

AFFIRMED and Opinion Filed May 21, 2020



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

No. 05-19-00223-CV

**U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC., MORTGAGE
ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-EFC2,
Appellant
V.
DENNIS MOSS, Appellee**

**On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-08395**

OPINION

Before Justices Myers, Whitehill, and Pedersen, III
Opinion by Justice Whitehill

This appeal arises out of cross summary judgment motions in which U.S. Bank (USB) sought to vacate a default judgment in an underlying suit involving title to real property through a bill of review based on allegedly improper service under the Texas Estates Code.

The pivotal issues are whether the Civil Practice and Remedies Code provision for serving financial institutions conflicts with the Estates Code provision for service on a foreign corporate fiduciary and whether the latter statute applies only

in “estate proceedings.” Construing the applicable statutes according to their plain language, we conclude that “No” is the correct answer to both issues.

The trial court granted Dennis Moss’s summary judgment motion, denied USB’s motion, and entered a take-nothing judgment on USB’s bill of review.

In six issues, USB argues the trial court erred by: (i) allowing service of process under the Estates Code when it should have been served under the Civil Practice and Remedies Code; (ii) not requiring Moss to provide evidence that he attempted to serve USB’s registered agent before attempting service through the secretary of state; (iii) finding service was adequate when the secretary of state’s return shows USB did not receive process; (iv) finding Moss pled adequate jurisdictional facts for service under the Estates Code; (v) finding the bill of review was barred by res judicata; and (vi) finding the bill of review was barred by the law of the case.

We conclude that the service provisions in the Estates Code are reconcilable with the Civil Practice and Remedies Code provisions for serving financial institutions. Thus, service on a foreign corporate fiduciary under the Estates Code is valid service under Civil Practice and Remedies Code § 17.028.

We further conclude that the record shows compliance with both statutes through service on the secretary of state, which USB, as a foreign corporate

fiduciary, appointed as its agent for service of process for this type of proceeding. Therefore, the trial court did not err in granting Moss's summary judgment motion.¹

I. BACKGROUND

In 1988, Moss purchased a house in Coppell, Texas and signed a promissory note for a loan made by Murray Mortgage and assigned to Gulf Coast Investment Corporation.

Moss refinanced in 2005 and signed a home equity deed of trust. USB claims ownership of the deed of trust by an assignment made in favor of "U.S. Bank National Association, as Trustee."

In 2017, Moss sued USB in its capacity as a foreign fiduciary corporation alleging that the deed of trust was no longer enforceable because the statute of limitations had expired. Moss attached several documents to his petition, including USB's foreign Corporate Fiduciary Probate Code filing appointing the Secretary of State as its registered agent and designating "Kristen Strong, Corporate Counsel and Assistant Secretary, U.S. Bank National Association" as the person to whom service was to be directed.

Accordingly, Moss's lawsuit was served on the Texas secretary of state. The secretary of state subsequently issued a Whitney Certificate stating, "Process was

¹ Because these issues are dispositive, we need not reach USB's fifth and sixth issues. *See* TEX. R. APP. P. 47.1.

returned to this office on March 21, 2017, bearing the notation, return to sender, no such number, unable to forward.”² The court thus granted a default judgment for Moss against USB on April 5, 2017.

On June 8, 2017, USB filed a Notice of Removal, seeking to remove the case to the United States District Court for the Northern District of Texas. USB argued that removal was timely because it had changed its registered agent to CT Corporation before service was attempted. Moss moved to remand, and the federal court granted the motion. *See Moss v. U.S. Bank Nat’l Ass’n for Residential Asset Mortg. Prods.*, No. 3:17-CV-1526-D, 2017 WL 4923894, at *1 (N.D. Tex. Oct. 31, 2017) (mem. op. and order).

Following remand, the state district court concluded that it lacked jurisdiction to consider the default judgment’s validity. Consequently, USB filed an independent bill of review seeking to set aside the default. USB and Moss both moved for traditional summary judgment on the bill of review.

Moss argued that: (i) USB irrevocably appointed the secretary of state as its agent for service of process; (ii) the federal court’s remand order barred the bill of

² In *Whitney v. L & L Realty Corp.*, 500 S.W.2d 94 (Tex. 1973), the plaintiff took a default judgment against the defendants after serving them via the secretary of state. The Texas Supreme Court ruled that the record before the trial court must have a certificate from the secretary of state certifying that it had forwarded a copy of the citation to the defendant and, without such a showing, the trial court did not have jurisdiction over the defendant. *Id.* at 95-96. Such a certificate is known as a Whitney Certificate.

review based on res judicata; and (iii) the federal court's remand order barred the bill of review based on the law of the case.

USB argued that: (i) Moss did not meet his burden to demonstrate that substituted service was proper under the Business Organizations Code and the Estates Code; (ii) the Whitney Certificate indicating "No such number" was prima facie evidence of a failure to establish service; and (iii) Moss failed to plead sufficient jurisdictional facts to effect service under the Estates Code.

After a hearing, the trial court denied USB's motion, granted Moss's motion, and rendered judgment that USB take nothing on its bill of review. USB appeals from that judgment.

II. ANALYSIS

A. **First Issue: Is Civil Practice and Remedies Code § 17.028 the exclusive method for serving process on a financial institution such that the Estates Code provision concerning service on a foreign corporate fiduciary does not apply?**

No, as applied to a financial institution serving as a foreign corporate fiduciary, Civil Practice and Remedies Code § 17.028 and Estates Code § 505.005 do not conflict and both statutes may be given full effect.

1. **Standard of Review and Applicable Law**

We review the trial court's summary judgment ruling de novo. *See Provident Life & Acc. Ins. Co., v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The issue on appeal in a traditional motion for summary judgment is whether the movant satisfied its

summary judgment burden by establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Provident Life*, 128 S.W.3d at 215–16. A defendant is entitled to summary judgment if it conclusively negates an essential element of the plaintiff's case or conclusively establishes all elements of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). Where, as here, the trial court's order does not set forth the specific grounds for its summary judgment, we are required to affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *See Provident Life*, 128 S.W.3d at 216.

“A bill of review is an equitable proceeding, brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for a new trial or direct appeal.” *Mabon Ltd. v. Afri-Carib Enters.*, 369 S.W.3d 809, 812-13 (Tex. 2012) (per curiam). Because a bill of review constitutes a direct attack on the judgment, there are no presumptions favoring valid issuance, service, or return of citation. *See Uvalde Country Club v. Martin Linen Supply Co., Inc.*, 690 S.W.2d 884, 885 (Tex. 1985).

Ordinarily, a bill of review plaintiff must plead and prove: (i) a meritorious defense to the underlying action; (ii) which the plaintiff was prevented from making by the fraud, accident, or wrongful activity of the opposing party or official mistake; (iii) unmixed with any fault of negligence on his own part. *See Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). Although bill of review plaintiffs

claiming non-service do not have to prove the first two elements, they do have to prove that the judgment was rendered through no fault or negligence of their own.

See id.

A default judgment is improper against a defendant who has not been served in strict compliance with the law, accepted or waived service, or entered an appearance. *See* TEX. R. CIV. P. 124; *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990).

2. Service of Process under the Estates Code

Under the Texas Estates Code, a foreign corporate fiduciary is defined as a “corporate fiduciary that does not have its main office or a branch office in [Texas].” TEX. EST. CODE § 505.001. A foreign corporate fiduciary “may be appointed by will, deed, agreement, declaration, indenture, court order or decree, or otherwise and may serve in this state in any fiduciary capacity, including as: trustee of a personal or corporate trust.” TEX. EST. CODE § 505.003(a).

A foreign corporate fiduciary must appoint the secretary of state as its agent for service of process and “[s]ervice of notice or process . . . on the secretary of state as agent for a foreign corporate fiduciary has the same effect as if personal service had been had in [Texas] on the foreign corporate fiduciary.” TEX. EST. CODE §§ 505.004, 505.005.

“[T]he appointment of the secretary of state as the agent to receive service of process . . . is limited to matters related to an estate in which the foreign bank or trust

company is acting as an executor, administrator, trustee, guardian of the estate, or in any other fiduciary capacity.” *Bank of N.Y. v. Chesapeake 34771 Land Trust*, 456 S.W.3d 628, 635 (Tex. App.—El Paso 2015, pet. denied); *see also Bank of N.Y. Mellon v. NSL Prop. Holdings, LLC*, No. 02-17-00465-CV, 2018 WL 3153540, at *5 (Tex. App.—Fort Worth 2018 no pet.) (mem.op).

3. Service of Process under the Civil Practice and Remedies Code

The Civil Practice and Remedies Code provides that service may be made on a financial institution by “serving the registered agent of the financial institution; or if the financial institution does not have a registered agent, serving the president or branch manager at any office located in this state.” TEX. CIV. PRAC. & REM. CODE § 17.028(b). USB’s status as a foreign financial institution is irrelevant to the statute’s application. *See Bank of N.Y. Mellon v. Redbud 115 Land Tr.*, 452 S.W.3d 868, 871 (Tex. App.—Dallas 2014, pet. denied) (nothing in § 17.028 limits its application to Texas financial institutions).

4. Do Civil Practice and Remedies Code § 17.028(b) and Estates Code § 505.005 Conflict?

No. Both statutes permit service on the secretary of state, and § 505.005 applies specifically to foreign corporate fiduciaries when they are sued in that capacity.

USB relies on *Bank of N.Y. Mellon v. Redbud 115 Land Tr.*, 452 S.W.3d at 871–874 to argue that § 17.028 provides the exclusive means to serve a financial

institution and service was improper because Moss failed to comply with § 17.028. Such reliance, however, is misplaced because the *Redbud* opinion did not address whether service under the Estates Code could meet § 17.028(b)(1)'s service requirements.

The Estates Code requires foreign corporate fiduciaries to appoint “the secretary of state and the secretary of state’s successors as the fiduciary’s agent for service of process,” specifically for actions related to the trust “to which the fiduciary is acting in a fiduciary capacity.” TEX. EST. CODE § 505.004(a)(2). The appointment is “of indefinite duration and irrevocable.” *Id.*

Section 17.028’s required methods for serving a financial institution include “serving the registered agent of the financial institution.” TEX. CIV. PRAC. & REM. CODE § 17.028(b). Because the financial institution appoints the secretary of state as its agent when it acts as a foreign corporate fiduciary, serving the secretary of state qualifies as “serving the registered agent of the financial institution.” Therefore, service on a foreign corporate fiduciary under the Estates Code is valid service under § 17.028.

USB nonetheless insists that service under the Estates Code was improper because the underlying proceeding was not part of an estate proceeding. Again, we disagree.

In Bank of New York Mellon v. NSL Prop. Holdings, LLC, 2018 WL 3153540, at *5–7, our sister court considered and rejected this argument. In that case, the bank

argued that NSL failed to comply with § 17.028's requirements for serving a financial institution and service was not proper under the Estates Code because the case did not involve an estate proceeding. *Id.*

Concluding that service was proper, the Fort Worth court examined the statutory language in § 505.004(a)(2), which states that appointment of the secretary of state as the fiduciary's agent for service of process applies to any action or proceeding "relating to a trust, estate, fund, **or other matter** within this state with respect to which the fiduciary is acting in a fiduciary capacity, including the acts or defaults of the fiduciary with respect to that trust, estate, or fund." *Id.* at *5 (quoting TEX. EST. CODE § 505.004(a) (2)) (emphasis added). The court reasoned that the disjunctive statutory language would be rendered meaningless if the statute was deemed to apply only to estate proceedings. *Bank of N.Y. Mellon*, 2018 WL 3153540, at *5; *see also Ohio Gravy Biscuit, Inc. v. U.S. Bank*, 4:18-CV-0480-ALM-CAN, 2018 WL 6424785, at *1 (E.D. Tex., Oct. 26, 2018) (service on foreign corporate fiduciary under Estates Code valid).

The court further concluded that § 505.004 and § 17.028 are reconcilable when a plaintiff sues a foreign corporate fiduciary. *Id.* at *6–7. Relying on the federal court's reasoning in *Moss v. USB*, 2017 WL 4923894, at *4, the court concluded that valid service on a financial institution serving as a foreign corporate fiduciary under the Estates Code is valid service under § 17.028. *Bank of N.Y. Mellon*, 2018 WL 3153540, at 7–8.

USB relies on *Bank of New York v. Chesapeake Land Trust*, 456 S.W.3d at 634 which held the opposite. There, the El Paso court reasoned that because § 17.028 was enacted to protect financial institutions from default judgments, it is the exclusive method for serving a financial institution. *Id.*

But we conclude that the Fort Worth and federal courts' opinions offer a better-reasoned approach and § 17.028's reference to service on a bank's registered agent is not inconsistent with or exclusive of the Estates Code provision designating the secretary of state as that agent. Accordingly, USB's first issue is resolved against it.

B. Second, Third, and Fourth Issues: Was USB properly served under the Estates Code?

Yes. Service was effected by serving the secretary of state. And USB was negligent in not keeping current its designee for receiving process from the secretary of state.

USB argues that it was not properly served under the Estates Code because (i) Moss failed to demonstrate that he attempted to serve USB's registered agent before serving the secretary of state; (ii) the record affirmatively demonstrates that USB did not receive process; and (iii) Moss failed to plead adequate jurisdictional facts. We begin by examining the jurisdictional facts as pled.

1. Jurisdictional Facts

USB argues that the court erred by not requiring Moss to plead that USB does not have a branch office in this state because a foreign corporate fiduciary is defined as “a corporate fiduciary that does not maintain its main office or a branch office in this state.” EST. CODE § 505.001. The crux of USB’s argument is that pleading sufficient jurisdictional facts under the Estates Code requires that a plaintiff allege both that an entity is a foreign corporate fiduciary and that it does not have a main office or branch office in this state. We disagree.

In support of its argument, USB relies on *U.S. Bank Nat’l Ass’n v. TFHSP LLC Series 6481*, 487 S.W.3d 715,719 (Tex. App.—Fort Worth 2016, no pet.) where the court concluded that the bank was not amenable to service under the Estates Code. But USB misquotes the language upon which it relies. That court did not conclude that the plaintiff failed to plead adequate jurisdictional facts because it did not allege that the bank was a foreign corporate fiduciary **and** that it did not have its main office or a branch office in Texas. Instead, the court said the petition failed to allege that the bank, “is a foreign corporate fiduciary **or** that [it] is a corporate fiduciary that does not have its main office or a branch office in this state.” *Id.* (emphasis added). We read the disjunctive “or” to signify a choice. *See id.*; *see also Kingman Holdings, LLC v. U.S. Bank Nat’l Ass’n*, No. 4:15CV588, 2016 WL 1756508, at *3 (E.D. Tex. May 3, 2016) (petition did not allege that bank was a

foreign corporate fiduciary or a corporate fiduciary that did not have its main office or a branch office in this state).

USB's argument seeks to have us impose pleading redundancy by requiring a plaintiff to plead both the statutorily defined term and its definition. We decline to do so because pled either way, it means the same thing.

Here, Moss's petition specifically alleges that USB was being sued in its fiduciary capacity as trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2005-EFC2. The petition further states:

Now and at all times herein mentioned, [USB], sued herein in its fiduciary capacity as Trustee, is and has been a foreign corporate fiduciary domiciled in the State of Ohio . . . Defendant represents that it is acting as a trustee pursuant to an indenture on file with the U.S. Securities and Exchange Commission. Such indenture is the document creating the unincorporated association purporting to be a trust. Defendant trust is a corporate trust. Defendant has the powers to act as a corporate fiduciary in the state of its formation.

. . . .

Attached hereto . . . is a publication made by Defendant attesting to its role as a corporate fiduciary. Pursuant to the Estates Code § 505.001 . . . it has irrevocably appointed the Secretary of State as its agent for service of process. In its filings with the secretary of state, it has designated Kristin Strong as the person to whom all process should be forwarded

Moss alleged that USB is a foreign corporate fiduciary, which by definition means that it has no main or branch offices in this state. *See* EST. CODE § 505.001. The petition further alleges that USB was acting in its fiduciary capacity and has its

principal office in another state. These facts are sufficient to assert jurisdiction over USB under the Estates Code.

2. Serving USB's Registered Agent

Next, we consider USB's argument that the trial court erred by not requiring evidence that Moss was unable to serve USB's registered agent. This argument confuses the requirements for service under Civil Practice and Remedies Code § 17.044 with the requirements in the Estates Code and overlooks a critical fact—the secretary of state was its agent. *See* EST. CODE § 505.004(a)(2).

Before a foreign corporate fiduciary may qualify to serve as a fiduciary in Texas, Chapter 505 requires it to file certain documents with the secretary of state. *TFHSP*, 487 S.W.3d at 718.

Relevant here, the foreign corporate fiduciary must file an instrument irrevocably appointing the secretary of state as its agent for service of process “on whom notices and processes issued by a court of this state may be served in an action or proceeding relating to a trust, estate, fund, or other matter within this state with respect to which the fiduciary is acting in a fiduciary capacity.” EST. CODE § 505.004(a)(2).

And the foreign corporate fiduciary must file a written certificate designating the name and address of the officer, agent, or other person to whom the secretary of state shall forward those notices and processes. *Id.* § 505.004(a)(3).

Section 505.005 provides that service of process described in § 505.004(a)(2) on the secretary of state as the agent for a foreign corporate fiduciary “has the same effect as if personal service had been had in this state on the foreign corporate fiduciary.” *Id.* § 505.005(b). The foreign corporate fiduciary may change the designation by filing a new notice. *Id.* § 505.004(b).

Nonetheless, relying on Business Organizations Code § 5.251 (1)(b) and Civil Practice and Remedies Code § 17.044(a)(2), USB insists that CT Corporation was its agent and Moss made no attempt to serve USB through this agent.

The Business Organizations Code provides that when an entity maintains a registered agent, service on the secretary of state is permitted only if “the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity.” TEX. BUS. ORGS. CODE § 5.251 (1)(b). The Civil Practice and Remedies Code authorizes substituted service on a nonresident with multiple agents through the secretary of state when unsuccessful attempts have been made to serve each agent. *See* TEX. CIV. PRAC. & REM. CODE § 17.044(a)(2).

Neither the Business Organizations Code nor the Civil Practice and Remedies Code is implicated here. USB’s argument is premised on the faulty assumption that service on the secretary of state was employed as an alternative service method because USB’s agent could not be found. But this was a case under the Estates Code where the secretary of state is the registered agent. As a result, diligence and efforts to serve some other agent were not required.

To the extent that USB argues that CT Corporation is its agent for service because it sent a letter to the secretary of state purporting to change its registered agent to CT Corporation, that argument is also misplaced.

Specifically, when service on a statutory agent (such as the secretary of state) is allowed, as it is under chapter 505, the designee is not an agent for serving, but rather for receiving process on the defendant's behalf. *Campus Inv., Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam); *see also Moss*, 2017 WL 4923894, at *4.

Moreover, correspondence requesting “a registered agent change in the state of Texas” is of no consequence under chapter 505's mandate that the secretary of state is the registered agent for foreign corporate fiduciaries. *See* EST. CODE § 505.004(a)(2) (irrevocably appointing secretary of state agent); *see also id.* § 505.004(b) (process for changing designee).

Although, the statute allowed USB to change the person designated to receive process once the secretary of state is served, USB had not complied with the statutory directive for doing so when the underlying suit was filed.³

³ It appears that USB subsequently filed the correct form with the secretary of state designating CT Corporation as the entity to which the secretary of state should forward process once served.

3. Evidence That USB Was Served

Finally, we address USB's argument that the trial court's refusal to set aside the default judgment was erroneous because the return of service conclusively demonstrated that USB was not served and did not receive the lawsuit.

USB bases its argument on the Whitney Certificate which said, "Process was returned to this office on March 21, 2017, bearing the notation, return to sender, no such number, unable to forward," and argues that a prior opinion from this court holds that such a notation constitutes prima facie evidence that there was no service. *See U.S. Bank, N.A. v. Bonney*, No. 05-12-01294-CV, 2013 WL 7149055, at *1 (Tex. App.—Dallas Dec. 13, 2013, no pet.) (mem. op.).

The *Bonney* case, however, involved service under the Business Organizations Code and the long arm statute, which we have already stated are inapplicable here. *See id.* at *3. Here, service was achieved through the Estates Code, which does not afford a similar "reprieve." *See Moss*, 2017 WL 4923894, at *5. "To the contrary, the statute provides that service of process described by § 505.004(a)(2) on the secretary of state as agent for a foreign corporate fiduciary has the same effect as if personal service had been in this state." *Id.*

USB's argument that it did not receive the lawsuit is similarly unavailing. Service of process is considered proper when the secretary of state forwards the citation and petition to the address in the petition, even if the face of the record shows the defendant did not receive the petition. *Convergence Aviation, Inc. v. Onala*

Aviation, LLC, No. 05-19-00067-CV, 2020 WL 29716, at *3 (Tex. App.—Dallas Jan. 2, 2020, no pet.) (mem. op.).

Moreover, USB had the burden to prove that its failure to receive the lawsuit did not result from its own negligence. *Caldwell*, 154 S.W.3d at 96. The record reflects, however that USB was negligent in failing to file the requisite form with the secretary of state changing its designee for receipt of service to CT Corporation. *See Cullever*, 144 S.W.3d at 466–67 (concluding defendant negligent in failing to follow statutory directives). Thus, the evidence supports the trial court’s denial of the bill of review.

We resolve USB’s second, third, and fourth issues against it.

III. CONCLUSION

Having resolved USB’s first four issues against it, we affirm the trial court’s judgment.

/Bill Whitehill/

BILL WHITEHILL
JUSTICE

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

JUDGMENT

U.S. BANK NATIONAL
ASSOCIATION, AS TRUSTEE
FOR RESIDENTIAL ASSET
MORTGAGE PRODUCTS, INC.,
MORTGAGE ASSET-BACKED
PASS-THROUGH CERTIFICATES,
SERIES 2005-EFC2, Appellant

On Appeal from the 68th Judicial
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Trial Court Cause No. DC-18-08395.
Opinion delivered by Justice
Whitehill. Justices Myers and
Pedersen, III participating.

No. 05-19-00223-CV V.

DENNIS MOSS, Appellee

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee DENNIS MOSS recover his costs of this appeal from appellant U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-EFC2.

Judgment entered May 21, 2020.