

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

TRACY NIXON

CIVIL APPEAL NO. \_\_\_\_\_

APPELLANT

VS.

GENERAL MOTORS CORPORATION

APPELLEE

TRACY NIXON REQUEST PERMISSION FOR LEAVE TO FILE INTERLOCUTORY  
APPEAL 28 U.S.C. § 1292(b)

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THE COURT OF APPEALS SHOULD ALLOW THE FILING OF APPELLANT TRACY  
NIXON INTERLOCUTORY APPEAL BECAUSE THE ORDER SIGNED ON AUGUST  
14, 2020.,

BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
TEXAS MARSHALL DIVISION JUDGE RODNEY GILSTRAP IN CIVIL ACTION  
CASE NUMBER. 2:19-cv-00287-JRG-RSP INVOLVES A CONTROLLING  
QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR  
DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL FROM THE  
ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE  
LITIGATION.

JURISDICTION

THE COURT OF APPEALS HAS JURISDICTION  
THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT  
SHALL HAVE EXCLUSIVE JURISDICTION OF APPEALS PURSUANT TO 28 U.S.  
CODE § 1292 (a)(1)(2)(3)(b)(c)(1)(2)

ISSUES PRESENTED

THIS IS A INTERLOCUTORY APPEAL FILED FROM AN ORDER THAT ADOPTED UNITED STATES MAGISTRATE JUDGE ROY S. PAYNE MEMORANDUM ORDER THAT WAS SIGNED JUNE 11, 2020.

OVER THE OBJECTIONS OF PLAINTIFF TRACY NIXON., IN THE INSTANT CASE PLAINTIFF FILED A CIVIL COMPLAINT AGAINST THE DEFENDANT GENERAL MOTORS CORPORATION WHO WAS A FOREIGN CORPORATION THAT WAS REGISTERED AND DOING BUSINESS IN THE STATE OF TEXAS PLAINTIFF BROUGHT SUIT ALLEGING COPYRIGHT INFRINGEMENT AGAINST THE DEFENDANT GENERAL MOTORS CORPORATION.

APPELLANT REQUESTED ENTRY OF A DEFAULT JUDGMENT FROM THE UNITED STATES DISTRICT COURT CLERK THAT WAS THEN ENTERED ON ARE ABOUT MARCH 25, 2020 AFTER APPELLANT TRACY NIXON HAD PROVIDED THE UNITED STATES DISTRICT COURT CLERK WITH THE STATE OF TEXAS SECRETARY OF STATE RETURN PROOF OF SERVICE. THATS ATTACHED TO THIS TRACY NIXON REQUEST FOR PERMISSION FOR LEAVE TO FILE INTERLOCUTORY APPEAL MARKED AS EXHIBIT 1 IS A TRUE AND CORRECT COPY SIGNED BY RUTH R. HUGHS SECRETARY OF STATE DATED MARCH 11, 2020 AFTER THE CITATION AND PROOF OF SERVICE HAD BEEN ON FILE FOR TEN DAYS. TEX.R. CIV.P. 107 THE APPELLANT REOUESTED FOR A DEFAULT JUDGMENT AND A HEARING ON MOTION FOR DEFAULT JUDGMENT FOR THE LIQUIDATED DAMAGES. ACCORDING TO FEDERAL RULES OF CIVIL PROCEDURE 4(a) A FEDERAL COURT MUST LOOK EITHER TO A FEDERAL STATUTE OR TO THE LONG-ARM STATUTE OF THE STATE IN WHICH IT SITS TO DETERMINE WHETHER AN OUT -OF-STATE DEFENDANT IS AMENABLE TO SERVICE.,

RELIEF SOUGHT

THE TEXAS BUSINESS CORPORATIONS ACT ARTICLE 2.11 (B). PROVIDES .  
THAT WHENEVER A CORPORATION SHALL FAIL TO APPOINT OR MAINTAIN A  
REGISTERED AGENT IN THIS STATE, OR WHENEVER ITS REGISTERED AGENT  
CANNOT WITH REASONABLE DILIGENCE BE FOUND AT THE REGISTERED  
OFFICE, THEN THE SECRETARY OF STATE SHALL BE AN AGENT OF SUCH CORP-  
ORATION UPON WHOM ANY SUCH PROCESS, NOTICE, OR DEMAND MAY BE  
SERVED. SERVICE ON SECRETARY OF STATE OF ANY PROCESS, NOTICE, OR  
DEMAND SHALL BE MADE BY DELIVERING TO AND LEAVING WITH HIM.  
OR WITH THE ASSISTANT SECRETARY OF STATE, OR WITH ANY CLERK  
HAVING CHARGE OF THE CORPORATION DEPARTMENT OF HIS OFFICE,  
DUPLICATE COPIES OF SUCH PROCESS, NOTICE, OR DEMAND. IN THE EVENT  
ANY SUCH PROCESS, NOTICE, OR DEMAND IS SERVED ON THE SECRETARY OF  
STATE, HE SHALL IMMEDIATELY CAUSE ONE OF THE COPIES THEREOF TO BE  
FORWARDED BY REGISTERED MAIL, ADDRESSED TO THE CORPORATION AT ITS  
REGISTERED OFFICE SO HAD ON THE SECRETARY OF STATE SHALL BE  
RETURNABLE IN NOT LESS THAN THIRTY (30) DAYS.

IN APPELLANT TRACY NIXON CASE EXHIBIT 1 SHOWS THAT THE  
STATE OF TEXAS SECRETARY OF STATE RECEIVED ON DECEMBER 23,  
2019 A COPY OF THE SUMMONS IN A CIVIL ACTION AND GENERAL  
COMPLAINT IN CAUSE STYLED TRACY NIXON VS GENERAL MOTORS  
CORPORATION UNITED STATES DISTRICT COURT, EASTERN DISTRICT  
OF TEXAS, MARSHALL DIVISION CAUSE NO: 219cv00287 jrg  
THAT WAS FORWARDED ON JANUARY 6, 2020, BY CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED TO: GENERAL MOTORS CORPORATION  
GLOBAL HEADQUARTERS 300 RENAISSANCE Ctr DETROIT , MI 48243  
NO RESPONSE HAD BEEN RECEIVED IN THE SECRETARY OF  
STATE OFFICE DATED MARCH 11, 2020

THE APPELLANT FILES FOR INTERLOCUTORY APPEAL FROM AN INTERLOCUTORY ORDER FILED AUGUST 14, 2020 SIGNED BY JUDGE RODNEY GILSTRAP UNITED STATES DISTRICT COURT JUDGE ATTACHED TO TRACY NIXON REQUEST PERMISSION FOR LEAVE TO FILE INTERLOCUTORY APPEAL

EXHIBIT 2 ALSO INCLUDED MARKED AS EXHIBIT 3 IS THE ORDER SIGNED BY THE UNITED STATES MAGISTRATE JUDGE ROY S. PAYNE SIGNED ON JUNE 11, 2020.

THE COLLATERAL ORDER DOCTRINE ALLOWS APPEAL FROM INTERLOCUTORY RULINGS (i.e., PRECEDING FINAL JUDGMENT) SO LONG AS THOSE RULINGS CONCLUSIVELY DECIDE AN ISSUE SEPARATE FROM THE MERITS OF THE CASE AND WOULD BE EFFECTIVELY UNREVIEWABLE AFTER FINAL JUDGMENT. SEE, COHEN v. BENEFICIAL INDUSTRIAL LOAN CORP., 337 U.S. 541 (1949) IN THAT CASE THE SUPREME COURT HELD TO BE APPEAL APPEALABLE THOSE ORDERS WHICH FINALLY DETERMINE CLAIMS OF RIGHT SEPARABLE FROM, AND COLLATERAL TO, RIGHTS ASSERTED IN THE ACTION, TOO IMPORTANT TO BE DENIED REVIEW AND TOO INDEPENDENT OF THE CAUSE ITSELF TO REQUIRE THAT APPELLATE CONSIDERATION BE DEFERRED UNTIL THE WHOLE CASE IS ADJUDICATED.. Id, 337 U.S. at 546.

ALTHOUGH A INTERLOCUTORY APPEAL FROM AN INTERLOCUTORY ORDER ARE RARE: A THREE -PART TEST DETERMINES WHETHER THE COLLATERAL ORDER MAKES SUCH AN APPEAL POSSIBLE:

1. THE ORDER MUST HAVE CONCLUSIVELY DETERMINED THE DISPUTED QUESTION:
2. THE ORDER MUST RESOLVE AN ISSUE COMPLETELY SEPARATE FROM THE MERITS OF THE ACTION;
3. THE ORDER MUST BE EFFECTIVELY UNREVIEWABLE ON APPEAL FROM FINAL JUDGMENT. SEE, HALLOCK v. BONNER, 387 F.3d 147(2d Cir. 2004).

REASON FOR GRANTING INTERLOCUTORY

APPEAL

THE UNITED STATES MAGISTRATE JUDGE SIGNED A JUNE 11, 2020 ORDER THAT DENIED PLAINTIFF TRACY NIXON MOTION FOR DEFAULT JUDGMENT AND MOTION FOR HEARING CONTRARY TO WELL ESTABLISHED RULE OF LAW UNDER FRCP 55. (b)(2)(A)(B)(C)(D) WITHOUT AFFORDING Appellant HEARING. SEE *Olcott v. DELAWARE Flood Co.*, 337 F.3d 1115, 1119 n.3 (10th Cir 2003) VIOLATED APPELLANT RIGHT TO A JURY WHEN AS REQUIRED BY ANY STATUTE OF THE UNITED STATES.

1. THE DEFENDANT REFUSED TO EXCEPT SUMMONS AND THE COMPLAINT,
2. THE ISSUE REMAINS UNRESOLVED ON THE ENTRY OF DEFAULT JUDGMENT BY THE UNITED STATES DISTRICT COURT CLERK.
3. THE ORDER IS EFFECTIVELY UNREVIEWABLE ON APPEAL FROM FINAL JUDGMENT ENTERED FROM BOTH EXHIBIT 1 and EXHIBIT 2.

IF THE SERVICE OF PROCESS WAS IMPROPER, THE COURT MUST SET ASIDE

THE ENTRY OF THE DEFAULT JUDGMENT SEE, THE CASE OF O.J. DISTRIBUTING INC V. HORNWELL BREWING COMPANY INC, 340 F.3d 345, 353 (6th Cir. 2003) IN THAT CASE A PLAINTIFF ARGUES THAT THE DISTRICT COURT ERRED IN SETTING ASIDE THE CLERKS ENTRY OF DEFAULT AND IN DISMISSING PLAINTIFFS MOTION FOR DEFAULT JUDGMENT.

SPECIFICALLY THE COURT OPINED:

THE DECISION WHETHER TO SET ASIDE AN ENTRY OF DEFAULT UNDER FEDERAL RULE OF CIVIL PROCEDURE 55(c) IS REVIEWED FOR AN ABUSE OF DISCRETION.

DUE PROCESS REQUIRES PROPER SERVICE OF PROCESS FOR A COURT TO HAVE JURISDICTION TO ADJUDICATE THE RIGHTS OF THE PARTIES.

IN TRACY NIXON CASE THE CLERKS ENTRY OF THE DEFAULT JUDGMENT IS STILL PENDING. APPELLANT TRACY NIXON PROPERLY SERVED THE DEFENDANT IN ACCORDANCE TO STATE LONG ARM STATUTE UNDER THE ALTERNATIVE METHOD OF F.R.C.P. 4(e)(1) THAT PROVIDES THAT SERVICE IN THE UNITED STATES MAY OCCUR BY FOLLOWING STATE LAW FOR

SERVING A SUMMONS IN AN ACTION BROUGHT IN COURTS OF GENERAL JURISDICTION IN THE STATE WHERE THE DISTRICT COURT IS LOCATED OR WHERE SERVICE IS MADE.....;

TEXAS LAW REQUIRED IN, CAMPUS INVESTMENTS, INC., V. ANTHONY SEAN CULLEVER AND KEVIN MICHAEL Els 144 S.W.3d 464(2004)

ACCORDING TO THE TEXAS BUSINESS CORPORATION ACT ARTICLE 8.10. (B) .

A FOREIGN CORPORATION MAY BE SERVED PROCESS

BY STATUTE.

IN WHITNEY V. L & L REALTY CORPORATION 500 S.W.2d 94(1973)

THE SUPREME COURT OF TEXAS SET THE STANDARDS TO BE MET BY TEXAS STATUTE SUFFICIENT TO THE ALLEGATIONS ALLEDGED BY

APPELLANT TRACY NIXON THAT WHERE SUFFICIENT UNDER THE TEXAS

LONG- ARM STATUTE TEX.CIV.PRAC. & REM.CODE ANN. S 17.043

TEXAS RULES OF CIVIL PROCEDURE 103 MAKES IT CLEAR THAT PROCESS

INCLUDING CITATION AND OTHER NOTICES, WRITS, ORDERS, AND

OTHER PAPERS ISSUED BY THE COURT MAY BE SERVED ANYWHERE BY (1)

ANY SHERIFF OR CONSTABLE OR OTHER PERSON AUTHORIZED BY LAW,

(2) ANY PERSON AUTHORIZED BY LAW OR BY WRITTEN ORDER OF THE

COURT WHO IS NOT LESS THAN EIGHTEEN YEARS OF AGE, OR (3) ANY

PERSON CERTIFIED UNDER ORDER OF THE SUPREME COURT. SERVICE

BY REGISTERED OR CERTIFIED MAIL AND CITATION BY PUBLICATION

MUST, IF REQUESTED, BE MADE BY THE CLERK OF THE COURT IN WHICH THE CASE IS PENDING.

CONCLUSION

THE UNITED STATES MAGISTRATE JUDGE SIGNED ON A JUNE 11, 2020 ORDER THAT DENIED PLAINTIFF TRACY NIXON MOTION FOR DEFAULT JUDGMENT AND MOTION FOR HEARING THE UNITED STATES MAGISTRATE JUDGE ORDER IS CONTRARY TO THE MAJORITY OF THE COURT OF APPEALS OPINIONS., REGARDING THE APPELLANT TRACY NIXON RIGHT TO A DEFAULT JUDGMENT FOLLOWING THE ENTRY OF A DEFAULT JUDGMENT FROM THE UNITED STATES DISTRICT COURT CLERK PURSUANT TO THE TEXAS BUSINESS CORPORATION ACT ARTICLE 2.11 B. TEXAS .CIV.PRAC.& REM.CODE ANN § 17.045 (A)(B).

PURSUANT TO THE TEXAS CIVIL PRACTICE AND REMEDIES CODE § 17.044(a)(3).

SEVERAL COURT OF APPEALS IN STATE AND FEDERAL COURT OPINIONS DIFFER FROM THE UNITED STATE DISTRICT COURT

SIGNED BY THE UNITED STATES MAGISTRATE JUDGE ROY S. PAYNE THAT DENIED THE APPELLANT TRACY NIXON REOUEST FOR DEFAULT JUDGMENT AND REQUEST FOR HEARING.

AFTER THE ENTRY OF A DEFAULT JUDGEMENT ON A PROPER SERVICE OF PROCESS EXHIBIT 1

THE U.S. DISTRICT COURT HAD PERSONAL JURISDICTION OVER THE DEFENDANT GENERAL MOTORS CORPORATION.

IT WAS THE DEFENDANT DUTY TO FILE A MOTION TO SET ASIDE ENTRY OF DEFAULT JUDGMENT UNDER FRCP 55(c) SEE O.J. DISTRIB. v. HORNEILL BREWING Co., 340 F.3d 345,353 (6th Cir. 2003) ONCE JUDGMENT HAS BEEN ENTERED, COURTS DISCRETION TO SET ASIDE JUDGMENT IS LIMITED BY PUBLIC POLICY FAVORING FINALITY OF THE JUDGMENT.THE APPELLANT PROPERLY SERVED THE DEFENDANT THE UNITED STATES DISTRICT COURT JUDGE FAILED TO CONSIDER THE PREJUDICE TO TRACY NIXON THE APPELLANT ,




HAS NO OTHER REMEDY AT LAW ON THE CONTROVERSY TO THE CLERKS ENTRY OF DEFAULT JUDGMENT PENDING AGAINST THE APPELLEE. APPELLANT CANNOT APPEAL THE DENIAL OF THE REQUEST FOR DEFAULT JUDGMENT. THE APPELLANT CANNOT PURSUE ANY OTHER REMEDY FROM THE APPELLEE. REFUSAL TO ACCEPT SERVICE OF PROCESS. THE APPELLATE COURT CAN REVIEW FINAL DEFAULT JUDGMENT THROUGH THE INTERLOCUTORY ENTRY OF DEFAULT AND FINAL DEFAULT JUDGMENT. CITY OF N.Y. v. MICKALIS PAWN SHOP, LLC, 645 f.3d 114,129 (2d Cir. 2011)

FOR THE ABOVE MENTION REASON THE APPELLANT REQUEST THAT THE COURT OF APPEALS REVERSE AND REMAND THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION OPINION AND REMAND THE CASE FOR INSTRUCTIONS.

GRANTING THE APPELLANT TRACY NIXON PERMISSION TO PROCEED WITH A HEARING FOR A DEFAULT JUDGMENT AGAINST THE APPELLEE GENERAL MOTORS CORPORATION.

THE APPELLANT MET THE SECOND STEP ENTRY OF A DEFAULT JUDGMENT THAT CONVERTS THE DEFENDANTS ADMISSION OF LIABILITY INTO A FINAL JUDGMENT THAT TERMINATES THE LITIGATION AND AWARDS THE PLAINTIFF ANY RELIEF TO WHICH THE COURT DECIDES IT IS ENTITLED, TO THE EXTENT PERMITTED BY RULE 54(c) THE U.S. DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT A HEARING TO APPELLANT TO ESTABLISH THE AMOUNT OF DAMAGES OR ESTABLISH THE TRUTH OF THE PLAINTIFFS ALLEGATIONS. FED.R.CIV.P. 55(b)(2)(B)(C).

RESPECTFULLY SUBMITTED

  
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