

[Cite as *Khatib v. Peters*, 2017-Ohio-95.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 104318

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**MARIA KHATIB, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**SHAMELL PETERS, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-14-823475

**BEFORE:** Jones, P.J., Kilbane, J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** January 12, 2017

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LARRY A. JONES, SR., P.J.:

{¶1} Plaintiffs-appellants, mother and son Maria Khatib and Jibril Khatib (“the Khatibs”), appeal the trial court’s judgment granting the motion to vacate judgment filed by defendant-appellee Shamell Peters. For the reasons that follow, we affirm.

### **Procedural History and Facts**

{¶2} In February 2013, the Khatibs initiated an action against Peters seeking damages that arose from a 2011 automobile accident involving the parties. In the accident report, Peters listed her address as a residence on East 260th Street in Euclid, Ohio; the Khatibs unsuccessfully attempted to serve Peters with the complaint by both certified and ordinary mail at this address. In August 2013, the trial court dismissed the Khatibs’ first complaint for want of prosecution based on lack of service on Peters.

{¶3} In March 2014, in the case now before us, the Khatibs refiled their complaint against Peters. They also named Peters’s automobile insurance carrier, First Acceptance Insurance Services, Inc. and First Acceptance Insurance Co., Inc. (collectively “First Acceptance”), as defendants. The Khatibs attempted to serve Peters with the complaint by certified mail at a Northfield Avenue, Cleveland, Ohio address. The certified mail receipt was returned for failure of service because of a “bad address.”

{¶4} Service was perfected on First Acceptance, and attorney David Henderson (“Henderson”) filed an answer on the company’s behalf. Attorney Henderson also filed a motion to dismiss or, alternatively, for summary judgment. The insurance company

contended that because the Khatibs had not obtained a final judgment against Peters, their complaint against the company was premature and in contravention of Ohio law. The trial court granted First Acceptance's motion.

{¶5} In June 2014, the Khatibs' counsel filed an affidavit for service by publication under R.C. 2703.14 and/or R.C. 3105.06. They averred that, despite "reasonable diligence," they had been unable to locate a valid address for Peters, and set forth the following steps that they took to locate her:

Used/wrote to defendant at last known address on police report related to this case (13-CV-8016740). Inquired of her insurance company who denied knowing her address; googled her; retained Cleveland Service Agency to perform a 'skip-trace' search (which resulted in the last known [Northfield Avenue] address noted above).

{¶6} The Khatibs also sent a letter to attorney Henderson in June 2014 advising him of their intent to obtain service on Peters by publication. Attorney Henderson did not respond, presumably because he did not represent Peters.

{¶7} In August 2014, proof of publication by the Daily Legal News was filed. In September 2014, the Khatibs filed a "Notice of Publication" with the trial court, and the following day the trial court found that service on Peters had been effected and ordered the Khatibs to file a motion for default judgment within three weeks.

{¶8} The Khatibs filed a motion for default judgment on September 26, 2014, and served attorney Henderson with a copy of it. The trial court set the matter for a hearing,

and the Khatibs provided notice of the hearing date to Peters. The notice was sent to Peters at the Northfield Avenue address, the same address at which service of the complaint had been attempted. It was returned to the Khatibs' counsel with the notation that it was "not deliverable as addressed. Unable to forward."

{¶9} The hearing was held; the Khatibs and their counsel were present, but neither Peters nor counsel on her behalf were present. At the conclusion of the hearing, the trial court granted the default motion as it related to the Khatibs' claim for medical expenses and property loss, and awarded judgment in their favor for \$10,762.32. After the Khatibs provided further documentation, the court awarded them an additional \$5,000 for pain and suffering.

{¶10} On December 21, 2014, attorney Henderson filed a notice of appearance on behalf of Peters and a "motion to vacate default judgment and quash service by publication, and alternatively, a Civ.R. 60(B) motion for relief from judgment." Attorney Henderson contended that under Civ.R. 4.4, service by publication was not permitted for contract or tort claims against Ohio residents unless the defendant concealed his or her whereabouts.

{¶11} According to Henderson, Peters was not concealing her whereabouts. Henderson averred in an affidavit that after he received the Khatibs' June 2014 letter advising of their intent to serve Peters by publication, he hired a private investigator to attempt to locate Peters. According to Henderson, his investigator located Peters within one day after being hired. Thus, Henderson contended that, based on his investigator's

success, the Khatibs had not exercised reasonable diligence in attempting to locate Peters. Henderson also submitted Peters's affidavit in support of the motion to vacate. Peters averred that she was not concealing her whereabouts and detailed where she had been living for the past several years.

{¶12} The Khatibs opposed the motion to vacate, contending that Peters did purposely conceal herself. They further contended that attorney Henderson participated in the concealment by not informing them that he had found Peters's current address. The trial court denied Peters's motion to vacate without opinion, and Peters appealed. She contended that the trial court abused its discretion by failing to vacate the default judgment because the Khatibs never perfected service on her. Specifically, Peters contended that the Khatibs did not exercise reasonable diligence in their attempts to locate her address and that service by publication was improper because there was no evidence that she lived outside of Ohio or was concealing her whereabouts.

{¶13} This court held that, based on the established abuse of discretion standard for determining the validity of service, the trial court did not abuse its discretion by finding that the Khatibs engaged in reasonable diligence in attempting to locate Peters. *Khatib v. Peters*, 8th Dist. Cuyahoga No. 102663, 2015-Ohio-5144, ¶ 21.

{¶14} This court next considered whether Peters concealed her location to avoid service. This court recognized that the use of reasonable diligence creates a rebuttal presumption that a defendant was concealing his or her location. *Id.* at ¶ 22, citing *Brooks v. Rollins*, 9 Ohio St.3d 8, 457 N.E.2d 1158 (1984). This court found that

Peters's affidavit in support of her motion to vacate contained "allegations of operative facts" such that would entitle her to relief. *Khatib* at ¶ 23-24. The Khatibs', however, "presented nothing to rebut Peters's affidavit." *Id.* at ¶ 24. This court, therefore, reversed the trial court's judgment denying Peters's motion to vacate, and remanded the case for an evidentiary hearing, at which the trial court could make assessments about Peters's credibility. *Id.* at ¶ 25-26.

{¶15} On remand, the trial court held a hearing pursuant to this court's mandate. Peters was the sole witness. She testified that she has resided in Cuyahoga County since the December 2012 car accident, and at the time of the accident she resided in the Parkside Gardens, an apartment complex on East 260th Street in Euclid, Ohio, which was the address she listed on the police report. Peters testified that she lived there for approximately eight or nine months, and then, because of bug infestation in her apartment, she moved to a residence on Northfield Avenue in East Cleveland, Ohio. Peters's name was on the lease, and she filed change of address notifications with relevant institutions, such as her employer, medical insurance provider, and bank.

{¶16} Peters testified that she lived at the Northfield Avenue address for approximately a year-and-a-half. While living at that address, she received a complaint filed against her by the landlord from the East 260th Euclid address. Peters also testified that, based on documentation presented by counsel to her, that the Khatibs had attempted to serve her with the complaint while she was residing at the Northfield Avenue address, but it was returned because it was a "bad address." She denied that she ever told postal

workers to tell people that she did not reside there, or that she wrote “bad address” on the envelope.

{¶17} Peters testified that when she moved out of the Northfield Avenue address, she moved to an apartment in a complex named North Pointe on Lakeshore Boulevard in Euclid, Ohio. She signed a lease for the apartment. The lease was dated April 30, 2014, and Peters testified that she moved in on that date. Peters also testified that she notified the necessary people and institutions of her move, and informed her landlord, Wanda, at the Northfield Avenue address, where she would be moving, giving Wanda the specific new address. Peters denied giving Wanda her new address so that she could get her security deposit back; she testified that Wanda gave her the deposit back before she even moved.

{¶18} In August 2014, while Peters was living at the North Pointe, Lakeshore Boulevard, Euclid, Ohio address, she gave birth to her daughter. The birth and subsequent complications required her to be hospitalized for a week or two, and shortly thereafter, an infection required her to be hospitalized again for a week or week and a half.

Peters testified that after the birth of her daughter, she was no longer able to work and applied for and received unemployment and welfare benefits; she received these benefits at her North Pointe, Lakeshore Boulevard address.

{¶19} Peters testified that she was unable to afford the rent at North Pointe and, as a result, in September 2014, an eviction action was filed in the Euclid Municipal Court against her. Peters moved out of the apartment to the residence in Richmond Heights,



Ohio, where she resided at the time of the hearing. She testified that she again informed the relevant people and institutions of her change of address.

{¶20} Peters testified that she first became aware of the judgment against her when attorney Henderson informed her. She denied ever attempting to conceal herself from anyone, including, as discussed above, a prior landlord who was suing her.

{¶21} On this evidence, the trial court found that Peters resided at the address where the Khatibs attempted to serve her, but that there was “no evidence before [the] court that she refused service, declined to accept service, or did anything else ‘with intent \* \* \* to avoid the service of a summons.’” The trial court further found that Peters’s testimony was consistent with her affidavit, and demonstrated that she moved for reasons other than to avoid service of process. Trial court’s judgment, ¶ 10, quoting R.C. 2703.14(L). The court, therefore, found that the Khatibs failed to obtain service on Peters, vacated the default judgments, and dismissed the case.

{¶22} The Khatibs raise the following two assignments of error for our review:

I. The trial court erred in holding that service by publication is not authorized in this action and in vacating the default judgment and in dismissing the case with prejudice, as the requirements of R.C. 2703.14 were met, the defendant was validly served and the judgment was not void ab initio.

II. The trial court erred in granting defendant-appellee’s 60(B)(5) motion for relief from judgment, as the requisites for relief were not satisfied.

## **Law and Analysis**

{¶23} Civ.R. 4.4, governing service by publication, provides in relevant part as follows:

(A) Residence unknown \* \* \* if the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel must be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot be ascertained with reasonable diligence.

{¶24} R.C. 2703.14 also governs service by publication, and sets forth the specific categories of cases where service by publication is authorized by law. Relevant to this case, subsection (L) of the statute provides that service by publication may be made as follows:

In any action where the defendant, being a resident of this state, has departed from the county of his residence with intent to delay or defraud his creditors or to avoid the service of a summons, or keeps himself concealed with like intent.

{¶25} The mandate on remand from this court was for the trial court to make a credibility determination as to whether Peters concealed herself to avoid service. Thus, our review is whether the trial court's determination that she was credible was substantiated by the evidence.

{¶26} A defendant's concealment as contemplated under R.C. 2703.14(L) may reasonably be inferred from the plaintiff's inability to locate that defendant after the exercise of reasonable diligence as contemplated by Civ. R. 4.4(A). *Brooks v. Rollins*, 9 Ohio St.3d 8, 10-11, 475 N.E.2d 1158 (1984). If the defendant challenging service by publication does not present evidence contradicting the inference, the inference is sufficient to support the service. *Id.* at 11. "Once the inference of concealment is raised, the burden is placed on the defendant to overcome its effect either by producing

herself or by producing other independent evidence.” *Id.*

{¶27} We find that Peters produced “independent evidence” sufficient to overcome the inference of concealment. Peters testified that she was living at the address where the Khatibs attempted service in March 2014, but stated that she never received any mail that required her signature and never told anyone, such as a postal worker, that she did not live at that address. She also testified that when she moved to that address, she notified relevant people and institutions, such as her employer, healthcare providers, and bank. She received mail at that address, including a complaint from an unrelated proceeding.

{¶28} According to the Khatibs, Peters’s testimony was not credible and the trial court’s decision “escapes reason.” We disagree. The credibility of a witness is primarily for the trier of fact to assess. *State v. Bradley*, 8th Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to make credibility determinations because it is able to view the demeanor of a witness while he or she is testifying; this court cannot. The trier of fact is therefore in the best position to determine if the proffered testimony is credible. *State v. Holloway*, 8th Dist. Cuyahoga No. 101289, 2015-Ohio-1015, ¶ 42, citing *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26.

{¶29} The trial court found Peters’s testimony that she did not refuse service, decline to accept service, or do anything else to try to avoid service, credible. There is nothing in this record that would make us second guess the court’s credibility

determination. Because we decline to reverse the trial court's credibility determination, the court's finding that service on Peters was not authorized under R.C. 2703.14(L) stands.

{¶30} Further, the trial court properly granted Peters's motion to vacate because a party who asserts lack of jurisdiction by improper service does not need to meet the requirements of Civ.R. 60(B). *Broadvox, L.L.C. v. Oreste*, 8th Dist. Cuyahoga No. 92064, 2009-Ohio-3466, ¶ 11. Thus, a default judgment rendered by a court without obtaining service over the defendant is void and the defendant is entitled to vacation of the judgment. *Id.* at ¶ 12.

{¶31} We consider one final issue: the trial court's dismissal of the action with prejudice. Civ.R. 3(A) provides that a "civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing upon a named defendant \* \* \*.*" (Emphasis added.)

{¶32} The Khatibs alleged bodily injury from a 2011 accident and, thus, had a two-year statute of limitations within which to bring their claims. *See* R.C. 2305.10. They filed their initial action in 2013, within the two-year statute of limitations framework, but the case was dismissed for want of prosecution based on lack of service on Peters. Pursuant to the one-year savings statute, the Khatibs refiled their action, which is the instant case, in March 2014. But, for the reasons discussed within, they did not obtain service on Peters within one year of the commencement of the action.

{¶33} In *Anderson v. Borg-Warner Corp.*, 8th Dist. Cuyahoga Nos. 80551 and 80926, 2003-Ohio-1500, this court held that when a plaintiff duly files its complaint within

the statute of limitations, but fails to obtain service within the one-year period required by Civ.R. 3(A), the action is not effectively commenced. “Given the applicable statute of limitations, plaintiffs have failed to commence their action within the statutory period[, and] the trial court’s dismissal based on this failure is on the merits \* \* \*.” *Id.* at ¶ 23, citing *LaBarbera v. Batsch*, 10 Ohio St. 2d 106, 227 N.E.2d 55 (1967), syllabus.

{¶34} The Ohio Supreme Court also considered this issue in *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St.3d 549, 575 N.E.2d 801 (1991). In *Goolsby*, the plaintiff filed his action within the limitations period but did not instruct the clerk to attempt service on the defendant for more than a year. The court held the belated instructions to the clerk to attempt service was the equivalent of a refiling of the complaint. These instructions were given within the limitations period for filing a complaint, so the plaintiff in *Goolsby* had an additional year within which to actually obtain service under Civ.R 3(A). Here, however, any request for service on Peters made by the Khatibs after the trial court’s ruling would not be made within the two-year statute of limitations. Any instructions for service would be the equivalent of refiling the complaint. See *Pewitt v. Roberts*, 8th Dist. Cuyahoga No. 85334, 2005-Ohio-4298, ¶ 15.

{¶35} In light of the above, the Khatibs’ two assignments of error are overruled.

{¶36} Judgment affirmed.

It is ordered that appellees recover of appellants 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.

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LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and  
EILEEN T. GALLAGHER, J., CONCUR