[Cite as *Kapszukiewicz v. Samuel*, 2007-Ohio-2152.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Wade Kapszukiewicz — Court of Appeals No. L-06-1206

Appellee — Trial Court No. TF 2004-1197

v.

Prabhu Samuel, et al. — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: May 4, 2007

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Joseph P. Boyle, III, for appellee.

George R. Royer, for appellant.

* * * * *

GLASSER, J.

{¶ 1} This appeal is from the June 8, 2006 judgment of the Lucas County Court of Common Pleas, which denied the motion of appellant, Prabhu Samuel, to set aside the default judgment entered against him. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} I. "THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT."

{¶ 3} II. "THE TRIAL COURT ERRED IN DENYING APPLICANT LEAVE TO FILE INSTANTER ON [sic] ANSWER AND COUNTERCLAIM."

{¶ 4} This tax foreclosure action was initiated by the Lucas County Treasurer in July 2004 against appellant and others who would have an interest in the property because of delinquent real estate taxes regarding three parcels of property owned by appellant.

{¶ 5} Service of process upon appellant was accomplished as follows. The attempted service by certified mail to appellant at 2001 Genesee Street, Toledo, Ohio, was returned "Attempted, Not Known." Certified service to appellant at 2747 120th Street, Toledo, Ohio, was returned "Moved, Left no Address, Unable to Forward, Return to Sender." Certified service to appellant at 3325 Elm Street, Toledo, Ohio was returned "Not Deliverable as Addressed, Unable to Forward." Certified service to appellant at P.O. Box 595701, Fort Gratiot, Michigan, was returned "Unclaimed." Certified service to appellant at P.O. Box 8001, Port Huron, Michigan, was returned "Unclaimed." Service was then made upon appellant by ordinary mail to the two Michigan addresses referenced above. The mailing to the Port Huron address was returned with a notation that the forwarding address at Fort Gratiot had expired. The mailing to the Fort Gratiot address was not returned.

{¶ 6} After service of the complaint was made upon appellant by ordinary mail, appellee moved to add an additional defendant to the action because of his claims or interests in the property to be sold. The motion was granted on February 4, 2005, and that party was served notice of the complaint.

{¶ 7} Appellant did not file an answer to the complaint nor appear in the action. Default judgment was granted to appellee on June 1, 2005, and the court ordered that the properties be sold at sheriff's sale to satisfy the $7,378.55 judgment. Notice of a January 12, 2006 sheriff's sale was filed on December 16, 2005.

{¶ 8} On December 20, 2005, appellant filed a motion to dismiss the action on the ground that the three parcels of property could not be sold as a single parcel; a Civ.R. 60(B) motion to set aside the default judgment because he had not been properly served with notice of the complaint or the hearing on the motion for default judgment; and a motion to vacate the sheriff's sale. The sheriff's sale was cancelled and a consent judgment entry was journalized on January 12, 2006. The parties agreed to vacate the sale and appellant withdrew his motions.

{¶ 9} However, on February 23, 2006, the Treasurer moved for an alias order of sale because appellant had neither paid the delinquent taxes and court costs nor entered into a contract to pay his debt in installments. The court granted appellant two extensions to respond to the motion for an alias order of sale, but he never filed a memorandum in opposition. He did, however, again file his motions to vacate the sheriff's sale and set aside the default judgment.

{¶ 10} Because appellant did not oppose the motion for an alias order of sale, the court granted appellee's motion. The court denied appellant's motion to vacate the sheriff's sale as no such sale had been scheduled. As to the motion to vacate the default judgment, the court found that appellant merely asserted that he never received service of process. The court found that service was repeatedly made by certified mail that was unclaimed, but that service was then accomplished by ordinary mail. Therefore, the court denied appellant's motion. Appellant sought an appeal to this court regarding the denial of his motion to vacate the default judgment.

{¶ 11} Appellant's assignments of error will be considered together. Appellant alleged in his motion that he was not properly served in accordance with the Civil Rules. He first argues that service was improper in this case because service by ordinary mail can only be done if certified mail is refused, not unclaimed. Furthermore, he argues that service by ordinary mail must be sent to the address set forth in the caption of the complaint. We find neither of these arguments well-taken.

{¶ 12} Civ.R. 4.6(D) provides that if service by certified mail is returned "unclaimed," the clerk shall send service by ordinary mail to the defendant at "either the address in the caption, or at the address set forth in the written instructions provided to the clerk." The rule further 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." In this case, service by ordinary mail was completed at the Fort Gratiot address because it was not returned.

{¶ 13} It is difficult to ascertain from appellant's motion and brief whether he is also arguing that he never actually received service. Therefore, we address that issue as well.

{¶ 14} Service made in accordance with the Civil Rules merely gives rise to a presumption that service was accomplished. *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 65-66, citing *Grant v. Ivy* (1980), 69 Ohio App.2d 40. The defendant may challenge that service was never actually received. *Rafalski*, supra.

{¶ 15} A dispute exists between the appellate courts as to whether the defendant's affidavit that no service was received is sufficient to overcome this presumption. See *Christy L. W. v. Chazarea E. S.*, 6th Dist. No. OT-02-019, 2003-Ohio-483, ¶ 13. We need not address this issue, however, as appellant never presented any evidence that he failed to actually receive service. He did not even present an affidavit attesting that he never received notice of the complaint. *Erie Insur. v. Williams*, 9th Dist. No. 23157, 2006-Ohio-6754, ¶ 7. Since appellant bears the burden of rebutting the presumption, we find that the trial court correctly found in this case that proper service can be presumed to have occurred.

{¶ 16} Appellant also argues on appeal that he was never properly served notice of appellee's amended complaint. Appellant's argument relates to the trial court's granting of appellee's motion to add another defendant to this action. This issue was not raised in appellant's motions before the trial court and, therefore, cannot be raised on appeal. *Kalish v. Trans World Airlines, Inc.* (1977), 50 Ohio St.2d 73, syllabus, and *State v.*

Williams (1977), 51 Ohio St.2d 112, paragraph one of the syllabus, modified on other grounds by *State v. Gillard* (1988), 40 Ohio St.3d 226, paragraph two of the syllabus.

{¶ 17} Therefore, we find that the trial court properly determined that there was no basis for setting aside the default judgment in this case. Appellant's two assignments of error are found not well-taken.

{¶ 18} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

William J. Skow, J. _____
JUDGE

George M. Glasser, J. _____
CONCUR.
JUDGE

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.