

[Cite as *Portfolio Recovery Assoc., L.L.C. v. Thacker*, 2009-Ohio-4406.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

PORTFOLIO RECOVERY ASSOCIATES, :
LLC, etc.

Plaintiff-Appellee : C.A. CASE NO. 2008 CA 119

v. : T.C. NO. 08 CV 0627

ELEANOR H. THACKER : (Civil appeal from
Common Pleas Court)

Defendant-Appellant :

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OPINION

Rendered on the 28th day of August, 2009.

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FROELICH, J.

{¶ 1} Eleanor Thacker appeals from a judgment of the Clark County Court of
Common Pleas, which denied her motion to vacate a default judgment in favor of Portfolio
Recovery Associates, LLC, pursuant to Civ.R. 60(B). For the following reasons, the

judgment of the trial court will be reversed and the matter will be remanded for further proceedings.

I

{¶ 2} In May 2008, Portfolio Recovery Associates, LLC (“PRA”) filed a complaint in the common pleas court, alleging that Thacker had not paid \$15,878.42 in credit card debt that was originally owed to Capital One Bank and had been assigned to PRA. PRA did not attach the assignment document or documentation to substantiate the amount owed. A copy of the summons and complaint was sent by certified mail to Thacker’s residence at 454 East Madison Avenue, Springfield, Ohio, 45503, but the mail was unclaimed. On June 6, 2008, the summons and the complaint were sent to the same address by ordinary mail. Thacker denies that she was received the mail, and she did not respond to the complaint.

{¶ 3} On July 25, 2008, PRA moved for a default judgment in the amount of \$15,878.42 with statutory interest of eight percent. Thacker was not served with the motion, and she did not respond. On August 13, 2008, the trial court entered a default judgment against Thacker in the amount of \$15,878.42, plus interest at the rate of eight percent and costs, as requested. Thacker claims that she never received a copy of the court’s judgment from the clerk of the common pleas court. It is clear that Thacker has actual knowledge of the judgment; at oral argument it was represented that this was apparently based on PRA’s attorney sending her a copy of the filed judgment.

{¶ 4} On August 28, 2008, Thacker, through her son and attorney-in-fact, Craig Thacker, moved to vacate the default judgment and to enjoin execution of the judgment. Upon PRA’s motion, the trial court struck Thacker’s motions on the ground that Craig

Thacker was not a licensed attorney.

{¶ 5} On October 7, 2008, Thacker, pro se, filed a motion to vacate the default judgment and to dismiss PRA's complaint. She argued that she had no knowledge of the action until after the default judgment was entered, that PRA failed to supply documentation to justify the claims in its complaint, that PRA's claims were fraudulent, that PRA failed to comply with Civ.R. 10(D)(1), that she has a meritorious defense, and that she had no notice of the motion for default judgment. The following day, Thacker moved to stay execution of the default judgment. Thacker subsequently filed an amended motion to vacate the judgment, raising additional arguments, including that the default judgment is void for lack of personal jurisdiction.

{¶ 6} PRA opposed Thacker's Civ.R. 60(B) motion, arguing that Thacker had failed to establish a meritorious defense and that she was entitled to relief under any of the grounds set forth in Civ.R. 60(B)(1) through (5). It further claimed that Thacker was not entitled to notice of the motion for default judgment. Thacker responded by moving to dismiss the complaint and to strike PRA's memorandum. Thacker claimed that PRA lacked standing to pursue its claims, that PRA was a public nuisance, and that the court lacked subject matter and personal jurisdiction.

{¶ 7} On December 11, 2008, the trial court overruled all of Thacker's motions. The court reasoned: "The Court finds that service was proper and defendant fails to meet all the required elements under Civil Rule 60(B) that would entitle her to the relief she seeks. Defendant has not provided any evidence of a meritorious defense, general allegations are not enough without operative facts."

{¶ 8} Thacker appeals from the trial court’s judgment. In her five assignments of error, Thacker claims that the trial court erred in failing to grant Civ.R. 60(B) relief, in denying her Civ.R. 60(B) motion without a hearing, in failing to hold a hearing on damages, and in finding, implicitly, that PRA had standing and that the court had personal jurisdiction.

Thacker asserts that the issues of standing and personal jurisdiction are threshold matters. She states: “Failure on any one of these grounds is itself sufficient for this court to dismiss PRA’s claims, making unnecessary the consideration by this court of Civil R. 60(B) issues.”

{¶ 9} In response, PRA claims that Thacker cannot raise standing on appeal, because it is a waivable defense and Thacker did not dispute standing before the default judgment was entered. PRA argues that the trial court properly concluded that Thacker had been served, thus giving the court personal jurisdiction, because her affidavit failed to offer “any reasonable explanation why she did not receive the complaint or summons at the address where she lived.” PRA further claims that Thacker failed to meet the requirements of Civ.R. 60(B), and the trial court properly denied her motion.

{¶ 10} We will address each of these issues in turn.

II

{¶ 11} Thacker’s first assignment of error states:

{¶ 12} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DISREGARDING THE FACT THAT PLAINTIFF LACKED STANDING.”

{¶ 13} In her first assignment of error, Thacker claims that the trial court erred in implicitly finding that PRA had standing to assert its claims against her. She argues that, under Civ.R. 10(D)(1), PRA was required to file the document assigning the Capital One

Bank credit card debt to PRA. Thacker also claims that PRA was “obligated to present, in support of its motion for default judgment, some evidence so that the trial court could fulfill its obligation to determine the existence of standing.” As stated above, Thacker asserts that standing is a threshold issue in this appeal.

{¶ 14} We disagree with Thacker that standing is a threshold issue in this case. As noted by PRA, “[t]he issue of lack of standing ‘challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.’ Accordingly, the issue of standing or the ‘real-party-in-interest’ defense is waived if not timely asserted.” (Internal citations omitted) *Mid-State Trust IX v. Davis*, Champaign App. No. 07-CA-31, 2008-Ohio-1985, at ¶56. We understand that it is impossible to waive a defense if a defendant has never been served and is not even aware of the claim (which we will address below), but standing is not an issue of subject matter jurisdiction, and lack of standing, by itself, does not automatically render a default judgment void. Accordingly, the trial court did not err in failing to address whether PRA was the real party in interest prior to addressing Thacker’s motion to vacate the default judgment pursuant to Civ.R. 60(B).

{¶ 15} The first assignment of error is overruled.

III

{¶ 16} Thacker’s second assignment of error states:

{¶ 17} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FINDING IT HAD PERSONAL JURISDICTION OVER THE DEFENDANT.”

{¶ 18} In her second assignment of error, Thacker asserts that the trial court erred in finding that it had personal jurisdiction over her.

{¶ 19} “It is well accepted that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. Personal jurisdiction may only be acquired by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by an appearance that waives of [sic] certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure.” *Abuhilwa v. O’Brien*, Montgomery App. No. 21603, 2007-Ohio-4328, at ¶14, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154.

{¶ 20} “Service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond. *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406, 406 N.E.2d 811, quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865. The plaintiff bears the burden of obtaining proper service on a defendant. *Cincinnati Ins. Co. v. Emge* (1997), 124 Ohio App.3d 61, 63, 705 N.E.2d 408. In those instances where the plaintiff follows the Civil Rules governing service of process, courts presume that service is proper unless the defendant rebuts this presumption with sufficient evidence of non-service.” *Carter-Jones Lumber Co. v. Meyers*, Clark App. No. 2005 CA 97, 2006-Ohio-5380, at ¶11.

{¶ 21} Under Civ.R. 4.1(A), service may be made by certified or express mail, personal service, or residential service. If certified or express mail service is attempted and the envelope “is returned with an endorsement showing that the envelope was unclaimed,” the party requesting service must be notified and that party may then request service by ordinary mail. Civ.R. 4.6(D). “[T]he 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 in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. *** 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 with an endorsement showing failure of delivery.” Id.

{¶ 22} Where service of process is not made in accordance with the Rules of Civil Procedure, the trial court lacks jurisdiction to consider the complaint, and any judgment on that complaint is void ab initio. *Rite Rug Co., Inc. v. Wilson* (1995), 106 Ohio App.3d 59, 62. Because a court has the inherent authority to vacate a void judgment, a party who asserts that the trial court lacks personal jurisdiction over him or her due to ineffective service of process need not satisfy the requirements of Civ.R. 60(B). *Carter-Jones Lumber Co.* at ¶10; *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 123. Only lack of proper service must be established. *Carter-Jones Lumber Co.* at ¶10.

{¶ 23} According to the record, service on Thacker was attempted by certified mail at 454 East Madison Avenue, Springfield, Ohio, 45503. After the certified mail was returned unclaimed, PRA requested service by ordinary mail to the same address. Thacker has not asserted that the mailing address was incorrect, and she has listed this address as her residential address on her motions. Accordingly, a rebuttable presumption arose that proper service was made.

{¶ 24} In her motion to vacate the default judgment and in her affidavit in support of that motion, Thacker asserted that she was not properly served. Her affidavit stated, in

relevant part:

{¶ 25} “1. That no notice was received by the Defendant from the Court of Common Pleas, Clark County OHIO [sic] of any legal proceedings filed against her.

{¶ 26} “2. That no notice or communication from any party, Court or third-party whether by Certified Mail, Regulation Mail or any United States Mail, whatsoever, on a matter concerning any legal action commenced, filed, being tried, on record, about to be filed, judgments, awards of judgments, pleadings, whether legal documents or not, on or before the date of filing of this action and through the date of Journal Entry of Default Judgment, inclusive therein, against the Defendant was received, delivered, or communicated to the Defendant in any manner or form, whatsoever, by the Plaintiff, any agent for the Plaintiff, any attorney for the Plaintiff, by the Clerk of Courts, Clark County, Ohio or by any third-party, whatsoever.

{¶ 27} “3. That said service was defective.

{¶ 28} “4. That service was not affected in accordance with the Ohio Rules of Civil Procedure.

{¶ 29} “5. That the Defendant has been denied due process.”

{¶ 30} We understand the argument that due process does not require that a defendant receive actual notice, but all that is required for a court to acquire personal jurisdiction is compliance with the Civil Rules. Further, we have noted that there is a split of authority as to the effect of a defendant’s affidavit that, although the Civil Rules were complied with, he or she never actually received service of process. *Cincinnati Ins. Co. v Lafitte*, Montgomery App. No. 21055, 2006-Ohio-1806, at ¶7. We observed that “[s]ome

courts hold that ‘an uncontroverted affidavit, alone, is sufficient to require a default judgment to be found void ab initio.’” (Citations omitted.) Id.

{¶ 31} However, we have held that, when process was sent to a defendant at the defendant’s correct address and the defendant has only his self-serving testimony that he did not receive service of process, the court must hold a hearing to determine whether service was proper. *Sec. Natl. Bank & Trust Co. v. Murphy* (July 20, 1989), Clark App. No. 2552. Also, see *Cincinnati Ins. Co.*, supra, at ¶8. Upon hearing testimony on the matter, the trial court is permitted to find that the defendant’s testimony is not credible, and the court is not required to find that the presumption of service of process has been satisfactorily rebutted. Id.; *Ohio Civ. Rights Comm. v. First Am. Properties, Inc.* (1996), 113 Ohio App.3d 233, 238-39; *Lafitte* at ¶8.

{¶ 32} In this case, the trial court determined that service on Thacker was proper without holding a hearing. In light of Thacker’s unrefuted affidavit that she did not receive service of process, the failure to hold a hearing was error, and this matter must be remanded for a hearing on that issue.

{¶ 33} The second assignment of error is sustained.

IV

{¶ 34} Thacker’s third assignment of error states:

{¶ 35} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN RULING THAT DEFENDANT HAD FAILED TO MEET THE REQUIREMENTS FOR RELIEF UNDER CIVIL R. 60(B).”

{¶ 36} In her third assignment of error, Thacker claims that the trial court erred in

concluding that she failed to meet the requirements of Civ.R. 60(B) for relief from judgment.

{¶ 37} “Civ. R. 60(B) represents an attempt to strike a balance between conflicting principles that litigation must be brought to an end and that justice should be done.” *Chapman v. Chapman*, Montgomery App. No. 21244, 2006-Ohio-2328, at ¶13. Civ.R. 60(B) permits trial courts to relieve parties from a final judgment for the following reasons: (1) “mistake, inadvertence, surprise or excusable neglect;” (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; or (5) any other reason justifying relief from the judgment.

{¶ 38} 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), and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. All of these requirements must be satisfied, and the motion should be denied if any one of the requirements is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107; *Cincinnati Ins. Co. v. Schaub*, Montgomery App. No. 22419, 2008-Ohio-4729, at ¶15.

{¶ 39} Where the judgment from which relief is sought is a default judgment, any doubt should be resolved in favor of the movant so that cases can be decided on their merits.

GTE Automatic Elec., Inc., supra, at paragraph three of the syllabus; *Mount Olive Baptist Church v. Pipkens Paints and Home Improvement Ctr., Inc.* (1979), 64 Ohio App.2d 285, 287.

{¶ 40} We review the trial court’s determination of a Civ. R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion is “‘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, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 41} Thacker claims that the trial court erred in concluding that she failed to establish a meritorious claim for relief. In order to establish a meritorious claim or defense under Civ.R. 60(B), the movant is required to allege a meritorious claim or defense, not to prove that she will prevail on such claim or defense. See *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, at ¶10. “In order to satisfy that requirement[,] the motion and/or affidavit submitted in support of the motion must set out operative facts which, if true, constitute a prima facie showing of the claim or defense concerned. A prima facie showing is one which is ‘[s]ufficient to establish a fact or raise a presumption unless disapproved or rebutted.’ Black’s Law Dictionary.” *Stewart v. Heard*, Montgomery App. No. 20787, 2005-Ohio-5241, at ¶24.

{¶ 42} Thacker’s motion to vacate the default judgment claimed that she had five valid defenses to present to the court: (1) that the complaint was “defective;” (2) that PRA “has abused process;” (3) that “the debt identified within the Complaint is NOT owed to the Plaintiff by the Defendant;” (4) that PRA has “no statutory right” to bring the claims against her; and (5) that PRA committed fraud, misrepresentation, and collusion. Thacker’s supporting affidavit averred that she believed that PRA had perpetrated a fraud against her and that the alleged debt “is not owed, was paid, is time barred, [and/or] is theft of Identity,

mistaken Identity and/or clerical error whether such clerical error was intentional or not.”

{¶ 43} The statements in her motion and affidavit that she does not owe the debt claimed by PRA are sufficient to satisfy the requirement that she allege a meritorious defense. Although Thacker presented alternative reasons as to why she did not owe the money – the debt was not owed, had been paid, was incurred due to identity theft, or is time-barred – each of these statements asserts the fact that she does not owe the credit card debt claimed by PRA, which, if proven, would constitute a defense to PRA’s claim for \$15,878.42 in credit card debt that was allegedly originally owed to Capital One Bank.

{¶ 44} In order to be entitled to Civ.R. 60(B) relief, Thacker was also required to demonstrate that she was entitled to relief under one of the grounds listed in Civ.R. 60(B)(1) through (5). Thacker sought relief under Civ.R. 60(B)(1), (3), and (5). She stated that she did not receive the complaint and was thus “surprised” within the meaning of Civ.R. 60(B)(1). Thacker further claimed that PRA’s claims were based on fraud and misconduct, justifying relief under Civ.R. 60(B)(3), and that PRA’s failure to comply with Civ.R. 10(D)(1) constituted grounds for relief under Civ.R. 60(B)(5). In its memorandum in opposition to Thacker’s motion, PRA disputed that Thacker had grounds for relief under Civ.R. 60(B).

{¶ 45} In its ruling, the trial court did not expressly address whether Thacker had satisfied any of the grounds for relief under Civ.R. 60(B); rather, it stated that “defendant fails to meet all the required elements under Civil Rule 60(B) that would entitle her to the relief she seeks” and that Thacker had failed to provide evidence of a meritorious defense. Thacker construes the trial court’s decision as finding that she failed to satisfy only the

requirement that she have a meritorious defense. PRA asserts, on the other hand, that the trial court found that Thacker failed to satisfy all three requirements for relief from judgment, even though PRA did not contest the timeliness of Thacker's motion.

{¶ 46} We, like Thacker, construe the trial court's ruling as finding that Thacker failed to demonstrate that she has a meritorious defense to PRA's claims. We see no indication that the trial court, having found Thacker's motion to be deficient, addressed the remaining two requirements for Civ.R. 60(B) relief.

{¶ 47} In light of our conclusion that Thacker presented a meritorious defense, the trial court erred in failing to address the remaining two requirements. We note that PRA did not dispute that Thacker's motion was timely. However, we decline to address, in the first instance, the timeliness of Thacker's motion or whether she presented grounds for relief under Civ.R. 60(B). Should the trial court conclude that it has personal jurisdiction over Thacker, these issues should be addressed by the trial court upon remand.

{¶ 48} Thacker's assignment of error is sustained to the extent that the trial court found that she failed to present a meritorious defense.

V

{¶ 49} Thacker's fourth assignment of error states:

{¶ 50} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN NOT HOLDING A HEARING TO TAKE EVIDENCE BEFORE IT RULED ON THE DEFENDANT'S CIVIL R. 60(B) MOTION."

{¶ 51} In her fourth assignment of error, Thacker argues that the trial court erred in failing to hold a hearing before ruling on her Civ.R. 60(B) motion. Failure of a defendant to

file an answer or otherwise appear because she has not received actual notice may constitute excusable neglect under Civ.R. 60(B)(1). *Jackson v. Jackson* (Dec. 27, 1988), Franklin App. No. 88AP-721. And a party making such a claim is entitled to a hearing to demonstrate such recognizable neglect if she did not have actual notice. *Pegram v. Dalton* (April 14, 1987), Franklin App. No. 86AP-817. This assignment is sustained.

VI

{¶ 52} Thacker’s fifth assignment of error states:

{¶ 53} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO HOLD A HEARING TO DETERMINE ACTUAL DAMAGES.”

{¶ 54} In her fifth assignment of error, Thacker claims that the trial court should have held a hearing to determine the amount of damages. In light of our disposition of the second and third assignments of error, the fifth assignment of error is overruled as moot.

VII

{¶ 55} The trial court’s denial of Thacker’s motion to vacate the default judgment will be reversed, and the matter will be remanded for further proceedings consistent with this opinion.

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FAIN, J., concurs.

GRADY, J., concurring:

{¶ 56} I concur with the opinion of the majority, subject to the following caveats.

{¶ 57} First, Defendant Thacker’s claim that she did not have actual notice of the action that Plaintiff Portfolio Recovery Services filed against her is not, on its face, sufficient

to demonstrate that the trial court lacked personal jurisdiction over Thacker necessary to render the default judgment that Thacker's motion seeks to vacate.

{¶ 58} Thacker concedes that ordinary mail service of process on her pursuant to Civ.R. 4.6(D) was complete. That method of service does not require actual notice. Furthermore, being complete, that service conferred personal jurisdiction over Thacker in the court in which the action had been filed. The resulting default judgment is therefore not void for the lack of actual notice Thacker alleges. The judgment may, however, be voidable pursuant to Civ.R. 60(B)(1) for Thacker's excusable neglect in failing to file a pleading responsive to the complaint that Portfolio Recovery Services filed, if Thacker lacked actual notice of the action. Thacker is entitled to a hearing to establish that ground for relief.

{¶ 59} Second, even if Thacker demonstrates grounds for relief pursuant to Civ.R. 60(B), she must in addition demonstrate a meritorious defense. *Baek v. City of Cincinnati* (1988), 43 Ohio App.3d 158. Thacker is not required to prove that she will prevail on the defense she identifies. However, it is not sufficient to merely set out a defensive matter, as one would in a Civ.R. 8(B) pleading responsive to a complaint. To show that the defense is "meritorious," Thacker must in addition make at least a prima facie showing that the time and trouble required by vacating a judgment are justified because a new judgment may be different. That must initially be done through operative facts set out in an affidavit in support of a Civ.R. 60(B) motion.

{¶ 60} Thacker's affidavit states that the debt alleged to be due and owing in the complaint Portfolio Recovery Services filed "is not owed, was paid, is time barred, [and/or] is theft of Identity, mistaken Identity and/or clerical error whether such error was intentional

or not.” Except for the allegation that the debt was paid, and for that reason it is not owed, the other matters Thacker’s affidavit alleges are wholly conclusory and fail to demonstrate that those defenses have any merit at all. The trial court did not abuse its discretion in finding that Thacker lacks a meritorious defense with respect to those other matters. The court did abuse its discretion in rejecting her allegations that the debt is not owed because it was paid, without first conducting a hearing to determine the truth of the facts concerned. On remand, the court is not required to hear evidence concerning other defensive matters, though in its discretion the court may do so if the court wishes to.

{¶ 61} The law supports the finality of judgments, including default judgments. Civ.R. 55(B) provides that default judgments may be set aside in accordance with Civ.R. 60(B). The grounds for relief in Civ.R. 60(B)(1)-(5) are essentially equitable, not legal. A motion filed pursuant to Civ.R. 60(B) is therefore not a substitute for a responsive pleading permitted by Civ.R. 8(B), in which multiple and alternative defenses in law may be set out.

{¶ 62} Though they are not necessarily mutually exclusive, the grounds for relief in Civ.R. 60(B)(1)-(4) are circumstantially distinct, and the grounds in Civ.R. 60(B)(5) do not apply when those of another section of the rule do or could apply. Therefore, Civ.R. 60(B) ordinarily is not a vehicle on which more than one particular set of circumstances would justify the relief sought. For the most part, Thacker’s many and diverse claims for Civ.R. 60(B) relief present claims in law that fall outside the grounds for relief that Civ.R. 60(B)(1)-(5) authorize, and the court is not required to rule on their merits when they do.

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