

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RYEE HAN YOUNG	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2003CA00228
RICK MICHAELSON	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Civil appeal from Massillon Municipal Court,
Case No. 2002CVF2556

JUDGMENT: REVERSED, VACATED and REMANDED

DATE OF JUDGMENT ENTRY: FEBRUARY 9, 2004

APPEARANCES:

For Plaintiff-Appellee
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Boggins, J.

{¶1} This is an appeal from a decision of the Massillon Municipal Court which denied Appellant's 60(B) Motion to vacate a default judgment.

STATEMENT OF THE FACTS

{¶2} The facts indicate that Appellee filed suit against Appellant on September 20, 2002, based upon an account which was attached to the complaint as Exhibit A.

{¶3} The account did not bear Appellant's name as such, but indicated the obligor was "Connections".

{¶4} The complaint did not indicate the relationship, or if I may use the word "connection", between Appellant and the name or entity listed on the account.

{¶5} Service was issued to Appellant at 5244 Peach Street, Erie, Pennsylvania.

{¶6} An answer was filed on November 5, 2002, which would have been beyond time if service was complete.

{¶7} On November 6, 2002, Appellee filed a motion for default judgment.

{¶8} On November 7, 2002, judgment by default was granted, which judgment recited that Appellee was in default of answer or appearance.

{¶9} On February 19, 2003, a motion to admit counsel pro hac vice was filed, which was denied.

{¶10} The 60(B) motion was filed by Ohio counsel on May 20, 2003, along with a supportive affidavit and memorandum in support which asserted that the address used in the complaint was incorrect, that Appellant was not liable on the debt personally as "Connections" is registered trade name of Autoguard Cellular, a Pennsylvania Corporation, of which Appellant is the president.

{¶11} Such Motion was denied on the basis, according to Appellant's affidavit, paragraph 5, that Appellant became aware of the suit on October 8, 2002, and had ample time to respond prior to the answer day of October 23, 2002, and failed to do so.

ASSIGNMENT OF ERROR

{¶12} “I. APPELLANT RESPECTFULLY SUBMITS THAT THE TRIAL COURT ERRED IN DENYING DEFENDANT’S MOTION TO SET ASIDE DEFAULT JUDGMENT. SEE ORDER DATED MAY 21, 2003.”

{¶13} In addressing the Assignment of Error, we must first look to Civil Rule 55(A) which states:

{¶14} “(A) Entry of judgment

{¶15} “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.” (emphasis added).

{¶16} In this cause, an appearance was made on November 5, 2002, even though such was late if service were actually perfected.

{¶17} The motion for default judgment as stated was filed November 6, 2002, and sustained the following day even though Civil Rule 55 requires a seven-day period and written notice.

{¶18} We therefore sustain Appellant's Assignment of Error. We need not, at this time, address the merits of claim of improper service, lack of liability, nor the apparent absence of a nexus between the pleadings and the account as the violation of the requirements of Civil Rule 55(A) dictate the vacation of the default judgment and remand for further proceedings.

By: Boggins, J.

Gwin, P.J. concurs separately

Edwards, J. concurs separately

Gwin, P.J., concurring

{¶19} I concur in the majority decision. However, I would find that upon remand the trial court must first determine whether or not it has personal jurisdiction over appellant.

{¶20} The account attached to appellee's complaint indicated that the obligor was, presumably, a business entity known as "Connections." The appellant is a resident of Pennsylvania. The complaint fails to indicate or allege any nexus between Connections and the appellant.

{¶21} A judgment rendered without personal jurisdiction over a defendant is void. *Patton V. Diemer* (1988), 35 Ohio St. 3d 68, 518 N.E. 2d 941. The authority to vacate a void judgment "is not derived from Civ. R. 60 (B), but rather constitutes an inherent power possessed by Ohio courts." *Id.*, paragraph four of the syllabus. A party seeking

to challenge a void judgment must file a motion to vacate or set aside the judgment. *Compuserve, Inc. v. Trionfo* (1993), 91 Ohio App. 3d 157, 631 N.E. 2d 1120; *Sunrise Equipment & Supply Co. v. Zlatanov*, Stark App. No. 2003CA00111, 2003-Ohio-3638. The fact that a party files a motion pursuant to Civ. R. 60 (B) instead of a motion styled as a motion to vacate or set aside is of no consequence. *Id.* In *Compuserve, Inc. v. Triofo, supra*, the court went on to state: “[t]he exercise of long-arm jurisdiction in Ohio depends not only upon the non-resident having sufficient minimum contacts with Ohio to satisfy due process, but, also, upon the fulfillment of one of the specified circumstances found in Civ. R. 4.3(A) and R.C. 2307.382 (A). 91 Ohio App. 3d at 162; 631 N.E. 2d at 1123. (citations omitted). The pleadings submitted by the appellee do not allege facts sufficient to show that appellant transacted business in Ohio and was therefore subject to the jurisdiction of the trial court. *Wright v. Automatic Valve Co.* (1969), 20 Ohio St. 2d 87, 253 N.E. 2d 771; *Compuserve Inc. v. Trionfo, supra*, 91 Ohio App. 3d at 162; 631 N.E. 2d at 1123. Accordingly, upon remand if the court finds that it does not have personal jurisdiction, the default judgment is void. *Id.*

JUDGE W. SCOTT GWIN

EDWARDS, J., CONCURRING OPINION

{¶22} I concur with the decision to reverse the judgment of the trial court and remand this matter to the trial court for further proceedings, albeit for a different reason.

{¶23} At issue in the case sub judice is whether the trial court erred in denying appellant’s Motion to Set Aside the Default Judgment. As is stated above, after a default judgment was entered against appellant, appellant filed a Civ. R. 60(B) Motion.

{¶24} Civ. R. 60 (B) states, in relevant part, as follows: “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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.”

{¶25} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that he has a meritorious defense or claim to present if relief is granted; that he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and that the motion is made within a reasonable time. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. The standard by which we review a trial court's decision on a Civ.R. 60(B) motion is abuse of discretion. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 665 N.E.2d 1102. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶26} Pursuant to *GTE*, supra., to be entitled to relief under Civ. R. 60(B), appellant was required to establish that he had a meritorious claim or defense to present if relief was granted. I would find that appellant has a meritorious defense since the invoice, which is attached to appellee's complaint, indicates that "Connection" owes the sum of \$13,745.00 to Ventura Wireless. There is no allegation in the complaint that the debt was incurred by appellant personally.

{¶27} With respect to grounds for relief, appellant, in the case sub judice, argued in his Motion to Set Aside the Default Judgment in part, that he was entitled to relief under Civ. R.60(B)(5). Such section is "intended as a catch-all provision reflecting the inherent power of a court to release a person from the unjust operation of a judgment." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66, 448 N.E.2d 1365. Clearly, if the debt was not incurred by appellant personally, it would be unjust to permit the default judgment entered against appellant to remain in effect.

{¶28} Finally, since appellant's motion was filed approximately six months after default judgment was entered, I would find that the same was timely filed.

{¶29} For the foregoing reasons, I would find that the trial court erred in denying appellant's Motion to Set Aside the Default Judgment and would remand this matter to the trial court for further proceedings.

Judge Julie A. Edwards