[Cite as *ABCO Servs., Inc. v. Kerr Constr. Servs., Inc.*, 2013-Ohio-968.]

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

ABCO Services, Inc.

Appellee

v.

Kerr Construction Services, Inc.

Defendant

and

Jeremy L. Kerr

Appellant

Court of Appeals No. WD-12-055

Trial Court No. 10-CVF-01725

DECISION AND JUDGMENT

Decided: March 15, 2013

* * * * *

Nathan Oswald, for appellee.

Jeremy L. Kerr, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Jeremy Kerr, appeals from the August 28, 2012 judgment of the Bowling Green Municipal Court, which awarded sanctions against him pursuant to Civ.R. 11. We affirm.

A. Facts and Procedural Background

{¶ 2} This action commenced on October 20, 2010, when appellee, ABCO Services, Inc., filed a six-count complaint against Kerr Construction Services, Inc. and appellant, who is believed to be the sole shareholder of Kerr Construction. The complaint alleged that the defendants owed $692.12 for the purchase of equipment and labor. Service was attempted by certified mail to appellant and to the registered agent for Kerr Construction. The mailing to Kerr Construction was returned as undeliverable.

{¶ 3} On December 17, 2010, ABCO moved for default judgment against appellant. The trial court granted ABCO's motion on December 21, 2010, and entered a default judgment against appellant in the amount of $692.12.

{¶ 4} Over a year later, on January 5, 2012, appellant, acting pro se, moved to vacate the default judgment for lack of service. Appellant alleged that he was not home when the postal worker attempted to deliver the original service. He stated that the postal worker then took the mailing across the street, where his neighbor, Jeanett Payne, signed for it. Attached to his motion was the delivery information for the certified mailing, showing that it was indeed signed for by Jeanett Payne. Also attached was Payne's affidavit acknowledging that she signed for the certified mail. The trial court granted appellant's motion to vacate the default judgment on January 6, 2012.

{¶ 5} On March 2, 2012, ABCO again moved for default judgment and partial summary judgment. ABCO reasoned that even if appellant had not been properly served, he undoubtedly was aware of the suit by January 5, 2012, when he moved to vacate the

default judgment. Therefore, ABCO argued that "service was *de facto* 'perfected' on January 5, 2012," and thus default judgment was proper since appellant had still not appeared, answered, or otherwise defended against the complaint. The trial court granted ABCO's revived motion for default judgment the same day it was filed.

{¶ 6} On March 8, 2012, appellant moved to vacate the March 2, 2012 default judgment. In his motion, appellant argued that he still had not been properly served with the complaint. The trial court set the matter for a hearing on May 3, 2012. On that day, counsel for ABCO represented that he had a scheduling conflict and could not remain at the hearing, so the matter was rescheduled to May 17, 2012. On May 17, 2012, the trial court continued the hearing until June 14, 2012, because counsel for ABCO indicated that he had not been served with appellant's March 8, 2012 motion to vacate the default judgment, and thus was unaware of appellant's arguments.

{¶ 7} On May 18, 2012, appellant filed a second motion to vacate the default judgment. In this motion, appellant argued that even if the court found that service was "de facto perfected" on January 5, 2012, that service would not have been completed within the one-year time limit.

{¶ 8} The hearing was ultimately held on June 14, 2012. Appellant failed to provide a transcript of the hearing as part of the record; however, the parties indicate that Payne testified that she signed for the certified mail and gave it to appellant a day or two later. It was also revealed at the hearing that Payne is appellant's mother.

{¶ 9} Following the hearing, the trial court gave the parties 14 days to brief the issues that were raised. In addition to filing his brief, appellant filed a third motion to vacate the default judgment, this time arguing that the copy of the invoice attached to the complaint violates the "Best Evidence Rule" in Evid.R. 1002.

{¶ 10} ABCO similarly filed its brief and an additional motion. In its motion, ABCO requested sanctions under Civ.R. 11 on the basis that appellant's motions were frivolous and only intended to delay the collection of the judgment. ABCO pointed out that appellant deceitfully omitted from his motions to vacate the fact that Payne was his mother, and that Payne delivered the complaint to appellant the day after she received it. Further, ABCO cited appellant's decision to wait over one year to move to vacate the default judgment despite his actual knowledge of the lawsuit and appellant's failure to serve ABCO with a copy of his March 8, 2012 motion to vacate as evidence that appellant's tactics were designed to delay the proceedings.

{¶ 11} On July 2, 2012, the trial court issued its decision on appellant's motions to vacate the default judgment. The court found that appellant was properly served with the complaint on October 29, 2010, when his mother signed for it, and that he received actual notice of the complaint when it was delivered to him a couple of days later. The court further stated that it improvidently granted appellant's January 5, 2012 motion to vacate the default judgment, and that the December 21, 2010 default judgment was proper. Therefore, the court denied appellant's motions to vacate, and reinstated the original December 21, 2010 judgment.

{¶ 12} Thereafter, a hearing was held on the motion for sanctions on July 12, 2012. Appellant also failed to provide a transcript of this hearing as part of the record. Following the hearing, the trial court entered its judgment on August 28, 2012, finding that appellant's conduct was willfully interposed for delay, and that his filings were made in bad faith. As such, the trial court awarded sanctions in favor of ABCO, and against appellant, in the amount of $2,962.33. It is from this judgment that appellant appeals.

B. Assignments of Error

{¶ 13} Appellant raises five assignments of error:

> 1. THE TRIAL COURT ERRED BY GRANTING APPELLEE-PLAINTIFF'S REVEVED [sic] MOTION FOR DEFAULT JUDGMENT.
>
> 2. THE TRIAL COURT ERRORED WHEN IT DENIED APPELLANT'S MAY 18, 2012 MOTION TO VACATE DEFAULT JUDGMENT.
>
> 3. THE TRIAL COURT ERRORED WHEN IT DENIED APPELLANT'S JUNE 28, 2012 MOTION TO VACATE DEFAULT JUDGMENT.
>
> 4. THE TRIAL COURT ERRORED WHEN IT FOUND APPELLANT WAS GIVEN ACTUAL NOTICE.
>
> 5. THE TRIAL [sic] ERRORED IN GRANTING AND LEVELING EXCESSIVE SANCTIONS AGAINST APPELLANT.

II. Analysis

A. Appellant was properly served with notice of the action.

{¶ 14} Appellant's first, second, and fourth assignments of error are interrelated and will be addressed together. The overriding issue we must decide is whether appellant was properly served where the summons and complaint were sent by certified mail to appellant's address, but were delivered across the street to appellant's mother's house, and where appellant's mother signed for the mail and delivered it to appellant a day or two later. We hold that he was.

{¶ 15} The Ohio Supreme Court has held that "[s]ervice of process by certified mail under the Civil Rules is consistent with due process standards where it is reasonably calculated to give interested parties notice of a pending action." *Mitchell v. Mitchell*, 64 Ohio St.2d 49, 413 N.E.2d 1182 (1980), paragraph two of the syllabus.

{¶ 16} Here, the clerk complied with Civ.R. 4.1(A)(1)(a), which governs service by certified mail. It provides,

{¶ 17} Evidenced by return receipt signed by any person, service of any process shall be by United States certified or express mail unless otherwise permitted by these rules. The clerk shall deliver a copy of the process and complaint or other document to be served to the United States Postal Service for mailing at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk as certified or express mail return receipt

requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

{¶ 18} In this case, service was sent by certified mail, return receipt with endorsement requested, to appellant at his address. A printout from the United States Postal Service website showing that the service was successfully delivered to appellant at his address was entered into the record. Thus, we find that the service was reasonably calculated to give appellant notice of the pending action. Moreover, we do not find that appellant's due process rights were violated by the fact that the postal worker unilaterally delivered the certified mail to a different address because, here, the recipient turned out to be appellant's mother, and she testified that she delivered the mail to appellant a day or two later. Therefore, we hold that appellant was properly served with notice of the action, and because of his failure to answer or otherwise defend, default judgment in favor of ABCO was appropriate.

{¶ 19} Accordingly, appellant's first, second, and fourth assignments of error are not well-taken.

B. The copy of the invoice attached to the complaint was proper.

{¶ 20} In his third assignment of error, appellant argues that the copy of the invoice attached to the complaint violates the "Best Evidence Rule" in Evid.R. 1002. Thus, he concludes the trial court should have found the complaint defective, and therefore the court lacked jurisdiction over him.

{¶ 21} We initially note that the alleged defectiveness of the complaint does not result in a lack of jurisdiction over appellant, but rather would subject it to dismissal for failure to state a claim upon which relief could be granted under Civ.R. 12(B)(6). Nevertheless, the copy of the invoice attached to the complaint was in accordance with Civ.R. 10(D), which states, "When any claim or defense is founded on an account or other written instrument, *a copy* of the account or written instrument must be attached to the pleading." (Emphasis added.)

{¶ 22} Accordingly, appellant's fourth assignment of error is not well-taken.

C. The trial court did not abuse its discretion when it awarded Civ.R. 11 sanctions.

{¶ 23} As his final assignment of error, appellant challenges the trial court's award of Civ.R. 11 sanctions. We review the trial court's decision on a Civ.R. 11 motion for sanctions for an abuse of discretion. *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 18. An abuse of discretion connotes that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 24} Civ.R. 11 states, in relevant part,

{¶ 25} The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or

upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. (Emphasis sic.)

{¶ 26} In this case, the trial court found that appellant's conduct in waiting over one year to move to vacate the default judgment, after he had actual knowledge of the filing of the complaint was no more than a delay tactic designed to frustrate the collection of a legitimate judgment. Further, appellant falsely suggested in support of his motion to vacate the default judgment that he had no notice of the complaint because it had been delivered to his neighbor. However, appellant omitted the fact that his neighbor was his mother, and that she delivered the complaint to him within a few days. Thus, the court found that appellant's motions were made in bad faith. As a result, the trial court awarded $2,962.33 to ABCO as compensation for its attorney fees as demonstrated by the attorney's billing invoice. In light of appellant's conduct, we cannot hold that the trial court abused its discretion.

{¶ 27} Accordingly, appellant's fifth assignment of error is not well-taken.

III. Conclusion

{¶ 28} For the foregoing reasons, the judgment of the Bowling Green Municipal Court is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE