[Cite as *Bendure v. Xpert Auto, Inc.*, 2011-Ohio-6058.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Connie Bendure et al.,	:	
Plaintiffs-Appellees,	:	
		No. 11AP-144
v.	:	(C.P.C. No. 09CVH05-6760)
Xpert Auto, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 22, 2011

Kathryn R. Gugle; and *James J. Collum*, for appellees.

Lerner & Shea, LLC, and *Michael J. Lerner*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Xpert Auto, Inc. ("Auto Inc."), appeals judgments of the Franklin County Court of Common Pleas that denied its motion for relief from judgment and granted the motion of plaintiffs-appellees, Connie and Matthew Bendure, to set aside the transfer of assets from Auto Inc. to Xpert Auto Center LLC ("Auto Center LLC"). For the following reasons, we affirm both judgments.

{¶2} On May 5, 2009, the Bendures filed suit against Auto Inc. In the informational summary submitted with the complaint, the Bendures acknowledged that they had previously filed and dismissed their case. The Bendures originally sued Auto

Inc. on June 28, 2006 and voluntarily dismissed their action without prejudice on November 14, 2008.

{¶3} In their refiled complaint, the Bendures alleged that Auto Inc. failed to perform necessary repairs to their 2003 Land Rover Freelander after it was involved in an automobile accident. Additionally, the Bendures alleged that Auto Inc. intentionally misrepresented that it replaced certain parts of the Freelander, when, in fact, it had only repaired those parts. Based on these allegations, the Bendures asserted claims for violation of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., breach of implied and express contract, and breach of implied and express warranty.[1]

{¶4} The Clerk of the Franklin County Court of Common Pleas served Auto Inc. with the complaint and summons by certified mail. An individual who identified himself as "M. Aronov" signed the receipt for the complaint and summons.

{¶5} When Auto Inc. did not answer the complaint, the Bendures moved for a default judgment. The Bendures served their motion on Auto Inc. by ordinary mail. Auto Inc., however, did not respond to the motion.

{¶6} On September 14, 2009, the trial court issued a judgment granting the Bendures a default judgment and referring the matter to a magistrate for a damages hearing. The magistrate held an evidentiary hearing regarding damages on November 5, 2009. No one representing Auto Inc. appeared. In his report and recommendation, the

[1] Initially, the complaint also named as defendants Tracey and Paul Jones, who, respectively, were the owner and driver of the automobile that collided with the Bendures' Freelander. The Bendures later dismissed their claim against the Jones.

magistrate found that a damages award of $47,814.83, plus interest, was reasonable. The magistrate also found an award of attorney fees of $3,680 reasonable.[2]

{¶7} Pursuant to the magistrate's instruction, the clerk served Auto Inc. with a copy of the magistrate's report and recommendation by ordinary mail. Auto Inc., however, did not file any objections. The trial court adopted the magistrate's decision by entry dated November 30, 2009.

{¶8} On July 23, 2010, the Bendures filed a motion pursuant to R.C. 1336.04 requesting that the trial court set aside the transfer of assets from Auto Inc. to Auto Center LLC. The Bendures attached to their motion documents showing that Michael Aronov, the president and statutory agent for Auto Inc., executed a certificate of dissolution for Auto Inc. on January 15, 2009. The Secretary of State certified the dissolution of Auto Inc. the next day. According to the Bendures, prior to dissolving, Auto Inc. transferred all of its assets to Auto Center LLC. The Secretary of State certified the articles of organization for Auto Center LLC on November 26, 2006. From that date until the dissolution of Auto Inc., Auto Center LLC and Auto Inc. shared a business address. The statutory agent for Auto Center LLC was Aronov's wife, Yelena Karlova.

{¶9} In their motion, the Bendures pointed out that the organization of Auto Center LLC, the transfer of Auto Inc.'s assets, and the dissolution of Auto Inc. all occurred while litigation was either pending or threatened against Auto Inc. Given the timing and the close relationship between Auto Inc. and Auto Center LLC, the Bendures argued that Auto Inc. attempted to conceal its assets by transferring them to an insider. The

[2] R.C. 1345.09(F) allows a plaintiff to recover attorney fees for a violation of the CSPA under certain circumstances.

Bendures asked the trial court to set aside the transfer so they could collect on their judgment against Auto Inc.

{¶10} The Bendures served their motion on Karlova, Auto Center LLC's statutory agent, by ordinary mail. Neither Auto Center LLC nor Auto Inc. responded to the motion. On September 2, 2010, the trial court issued a decision granting the Bendures' motion.

{¶11} Auto Inc. then entered the litigation with a Civ.R. 60(B) motion for relief from judgment, filed September 10, 2010. Auto Inc. argued that the Bendures never achieved service of it because it had dissolved before the Bendures filed the instant lawsuit. Auto Inc. also argued that Auto Center LLC was the real party in interest and the entity that the Bendures should have sued, instead of Auto Inc. On the same day that Auto Inc. moved for relief from judgment, it also filed a motion asking the trial court to stay the set aside of the transfer of assets until the court ruled on its Civ.R. 60(B) motion.

{¶12} In a decision entered December 15, 2010, the trial court denied both of Auto Inc.'s motions. The trial court reduced its September 2, 2010 and December 15, 2010 decisions to judgment on January 24, 2011.

{¶13} Auto Inc. now appeals from the January 24, 2011 judgments, and it assigns the following errors:

> [I.] The trial court abused its discretion as a matter of law under Rules 4 and 17 by denying appellant's motion [for] relief from judgment and motion [to stay the order] to set aside transfer of Defendant-Appellant's [a]ssets, pursuant to the Ohio Rules of Civil Procedure.
>
> [II.] The trial court abused its discretion by denying appellant's Rule 60(B) motion for relief from judgment and denying appellant's motion to stay the order to set-aside [sic] the transfer, pursuant to the Ohio Rules of Civil Procedure.

{¶14} Because they are interrelated, we will address Auto Inc.'s two assignments of error together. We first turn to Auto Inc.'s contention that the trial court erred in denying its motion to stay the set aside of the transfer of assets from Auto Inc. to Auto Center LLC. As we stated above, Auto Inc. requested that the trial court stay implementation of the set aside until the court ruled on Auto Inc.'s Civ.R. 60(B) motion for relief from judgment. As the trial court has ruled on the Civ.R. 60(B) motion, the motion for a stay is now moot. Even if the trial court erred in denying the motion for a stay, we cannot rectify that error because the stay period requested by Auto Inc. has lapsed. Consequently, we decline to rule on the portions of Auto Inc.'s assignments of error that assert that the trial court erred in denying Auto Inc.'s motion to stay. See *Devine-Riley v. Clellan*, 10th Dist. No. 11AP-112, 2011-Ohio-4367, ¶3 ("Appellate courts are not required to render an advisory opinion on a moot question or to rule on a question of law that cannot affect matters at issue in a case.").

{¶15} Turning to the remaining issue, we must determine whether the trial court erred in refusing to vacate the default judgment. Auto Inc. contends that the default judgment must be vacated because the Bendures never attained service over it. We disagree.

{¶16} If a plaintiff fails to perfect service on a defendant and the defendant has not appeared in the action or waived service, a trial court lacks the jurisdiction to enter a default judgment against the defendant. *Waterford Tower Condominium Assn. v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006-Ohio-508, ¶17; *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. No. 05AP-51, 2005-Ohio-5924, ¶27. A judgment rendered by a court that has not acquired personal jurisdiction over the defendant is void.

State ex rel. Estate of Miles v. Piketon, 121 Ohio St.3d 231, 2009-Ohio-786, ¶23; *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501, ¶10. The authority to vacate a void judgment arises from the inherent power possessed by Ohio courts, not Civ.R. 60(B). *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph four of the syllabus; *Freedom Mtg. Corp. v. Groom*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶19. When a party attempts to vacate a void judgment through a Civ.R. 60(B) motion, courts treat the motion as a common-law motion to vacate the judgment. *Malone* at ¶10. Appellate courts review the denial of a common-law motion to vacate under the abuse-of-discretion standard. *Freedom Mtg. Corp.* at ¶20.

{¶17} Here, Auto Inc. contends that its dissolution prior to the filing of the instant suit meant that the Bendures could not serve it. Ohio law explicitly contradicts this contention. "[T]he dissolution of a corporation does not abate '[a]ny claim existing or action or proceeding pending by or against the corporation or which would have accrued against it * * *.' " *State ex rel. Falke v. Montgomery Cty. Residential Dev., Inc.* (1988), 40 Ohio St.3d 71, 74 (quoting R.C. 1701.88(B)). Thus, "even if a corporation is dissolved it may still be sued, and satisfaction or performance of any judgment obtained may be enforced against such corporation." *N. Consultants, Inc. v. Stimel-Givens* (May 14, 1985), 10th Dist. No. 83AP-851. See also *Bob's Beverage, Inc. v. Acme, Inc.* (N.D.Ohio 1999), 169 F.Supp.2d 695, 719, affirmed (C.A.6, 2001), 264 F.3d 692 ("[T]he dissolution of [a] corporation consequent to 'winding up' do[es] not prevent a plaintiff with a valid cause of action against [the corporation] from proceeding."); *Daniel v. Motorcars Infiniti, Inc.*, 8th Dist. No. 85005, 2005-Ohio-3008, ¶9-11 (holding that service of a dissolved corporation at its former place of business invested the trial court with jurisdiction to enter

a default judgment against the corporation); *Octavia Coal Co. v. Cooper T. Smith Corp.* (June 15, 2001), 5th Dist. No. 00CA00223 (quoting *N. Consultants, Inc.*); *Crosby v. Beam* (July 8, 1988), 6th Dist. No. L-87-198, affirmed (1989), 47 Ohio St.3d 105 ("R.C. 1701.88 provides that any claim which exists prior to dissolution may be prosecuted to judgment.").

{¶18} Once a corporation dissolves, "[a]ny process, notice, or demand against the corporation may be served by delivering a copy to an officer, director, liquidator, or person having charge of its assets or, if no such person can be found, to the statutory agent." R.C. 1701.88(C). Here, the clerk served Auto Inc. at its former business address, which is now the business address of Auto Center LLC. "M. Aronov," presumably Michael Aronov, signed the certified mail receipt. As Aronov was the president and statutory agent of Auto Inc., the Bendures attained service of Auto Inc. Consequently, we conclude that the trial court had jurisdiction to render a default judgment against Auto Inc.

{¶19} Auto Inc. also argues that the trial court should have set aside the default judgment because the Bendures did not name Auto Center LLC as a defendant or achieve service over Auto Center LLC. According to Auto Inc., Auto Center LLC is a real party in interest, and thus, must be a party to the action. To support its argument, Auto Inc. cites solely Civ.R. 17(A), which states that "[e]very action shall be prosecuted in the name of the real party in interest." By its plain language, Civ.R. 17(A) governs who must prosecute an action, i.e., who must bring an action as *plaintiff*. The rule has no application to Auto Inc.'s argument, which posits that Auto Center LLC had to be a *defendant* to this action. We thus find that Auto Inc.'s argument has no merit.

{¶20} Because the trial court possessed personal jurisdiction over Auto Inc., the default judgment is not void. Accordingly, we overrule the portions of the assignments of error that challenge the trial court's denial of Auto Inc.'s motion for relief from judgment.

{¶21} For the foregoing reasons, we find part of Auto Inc.'s two assignments of error moot and we overrule the remainder of the assignments of error. We affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BRYANT, P.J., and TYACK, J., concur.