[Cite as *Am. Family Ins. Co. v. Williams*, 2010-Ohio-1672.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93658

AMERICAN FAMILY INS. CO., ET AL.

PLAINTIFFS-APPELLEES

vs.

DARRYL R. WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-652973

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

RELEASED: April 15, 2010

JOURNALIZED:
ATTORNEY FOR APPELLANT

Shondra C. Longino
6809 Mayfield Road
Suite N275
Mayfield Heights, Ohio 44124

ATTORNEYS FOR APPELLEES

Patrick J. O'Malley
Kathleen A. Kaduk
55 Public Square
Suite 800
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Darryl Williams ("Williams"), appeals the decision of the lower court denying his motion to vacate judgment. Having reviewed the arguments of the parties and the pertinent law, we hereby reverse and remand.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} In August 2006, Williams was involved in a car accident. On March 5, 2008, American Family Insurance Co., et al. ("American"), filed a lawsuit against Williams seeking reimbursement of property damage, uninsured motorist, and bodily injury payments arising from the August 2006 motor vehicle accident.

{¶ 3} On March 14, 2008, the summons and complaint were sent by certified mail to Williams at 3117 East 116th Street in Cleveland, Ohio. On April 3, 2008, the certified mail receipt was returned unclaimed. Service of the summons and complaint were then sent by regular U.S. mail on April 11, 2008, to the same address. The regular U.S. mail service to Williams was not returned, and the trial court's docket noted an answer date of May 14, 2008 for Williams.

{¶ 4} Williams did not file an answer, and on May 23, 2008, American filed for default judgment. On June 3, 2008, the trial court set the default hearing for June 26, 2008. Notice of the hearing was sent to Williams. Williams did not appear, and having not otherwise answered, the trial court granted judgment in favor of American. The journal entry was docketed on July 8, 2008. The docket further reflects that, on July 2, 2009, Williams filed a motion for relief from judgment with an affidavit indicating that service was not perfected upon him because he had

moved. Williams stated that he never received service and now appeals the lower court's default judgment.

Assignment of Error

{¶ 5} Williams assigns one assignment of error on appeal:

{¶ 6} "[1.] The trial court abused its discretion in not granting the defendant-appellant relief from judgment."

LEGAL ANALYSIS

Relief from Judgment

{¶ 7} The Supreme Court of Ohio has held that in order to prevail on a motion for relief from judgment pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure it must be shown that the movant has (1) a meritorious claim or defense; and (2) entitlement to relief under one of the five grounds set forth in the Rule; and (3) timeliness of the motion. *GTE Automated Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. An appellate court reviews a trial court's ruling on a Civ.R. 60(B) motion for relief from judgment for an abuse of discretion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Bohannon v. Gallagher Pipono, Inc.*, Cuyahoga App. No. 92325, 2009-Ohio-3469, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral

delinquency." *Pons v. Ohio State Med. Bd.* (1993) 66 Ohio St.3d 619, 614 N.E.2d 748.

{¶ 8} A review of the signed and sworn affidavit that Williams submitted provides the following information:

> "1. That I moved from Cleveland, Ohio to Atlanta, Georgia in September 2006."
>
> "2. That my address before I moved out-of-state was 1129 E. 111th Street, Cleveland, Ohio 44104."
>
> "3. That I did leav[e] a forwarding address when I moved out-of-state and any mail sent to my previous address on E. 111th Street would not have been received by me."
>
> "4. That I moved from Georgia to Memphis, Tennessee in February 2007 and then moved from Tennessee back to Cleveland in October 2007."
>
> "5. That upon returning to Cleveland I rented a room at 3117 E. 116th Street, Cleveland, Ohio 44120 for the months of October and November 2007 only."
>
> "6. That I then moved on Polonia Avenue in Cleveland, Ohio for about three to four months before moving to my current residence of 12701 Harvard Ave., Cleveland, Ohio 44105."
>
> "7. That I did not receive service of the Complaint that was filed in the action titled *American Family Insurance Company v. Darryl R. Williams*, Case No.: CV 08-652973."
>
> "8. That I had not resided at 3117 E. 116th Street, Cleveland, Ohio 44120 since November 2007 and did not live there on or after 3/5/2008 when the lawsuit was filed."

{¶ 9} Williams moved several times over the last few years. He stated in his affidavit that his address before he moved out of Ohio was 1129 E. 111th Street, Cleveland, Ohio 44104. Williams attested in his signed affidavit that he *did* leave a

forwarding address and moved to Georgia, and then to Memphis, Tennessee in February 2007. Williams also moved from Tennessee back to Cleveland, Ohio in October 2007.

{¶ 10} Upon returning to Cleveland, Williams rented a room at 3117 E. 116th Street in Cleveland, Ohio. However, that was only for the months of October and November of 2007. Williams then moved to Polonia Avenue in Cleveland, Ohio for approximately three or four months before ending up at 12701 Harvard Avenue, Cleveland, Ohio. In addition to moving, a review of page one of the Ohio Public Safety Traffic Crash Report submitted by American indicates that Williams's phone number was disconnected.

{¶ 11} The court's journal entry of July 20, 2009 provided that Williams's motion to vacate default judgment was denied because the "motion did not advance facts entitling defendant to relief or a hearing under Civil Rule 60(B) or *GTE Automatic Electric, Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113."

{¶ 12} The rebuttable presumption of proper service under Civ.R. 4.6(D) may be rebutted by evidence that a defendant no longer resides or receives mail at the address to which ordinary mail service was addressed. *Community Ins. Co. v. Sullivan* (June 30, 1997), Franklin App. No. 96APE12-1750.

{¶ 13} Furthermore, in *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 133 N.E.2d 606, the court held: "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a

judgment rendered without proper service or entry of appearance is a nullity and void." See, also, *Cincinnati Sch. Dist. Bd. of Edu. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 2000-Ohio-452, 721 N.E.2d 40 (a judgment rendered without personal jurisdiction over a defendant is void ab initio); *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941; *CompuServe, Inc. v. Trionfo* (1993), 91 Ohio App.3d 157, 631 N.E.2d 1120.

{¶ 14} Williams did not live at the address the complaint was mailed to and had not lived there for several months. American did not obtain good service on Williams. Accordingly, the lower court lacked jurisdiction to enter a judgment against him. A default judgment granted because of failure to answer when there was improper service is void. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 464 N.E.2d 538.

{¶ 15} According to the evidence in the record, American's judgment is void, and

{¶ 16} Williams's assignment of error is sustained.

{¶ 17} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellees 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.

LARRY A. JONES, JUDGE

MELODY J. STEWART, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR