[Cite as *Aguirre v. Sandoval*, 2010-Ohio-6006.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

EMILIANO AGUIRRE	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010CA00001
MARIA DOLORES SANDOVAL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Family Court Division, Case No. 2007DR01349
JUDGMENT:	DISMISSED
DATE OF JUDGMENT ENTRY:	November 29, 2010

APPEARANCES:

For Defendant-Appellant:	For Plaintiff-Appellee:
ROSEMARY G. RUBIN 1435 Market Ave., N. Canton, OH 44714	ARNOLD F. GLANTZ 4883 Dressler Rd., N.W. Canton, OH 44718

Delaney, J.

{¶1} Defendant-Appellant Maria Dolores Sandoval appeals the March 12, 2008 Final Decree of Divorce by the Stark County Court of Common Pleas, Family Court Division.

STATEMENT OF THE CASE[1]

{¶2} Plaintiff-Appellee Emiliano Aguirre filed a complaint for divorce on November 5, 2007. Appellee requested service of the complaint to Appellant by certified mail to 972 McKinley Ave., Akron, Ohio.

{¶3} On November 26, 2007, certified mail service was returned to the Stark County Clerk of Courts as "unclaimed."

{¶4} Appellee filed a Praecipe for Service on December 3, 2007, requesting service by ordinary mail on Appellant at 972 McKinley Ave., Akron, Ohio. The Stark County Clerk of Courts filed the Certificate of Mailing on December 4, 2007.

{¶5} The ordinary mail envelope did not return to the Clerk of Courts.

{¶6} On March 5, 2008, Appellee appeared before the magistrate on his complaint for divorce. The magistrate noted in her decision that Appellant was served with the complaint by ordinary mail after the certified mail service was returned as "unclaimed." (Magistrate's Decision, Mar. 5, 2008). The magistrate determined that the trial court had jurisdiction over the matter. In her decision, the magistrate granted the divorce to Appellee. Appellant was ordered to pay child support to Appellee for the parties' one minor child in the amount of $50.00 per month. The Magistrate's Decision states that the decision was "served in court."

[1] The underlying facts of the case are unnecessary for the disposition of this appeal.

{¶7} Appellee submitted a proposed Final Decree of Divorce and the trial court granted the Divorce Decree on March 12, 2008.

{¶8} On January 4, 2010, Appellant filed a Notice of Appeal of the March 12, 2008 Divorce Decree.

{¶9} Appellant filed a Motion to Set Aside the Decree of Divorce in the trial court on May 12, 2010. This Court granted a limited remand of the case to the trial court for the purposes of ruling on Appellant's motion. The trial court denied Appellant's motion on September 16, 2010. The denial of Appellant's Civ.R. 60(B) motion is not part of this appeal.

{¶10} Appellant raises three Assignments of Error:

{¶11} "I. THE TRIAL COURT LACKED JURISDICTION TO PROCEED ON A FINAL DECREE OF DIVORCE ON MARCH 4, 2008 [SIC] BECAUSE SERVICE OF PROCESS OF THE INITIAL COMPLAINT WAS NEVER PERFECTED ON THE DEFENDANT/APPELLANT.

{¶12} "II. THE TRIAL COURT ERRED IN FAILING TO INQUIRE AS TO THE RESIDENCE OF THE DEFENDANT/APPELLANT WHEN CERTIFIED MAIL WAS RETURNED 'UNCLAIMED.'

{¶13} "III. THE TRIAL COURT ERRED IN NOT REQUIRING SERVICE UPON THE DEFENDANT/APPELLANT OF THE JUDGMENT ENTRY/DECREE OF DIVORCE TO PROVIDE HER NOTICE IN SUFFICIENT TIME TO OBJECT OR TO APPEAL THE DECISION."

I., II., and III.

{¶14} We address Appellant's third Assignment of Error first because it raises the issue of this Court's jurisdiction to consider Appellant's appeal. The Final Divorce Decree was filed on March 12, 2008. Appellant filed her appeal of the divorce decree on January 4, 2010. We must determine whether the timing of Appellant's appeal divests this court of jurisdiction to consider Appellant's appeal.

{¶15} App.R. 3(A) states, "[a]n appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 4(A) sets the time for appeal. It reads, "[a] party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry of service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶16} Appellant states in her brief that when she became aware of the Divorce Decree, she filed her appeal. Appellant argues that she filed her appeal beyond the thirty-day limit as stated in App.R. 4(A) because she was never served with the Magistrate's Decision filed on March 5, 2008 or the Final Decree of Divorce filed on March 12, 2008.

{¶17} Appellant states that because she was never served with the complaint for divorce, so she was unaware that she needed to appear in the divorce proceedings. We agree that Appellant was not served with the Magistrate's Decision as the Magistrate's Decision states in the entry that it was served in court. The Magistrate's Decision, however, is not a final, appealable order. The Final Divorce Decree is a final,

appealable order. *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, 878 N.E.2d 16, ¶15-16.

{¶18} Civ.R. 58(B) provides:

{¶19} "When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A)."

{¶20} The Ohio Supreme Court has stated:

{¶21} "In those cases in which both Civ.R. 58(B) and App.R. 4(A) are applicable, if service of the notice of judgment and its entry is made within the three-day period of Civ.R. 58(B), the appeal period begins on the date of judgment, but if the appellants are not served with timely notice, the appeal period is tolled until the appellants have been served. *In re Anderson* (2001), 92 Ohio St.3d 63, 67, 748 N.E.2d 67. Consequently, App.R. 4(A) 'tolls the time period for filing a notice of appeal * * * if service is not made within the three-day period of Civ.R. 58(B).' *State ex rel. Hughes v. Celeste* (1993), 67 Ohio St.3d 429, 431, 619 N.E.2d 412." *Blair v. Wallace*, Summit App. No. 24819, 2010-Ohio-2734, ¶12 citing *State ex rel. Sautter v. Grey*, 117 Ohio St.3d, 465, 2008-Ohio-1444, 884 N.E.2d 1062, ¶16.

{¶22} In the present case, a review of the March 12, 2008 Final Divorce Decree shows that the trial court did not endorse the judgment entry with direction to the clerk of courts to serve notice of the entry upon all parties pursuant to Civ.R. 58. There is no entry in the trial court docket that notice of the Final Divorce Decree was served upon the parties.

{¶23} However, Civ.R. 58(B) states, "[w]hen the court signs a judgment, the court shall endorse thereon a direction to the *clerk to serve upon all parties not in default for failure to appear* notice of the judgment and its date of entry upon the journal." (Emphasis added).

{¶24} As stated above, Appellant did not appear in this case. If Appellant did not appear in the case, we find that regardless of the trial court's failure to include the required Civ.R. 58(B) endorsement, the error is harmless because Civ.R. 58(B) does not require the clerk of courts to serve notice upon parties in default for their failure to appear. However, Appellant argues that she did not appear because she was never served with the complaint for divorce. In order to resolve this issue, we next address Appellant's first and second Assignments of Error.

{¶25} Appellant argues in her first and second Assignments of Error that Appellant was not properly served with the complaint for the divorce. Appellant argues in her brief that the mailing address Appellee used to serve Appellant by certified and ordinary mail was incorrect.

{¶26} Appellee first attempted service of the complaint for divorce on Appellant by certified mail. The certified mail service was returned "unclaimed." Appellee then

attempted ordinary mail service upon Appellant at the same mailing address. The ordinary mail envelope did not return to the clerk of courts.

{¶27} Civ.R. 4.6(D) allows for service to be made by ordinary mail if the certified mail is returned unclaimed, and provides that "[s]ervice 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." If the ordinary mail envelope is not returned, there is a rebuttable presumption that proper service has been perfected. *Hamilton v. Digonno,* Butler App. No. CA2005-03-075, 2005-Ohio-6552, ¶10. This Court has held: "Courts will presume service to be proper in cases where the civil rules are followed unless the defendant rebuts the presumption by sufficient evidence." *State ex rel. Fairfield County CSEA v. Landis*, Fairfield App. No. 2002 CA 00014, 2002-Ohio-5432, ¶17 citing *Bank One Cincinnati, N.A. v. Wells* (Sept. 18, 1996), Hamilton App. No. C-950279, citing *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 650, 641 N.E.2d 739.

{¶28} We have reviewed the trial court record before us. As stated above, Appellant's Civ.R. 60(B) motion and resulting ruling from the trial court is not part of this appeal. The ordinary mail envelope in this case was not returned, therefore creating a rebuttable presumption that proper service was perfected. Upon this record, we find no sufficient evidence, other than Appellant's arguments in her brief, to rebut the presumption that ordinary mail service was perfected. Appellant's arguments in her appeal are more properly raised in a Civ.R. 60(B) motion before the trial court; but as we have stated, that issue is not before us.

{¶29} Appellant was properly served with the complaint for divorce but failed to appear in the case. The clerk of courts, therefore, was not required to serve Appellant with notice of the Final Divorce Decree pursuant to Civ.R. 58(B), even if the trial court had correctly included the endorsement on the judgment entry. Appellant is consequently forestalled from arguing that the appeal period under App.R. 4(A) was tolled because she was not served with the Final Decree Divorce.

{¶30} As such, we find Appellant's appeal of the March 12, 2008 Final Decree of Divorce to be untimely pursuant to App.R. 4(A) and this Court is without jurisdiction to consider Appellant's appeal of that judgment entry.

{¶31} We hereby dismiss Appellant's appeal.

By: Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

PAD:kgb

[Cite as *Aguirre v. Sandoval*, 2010-Ohio-6006.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

EMILIANO AGUIRRE	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARIA DOLORES SANDOVAL	:	
	:	
	:	Case No. 2010CA00001
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, Appellant's appeal of the judgment of the Stark County Court of Common Pleas, Family Court Division is dismissed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER