[Cite as *Matrix Acquisitions, L.L.C. v. Georgeff*, 2014-Ohio-1762.]

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

Matrix Acquisitions, LLC	Court of Appeals No. L-13-1208
Appellant	Trial Court No. CVF-10-07510
v.	
Wendy M. Georgeff	**DECISION AND JUDGMENT**
Appellee	Decided: April 25, 2014

* * * * *

Jackson T. Moyer and Elliot B. Garvey, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Matrix Acquisitions, LLC, appeals a Toledo Municipal Court decision granting a motion to vacate judgment filed by appellee, Wendy M. Georgeff. For the reasons that follow, we reverse.

{¶ 2} Appellee was issued a credit card by the original creditor. Appellee later defaulted on payments owed to the original creditor for purchases made with the credit

card. Appellant subsequently purchased this account. Appellee's obligations to the original creditor were assigned to appellant.

{¶ 3} On April 23, 2010, appellant sued, alleging that appellant purchased the obligations appellee owed to the original creditor and that appellee owed appellant $728.89, plus $331.97 in accrued interest. The court clerk sent appellee the complaint and summons via certified mail. The certified mail receipt was received and signed on May 3, 2010, with the name "Wendy Georgeff." Appellee did not answer the complaint.

{¶ 4} Appellant moved for and was granted default judgment for the amount set forth in the complaint. When appellant moved to garnish her wages, appellee filed a motion to vacate the judgment for lack of service of the summons and complaint. Appellee stated in her motion that she was not living at the address at the time the certified mail was sent and she did not sign the certified mail receipt.

{¶ 5} On August 23, 2013, the court granted appellee's motion to vacate. Appellant now appeals setting forth the following assignments of error:

> I. The trial court abused its discretion by vacating the underlying judgment when the certified mail receipt for the summons and complaint was signed.
>
> II. The trial court abused its discretion by vacating the underlying judgment when the defendant-appellee failed to prove the *GTE* test's requirements for vacating a judgment pursuant to Civ.R. 60(B).

{¶ 6} We will consider appellant's assignments of error together. Appellant contends that the trial court abused its discretion by vacating the underlying judgment when appellee failed to prove the *GTE* requirements for vacating a judgment pursuant to Civ.R. 60(B).

{¶ 7} Civ.R. 60(B) provides:

> 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 8} To prevail on a Civ.R. 60(B) motion:

> (1) the party [must] ha[ve] a meritorious defense or claim to present if relief is granted; (2) the party [must be] entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion [must be] made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146, 150-51, 351 N.E.2d 113 (1976).

{¶ 9} Because the elements of the *GTE* test are conjunctive, a failure of any single element is fatal. *Strack v. Pelton,* 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994). Civ.R. 60(B) is a remedial rule and should be liberally construed. *Babcock Dairy Co., Inc. v. Davis*, 6th Dist. Lucas No. L-83-142, 1983 WL 6910, *2 (Aug. 12, 1983), citing *Blasco v. Mislik*, 69 Ohio St.2d 684, 685, 433 N.E.2d 612 (1982); *Colley v. Bazell*, 64 Ohio St.2d 243, 248, 416 N.E.2d 605 (1980).

{¶ 10} Appellee did not set forth a meritorious defense or claim. To show the existence of a meritorious defense under Civ.R. 60(B), the movant need not establish ultimate success on the merits. *K. Ronald Bailey & Assoc., L.P.A. v. Martin*, 6th Dist. Erie No. E-08-057, 2009-Ohio-2932, ¶ 15. Rather, the movant must provide the trial court with operative facts that would constitute a meritorious defense if found to be true. *Id*. The operative facts must be alleged with enough specificity to allow the trial court to decide whether he or she has met that test. *Id*.

{¶ 11} Appellee did not allege a meritorious defense or claim nor any operative facts to support such a claim. No evidence was submitted in support of appellee's motion to vacate. Accordingly, appellee failed to meet element (1) of the *GTE* test. Although a failure of a single element is fatal, this court will also address element (2) of the *GTE* test.

{¶ 12} While appellee in the instant case did not explicitly outline each element of *GTE*'s requirements for a Civ.R. 60(B) motion, she stated enough in her motion to bring a Civ.R. 60(B) motion. In her motion to vacate, appellee stated that she was not living at 3401 Buckeye St. when the certified letter was sent, that she had "no idea" who signed the certified mail receipt, and that she had not learned of the default judgment proceeding until three years afterwards. This is sufficient to infer that appellee moved for relief from judgment "predicated upon Civ.R. 60(B)(5)."

{¶ 13} Civ.R. 60(B)(5) is a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of judgment. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983). The grounds for invoking Civ.R. 60(B)(5) should be substantial. *Babcock*, 6th Dist. No. L-83-142 at *2, citing *Lohman, supra*; *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 316 N.E.2d 469 (8th Dist.1974).

{¶ 14} Appellee has not set forth substantial grounds for invocation of Civ.R. 60(B)(5) and the default judgment must be affirmed. The methods of service in Civ.R. 4.1(A)(1) provide for "[s]ervice by United States certified or express mail. Evidence 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." Prior to its

amendment in 1971, Civ.R. 4.1 provided that "if the return receipt shows failure of delivery **to the addressee** the clerk shall forthwith notify, by mail, the attorney of record * * *." (Emphasis added.) The words "to the addressee" were deleted in order to broaden the amount of potential recipients and signatories of certified mail who could satisfy the service requirement. *Castellano v. Kosydar*, 42 Ohio St.2d 107, 110, 326 N.E.2d 686 (1975). This relevant legislative history infers that someone other than the named addressee may be served. *Babcock*, 6th Dist. No. L-83-142 at *3, citing *Samson Sales v. Honeywell, Inc.*, 66 Ohio St.2d 290, 292-93, 421 N.E.2d 522 (1981); *Regional Airport Authority v. Swinehart*, 62 Ohio St.2d 403, 405, 406 N.E.2d 811 (1980); *compare Mitchell v. Mitchell*, 64 Ohio St.2d 49, 413 N.E.2d 1182 (1980).

{¶ 15} Service must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 51, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *In re Foreclosure of Liens*, 62 Ohio St.2d 333, 405 N.E.2d 1030 (1980). Certified delivery is "reasonably calculated" to provide notice. *Castellano* at 110.

{¶ 16} While the allegation set forth in appellee's motion is sufficient to infer that appellee moved for relief from judgment "predicated upon Civ.R. 60(B)(5)," appellee presented no evidence to support the allegation. Operative facts should be supported by evidence in the form of "affidavits, depositions, written admissions, written stipulations, answers to interrogatories, or other sworn testimony." *Hussein v. Hafner & Shugarman*

Ents., Inc., 6th Dist. Wood No. WD-10-083, 2011-Ohio-4738, *4, quoting *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 221, 394 N.E.2d 348 (8th Dist.1978). Appellee failed to submit any such evidence regarding the service of the summons and complaint.

{¶ 17} The trial court can only use its inherent power to vacate the judgment for want of personal jurisdiction where evidence supports use of such a power. *In re Name Change of Denny*, 6th Dist. Lucas No. L-05-1134, 2005-Ohio-5023, ¶15. Without any evidence presented, appellee fails to establish element (2) of the *GTE* test. Accordingly, appellant's assignments of error are found well-taken.

{¶ 18} The judgment of the Toledo Municipal Court is reversed. This case is remanded to the trial court for further proceedings consistent with this decision. Pursuant to App.R. 24, costs assessed to appellee.

Judgment reversed.

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

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE