[Cite as *Matteo v. Principe*, 2010-Ohio-1204.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92894

PATRICIA MATTEO, ET AL.

PLAINTIFFS-APPELLANTS/
CROSS-APPELLEES

vs.

JOSEPH S. PRINCIPE

DEFENDANT-APPELLEE/
CROSS-APPELLANT

JUDGMENT:
AFFIRMED IN PART
AND DISMISSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. PR 90 773 441

BEFORE: Stewart, J., Blackmon, P.J., and Celebrezze, J.

RELEASED: March 25, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} This is an appeal and cross-appeal from rulings on motions to dismiss three separate motions for modification of child support and attorney fees. The juvenile division dismissed plaintiff-appellant/cross-appellee, Patricia Matteo's 2002 motion to modify child support on grounds that she failed to perfect service upon defendant-appellee/cross-appellant, Joseph Principe, within one year from the date on which she filed the motion. Matteo appeals from the ruling. The court also denied Principe's motion to dismiss Matteo's 2004 and 2005 motions to modify child support, finding that Matteo had perfected service upon Principe and that the juvenile division had subject matter jurisdiction over the matter despite the child[1] having been emancipated while the motions to modify child support were pending. Principe cross-appeals from these rulings. We find that Matteo failed to perfect service of the 2002 motion to modify child support, so the court properly dismissed that complaint. We lack jurisdiction to hear the cross-appeal relating to the court's denial of Principe's motion to dismiss the 2004 and 2005 motions to modify child support because an order denying a motion to dismiss is not a final order.

I. The Appeal

[1]It appears that the child in question reached the age of majority in 2007.

{¶ 2} Matteo's four assignments of error collectively raise issues regarding the court's dismissal of her 2002 motion to modify child support for failure to obtain service within one year. She maintains that service had been perfected and that any delay or failure of service was caused through no fault of her own but because of unreasonable delay on the part of the clerk of courts.

{¶ 3} R.C. 3111.16 states that the court "has continuing jurisdiction to modify or revoke a judgment or order issued under sections 3111.01 to 3111.18 of the Revised Code to provide for future education and support * * *." In *Cuyahoga Support Enforcement Agency v. Guthrie* (1999), 84 Ohio St.3d 437, 444, 1999-Ohio-362, 705 N.E.2d 318, the Supreme Court of Ohio stated: "Pursuant to R.C. 3111.16, a juvenile court has continuing jurisdiction over all judgments or orders issued in accordance with R.C. 3111.01 to 3111.19, which includes judgments or orders that concern the duty of support or involve the welfare of a minor child." See, also, *State ex rel. Spencer v. Gatten*, Cuyahoga App. No. 89398, 2007-Ohio-4071, at ¶15.

{¶ 4} The court entered its original order establishing Principe's paternity and child support obligation in 1993, so it retained continuing jurisdiction to modify child support and Matteo's motions to modify child support invoked the court's continuing jurisdiction.

{¶ 5} Juv.R. 35(A) states that the invocation of the court's continuing jurisdiction shall be "by motion filed in the original proceeding, notice of which must be served in the manner provided for the service of process." Juv.R. 16(A) states that such notice "shall be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6." Civ.R. 3(A) requires service of process within one year.

{¶ 6} Civ.R. 4.1(A) requires that service of process "shall be by certified mail or express mail," and that "[t]he clerk shall forthwith enter the fact of mailing on the docket and make a similar entry when the return receipt is received." Service by ordinary mail can be made only if the certified letter is refused or returned as unclaimed. Civ.R. 4.6(C) and (D). In each of these circumstances, the clerk must notify the attorney of record or, if there is no attorney of record, the serving party. The attorney or serving party must then file a written request for ordinary mail service. Id.

{¶ 7} A certificate of service attached to Matteo's August 2002 motion to modify child support attested that she served a copy of the motion on Principe by certified mail. The court's docket shows that on December 30, 2002, service had been returned "signed by other, for Patricia Matteo." In his motion to dismiss the motion to modify child support, Principe stated that he had not been served with the motion within one year as required by Civ.R. 3(A). He provided a copy of the summons sent by certified mail, and

although that summons contains Principe's name, it was addressed "To: Patricia Matteo." He claimed that Matteo had not perfected service until December 2003 — some 17 months after filing the motion to modify child support.

{¶ 8} In July 2004, Matteo responded to Principe's motion to dismiss in two ways: she opposed Principe's motion to dismiss and filed a new motion to modify child support and again sought attorney fees. In her opposition to the motion to dismiss, she challenged Principe's claim that he had not been served with notice of the motion to modify child support by offering proof that she had instructed the clerk of courts to serve Principe at his work address. Matteo conceded, however, that the clerk of the court "mistakenly issued the Summons in the name of the Plaintiff and Defendant" to Principe's business address.

{¶ 9} Principe did not associate his motion to dismiss with any rule of civil procedure. However, Civ.R. 12(B)(5) allows a party to challenge "insufficiency of service of process[.]" A court's ruling under Civ.R. 12(B)(5) is reviewed for an abuse of discretion. *Michigan Millers Mut. Ins. Co. v. Christian* (2003), 153 Ohio App.3d 299, 2003-Ohio-2455, 794 N.E.2d 68, at ¶9, citing *Bell v. Midwestern Edu. Serv., Inc.* (1993), 89 Ohio App.3d 193, 203, 624 N.E.2d 196.

{¶ 10} Civ.R. 4.1(A) provides that service of process may be made by certified mail "evidenced by return receipt signed by any person * * *." The court's docket shows that certified mail service of summons for the August 2002 motions to modify child support and attorney fees was returned "signed by other, for Patricia Matteo." Under Civ.R. 4.1(A), this was a return receipt signed by "any person" and service was presumptively completed. *Castellano v. Kosydar* (1975), 42 Ohio St.2d 107, 110, 326 N.E.2d 686 ("[C]ertified mail, under the Rules of Civil Procedure, no longer requires actual service upon the party receiving the notice, but is effective upon certified delivery.").

{¶ 11} But even though there is a presumption of proper service in cases where the Civil Rules on service are followed, "this presumption is rebuttable by sufficient evidence." *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66, 477 N.E.2d 1212. Certified mail must be 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, 680 N.E.2d 725. In *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406, 406 N.E.2d 811, the supreme court stated:

{¶ 12} "Indeed, we look suspiciously at any service attempted by means falling short of that most likely to achieve success. There are inherently greater risks involved in attempting certified mail service at a business rather than at a

residence by virtue of the oftentimes numerous intermediate, and frequently uninterested, parties participating in the chain of delivery."

{¶ 13} The presumption of proper service was not met in this case because it is uncontested that the summons sent to Principe's place of business was specifically addressed "To: Patricia Matteo." Moreover, Principe did not work for an employer with a small number of employers, so the concerns expressed in *Akron-Canton Regional Airport Auth*. regarding the danger of having an "uninterested" party sign for the summons were present here. Plainly, Principe did not sign the signature return for certified mail as the return receipt indicated that it had been "signed by other."

{¶ 14} With the mailing of an improperly addressed summons sent to a large employer overcoming the presumption of proper service, Matteo needed to show that Principe actually received the summons. She offered an affidavit from an assistant general counsel at Principe's place of business, who averred that summons had been received at Principe's place of employment. This averment added nothing to the case because even Principe agreed that the return receipt had been signed by some "other" person at his place of employment. The assistant general counsel further averred that he personally saw the summons and even had contact with Matteo's attorneys about the summons, but at no point did the assistant general counsel state that he gave the summons to Principe or that Principe actually received the summons. This is a telling omission, for if the

assistant general counsel had personal knowledge that Principe actually received the summons, one would imagine that the affidavit would have so stated.

{¶ 15} In the end, our review is limited to determining whether the court abused its discretion by granting Principe's motion to dismiss for failure to serve the summons. Although some judges might have reached a different conclusion on the issue, an abuse of discretion standard of review does not allow us to substitute our judgment for that of the trial judge. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. On the facts presented, the court could rationally have considered the "inherently greater risks involved in attempting certified mail service at a business rather than at a residence," and found that a summons improperly addressed to Matteo, sent to a place of business, and signed for "by other" was sufficient to rebut the presumption of proper service to Principe. Indeed, the December 3, 2002 docket entry stating "signed by other, for Patricia Matteo" should have put Matteo on notice that there had been an error in service, thus prompting her to investigate whether there had been proper service, particularly when the assistant general counsel at Principe's place of employment did not testify that Principe actually received the summons.

{¶ 16} Admittedly, Matteo did not cause the error that resulted in her name being listed as the person to whom summons was being issued, but that fact does not obviate the stringent time limitations set forth in Civ.R. 3(A).

"Failure of proper service is not a minor, hypertechnical violation of the rules." *Cleveland v. Ohio Civil Rights Comm.* (1988), 43 Ohio App.3d 153, 157, 540 N.E.2d 278. For this reason, Civ.R. 4.6(E), which is made applicable by Juv.R. 35, states: "The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Civ.R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process." Matteo's counsel submitted an affidavit detailing the steps she took to ensure that service had been completed, but that affidavit only stated that counsel had inquired "after November 8, 2002" and that the case file had been transmitted to this court on November 21, 2002.[2] At no point does Matteo's counsel indicate that she made any further attempts to verify service until December 4, 2003, when the file was returned to the clerk of court. Nothing prohibited counsel from viewing the case file in this court, and given that the appeal involved a prior motion to modify child support and a motion for attorney fees that had been dismissed for failure to complete service within one year, additional diligence might have been advisable. So

[2]In June 2002, the court dismissed Matteo's February 2001 motion to modify child support and motion for attorney fees for failure to complete service within one year. Matteo appealed that ruling to this court. We affirmed the dismissal because Matteo failed to provide a transcript of hearing before the magistrate who heard the motion to dismiss. See *P.M. v. J.S.P.*, 8th Dist. No. 81917, 2003-Ohio-4668.

regardless of whether the clerk of courts erred by listing Matteo's name as the party to be served with summons, Matteo bore the ultimate responsibility to ensure the perfection of service, particularly when the December 3, 2002 docket entry showed that receipt of service had been signed in her name rather than in Principe's name.

{¶ 17} Finally, we agree with Principe that Matteo's citation to *Scott v. Orlando* (1981), 2 Ohio App.3d 333, 442 N.E.2d 96, for the proposition that she is not responsible for the clerk's error, is not on point. In *Scott*, the Sixth District Court of Appeals held "a cause of action will not be barred by failure to obtain service within the prescribed time when such failure is caused by unreasonable delay attributable to the clerk of courts or the court itself." *Scott* involved facts in which the clerk of courts refused to serve a complaint, in violation of Civ.R. 4(A), which states that "[u]pon the filing of the complaint the clerk *shall* forthwith issue a summons for service upon each defendant listed in the caption." (Emphasis added.) In this case, by contrast, the clerk of courts did serve the complaint, albeit to the incorrect party. Nevertheless, Matteo bore ultimate responsibility under Civ.R. 4.6(E) to ensure that service was perfected, particularly in light of the ample notice of error provided by the December 3, 2002 docket entry showing that receipt of service had been signed in Matteo's name. We therefore find that the court did not err by dismissing the complaint.

II. The Cross-Appeal

{¶ 18} For his cross-appeal, Principe complains that the court erred by refusing to dismiss for want of jurisdiction Matteo's July 2004 and May 2005 motions to modify child support. The child was born in March 1989 and reached the age of majority in March 2007. Although Matteo's motions to modify child support were filed in 2004 and 2005, the court did not issue rulings on the merits of either motion until February 2009, well after the child reached the age of majority and became emancipated. Principe sought dismissal on grounds that the juvenile court lacked subject matter jurisdiction over a child who had reached the age of majority.

{¶ 19} We cannot reach the merits of the cross-appeal because we lack a final order. It is well-settled that an order denying a motion to dismiss is not a final order under R.C. 2505.02(B)(1) because it does not determine the action and prevent a judgment.[3] In *State v. Eberhardt* (1978), 56 Ohio App.2d 193, 197-198, 381 N.E.2d 1357, we stated:

{¶ 20} "Generally speaking, the overruling of a motion to dismiss in a criminal case or a civil case is not considered a final appealable order. * * *

[3] There are some inapplicable exceptions to this rule; for example, R.C. 2744.02(C) provides: "An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." Hence, a political subdivision and its employees may appeal from an order that denies the assertion of immunity. See *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶27.

Ordinarily, after a motion to dismiss is overruled, the case will proceed to trial and in the event of judgment adverse to the moving party, the trial court's action overruling the motion may become one of the assignments of error on appeal."

{¶ 21} The rule that the denial of a motion to dismiss is not a final order applies with equal force to motions that challenge the subject matter jurisdiction of a court. See *Lonigro v. Lonigro* (1989), 55 Ohio App.3d 30, 31, 561 N.E.2d 573; *Digiantonio v. Turnmire*, 173 Ohio App.3d 665, 2007-Ohio-6178, 880 N.E.2d 109. In *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 83, 2007-Ohio-2942, 868 N.E.2d 663, the supreme court justified this rule by noting that "[p]arties that believe an Ohio court has wrongly asserted jurisdiction over them have a right of appeal." (Citations omitted).

{¶ 22} Principe's motion to dismiss challenged the subject matter jurisdiction of the juvenile court over the 2004 and 2005 motions to modify child support on grounds that the child had reached 18 years of age and the juvenile court had "power and jurisdiction" only over "children," who are defined as persons under 18 years of age. See R.C. 2151.011(B)(5). By denying the motion to dismiss, the court did not determine the action and prevent a judgment, so it did not issue a final order. Moreover, Principe has the ability to challenge the court's exercise of jurisdiction through an appeal

of any order that modifies child support. We therefore find that we lack a final order and dismiss the cross-appeal.

{¶ 23} The appeal is affirmed; the cross-appeal is dismissed.

It is ordered that the parties bear their own 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 — Juvenile Division 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

PATRICIA ANN BLACKMON, P.J., CONCURS

FRANK D. CELEBREZZE, JR., J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION

FRANK D. CELEBREZZE, JR., J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 24} While I concur with the majority's holding dismissing Joseph Principe's cross-appeal, I respectfully dissent from their holding affirming the lower court's dismissal of Patricia Matteo's 2002 motion to modify child support.

{¶ 25} The majority appropriately determines that Ms. Matteo is ultimately responsible for ensuring that service is perfected; however, they ignore the evidence Ms. Matteo submitted to demonstrate constructive service. After a party shows a defect or irregularity in service, "that party's adversary shall then be permitted to show by clear and convincing proof that, notwithstanding the defect or irregularity, the statutory objective of notice, actual *or constructive*, has, in fact, been accomplished and that the court has, in fact, jurisdiction of the former party." (Emphasis added.) *Krabill v. Gibbs* (1968), 14 Ohio St.2d 1, 7, 235 N.E.2d 514.

{¶ 26} The second affidavit submitted by Ms. Matteo in her motion opposing dismissal of her 2002 motion to modify child support was from Andrew D. Richman, assistant general counsel for the New York Stock Exchange, Mr. Principe's employer. This affidavit demonstrates constructive notice occurred in this case. Mr. Richman averred that in November 2002, he received a summons regarding Ms. Matteo's 2002 motion to modify child support, among others. He further averred that he faxed copies of these items to Ms. Matteo's attorney and discussed them with her. This means that these documents were examined at Mr. Principe's place of employment. While the envelope sent by the clerk of courts displayed the name of Patricia Matteo, the documents contained within clearly involved Joseph Principe.

{¶ 27} As the majority notes, "certified mail must be sent to an address 'reasonably calculated to cause service to reach the defendant.'" Quoting *Rafalski*, supra, at 66. It should also be noted that "[c]ertified mail service to an individual's business address complies with Civ.R. 4.1 and is constitutionally sound, so long as it is reasonably calculated to reach the interested party." *Lanza v. Lanza* (June 11, 1992), Cuyahoga App. No. 60225. The majority cites to *Swinehart*, supra, for the proposition that service to a business address is to be viewed skeptically, but that court held, "[w]e believe therefore that certified mail service sent to a business address can comport with due process if the circumstances are such that successful notification could be reasonably anticipated." *Swinehart* at 406. What the *Swinehart* court actually took issue with was the failure of the plaintiff to serve the defendant at an address where the defendant could be found regularly. The defendant only occasionally visited the business address where the plaintiff sent service. The *Swinehart* court found that "service was not made in a manner 'reasonably calculated' to reach [the defendant]." Id. at 407.

{¶ 28} The requirements of service of process exist to ensure that a party to an action has notice of the action and an opportunity to defend. That goal was met here. Ms. Matteo provided evidence that, despite the irregularity in service, an attorney at Mr. Principe's place of employment examined the

summons regarding the 2002 motion to modify child support. When evidence is adduced that shows notice was received by an attorney at a party's place of employment, the court abuses its discretion in failing to, at the very least, hold a hearing to evaluate such evidence. The affidavit of Mr. Richman is sufficient evidence to mandate a hearing on this matter, and the trial court abused its discretion in failing to conduct such a hearing.