[Cite as *Bowman v. DeMarco*, 2009-Ohio-5631.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

BETH ANN BOWMAN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0020**
- vs -	:	
ANTHONY R. DeMARCO,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 1070.

Judgment: Affirmed.

Jon A. Oldham, Oldham Kramer, 195 South Main Street, Suite 300, Akron, OH 44308-1314 (For Plaintiff-Appellee).

A. Dale Naticchia, 4141 Rockside Road, Suite 230, Seven Hills, OH 44131 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.,

{¶1} Appellant, Anthony R. DeMarco, appeals from the March 19, 2009 judgment entry of the Portage County Court of Common Pleas denying his motion to vacate a default judgment entered in favor of appellee, Beth Ann Bowman. For the following reasons, the judgment of the trial court is hereby affirmed.

{¶2} This instant action was commenced upon the filing of a complaint to quiet title and for forcible entry and detainer concerning real property located at 11351 Nicholson Road, Garrettsville, Ohio. Appellee's counsel instructed the trial court to

issue service of the complaint upon appellant via certified mail at the above address. In addition, the Portage County Sherriff's Department was instructed to personally serve the complaint upon appellant. On July 10, 2008, the attempt for personal service was returned as "unsuccessful." The regular mail service sent to 11351 Nicholson Road was returned, on July 24, 2008, as "unsuccessful."

{¶3} On July 24, 2008, the certified mail service sent to P.O. Box 39301, Solon, Ohio was returned as "unclaimed." Thereafter, pursuant to Civ.R. 4.6(D), appellee served appellant by regular mail service at the aforementioned P.O. Box on July 31, 2008. The regular mail was not returned and, therefore, it was presumed perfected pursuant to the rule.

{¶4} Appellant failed to make an appearance or answer the complaint, and appellee filed a motion for default judgment. The trial court denied appellee's motion for default judgment. Appellee filed a motion to reconsider, upon which the trial court conducted a hearing. Thereafter, the trial court held a hearing on appellee's motion for default judgment, which was granted.

{¶5} On January 20, 2009, appellant moved to vacate the default judgment. After an evidentiary hearing, the trial court overruled appellant's motion to vacate. Appellant now appeals and asserts the following assignments of error:

{¶6} "[1.] The trial court abused its discretion when it overruled appellant's motion for relief from judgment where the appellant had established that he did not receive service of the complaint or final notice prior to granting default judgment.

{¶7} "[2.] The trial court abused its discretion when it overruled appellant's motion for relief from judgment where the appellant had established that he had a meritorious defense."

{¶8} Since appellant's assignments of error are interrelated, we address them in a consolidated fashion.

{¶9} At the outset, we recognize that a review of the appellate record reveals that appellant has failed to file a transcript of the trial court proceedings. See App.R. 9. Furthermore, to support his arguments on appeal, appellant relies primarily on testimony from the hearing on the motion for relief from judgment.

{¶10} In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held:

{¶11} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *** 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." (Citations omitted.)

{¶12} Without a transcript or other acceptable statement of the proceedings, a review of the trial court's judgment is confined to the pertinent portions of the record before us.

{¶13} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman* (1998), 81 Ohio St.3d 239, 242, citing

Griffey v. Rajan (1987), 33 Ohio St.3d 75, 77. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶14} Appellant claims the trial court erred in denying his motion to vacate the default judgment, as he did not receive service of process. To support his argument, appellant cites to his testimony at the hearing on the motion for relief from judgment; however, as previously noted, appellant has not provided this court with a transcript of those proceedings.

{¶15} Civ.R. 4.6(D) states that: "[i]f a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or *** the party at whose instance process was issued. *** Service shall be deemed complete when the fact of mailing is entered on record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. ***"

{¶16} This court has held "that pursuant to Civ.R. 4.6(D), service by ordinary mail '*** is deemed complete when the fact of mailing is entered on the record. If the ordinary mail envelope is not returned, there is a presumption that proper service has been perfected. This is so if the ordinary mail is sent to an address where there is a reasonable expectation that it will be delivered to the defendant.'" *The News-Herald v. Bahr*, 11th Dist. No. 2002-L-176, 2003-Ohio-6223, at ¶18. (Citations omitted.)

{¶17} In the instant matter, the record before this court reveals that the ordinary mail envelope issued to the foregoing P.O. Box was not returned as undelivered. In

addition, appellee, in her brief in opposition to appellant's motion for relief from judgment filed in the trial court, attached a copy of a "change of address or boxholder information request format" from the United States Postal Service indicating appellant did not cancel P.O. Box 39301 until November 24, 2008. In its November 24, 2008 judgment, the trial court stated "[t]he plaintiff submitted an affidavit and presented evidence which is sufficient to find that it is reasonably certain that the defendant received service of this lawsuit. Therefore, the Court, finds that the service is sufficient."

{¶18} Based on the record before this court and pursuant to Civ.R. 4.6(D), proper service was perfected. Appellant's first assignment of error is without merit.

{¶19} In his second assignment of error, appellant maintains the trial court erred in overruling his motion for relief from judgment, since he had a meritorious defense pursuant to Civ.R. 60(B)(5), and appellee lacked standing to assert an action to quiet title.

{¶20} With respect to appellant's first argument under his second assignment of error, relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶21} "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 (whether heretofore denominated intrinsic or extrinsic), 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."

{¶22} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶23} "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." *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶24} As stated in Civ.R. 60(B)(5), relief is to be granted for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) is a catch-all provision, which reflects "the inherent power of a court to relieve a person of the unjust operation of a judgment." *Smith v. Smith*, 8th Dist. No. 83275, 2004-Ohio-5589, at ¶16.

{¶25} Appellant maintains that he is the real owner and was in possession of the property when the instant action was filed; however, he has failed to support this argument on appeal. In fact, appellant only states: "[t]his evidence was asserted at the hearing on the [r]elief from [j]udgment and was uncontroverted." As previously noted, appellant has failed to submit the transcript of this proceeding for our review. Therefore, "the court has no choice but to presume the validity of the lower court's proceedings,

and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d at 199. This argument is without merit.

{¶26} Moreover, appellant alleges that appellee did not have standing to bring forth the instant action, since she was "'out of possession' because she has no reversionary interest nor was she a remainderman." We disagree.

{¶27} The record presented for our review reveals that appellant was in possession of the property at issue pursuant to a month-to-month lease. Additionally, appellant maintains that he has a meritorious defense, as the "uncontroverted testimony" indicates the deed granting him the property at issue was valid. To further support this contention, appellant notes the deed was accepted for filing with the Portage County Recorder's Office. We recognize, however, the Supreme Court of Ohio, in *Kniebbe v. Wade* (1954), 161 Ohio St. 294, 297, has held:

{¶28} "It is the general rule that there is a presumption of delivery arising from the possession of a deed by the named grantee. *** But the mere manual transfer of a deed does not constitute delivery unless it is coupled with an intent of a present, immediate and unconditional conveyance of title." (Emphasis deleted.)

{¶29} A review of the record indicates that appellee signed a warranty deed on May 5, 2003 to transfer the property at issue to appellant only in the event she passed away during her travels. Appellee averred that she never intended to convey title to appellant during her lifetime and, when she returned from her travels, she destroyed the original deed, not aware that appellant had a copy of it.

{¶30} We further recognize that the trial court, in its March 19, 2009 judgment entry, indicated that it had considered "the testimony presented by the defense *and* the

testimony received from the plaintiff at a hearing on the motion to reconsider[.]" (Emphasis added.) Therefore, since the trial court was in the best position to determine the credibility of the witnesses at the evidentiary hearing and the hearing on the motion to reconsider, coupled with the limited record before us, we do not find merit in appellant's argument.

{¶31} For the reasons discussed in this opinion, we find that the record is insufficient to establish that the trial court abused its discretion in denying appellant's motion to vacate. Therefore, appellant's first and second assignments of error are without merit, and the judgment of the Portage County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.