[Cite as *Huntington Natl. Bank v. Dixon*, 2008-Ohio-5250.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90414

HUNTINGTON NATIONAL BANK

PLAINTIFF-APPELLEE

vs.

DEBRA DIXON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-585873

BEFORE: Rocco, J., Calabrese, P.J., and Blackmon, J.

RELEASED: October 9, 2008

JOURNALIZED:

[Cite as *Huntington Natl. Bank v. Dixon*, 2008-Ohio-5250.]

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[Cite as *Huntington Natl. Bank v. Dixon*, 2008-Ohio-5250.]
KENNETH A. ROCCO, J.:

{¶ 1} In this foreclosure action, defendants-appellants Penny and James Dixon were listed by plaintiff-appellee Huntington National Bank in its complaint as persons having an interest in the real property at issue. The Dixons appeal from the trial court's denial of their post-judgment motion, which sought both to vacate the order of sale of the property and, further, to challenge the bank's "Certificate of Readiness."

{¶ 2} The Dixons present one assignment of error. Essentially, they assert the trial court abused its discretion in determining they were required to file a motion pursuant to Civ.R. 60(B) before their claim of lack of personal jurisdiction could be entertained.

{¶ 3} This court agrees. Consequently, the trial court's order is reversed, and this case is remanded for further proceedings.

{¶ 4} The record reflects the bank filed this action on March 6, 2006 seeking foreclosure of a property owned by Debra Dixon; apparently, she is the Dixons' daughter. The Dixons were listed among the defendants, since they had an interest in the property. Their address was set forth as "1215 Ramona Avenue" in Lakewood, Ohio. The bank made several attempts at service upon them at this address, which proved unsuccessful.

{¶ 5} In April, the bank attempted certified mail service upon the Dixons at "11810 Lake Avenue, Lakewood, Ohio," but the mail was returned as

"unclaimed." Nothing in the record indicates where the bank obtained this address.

{¶ 6} On May 16, 2006, the trial court issued an order that notified the bank service must be perfected by September 6, 2006 or the case would be dismissed pursuant to Civ.R. 4(E). Thus, in June, the bank attempted to serve the Dixons at the Lake Avenue address by regular mail; once again, the summonses were returned as "undeliverable/addressee unknown."

{¶ 7} On July 6, 2006, the bank's attorney filed in the trial court an affidavit for service upon the Dixons by publication. He stated he checked the telephone listings, the post office and the "Credit Bureau Report," but could not ascertain the Dixons' whereabouts. On August 30, 2006, he filed his proof of publication.

{¶ 8} On November 16, 2006, the bank filed motions for both summary judgment and default judgment on its complaint, together with a certificate of readiness. The case subsequently was set for hearing before a magistrate; the hearing was held on February 27, 2007.

{¶ 9} On May 31, 2007, the trial court entered judgment on the magistrate's recommendation for the bank against Debra Dixon on the complaint for foreclosure. The court further issued a decree of foreclosure, and determined pursuant to Civ.R. 54(B) there was no just reason for delay.

{¶ 10} On June 27, 2007, the trial court issued an order to the sheriff to sell the property. On July 11, a journal entry set the date of sheriff's sale for August 13.

{¶ 11} On August 3, 2007, ten days before the sheriff's sale date, the Dixons filed a "motion to vacate" the order of sale, and additionally moved the court to strike the bank's "Certificate of Readiness." The Dixons argued in their motion that they had never been served with the complaint, and, further, that the bank had failed to exercise due diligence prior to seeking service by publication. They asserted a simple check of the county auditor's "web site" would have shown the bank their residence address. They attached to their motion as an unverified exhibit what purported to be proof of this assertion.

{¶ 12} On August 14, 2007, the day after the scheduled sheriff's sale, the trial court issued a journal entry denying the Dixon's motion. The court indicated it would "entertain a properly filed motion for partial relief from judgment and a motion for leave to plead," if the Dixons wanted to file such motions.

{¶ 13} The Dixons have filed a timely notice of appeal from the trial court's denial of their motion. They present one assignment of error.

{¶ 14} "I. The trial court erred and abused its discretion in denying appellants' motion to vacate where the affidavit of service by publication failed to establish that Huntington checked readily

available sources of public information, and exercise of reasonable diligence in checking such sources would have yielded appellants' current residence address."

{¶ 15} The Dixons argue that the trial court's denial of their motion to vacate its earlier order to sell the property at sheriff's sale constituted error. Their argument has merit.

{¶ 16} This court observed in a previous foreclosure action that an "averment in an affidavit to obtain service by publication that defendant's residence is unknown and cannot be discovered with reasonable diligence gives rise to a rebuttable presumption that reasonable diligence was exercised." *Ridgewood Savings Bank v. Winters* (Oct. 20, 1988), Cuyahoga App. No. 54215, citing *Sizemore v. Smith* (1983) 6 Ohio St.3d 330, 331 (Emphasis added). Thus, the presumption may be challenged. Id., citing *Sizemore* at 332. On these points, *Sizemore* remains good law. *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238.

{¶ 17} Strict compliance with Civ.R. 4.4 is required; otherwise, the trial court's judgment is void. *Anstaett v. Benjamin,* Hamilton App. No. C-010376, 2002-Ohio-7339, ¶17. This follows because it is axiomatic that for a court to acquire personal jurisdiction there must be proper service; a judgment entered without proper service is a nullity. *Chartier v. Hedges*, Crawford App. No. 3-03-

01, 2003-Ohio-2686, ¶6.

{¶ 18} When a judgment is challenged on the basis that the trial court lacked jurisdiction for failure of service, the proper course for the trial court to take is to hold a hearing on the motion. *Ridgewood Savings Bank*, supra. Only after the court determines that proper service was established, and, thus, the trial court had jurisdiction over the matter, may the defendants be required to file a Civ.R. 60(B) motion for relief from judgment. Id.; see also, *C & W Investment Co. v. Midwest Vending, Inc.*, Franklin App. No. 03AP-40, 2003-Ohio-4688; cf., *Anstaett*, supra, ¶8.

{¶ 19} In the instant case, the Dixons asserted the trial court lacked jurisdiction to enter the order of foreclosure and sale. They attached evidence to their motion to support their assertions, the evidentiary value of which the bank did not dispute. Nevertheless, the trial court simply denied their motion without a hearing. This constituted an abuse of discretion. *Ridgewood*, supra.

{¶ 20} Accordingly, the Dixons' assignment of error is sustained.

{¶ 21} The trial court's order is reversed, and this matter is remanded for further proceedings.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

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KENNETH A. ROCCO, JUDGE

ANTHONY O. CALABRESE, JR., P.J., CONCURS
PATRICIA ANN BLACKMON, J., DISSENTS
(SEE ATTACHED DISSENTING OPINION)

PATRICIA ANN BLACKMON, DISSENTING:

{¶ 22} I respectfully dissent from the Majority Opinion. The Majority Opinion holds that when service by publication is challenged an evidentiary hearing is required, citing *Ridgewood Savings v. Winters* II.[1] I interpret *Ridgewood Savings* II differently and begin by looking at its history. In *Ridgewood Savings v. Winters* I,[2] the creditor-plaintiff filed with the trial court an affidavit for service by publication, wherein the affidavit merely averred that reasonable diligence to ascertain service had been attempted. The creditor did not state what sources it used to attempt service over the debtor. Debtor-defendant appealed, and this court remanded the case to the trial court holding

[1](Oct. 20, 1988), Cuyahoga App. No. 54215.

[2](Sept. 4, 1986), Cuyahoga App. No. 52133.

that creditor's bare allegation that it attempted to locate the debtor was insufficient to sustain its burden of proof that it used reasonable diligence to locate the debtor. In making its decision, this court relied on the Supreme Court of Ohio's decision in *Sizemore v. Smith*.[3]

{¶ 23} In *Sizemore*, the Supreme Court of Ohio held that a bare affidavit averring reasonable diligence and nothing more is not enough; the creditor-plaintiff must support the fact that he or she used reasonable diligence by checking some or all of the following sources: telephone company, credit bureau, county records such as auto title department or board of elections, city directory, or an inquiry of former neighbors.[4] In *Ridgewood Savings* I and II, this court appeared to be concerned with the sufficiency of the affidavit, not whether a hearing was held or not.

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[3](1983), 6 Ohio St.3d 330.

[4]Id. at 331.

{¶ 24} Thus, the issue raised in this appeal is whether the affidavit of Huntington National Bank, herein after ("Huntington"), is sufficient as a matter of law or is a hearing required because the debtor challenged the sources used by the creditor. I believe the affidavit is sufficient as a matter of law under both *Ridgewood Savings* (I and II), and under the historical case law on the subject.[5]

{¶ 25} A creditor is required to use reasonable diligence in its attempt to locate the party to be served and those sources should demonstrate a reasonable expectation of success in locating the party to be served. Huntington met this requirement in its affidavit. Huntington submitted a "reasonable diligence" affidavit to the trial court, which stated that Huntington attempted to serve the Dixons by certified mail at two separate addresses before attempting ordinary mail, and before finally resorting to service by publication. The affidavit also stated that Huntington checked with the telephone directory assistance, which indicated they had no listing. In addition, the affidavit stated that Huntington checked with the postal service, which indicated it had no forwarding address on file for the Dixons. Further, the affidavit stated that Huntington Bank checked

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[5]*In re Randolph*, 11th Dist. Nos. 2003-T-0017 and 2003-T-018, 2005-Ohio-414, quoting *First Bank of Marietta v. Cline* (1984), 12 Ohio St.3d 317, 318, citing *Brooks v. Rollins* (1984), 9 Ohio St.3d 8; *Kraus v. Maurer* (2000), 138 Ohio App.3d 163.

with the credit bureau, which indicated that they had no new address for the Dixons.

{¶ 26} Consequently, no evidentiary hearing was required because Huntington provided an affidavit of its due diligence to locate the Dixons. The Dixons argue that Huntington failed to pick the correct source or the better source. The Supreme Court of Ohio has not held that one source is better than the other; it has held that when the residence is unknown and not discoverable, the party seeking publication service must demonstrate that it used reasonable diligence by using any of those various sources.[6]

{¶ 27} In *Ridgewood Savings v. Winters* II, the party seeking service by publication filed a supplementary brief with supporting affidavits and exhibits to justify service by publication and the trial court upheld the service; no hearing on the challenge was held.

{¶ 28} Consequently, I conclude that when an affidavit details the sources used to justify service by publication, the affidavit is sufficient and a hearing is unnecessary. I would affirm the trial court's decision.

[6]*Sizemore v. Smith*, supra.