**[Cite as *G.K.G. Builders, Inc. v. Burgess*, 2014-Ohio-2431.]**

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

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| G.K.G. Builders, Inc. | Court of Appeals No. L-13-1228 |
| Appellee | Trial Court No. CVG-13-09516 |
| v. | |
| Nicole Burgess | **DECISION AND JUDGMENT** |
| Appellant | Decided: June 6, 2014 |

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Martin J. Holmes, Jr., for appellee.

Douglas A. Wilkins, for appellant.

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**JENSEN, J.**

**{¶ 1}** Appellant, Nicole Burgess, appeals from the order of the Toledo Municipal Court denying her motion to vacate judgment for lack of proper service in a forcible entry and detainer (FED) action. For the reasons that follow, we affirm the decision of the trial court.

**{¶ 2}** On June 20, 2013, G.K.G. Builders filed a "Landlord Complaint" against Nicole Burgess in the Toledo Municipal Court.[1] Later that day, the trial court issued a summons in the form specified by R.C. 1923.06(B) and set a July 9, 2013 hearing date. A copy of the summons and complaint were sent to Burgess at 1012 Woodward, Apt. A, Toledo, Ohio 43608 by ordinary mail.[2] Four days later, the deputy bailiff, unable to find Burgess at the rental unit, posted a copy of the summons and complaint on the door.

**{¶ 3}** Burgess failed to appear at the July 9, 2013 hearing. After finding that Burgess had been properly served, the magistrate issued a decision granting judgment in favor of G.K.G. Builders.

**{¶ 4}** On July 15, 2013, mail service of the complaint was returned to the court having been marked "RETURN TO SENDER – NOT DELIVERABLE AS ADDRESSED – UNABLE TO FORWARD." On the same day, the trial court adopted the magistrate's July 9, 2013 decision and ordered a writ of restitution be issued to the bailiff for execution of the set out eviction.

**{¶ 5}** On August 2, 2013, Ms. Burgess, through counsel, filed a motion to set aside judgment. In her motion, Burgess alleged she was never served with a copy of the complaint because G.K.G. Builders "locked her out of the unit on June 8, 2013." Burgess

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[1] The sole claim in the complaint alleged nonpayment of rent and sought a writ of restitution for return of property located at 1012 Woodward, Apartment A, Toledo, Ohio, plus costs.

[2] The subject lease agreement provides, "[n]otice to the Lessee to vacate the premises shall be mailed to the premises address or posted on the door of the premises or service otherwise as provided by law."

noted the failure of regular mail service and argued the judgment was void because it was rendered without proper service. G.K.G. Builders opposed the motion asserting, in part, that service of process was sufficient in this instance because Burgess failed to provide a forwarding address and refused G.K.G. Builders' offers to let her back into the property after a broken lock set was replaced. In support of its motion in opposition, G.K.G. Builders submitted the affidavit of its owner, Gregory Hite. Mr. Hite averred, in relevant part, as follows:

> 4. Nicole Burgess stopped making rental payments in the fall of 2012, and fell several months behind in rental payments and late fees by the spring of 2013.
>
> 5. On May 13, 2013, after the lease term ended, I stopped by the property to talk to Ms. Burgess about her plans, and at that time Ms. Burgess told me that she would be out by the following Sunday (June 2, 2013).
>
> 6. On May 31, I stopped by the property and talked with Mr. [SIC] Burgess again. At that time she again stated that she would be out of the property by Sunday, June 2, 2013. I then asked Ms. Burgess to call me if for any reason she wasn't out by June 2.
>
> 7. I waited until June 7, 2013, and not hearing anything further from Mr. [SIC] Burgess I went over to the property. At that time I noticed that the door's lockset was broken.

8. At that time, I knocked on the door, but there was no answer. I next mowed the lawn, and then returned to the front door to replace the broken lockset. When I ultimately opened the door to replace the lockset, from what I saw it was filthy and the place looked abandoned.

* * *

11. At that time, I had no way of reaching Ms. Burgess because the only phone number she provided me was now no longer in service.

12. At that time, I assumed she had moved out, so I put a "FOR RENT" sign in the front yard with my mobile phone number on it.

13. The next day, June 8, I received a phone call from a number unknown to me * * * and it was Ms. Burgess calling. When I answered, Ms. Burgess began yelling at me and claimed that she was calling the police because I had locked her out.

14. * * * I tried to explain to her that the door lockset was broken so I replaced it to secure the property, and that it looked like she had already moved out just like she said she was going to. At that time, I also offered to meet Ms. Burgess at the property to let her back inside.

15. * * * I asked Ms. Burgess when she wanted to meet, but she replied that she was waiting to hear from legal aid to press charges, and would not otherwise respond to my offering.

* * *

17. Two days later, on June 10, 2013, hearing nothing further from her or anyone else on her behalf, I returned to the property and posted a three day notice to vacate the premises on the front door of the property.

18. The next day, June 11, 2013, I received another call from Ms. Burgess * * *. At that time, Ms. Burgess claimed to be at the property with the police, and demanded that I immediately come let her in the property. * * * I was at work at a jobsite at the time * * * she accused me of being uncooperative and hung up on me again.

* * *

20. Immediately after Ms. Burgess hung up the phone on me on June 11, I tried to call her back, but she did not answer, so I sent her two text messages: "Never said I would not let you in" and "I would be more than happy to let you in at any time." Ms. Burgess's only response was this: "my attorney will contact u." * * *

* * *

23. Ms. Burgess never provided GKG, myself or the post office with a forwarding address, and made no attempt to communicate with me with regard to her belongings from June 11 to July 29 * * *.

**{¶ 6}** Ms. Burgess filed a reply citing Rule 35 of the Rules of the Toledo Municipal Court and arguing that "an eviction cannot proceed until and if there has been both posting and proper mail service." The trial court denied Ms. Burgess' motion to set

aside judgment without explanation. Ms. Burgess appealed, asserting the following assignment of error for review.

THE LOWER COURT ERRED IN DENYING BURGESS' MOTION TO SET ASIDE JUDGMENT.

**{¶ 7}** We first note that a judgment based on faulty service is void. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956), paragraph three of the syllabus. Inherent in the power possessed by Ohio courts is the authority to vacate a void judgment. *Westmoreland v. Valley Homes Mut. Hous. Corp*., 42 Ohio St.2d 291, 294, 328 N.E.2d 406 (1975). "Because a court has the inherent power to vacate a void judgment, a party who claims the court lacked personal jurisdiction as a result of a deficiency in service of process is entitled to have the judgment vacated and need not satisfy the requirements of Civ.R. 60(B)." *C&W Invest. Co. v Midwest Vending, Inc.*, 10th Dist. Franklin No. 03AP-40, 2003-Ohio-4688, ¶ 7, citing *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990), paragraph one of the syllabus. "The decision of a trial court regarding a motion to vacate a judgment will not be overturned on appeal absent an abuse of discretion." *Id*. (citations omitted).

**{¶ 8}** Ordinarily, the civil rules govern service of process in all civil actions, however, "Civ.R. 1(C) specifically exempts forcible entry and detainer actions from their purview." *Dobbins v. Kalson*, 10th Dist. Franklin No. 07AP-831, 2008-Ohio-395, ¶ 10, citing *Miele v. Robovich*, 90 Ohio St.3d 439, 739 N.E.2d 333 (2000); Civ.R. 1(C) ("These

rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in forcible entry and detainer * * *.")

**{¶ 9}** Service of process for FED actions filed in Toledo Municipal Court are governed by the Rules of the Toledo Municipal Court. Loc.R. 35(A)(1) specifically provides:

> In forcible entry and detainer (FED) actions under Ohio Revised Code Chapter 1923, summons shall be issued in the form as specified in section 1923.06(B) of the Ohio Revised Code and shall be served as in the Rules of Civil Procedure, except as set forth in subsection (3) therein.[3] Service of summons shall be made at least 5 days before the hearing date.

**{¶ 10}** Burgess does not dispute that a copy of the summons and complaint was posted on the door of the rental unit. Rather, she argues that service of process by ordinary mail failed because it was returned to the court as "undeliverable." Under the local rules, service of process in a FED action is deemed "complete" in a variety of ways. Loc.R. 35(A)(3)(c) provides that service of process is complete on the date "[b]oth ordinary mail service under division (A)(3)(b) and service by posting pursuant to division (A)(3)(a)(2) of this section have been made." Loc.R. 35(A)(3)(c)(2).

[3] It appears the Toledo Municipal Court mistakenly inserted the word "therein" at the end of the first sentence in Loc.R. 35(A)(1). The context of Loc.R. 35(A) would suggest the word "herein" would be proper. We proceed accordingly.

**{¶ 11}** It is clear from our review of the record that posting pursuant to division (A)(3)(a)(2)[4] was "made" on June 24, 2013. In order to determine when ordinary mail service under division (A)(3)(b) was "made," we look to the relevant language of the subsection in question. Loc.R. 35(A)(3)(b) provides:

> The Clerk shall mail one copy of the summons and complaint by ordinary mail, certificate of mailing, to the address(es) set forth in the caption of the complaint and to any address(es) set forth in written instructions. If requested, the clerk shall mail by certified mail, return receipt requested, a copy of the summons, complaint, document, or other process to be served to the address set forth in the caption of the summons and to any address(es) set forth in any written instructions furnished to the clerk. The Clerk shall instruct the post office to return the certified mail within 10 days of mailing.

**{¶ 12}** At this juncture, it is important to note, that the language found in Loc.R. 35(A)(3)(c) mirrors the language found in R.C. 1923.06(G). We upheld the constitutionality of R.C. 1923.06(G) in *Amhurst Village Mgt. v. Vestal*, 6th Dist. Wood No. WD-99-075, 2000 WL 1595719 (Oct. 27, 2000).

**{¶ 13}** In *Amhurst Village*, the clerk served two tenants in a FED action by ordinary mail and by posting on the door of the rental unit. *Id.* at *2. Default judgment

[4] Loc.R. 35(A)(3)(a)(2) provides, "[i]f the bailiff is unable to effect personal or residence service, the bailiff shall post the summons and complaint in a conspicuous place at the subject premises."

was entered against one tenant despite ordinary mail being returned to the court with a notation "no forward order on file." *Id.* The other tenant, Vestal, appeared at the hearing on a special appearance and moved to dismiss the complaint for insufficiency of process arguing that the service of process methods set forth in R.C. 1923.06 were invalid and unconstitutional insofar as they contradict the service of process requirements set forth in Civ.R. 4.1[5] and Civ.R. 4.6.[6] *Id.*

**{¶ 14}** Rejecting Vestal's argument, we concluded that "the General Assembly was authorized to amend R.C. 1923.06 to allow for service of process by ordinary mail and simultaneous posting in FED actions." *Id.* at *5. We reasoned that the delay associated with the service of process by certified mail frustrates the "summary, extraordinary, and speedy method for the recovery of possession of real estate in the cases especially enumerated by statute." *Id.* at *4. We noted that when the Ohio Supreme Court promulgated the Civil Rules, it specifically determined that the rules do not apply to forcible entry and detainer actions "to the extent that they would by their

[5] Civ.R. 4.1 sets forth the requirements for (a) service by certified or express mail, (b) personal service, and (c) residence service.

[6] Civ.R. 4.6(C) provides that if service of process is refused, and the certified or express mail envelope is returned showing such refusal, the serving party may request ordinary mail service. Ordinary mail service is deemed "complete" when "the fact of mailing is entered of record." If, however, the certified or express mail envelope is returned "unclaimed" the serving party may request ordinary mail service and service is only 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 deliver." Civ.R. 4.6(D).

nature be clearly inapplicable." *Id*. at *3. *See* Civ.R. 1(C). We indicated that "this language has come to mean that where a Civil Rule would impede the summary nature of an FED action, it will not apply to that action." *Amhurst Village* at *3, citing *Colonial Am. Dev. Co. v. Griffith*, 48 Ohio St.3d 72, 549 N.E.2d 513 (1990); *State ex rel. GMS Mgt. Co., Inc. v. Callahan*, 45 Ohio St.3d 51, 543 N.E.2d 483 (1989).

**{¶ 15}** While the circumstances are distinguishable,[7] we are compelled to extend the principal concepts carefully articulated in *Amhurst Village* to the case at bar. Under a plain reading of the local rule, and in order to preserve the summary nature of FED actions, we conclude that service by ordinary mail was "made" when the clerk placed a copy of the summons and complaint in the mail and the fact of the mailing is placed on the record.

**{¶ 16}** Here, service by ordinary mail was made on June 20, 2012. Service by bailiff was made on June 24, 2012. Thus, service of process is deemed "complete" on that later of the two dates: June 24, 2012.

**{¶ 17}** The next question before this court, however, is what effect does the return of ordinary mail service as "not deliverable as addressed – unable to forward"[8] on

[7] The appellant in *Amhurst Village* denied receiving any of the notices allegedly posted on her door but admitted receiving the summons and complaint through the mail. *Amhurst Village* at *3. Here, appellant does not deny receiving the notice posted on the unit's door, but clearly did not receive the properly addressed summons and complaint by regular mail.

[8] The USPS endorsement "not deliverable as addressed – unable to forward" indicates the reason for nondelivery as "Mail undeliverable at address given; no change-of-address

July 15, 2012, have on the validity of the trial court's judgment of the same day adopting the magistrate's decision and granting judgment for possession of the premises. Neither Loc.R. 35(A) nor the nearly identical provisions in R.C. 1923.06 provide any guidance on the effect of the return of ordinary mail service in forcible entry and detainer actions.

**{¶ 18}** In *Showe Mgt. Corp. v. Cunningham*, 191 Ohio App.3d 123, 2011-Ohio-432, 944 N.E.2d 1234 (10th Dist.), the Tenth District Court of Appeals acknowledged a conflict between mail service in the civil rules and mail service under R.C. 1923.06, and opined:

> If the mail is returned following the issuing of service under the civil rules, the service is deemed unperfected. No such provision is contained in R.C. 1923.06.
>
> There are valid reasons why R.C. 1923.06 does not include the additional provisions contained in the civil rules in the context of [FED] actions. First, some tenants simply move out after receiving their three-day notice of the landlord's intention to file an [FED] action. A landlord cannot reasonably be expected to find such tenants before legally regaining possession of the property through use of an [FED] action.

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order on file; forwarding order expired." United States Postal Service, Domestic Mail Manual F010 (May 5, 2014).

> Second, some tenants wish to stay and just not pay rent. Such persons are capable of marking mail or having mail marked in a way that claims absence when the tenants are not in fact absent.
>
> Third, significant delays can occur between the mailing of the documents to tenants and the return of the mail to the clerk of courts. Judgments for restitution of the premises or even set outs can occur before the returned mail makes its way to the court file. Such delays create problems for all involved—the litigants, the clerks, and the trial court judges.
>
> We therefore resolve the conflict in the service rules in the context of [FED] actions only, not the separate claims for money damages, by finding that service is perfected when the documents are placed in the mail.

*Id.* ¶ 8-12.

**{¶ 19}** Adopting the Tenth's District's holding in *Showe Mgt. Corp.* and extending our reasoning in *Amhurst Village* to the case at bar, we conclude that restricting the validity of ordinary mail service to instances where ordinary mail service does not fail would frustrate the summary proceeding in FED actions. Thus, ordinary mail service under Loc.R. 35(A)(3)(b) shall be deemed complete when the fact of the mailing is entered of record.

**{¶ 20}** Pursuant to the above, we hold that the trial court did not abuse its discretion in denying Ms. Burgess' motion to set aside judgment for lack of proper

service. Appellant's sole assignment of error is found not well-taken. We affirm the judgment of the trial court. The 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE