-mail service.[3] However, while the Legislature may have a legitimate interest in expediting eviction cases, it cannot do so at the expense of the constitutional right of Texans to be notified when they are sued. *In re E.R.*, 385 S.W.3d 552, 566 (Tex. 2012) (the Legislature cannot expedite proceedings at the expense of constitutional right to notice.); Tex. Const. art. I, § 29 ("[A]ll laws contrary [to the Texas Bill of Rights] shall be void.").

Moreover, procedural curiosities in the Texas eviction context mean that - in contrast to *Greene* - a defendant has an especially heightened interest in timely notice of rent claims that have been joined to an eviction proceeding. Specifically, rules forbidding motions for new trial (Tex. R. Civ. P. 510.8(e)), terminating the right to appeal after only five days (Tex. R. Civ. P. 510.9(a)), and requiring[4] the posting of security in order to perfect an appeal (Tex. R. Civ. P. 510.9(b)), create a harsh procedural environment unlike almost any other known to the law. *cf. Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939) (traditional factors for granting motion for new trial after no-answer default judgment). In combination, these rules create an 11-day window during which a defendant must either learn about the lawsuit and defend themselves or be stripped of their right to do so forever.[5] Tex. R. Civ. P. 510.4 & 510.9.

"[T]he reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen." *Greene*, 456 U.S. at 454. Such feasible and customary alternatives already exist here in the form of Texas Rules of Civil Procedure 106 and 501.2, which govern substitute service in nearly all other claims for money damages.

Accordingly, the Court concludes: (1) that service under Rule 510.4(c) is not reasonably calculated to provide defendants with notice of monetary claims against them, and (2) that the

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[3] *See* House Comm. on Bus. & Ind., Bill Analysis, Tex. H.B. 3182, 76th Leg., R.S. (1999).
[4] Except in the case of indigency. *See* Tex. R. Civ. P. 510.9(c).
[5] Specifically, Rule 510.4(c)(3) allows alternative service to be completed six days before trial, and Rule 510.9(a) requires the appeal to be perfected within five days after trial.

default judgment for monetary relief (pursuant to Section 24.0051(a) of the Texas Property Code) against Plaintiff violated her due process rights.

"[A] judgment is void if the defects in service are so substantial that the defendant was not afforded due process." *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012). This is because such defects prevent a court from acquiring personal jurisdiction over the defendant. *Id.* With that in mind, the Court concludes that the justice of the peace in this case had no jurisdiction to render a default money judgment on the basis of alternative service under Texas Rule of Civil Procedure 510.4(c) and thus the default judgment rendered pursuant to such service was void.

Finally, the Court concludes that rendition of the default judgment was an *ultra vires* act as it was done pursuant to an unconstitutional law. "It is . . . well settled that when a party's rights have been violated by a state agent's action pursuant to an unconstitutional law, that party may sue to remedy the violation or prevent its recurrence." *Rylander v. Caldwell*, 23 S.W.3d 132, 136 (Tex. App.—Austin 2000, no pet.).

III. RELIEF ORDERED

Based on the foregoing, the Court now hereby **GRANTS IN PART** Plaintiff's Traditional Motion for Partial Summary Judgment and **ORDERS** relief as follows:

1. The Court **DECLARES** that Section 24.0051(a) of the Texas Property Code and Texas Rule of Civil Procedure 510.4(c) are **UNCONSTITUTIONAL** to the extent they authorize a default judgment for monetary relief on the basis of service under Texas Rule of Civil Procedure 510.4(c), unless the defendant has previously made an appearance in the case.

2. The Court further **DECLARES** that the money award part of the default judgment (including the court costs) rendered against Plaintiff in Cause Number JE-1702957G, *WaterRidge Apartment Homes d/b/a Water Ridge Apartment Homes vs. Arnieka Simmons, and all other occupants* is **VOID**.

3. The Court additionally **DENIES** the pleas to the jurisdiction filed by the State of Texas, Attorney General Ken Paxton, and Judge Michael Jones, Jr.

SIGNED: November 15, 2019

JUDGE MARTIN HOFFMAN

APPROVED AS TO FORM ONLY:

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