

[Cite as *Central Ohio Sheet Metal, Inc. v. Walker*, 2004-Ohio-2816.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Central Ohio Sheet Metal, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 03AP-951
Donna Walker et al.,	:	(C.P.C. No. 01CVH10-10753)
Defendants-Appellants.	:	(REGULAR CALENDAR)

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O P I N I O N

Rendered on June 1, 2004

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*Larry F. Shafer and J. Michael Nicks*, for appellee.

*Wayne D. Miller*, for appellants.

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APPEAL from the Franklin County Court of Common Pleas.

LAZARUS, P. J.

{¶1} Defendant-appellant, Laurence Gibbs, appeals from the August 22, 2003 decision and entry of the Franklin County Court of Common Pleas denying his motions to vacate judgment filed on February 25, 2003 and May 30, 2003. For the reasons that follow, we affirm the decision of the trial court.

{¶2} On October 31, 2001, plaintiff-appellee, Central Ohio Sheet Metal, Inc., filed a complaint against appellant for overpayment of wages, reimbursements and vacation,

and holiday pay which was not earned or accrued by appellant. Appellee alleges that appellant was unjustly enriched in the amount of \$119,034.50. On October 31, 2001, service upon appellant was requested by certified mail and sent to appellant's residence at 1482 Burstock Road, Apartment C, Columbus, Ohio 43206. On December 11, 2001, a notice of failure, which was returned to the Franklin County Clerk of Court's office, indicated that service upon appellant was returned and marked "unclaimed." On January 10, 2002, service was sent by ordinary mail to appellant at the same address. Service by ordinary mail was not returned to the clerk's office.

{¶3} On October 16, 2002, appellee filed a motion and affidavit for judgment by default against appellant. On October 25, 2002, the trial court granted appellee's request for default judgment. On February 25, 2003, appellant filed a "Motion and Affidavit to Re-Open Under Civil Rule 60(B)." Appellant alleges that he was never served according to Civ.R. 4. Appellant maintains that the address in which appellee served the summons and complaint was abandoned because appellant was incarcerated. Appellee did not file a memorandum contra to appellant's motion.

{¶4} On May 30, 2003, appellant filed a "Motion to Move the Court for an Order to Re-Open under Civil Rule 60(B)." On June 17, 2003, appellee filed a memorandum contra to appellant's motion. On June 25, 2003, appellant filed a reply and, on August 22, 2003, the trial court determined that appellee complied with Civ.R. 4.6(D) and that appellant failed to present sufficient evidence to rebut the presumption of proper service. It is from this entry that appellant appeals, assigning the following as error:

#### FIRST ASSIGNMENT OF ERROR

The trial court erred [sic] in not granting defendant Lawrence [sic] Gibb's [sic] Motion to Vacate the Default Judgment.

## SECOND ASSIGNMENT OF ERROR

The trial court erred [sic] in not holding a damages hearing after Granting the default judgment to plaintiff/appellee.

{¶5} In the first assignment of error, appellant maintains that the trial court erred in not granting his Civ.R. 60(B) motion. Civ.R. 60(B), in pertinent part, provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud \* \* \* misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. \* \* \*

{¶6} The requirements for prevailing on a Civ.R. 60(B) motion are set forth in paragraph two of the syllabus of *GTE Automatic Electric v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146:

To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

{¶7} A motion made pursuant to Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 66; *Investors Reit One v. Fortman* (Jan. 16, 2001), Franklin App. No. 00AP-195. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} Turning to the facts of the instant appeal, we note that while appellant's motion was made within a reasonable time, appellant failed to meet the first and second prongs of *GTE*. The first prong requires the movant to allege operative facts, which would support a defense to the judgment. Appellant contended in his motion that he was entitled to relief because he did not receive service of the summons and complaint. In general, service of process must be made by certified mail, personal service, or residence service. Civ.R. 4.1. Ordinary mail service, if applicable, is to be requested only after the failure of certified mail service. Civ.R. 4.6(D). Service of process by ordinary mail under Civ.R. 4.6(D) is proper after a certified mail delivery to appellant's address is returned marked "unclaimed." *Pittsburgh Hilton v. Reiss* (1985), 22 Ohio App.3d 134, 135. Civ.R. 4.6(D) provides in part that, after a certified mail envelope is returned unclaimed, the serving party may:

\* \* \* [file] with the clerk a written request for ordinary mail service, [whereupon] the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth \* \* \*. Service

shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities \* \* \*.

{¶9} In *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 42-43, the trial court stated:

While ordinary mail service following unsuccessful certified mail service is sufficient to vest jurisdiction in the court pursuant to Civ.R. 4.6(D) where the ordinary mail envelope is not returned indicating failure of delivery, there is an exception to this general rule. In other words, there is a presumption of proper service under such circumstances, but such presumption is rebuttable by sufficient evidence. \* \* \*

{¶10} The rebuttable presumption of proper service arising under Civ.R. 4.6(D), ordinary mail service, may be rebutted by evidence that appellant never resided nor received mail at the address to which such ordinary mail service was addressed. *Id.*

{¶11} In his affidavit, attached to his Civ.R. 60(B) motion, appellant stated:

3. From October 2001, through March 15, 2002 I did reside at 1482 Burstock Road, Apt. C, Columbus, Ohio 43206;

\* \* \*

5. I have been incarcerated at the Pickaway Correctional Institution (P.C.I.) since March of 2002[.]

{¶12} Ordinary mail service was sent to appellant on January 10, 2002 and was not returned. According to appellant's own sworn affidavit, appellant resided at the address to which the ordinary mail was addressed up until March 15, 2002. Appellant has failed to rebut the presumption of proper service. We conclude that appellant did not sufficiently allege and support that he had a viable defense, and that, therefore, the first prong of *GTE* has not been met.

{¶13} The second prong of *GTE* requires that the movant demonstrate that he was entitled to relief under one of the provisions of Civ.R. 60(B)(1) through (5). Although

appellant filed a Civ.R. 60(B) motion, the motion does not discuss any grounds for relief from judgment as stated in Civ.R. 60(B)(1) through (5). Appellant having failed to do so, the trial court did not err in denying appellant's motion to vacate. As such, appellant's first assignment of error lacks merit, is not well-taken and is overruled.

{¶14} In his second assignment of error, appellant maintains that the trial court erred in not conducting a damages hearing after granting default judgment in appellee's favor. Following a default judgment in a civil matter, the trial court has discretion to decide whether or not to conduct an evidentiary hearing on damages. *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134. Pursuant to Civ.R. 55(A), a trial court is to ascertain what damages are appropriate. *Castle Hill Holdings VII, L.L.C. v. Midland Food Services II, L.L.C.* (Sept. 27, 2001), Tuscarawas App. No. 2001AP010003.

{¶15} Civ.R. 55(A) states in part:

\* \* \* If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

{¶16} In the complaint, appellee claimed a specific dollar amount for wages, reimbursements, and vacation and holiday pay received by, but not earned by appellant, which totaled \$119,034.50. The value of such funds was ascertainable without an evidentiary hearing. Accordingly, we hold that the trial court did not abuse its discretion in failing to conduct an evidentiary hearing on the issues of damages. Appellant's second assignment of error is not well-taken and is overruled.

{¶17} For the foregoing reasons, appellant's first and second assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

PETREE and KLATT, JJ., concur.

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