

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-1056

P. J. TRANSPORTATION, INC., PHILIP
JOHNSTON, CATHERINE
JOHNSTON, PHILIP “DUSTY”
JOHNSTON, & MICHAEL DUROW
APPELLANTS

V.

FIRST SERVICE BANK

APPELLEE

Opinion Delivered April 25, 2012

APPEAL FROM THE MARION
COUNTY CIRCUIT COURT
[CV-2010-136-4]

HONORABLE GORDON WEBB,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

On January 14, 2011, an agreed judgment was entered in favor of Appellee First Service Bank (the “bank”) regarding Note Nos. 4000433 (against Appellant Cathy Johnston/\$16,778.00); 400510 (against Appellants Cathy and Philip Johnston/\$30,225.64); 4000403 (against Appellants Cathy and Philip Johnston/\$30,206.75); 4000312 (against Appellant P. J. Transportation, Inc./\$22,078.46); 4000427 (against Appellant P. J. Transportation, Inc./\$20,251.00); and 4000349 (against Appellant Philip Johnston/\$43,304.01). The agreed order also addressed other items of personal property, costs, attorney’s fees, and pre- and post-judgment interest rates. Further, the agreed judgment ordered that Cathy Johnston, Philip Johnston, and P. J. Transportation, Inc., “shall, pursuant to Ark. Code Ann. § 16-66-221, file with the clerk of the court on or before forty-five days from the date of this judgment a schedule, verified by affidavit, of all



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of their property, both real and personal, and shall specify the particular property which they claim as exempt under the provisions of the law.”

On the same date, an amended default judgment was entered in favor of the bank against appellants Philip “Dusty” Johnston and Michael Durow on Note No. 4000349 in the amount of \$43,304.01, plus interest and attorney’s fees. The amended default judgment also addressed other items of personal property and ordered that “Phillip ‘Dusty’ Johnston and Michael D. Durow shall, pursuant to Ark. Code Ann. § 16-66-221, file with the clerk of the court on or before forty-five days from the date of this judgment a schedule, verified by affidavit, of all of their property, both real and personal, and shall specify the particular property which they claim as exempt under the provisions of the law.”

On March 1, 2011, the bank filed a petition for contempt, alleging that the appellants had failed to file their schedules of assets as ordered by the trial court. The petition was served on the attorney who represented all five defendants, and an answer to the petition was filed on March 21, 2011. A hearing on the petition was held June 1, 2011, at which time attorneys for both sides presented their arguments with no witnesses. At the outset of the hearing, the trial court confirmed with counsel that he was representing all five of the appellants in the contempt matter. Following the hearing, the trial court denied appellants’ motion to dismiss, issued a letter opinion on June 16, 2011, and entered an order on June 28, 2011, holding each of the appellants in contempt and ordering each of them to pay \$200 to the bank for a total of \$1,000 in attorney’s fees to



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compensate the bank for having to pursue the petition for contempt. No other fines or jail time were ordered, and appellants were given an additional thirty days in which to comply with the trial court's original order to file their schedules of assets with the circuit court clerk.

Appellants raise three points in this appeal, contending that the trial court erred 1) in holding appellants in contempt because the petition for contempt was not verified and the trial court never issued an order citing the appellants into court for contempt, 2) in finding a Texas resident in contempt for failure to comply with Arkansas Code Annotated section 16-66-221, and 3) in finding a domestic corporation in contempt for failure to comply with section 16-66-221.¹ We affirm.

For their first point of appeal, appellants contend that the trial court erred in holding them in contempt for failure to comply with Arkansas Code Annotated section 16-66-211 because the bank's petition for contempt was not verified, and the trial court never issued an order citing them into court for contempt. We disagree.

The bank acknowledges that the petition for contempt was not verified and that the trial court never entered an order to show cause that ordered appellants to appear in court and answer for their failure to file the schedules of assets as they had been ordered to do in the January 14, 2011 judgments. However, appellants cite no statute or rule that

¹Appellants do not challenge the basic validity of the trial court's finding of contempt under the reasoning set forth in *Applegate v. Applegate*, 101 Ark. App. 289, 275 S.W.3d 682 (2008). Therefore, we do not address the issue nor do we decide this appeal on that basis.



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requires a contempt petition to be verified and accompanied by an affidavit in every situation before a trial court may move forward on a petition for contempt. Moreover, the cases that they rely upon are either distinguishable or support the trial court's action. In its letter opinion, the trial court addressed the primary case that the appellants relied upon, *Nelson v. Nelson*, 20 Ark. App. 85, 723 S.W.2d 849 (1987), and explained:

At that hearing, the Defendants asserted that because the Petition for Contempt was unverified and not accompanied by an attached Affidavit, that the Petition for Contempt was not properly before the Court. [Counsel] argued that the case *Nelson v. Nelson*, [citation omitted] stands for the proposition that if a Contempt Petition is not verified that the proper procedures have not been formalized to proceed. The Court has taken the time to read, not only the *Nelson* decision, but most of the case law cited in the *Nelson* decision that stands for the proposition asserted by the defense. The gist of the case law holds that what is required of the Court before it can hold someone in contempt or punish for contempt is there must be Notice given to the party or parties to be held in contempt and they must be fully informed about the allegations against them and have an opportunity to respond in Court.

It appears to this Court that all of those requirements have been met in the case now before the Court. The parties were served with the Petition for Contempt filed by the Petitioner which clearly sets out the accusations against them. Likewise, each of the parties appeared in Court, represented by counsel . . . , and had their day in Court asserting their defenses. The primary case that [counsel] relies on, *Nelson v. Nelson*, . . . in which the Court of Appeals sets out both the Rule that [counsel] asserts, also holds the fact that if all the requirements of prior notice and being informed of the accusations and the opportunity to be in court are met then the Court can go ahead and find the parties in contempt and punish, even though the original Petition was unverified. In essence, [counsel's] own case stands against him in this Court's opinion.

We agree with the trial court's assessment of what the cases relied upon by appellants hold with respect to verified petitions and affidavits—they are not essential in every situation before a court may move forward on a petition for contempt. Rather, the primary



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concerns for a trial court to consider are that the alleged contemnors have notice of the contempt allegations, that they be fully informed of the allegations of contempt, and that they have the opportunity to defend themselves. *See also Hilton Hilltop, Inc. v. Riviere*, 268 Ark. 532, 597 S.W.2d 596 (1980); *Henderson v. Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978).

Here, the trial court had ordered the appellants to file their schedules of assets with the court clerk within forty-five days from the date of the judgments. Therefore, the trial court was not dependent upon affidavits or verified petitions in this case because all the court had to do was examine the court clerk's files and see that the schedules had not been filed within forty-five days to establish a prima facie case of contempt. Though the failure to obey the trial court's order did not technically happen in the court's presence, it came exceedingly close. Moreover, the appellants were served with a copy of the contempt petition, which set out the facts, and they were informed of the basis for contempt in the petition. They answered the petition. They were represented by counsel and had an opportunity to defend at the hearing on the petition. Accordingly, we are not convinced by appellants' arguments under this point of appeal that the trial court erred in holding appellants in contempt.

Appellants' remaining two points of appeal can best be discussed together. They contend that the trial court erred in finding Phillip "Dusty" Johnston, a Texas resident, and P. J. Transportation, Inc., a domestic corporation, in contempt because, they argue,



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Arkansas Code Annotated section 16-66-221 is not applicable to either of these parties. We disagree.

In both the agreed judgment and the amended default judgment, the court ordered designated parties to file on or before forty-five days from the date of each judgment schedules, verified by affidavit, of all of their property, both real and personal, specifying the particular property that they claimed as exempt under the provisions of the law. Both judgments specifically referenced section 16-66-221. One judgment was an agreed judgment, and no appeal was taken from either. The time for making the arguments under these two points of appeal has passed. We cannot address them on their merits in the context of an appeal from a finding of contempt for failure to obey the trial court's order. When a judgment becomes final, it is protected by the common-law principle of res judicata, and the findings and orders of the decree cannot later be collaterally attacked.

Nelson v. Nelson, supra.

Affirmed.

HART and GRUBER, JJ., agree.

The Law Offices of Christopher O'Hara Carter, P.A., by: Christopher O'Hara Carter, for appellants.

Jason Duffy, for appellee.