[Cite as *Brownfield v. Krupman*, 2015-Ohio-1966.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[Norma J. Brownfield, Administrator of the Estate of Robert W. Brownfield, Deceased, for Robert W. Brownfield],	:	
Plaintiff-Appellant,	:	No. 14AP-294 (C.P.C. No. 12CV-03-3246)
v.	:	(REGULAR CALENDAR)
Victor S. Krupman,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 21, 2015

James H. Banks, for appellant.

Victor S. Krupman, pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Robert W. Brownfield, appeals the March 11, 2014 judgment of the Franklin County Court of Common Pleas dismissing appellant's complaint against defendant-appellee, Victor S. Krupman. Appellant has also filed a motion to strike an affidavit contained within appellee's brief and exhibits attached to appellee's brief. Appellee has filed a motion to supplement the record. For the reasons that follow, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} On March 13, 2012, appellant filed a complaint against appellee alleging claims including fraud, breach of contract, and legal malpractice. The complaint stated that this was a refiled action and that the original action had been dismissed without prejudice on August 24, 2011.

{¶ 3} On March 4, 2014, appellant filed a motion for default judgment, as appellee had not filed an answer or responsive pleading, and trial was scheduled to commence on March 11, 2014. On the same date, appellant filed a second motion for default judgment and attached two pages, which he purported to be printed copies of delivery records from the United States Postal Service. Appellant asserted in his memorandum in support of the motion for default judgment that "[a]ccording to the Court docket, service of summons and complaint was issued by Certified Mail on March 14, 2012" and that, "[a]ccording to the United States Post Office, service was perfected on April 6, 2012, as set forth in the official documents attached hereto and incorporated herein." (Motion for Default Judgment, R. 16.)

{¶ 4} On March 10, 2014, the trial court filed an entry denying both of appellant's March 4, 2014 motions for default judgment because appellant failed to demonstrate completed service of process. On March 11, 2014, the trial court entered a "decision and final judgment," finding that it lacked jurisdiction and dismissing the action because "good service on defendant Krupman was never accomplished."

II. Assignment of Error

{¶ 5} Appellant appeals, assigning the following error for our review:

> THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT DEFAULT JUDGMENT AND DETERMINING THAT IT LACKED JURISDICTION BELOW BASED UPON FAILURE OF SERVICE.

{¶ 6} Initially, we must address (1) appellant's motion to strike both the exhibits attached to appellee's brief and appellee's affidavit contained therein, and (2) appellee's motion to supplement the record. Appellant asserts that the documents attached to appellee's brief and the statements of fact that appellee attempts to validate through use of an included affidavit are not part of the record in this case and should not be

considered by this court. Appellee's motion to supplement the record purports to include copies of documents from appellant's previously filed case that appellee claims are relevant to the disposition of the present appeal in order to counter assertions made by appellant in his brief.

{¶ 7} App.R. 9(A)(1) provides that the record on appeal, in all cases, consists of "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." *See Cashlink, L.L.C., v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 8. " 'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.' " *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. "An exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal." *Cashlink* at ¶ 8, citing *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 10. Therefore, we shall not consider allegations from either brief or any attachments thereto that are not contained in the record of the trial court proceedings in the present case. However, we need not strike the exhibits and affidavit attached to appellee's brief to accomplish this result. Accordingly, appellant's motion to strike portions of appellee's brief not contained in the record is denied, and appellee's motion to supplement the record is also denied.

{¶ 8} Next, although not raised by either party, because the trial court's judgment entry does not reflect dismissal with prejudice, we must determine whether this case presents a final, appealable order. *Israel v. G-Core Automotive Corp.*, 10th Dist. No. 13AP-201, 2013-Ohio-4461, ¶ 5, citing *White v. Unknown*, 10th Dist. No. 09AP-1120, 2010-Ohio-3031, ¶ 6. Although "[g]enerally, an involuntary dismissal without prejudice is not a final, appealable order" such a dismissal "may be a final appealable order if the plaintiff cannot refile his suit because the applicable statute of limitations has lapsed and he cannot take advantage of the savings statute." *Israel* at ¶ 5. Thus, in determining whether the trial court's March 11, 2014 dismissal is a final, appealable order, we must examine whether the statute of limitations or the savings statute preclude appellant from

refiling his complaint. *Thompson v. Ohio State Univ. Hosps.*, 10th Dist. No. 06AP-1117, 2007-Ohio-4668, ¶ 21.

{¶ 9} An action for legal malpractice must be commenced within one year of the accrual of the cause of action. R.C. 2305.11(A). *See Boggs v. Baum*, 10th Dist. No. 10AP-864, 2011-Ohio-2489, ¶ 17. Pursuant to R.C. 2305.11(A), " 'an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.' " *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶ 4, quoting *Zimmie v. Calfee, Halter & Griswold*, 43 Ohio St.3d 54 (1989), syllabus, citing *Omni-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385 (1988).

{¶ 10} R.C. 2305.19(A), conventionally referred to as Ohio's savings statute, provides that "[i]n any action that is commenced or attempted to be commenced, if in due time * * * the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." Civ.R. 41(A)(1)(a) provides in pertinent part that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any time before the commencement of trial." "[V]oluntary dismissals, under Civ.R. 41(A)(1), amount to failures 'otherwise than upon the merits' within the meaning of the savings statute." *Hancock v. Kroger Co.*, 103 Ohio App.3d 266, 269 (10th Dist.1995), citing *Frysinger v. Leech*, 32 Ohio St.3d 38 (1987), paragraph two of the syllabus. Under Civ.R. 41(B)(4)(a), involuntary dismissals due to a "lack of jurisdiction over the person or the subject matter" constitute a "failure otherwise than upon the merits." However, the savings statute "may be used only once to invoke an additional one-year time period in which to refile an action." *Boggs* at ¶ 30, citing *Hancock* at 269; *Gao v. Barrett*, 10th Dist. No. 10AP-1075, 2011-Ohio-3929, ¶ 13.

{¶ 11} Here, appellant's complaint alleges that appellee committed malpractice as a result of his failure to return money and property entrusted to him by appellant. Specifically, appellant alleges that he entrusted appellee, who had commenced legal representation of appellant, with a cashier's check in the amount of $67,000, in addition to personal belongings upon his incarceration on or about December 19, 2006. Following his release from prison, appellant requested the return of his money and possessions on or about May 25, 2007, but appellee failed to return the full amount to him. Thereafter, appellant alleged that appellee returned portions of the money and made minimal interest payments, promising to repay the full amount by July of 2009 but failed to fulfill that promise.

{¶ 12} Based upon the above facts as stated in appellant's complaint, it is apparent that the statute of limitations for his legal malpractice claim began to run no later than July of 2009, when he should have discovered that his injury was related to his attorney's actions or non-actions. *Smith* at ¶ 4. Therefore, since appellant was required to commence his action within one year of its accrual, the statute of limitations would have barred appellant's refiling of his claim for legal malpractice by the time of the trial court's dismissal of his original case on August 24, 2011.

{¶ 13} As a result, appellant was required to invoke the savings statute in order to refile his complaint on March 13, 2012, nearly two years after expiration of the statute of limitations on his claim of legal malpractice. Since appellant has already invoked the savings statute, he cannot do so again to refile this matter. *Thompson* at ¶ 26; *Boggs* at ¶ 30; *Israel* at ¶ 6. Therefore, because the applicable statute of limitations has expired and appellant is barred from invoking the savings statute more than once, thereby precluding appellant from refiling this case, we find that the trial court's March 11, 2014 dismissal constitutes a final, appealable order. *Thompson* at ¶ 28. *See also Israel* at ¶ 6; *Gao* at ¶ 14. Having determined that we possess jurisdiction, we turn to the merits of appellant's appeal.

{¶ 14} In his sole assignment of error, appellant asserts that the trial court erred in finding that it lacked jurisdiction because appellant submitted evidence to the court demonstrating that service was completed. A trial court lacks personal jurisdiction to render a valid judgment if effective service of process has not been made on the defendant

and the defendant has not voluntarily appeared in the case or waived service. *Erin Capital Mgt., L.L.C., v. Fournier*, 10th Dist. No. 11AP-483, 2012-Ohio-939, ¶ 16, citing *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182 (1990), paragraph one of the syllabus; *Shah, DDS, v. Simpson*, 10th Dist. No. 13AP-24, 2014-Ohio-675, ¶ 9. We review the dismissal of an action due to insufficient service of process for an abuse of discretion. *Craig v. Reynolds*, 10th Dist. No. 14AP-125, 2014-Ohio-3254, ¶ 9; *New Co-Operative Co. v. Liquor Control Comm.*, 10th Dist. No. 01AP-1124, 2002-Ohio-2244, ¶ 11; *Wells Fargo Bank N.A. v. McGinnis*, 2d Dist. No. 24776, 2012-Ohio-1779, ¶ 7.

{¶ 15} Civ.R. 3(A) states that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant." "Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue * * * against any defendant." Civ.R. 4(A). Civ.R. 4.6(E) states that the "attorney of record or the serving party shall be responsible for determining if service has been made."

{¶ 16} Civ.R. 4.1 outlines the methods for obtaining service of process within this state, including service via certified mail. Pursuant to Civ.R. 4.1(A), service of process via certified mail is "[e]videnced by return receipt signed by any person." Notably, Civ.R. 4.1(A) does not require that delivery is restricted to the defendant or to a person authorized to receive service of process on the defendant's behalf. *See TCC Mgt., Inc. v. Clapp*, 10th Dist. No. 05AP-42, 2005-Ohio-4357, ¶ 11, citing *New Co-Operative* at ¶ 8. "All that is required is that certified mail service be consistent with due process standards; i.e., it must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mitchell v. Mitchell*, 64 Ohio St.2d 49, 51 (1980). "When service is attempted by certified mail, a signed receipt returned to the sender establishes a prima facie case of delivery to the addressee." *Clapp* at ¶ 11, citing *New Co-Operative* at ¶ 8. *See also W2 Properties, L.L.C. v. Haboush*, 196 Ohio App.3d 194, 2011-Ohio-4231, ¶ 17 (1st Dist.) ("The presumption of proper service by certified mail applies where the record contains a signed return receipt for the envelope delivered that should have contained the summons and complaint.").

{¶ 17} Here, the record contains a request for service by certified mail filed by appellant on March 13, 2012 with the office of the Franklin County Clerk of Courts. On March 14, 2012, the clerk filed a certified mail receipt, which showed that summons were sent by certified mail to appellee at 64 Stanley Avenue in Columbus. However, the record fails to reflect any return receipt demonstrating that service was completed or that anyone received the certified mail in question. Because there is no signed return receipt in the record, valid service of process cannot be presumed. *Stonehenge Condominium Assn. v. Davis*, 10th Dist. No. 04AP-1103, 2005-Ohio-4637, ¶ 15; *Clapp* at ¶ 11; *Haboush* at ¶ 17. However, the record also does not contain evidence showing a failure of certified delivery. As a result, "whether or not proper service was achieved was a question of fact for the trial court, the outcome of which hinged on whether [appellant] presented sufficient evidence to demonstrate that the USPS accomplished certified delivery." *Stonehenge* at ¶ 15 (concluding that trial court did not abuse its discretion by finding proper service given totality of the evidence).

{¶ 18} In its entry denying the motions for default judgment, the trial court found that appellant failed to obtain service of process under Civ.R. 4.1(A) because "no 'green card' or other official receipt for service of process is on file with the Clerk" and because "Mr. Krupman is a member of the bar, who no doubt understands the importance of responding once sued." (R. 17. at 1.) The trial court considered the documents attached to one of appellant's motions for default judgment, which appellant claimed were records from the United States Postal Service demonstrating that the certified mail service issued by the clerk had been delivered to appellee on April 6, 2012. However, the trial court found that the "attachment purportedly from 'USPS Tracking' " did not satisfy the requirements of Civ.R. 4.1(A) because it was "unofficial, and was only generated in response to a request by plaintiff's counsel." (Decision Denying Default Judgment, R. 17 at 1.) Further, the trial court cited the length of time between appellant's filing of the complaint on March 13, 2012 and the motion for default judgment filed on March 4, 2014, during which time appellant made no additional attempts to effect service, as evidence of appellant's failure to uphold his responsibility to ensure sufficient service of process.

{¶ 19} Although Civ.R. 4.1(A) does not bar the introduction of other evidence to establish certified delivery, we cannot find that the trial court abused its discretion here in

finding that service of process was not made since (1) no evidence of a signed return receipt appeared in the record, and (2) nearly two years after the commencement of the action, appellant's sole evidence of delivery consisted of an unauthenticated computer printout without a signature evidencing delivery to any person. *Compare Stonehenge* at ¶ 14-18 (finding trial court did not abuse its discretion in determining that defendant was properly served despite lack of signed return receipt in record where plaintiff submitted letter from USPS stating that mail was delivered and containing an image of signature evidencing certified delivery). Therefore, based upon circumstances present in this case, the certified mail service was not reasonably calculated to apprise appellee of the pendency of the action and afford him an opportunity to present objections. *Mitchell* at 51.

{¶ 20} Accordingly, we overrule appellant's assignment of error.

III. Disposition

{¶ 21} For the foregoing reasons, having denied appellant's motion to strike and appellee's motion to supplement, and having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motions denied; judgment affirmed.

KLATT and SADLER, JJ., concur.

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