

[Cite as *Rokakis v. Estate of Thomas*, 2008-Ohio-5147.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89944

JAMES ROKAKIS, TREASURER

PLAINTIFF-APPELLEE

vs.

**ESTATE OF HENRY J. THOMAS,
ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-576791

BEFORE: Stewart, J., Sweeney, A.J., and Cooney, J.

RELEASED: May 29, 2008

JOURNALIZED:

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N.B. This entry is an announcement of the court’s decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court’s decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court’s announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Estate of Henry J. Thomas, appeals from a decision of the Cuyahoga County Court of Common Pleas. Appellant’s single assignment of error states: “THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION OF THE APPELLANT FOR RELIEF FROM JUDGMENT.” For the reasons stated below, we affirm.

{¶ 2} A review of the record establishes the following pertinent facts and dates. On November 8, 2005, James Rokakis, Cuyahoga County Treasurer, filed an in rem foreclosure action under R.C. 5721.18 to recoup delinquent property taxes due on the premises located at 8136 Superior Avenue in the city of Cleveland. Henry J. Thomas was one of the named defendants in the action. The complaint alleged that \$31,924.78 was due and unpaid as delinquent taxes, assessments, and penalties at the time the complaint was filed. Thomas had acquired the title to this property in 1994 by way of an auditor’s deed after the property was ordered sold for unpaid property taxes.

{¶ 3} The record reflects that the summons and complaint was served upon Thomas at 3155 Chelsea Drive, Cleveland, by certified mail and completed on November 19, 2005 with the return receipt returned to the court “signed by other.” The complaint named 13 additional defendants with a possible claim or interest in the land. Service was completed upon these defendants through certified mail or through publication.

{¶ 4} Thomas did not file an answer. Some of the other named defendants filed answers and the action proceeded. The magistrate’s decision, finding that the county treasurer held a valid tax lien equal to the amount shown on the Delinquent Land Tax

Certificate, and ordering the lien foreclosed and the property sold to satisfy the lien, was issued on October 4, 2006 and reissued on November 7, 2006.¹ No one filed objections to the magistrate's decision. On December 4, 2006, the trial court adopted the magistrate's decision and issued its final judgment granting a decree of foreclosure and ordering the property sold to pay the delinquent taxes.

{¶ 5} Thomas died on October 23, 2006. On November 8, 2006, counsel for some of the named defendants filed with the court and served on all of the parties, a suggestion of Thomas' death. On November 15, 2006, Mona D. Walker was appointed executor of Thomas' estate. On December 12, 2006, Walker filed a motion for leave to substitute herself, as representative of Thomas' estate, as party defendant. The court granted the substitution on December 18, 2006.

{¶ 6} In its motion for relief from judgment filed on March 30, 2007, appellant asserted two grounds for relief. The first is jurisdictional and claims that the trial court lacked jurisdiction over the person of the defendant and therefore was without authority to issue the decree of foreclosure. The second is grounded in Civ.R. 60 (B) and claims the trial court erred in denying the motion for relief from judgment. We will address the jurisdictional issues first.

{¶ 7} Ohio law provides that a judgment rendered without personal jurisdiction over a defendant is void rather than voidable. See *Patton v. Diemer* (1988), 35 Ohio St.3d 68.

¹ There is nothing in the record to explain why the magistrate's decision was reissued.

The authority to vacate a void judgment is not derived from Civ.R. 60(B), “but rather constitutes an inherent power possessed by Ohio courts.” *Id.* at paragraph four of the syllabus. To be entitled to relief from a void judgment, a movant need not present a meritorious defense or show that the motion was timely filed under Civ.R. 60(B). *Id.*

{¶ 8} The distinction between voidable and void judgments was explained by this court in *Security Ins. Co. v. Regional Transit Auth.* (1982), 4 Ohio App.3d 24, 28, as follows:

{¶ 9} “A motion to vacate judgment pursuant to Civ. R. 60(B) is a collateral attack upon a judgment. It is an allegation that the judgment is voidable on account of fraud, mistake, excusable neglect or some other reason. A motion to vacate judgment on jurisdictional grounds is a direct attack upon a judgment authorized by common law, and constitutes an allegation that the judgment is void. *Lincoln Tavern v. Snader* (1956), 165 Ohio St. 61 [59 O.O. 74]; *Hayes v. Kentucky Joint Land Bank of Lexington* (1932), 125 Ohio St. 359.”

{¶ 10} Appellant argues that the trial court erred in denying the motion for relief from judgment because Thomas was not properly served. It asserts that if Thomas was not properly served with the summons and complaint, the judgment rendered is void and must be vacated. To support its allegation that service was defective, appellant points out that the return receipt was not signed by Thomas and provides affidavits, attached to the motion, demonstrating that Thomas never lived at the address served.

{¶ 11} Service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond. This

determination is made on a case-by-case basis. *Tube City, Inc. v. Halishak*, Cuyahoga App. No. 88287, 2007-Ohio-2118, citing *Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406. See, also, *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314 (method for providing notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).

{¶ 12} Ohio Civ.R. 4.1(A) provides that service of process may be made by certified mail “evidenced by return receipt signed by any person ***.” Service by certified mail is perfected when it is sent to an address “reasonably calculated to cause service to reach the defendant.” *Ohio Civ. Rights Comm. v. First Am. Properties* (1996), 113 Ohio App.3d 233, 237. It is presumed that valid service of process has been made when the envelope is received by any person at the defendant’s address. *Id.*

{¶ 13} The court’s docket shows that the summons was served on Thomas at 3155 Chelsea Drive, Cleveland, and was received and signed for by Thomas’ brother, Richard. The auditor’s tax bill summary attached to appellant’s motion for relief from judgment shows the Chelsea Drive address as Thomas’ tax mailing address for the foreclosed property. “In situations where a taxpayer supplies officials with an address, it may be fairly presumed that the taxpayer can be reached at such address.” *In re Foreclosure of Liens* (1980), 62 Ohio St.2d 333, 337. Appellant attached affidavits from Thomas’ daughter and from his brother Richard, stating that Thomas never *lived* at the Chelsea address. Neither affidavit addressed Thomas’ use of the address as a tax mailing address nor explained why service at this address

was not reasonably calculated to reach Thomas. Appellant's affidavits are insufficient to rebut the presumption of valid service. Accordingly, appellant's assertion that the trial court failed to obtain jurisdiction over Thomas lacks merit.

{¶ 14} Appellant raises a second challenge to the court's jurisdiction, arguing that even if the trial court had obtained jurisdiction over Thomas in November 2005, it lost authority to act against his interests once the suggestion of death was filed with the trial court on November 8, 2006.

{¶ 15} Civ.R. 25 sets forth the procedure for substitution of parties in the event of death and provides in pertinent part:

{¶ 16} "If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 through Rule 4.6 for the service of summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party." Civ.R. 25(A)(1). "[A] dismissal for failure to substitute a decedent's personal representative pursuant to Civ. R. 25(A)(1) is a dismissal without prejudice for lack of personal jurisdiction." *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 173.

{¶ 17} Appellant cites to the Ninth Appellate District decision in *Abood v. Nemer* (1998), 128 Ohio App.3d 15, in which the court, relying on *Perry*, held that once a suggestion of death is filed, the trial court is without authority to conduct proceedings involving the decedent's interests until a proper substitution of parties is made or the case against the decedent is dismissed. The Sixth Appellate District reached the same conclusion in *Lierenz v. Bowen* (Mar. 22, 1991), Erie App. No. E-90-13, stating:

{¶ 18} “The effect of a suggestion of death notice is to abate in personam jurisdiction. *Perry v. Eagle-Picher Indus. Inc.* (1990), 52 Ohio St.3d 168, 172-173. Civ. R. 25(A)(1) may be read that when a party loses in personam jurisdiction by virtue of the death of a party opponent which is suggested on the record he or she may regain such jurisdiction by substituting a proper party and procuring service.”

{¶ 19} We find that the instant case can be distinguished from *Abood* and *Lierenz*. In both of those cases, the proceeding was in personam and therefore required the trial court to have personal jurisdiction over a party at the time of granting personal judgment against that party. In the instant case, the action is one in rem to foreclose on a state lien on delinquent land under R.C. 5721.18. It is an action against the land and does not seek a personal judgment against Thomas as the property owner.

{¶ 20} In *Hunter v. Gorier* (1962), 173 Ohio St. 158, the Ohio Supreme Court stated: “A proceeding to foreclose a tax lien on land instituted under the provisions of what is now Section 5721.18, Revised Code, is essentially one in rem operating on the land itself rather than on the title thereto, and the omission in such proceeding to make all the heirs and

devisees of a deceased tax-delinquent owner of the land parties thereto is not fatal ***.” Id. at syllabus. “Proceedings of this nature are not usually proceedings against parties ***. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form.” Id. at 161 (citation omitted).

{¶ 21} As stated above, this is an in rem proceeding, and the trial court clearly had jurisdiction over the action because the real property in question is located in Cuyahoga County, Ohio. Thomas, as a party with an interest in the land, was given proper notice of the action and an opportunity to present his objections to the state’s claims. Therefore, although the trial court erred in entering judgment after the suggestion of Thomas’ death and before proper substitution or dismissal, the court’s procedural error under Civ.R. 25 makes the judgment voidable, not void. See *Wood & Pond v. Strawberry* (1871), 21 Ohio St. 142; *Goering v. Devon, Inc.* (June 28, 1995), Hamilton App. No. C-940530.

{¶ 22} Civ.R. 60(B) provides for the vacation of voidable judgments on certain grounds which would make the enforcement of the judgment unjust. The Ohio Supreme Court set forth the requirements for relief under Civ.R. 60(B) in *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus:

{¶ 23} “To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is

granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is 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.”

{¶ 24} A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court and a ruling will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than a mere error of law or judgment; it implies an attitude on the part of the trial court that is arbitrary, capricious, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 25} As a meritorious defense against the treasurer’s claim for delinquent tax payments, appellant challenges the dollar amount shown as due and owing on the tax rolls. Specifically, appellant contests the \$24,270 tax deficit that the auditor’s records show accumulated on the property from 1994 to 1998. In support of its motion, appellant attached a copy of the Cuyahoga County auditor’s tax bill summary for the property which shows that the property taxes due on the property after 1998 were less than \$1,000 per year. Appellant seeks to vacate the foreclosure judgment so as to join the auditor in the action and demand an accounting.

{¶ 26} Appellant fails to state a valid defense for purposes of Civ.R. 60(B) relief. Appellant’s challenge to the auditor’s 1998 assessment is not a meritorious defense to the treasurer’s claims of tax delinquency. The tax bill relied upon by appellant shows that

Thomas had not made any property tax payment since 1998. Thomas' alleged dispute over a 1998 assessment did not relieve him of his obligation to pay his annual real estate taxes and does not change the fact that he was more than six years delinquent in his payments when the treasurer filed the complaint in November 2005. We therefore conclude that appellant has failed to sustain its burden under the first prong of the *GTE Automatic Electric* criteria, and was not entitled to relief from judgment.

{¶ 27} Appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

JAMES J. SWEENEY, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR