[Cite as *Mtge. Electronic Registration Sys., Inc. v. Sebastian*, 2012-Ohio-4078.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mortgage Electronic Registration Systems, Inc. et al.,	:	
Plaintiffs-Appellees,	:	No. 12AP-106
v.	:	(C.P.C. No. 05CVE-07-7722)
Richard M. Sebastian, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 6, 2012

Lerner, Sampson, & Rothfuss, and *Patricia K. Block*, for appellee Mortgage Electronic Registration Systems, Inc.

John Sherrod, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Richard M. Sebastian, Jr. ("appellant"),[1] appeals the judgment of the Franklin County Court of Common Pleas, which denied appellant's motion to vacate its judgment in foreclosure in favor of plaintiff-appellee, Mortgage Electronic Registration Systems, Inc. ("MERS"). Because we conclude that the trial

[1] Although the notice of appeal identifies both Richard and Karrie L. Sebastian as appellants, only Richard has participated in this appeal, and we will refer to him, alone, as appellant.

court did not commit plain error in adopting a magistrate's decision to which appellant did not object, we affirm.

I. BACKGROUND

{¶ 2} On July 19, 2005, MERS and co-plaintiff, Countrywide Home Loans, Inc. (together, "plaintiffs") filed a complaint in foreclosure against appellant and his former wife, Karrie L. Sebastian ("the Sebastians"). The complaint alleged that Countrywide was the holder and owner of a note concerning residential real property, and MERS was the holder of a mortgage securing the note, both signed by the Sebastians. The complaint also alleged that the Sebastians were in default and owed $148,127.02, plus interest and costs.

{¶ 3} The Sebastians did not file an answer to the complaint. The trial court granted default judgment to plaintiffs and issued a decree of foreclosure. Prior to a sheriff's sale of the property, however, appellant, through counsel, notified the court that he had filed a Chapter 13 Bankruptcy petition. The trial court issued a stay, which was lifted on January 10, 2011. The trial court thereafter reinstated the action and scheduled a sheriff's sale.

{¶ 4} On July 21, 2011, appellant, through new counsel, filed a motion to vacate the 2005 default judgment. In his motion, he argued that he had never been served with the complaint.

{¶ 5} A magistrate of the trial court conducted an evidentiary hearing on the motion in October 2011. Following the hearing, the magistrate issued a decision in which he concluded that appellant's claims of non-service were not credible and relied instead on the evidence of personal service contained in the record. The magistrate recommended that the trial court deny the motion.

{¶ 6} No objections to the magistrate's decision were filed. On January 12, 2012, the trial court adopted the magistrate's decision and denied appellant's motion to vacate the 2005 default judgment.

II. ASSIGNMENT OF ERROR

{¶ 7} Appellant filed a timely appeal and raises the following assignment of error:

> The trial court committed plain error in denying Appellant's motion to vacate judgment for lack of service of process of summons and complaint.

III. DISCUSSION

{¶ 8} In his assignment of error, appellant contends that the trial court should have granted his motion to vacate judgment for lack of service of the complaint upon him. It is well-established that a defendant must be properly served with process before a court may exercise personal jurisdiction over him. *TCC Mgmt., Inc. v. Clapp*, 10th Dist. No. 05AP-42, 2005-Ohio-4357, ¶ 9. A judgment in the absence of personal jurisdiction over the defendant is void. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64 (1956). Ordinarily, we will not reverse a trial court's decision regarding a motion to vacate a judgment absent an abuse of discretion. *C & W Invest. Co. v. Midwest Vending, Inc.*, 10th Dist. No. 03AP-40, 2003-Ohio-4688, ¶ 7. As appellant acknowledges, however, we must review the trial court's judgment in this case under a higher standard.

{¶ 9} Where a magistrate hears an action, Civ.R. 53 imposes an affirmative duty on parties to make specific, timely objections in writing to the trial court, identifying any factual or legal error in the magistrate's decision. *Howard v. Norman's Auto Sales*, 10th Dist. No. 02AP-1001, 2003-Ohio-2834, ¶ 21. Pursuant to Civ.R. 53(D)(3)(b), a party may not raise on appeal any error pertaining to a trial court's adoption of any finding of fact or conclusion of law by the magistrate, unless that party timely objected to that finding or conclusion, as required by the rule. *State ex rel. Booher v. Honda of Am. Mfg., Inc.*, 88 Ohio St.3d 52, 53-54 (2000).

{¶ 10} Here, consistent with Civ.R. 53, the magistrate's decision included the following notice: "A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY IDENTIFIED AS A FINDING OF FACT OR CONCLUSION OF LAW, UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b)." Appellant, although represented by counsel, did not file objections to the magistrate's decision, which the trial court adopted.

{¶ 11} This court has held that, when a party fails to file objections to a magistrate's decision, we may still review the decision for plain error. *Brown v. Zurich US*, 150 Ohio App.3d 105, 2002-Ohio-6099, ¶ 27 (10th Dist.); *O'Connor v. Trans World Servs., Inc.*, 10th Dist. No. 05AP-560, 2006-Ohio-2747, ¶ 8. *See also* Civ.R. 53(D)(3)(b)(iv). The plain error doctrine is not favored in civil appeals, however, and we may apply it "only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process." *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus.

{¶ 12} Here, appellant contends that the trial court committed plain error by denying his motion to vacate. More specifically, he contends that the magistrate erred by not giving conclusive effect to his affidavit and testimony, in which he stated that he did not receive service of the complaint. He describes this evidence as a prima facie showing of non-service and states that MERS did not rebut it. We disagree with appellant's contentions.

{¶ 13} First, our record does not contain a transcript of the evidentiary hearing before the magistrate. Therefore, we have no way of reviewing the evidence, other than reviewing the evidence contained in the record, upon which the magistrate relied. *See Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980) ("When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.").

{¶ 14} Second, as the magistrate noted, the docket shows that a process server personally served the complaint upon appellant at his home on July 24, 2005. The address identified on the process server's filing is the same address used by appellant throughout the proceedings and the same address at which he admits he received the motion for default judgment. The magistrate refers to this evidence as "Plaintiff's Exhibit A," and the record contains a copy of that exhibit. Notably, the process server's filing expressly states that he personally served "Richard Sebastian" at the address; Karrie Sebastian was served at a different address.

{¶ 15} Finally, as the magistrate stated, this court has held that, when confronted with an uncontroverted affidavit disputing service, a trial court need not give preclusive effect to the affidavit, but should conduct a hearing to test the validity of the affidavit. *TCC Mgmt.* at ¶ 15. Here, the magistrate held an evidentiary hearing, considered not only the affidavit but the testimony of appellant, and concluded that appellant's claim of non-service was not credible. The magistrate did not err by doing so.

{¶ 16} For all these reasons, we conclude that the trial court did not err, let alone commit plain error, by adopting the magistrate's decision. Therefore, we overrule appellant's assignment of error.

IV. CONCLUSION

{¶ 17} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.