[Cite as *Hook v. Collins*, 2017-Ohio-976.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104825

TONIA L. HOOK

PLAINTIFF-APPELLANT

vs.

MARTIN COLLINS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Berea Municipal Court
Case No. 14CVF02529

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 9, 2017

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EILEEN T. GALLAGHER, J.:

{¶1} Plaintiff-appellant, Tonia L. Hook ("Hook"), appeals from the judgment of the Berea Municipal Court granting defendant-appellee, Martin Collins's ("Collins") motion to vacate a default judgment for lack of jurisdiction. Hook raises the following assignment of error for review:

> 1. The trial court erred in granting the defendant-appellee's motion for relief from judgment.

{¶2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Procedural History

{¶3} In November 2014, Hook filed a complaint against Collins in the Berea Municipal Court, alleging causes of action for fraudulent inducement, fraud, and mutual mistake of fact. The complaint alleged that Collins sold Hook a defective home, made false and fraudulent representations concerning the property, and failed to disclose water damage in the basement of the home. The record reflects that the clerk mailed the summons and complaint by certified mail to Collins at an address in Kent, Ohio (the "Kent address"). In December 2014, the post office returned the envelope with an endorsement that the letter was "unclaimed." In January 2015, the clerk reported that development to Hook, and a copy of the summons and complaint was then sent to the same address by regular mail. The envelope was not returned as undeliverable.

{¶4} In April 2015, Hook filed a motion for default judgment, arguing that she properly served Collins by regular mail and that Collins failed to file a responsive pleading. Subsequently, the trial court granted Hook's motion for default judgment and entered judgment against Collins in the amount of $15,000.

{¶5} In January 2016, Collins filed a motion to vacate the default judgment pursuant to Civ.R. 60(B), claiming that he had never been served with the complaint in this matter. Hook filed a brief in opposition, arguing that service was perfected on Collins "on more than one occasion." In May 2016, an evidentiary hearing was held in order to determine if proper service was completed. Neither Hook nor her counsel attended the hearing.

{¶6} At the conclusion of the hearing, the magistrate granted Collins's motion to vacate the default judgment for lack of personal jurisdiction, stating in pertinent part:

> This Magistrate specifically finds that defendant, Martin Collins, was never served with Plaintiff's Complaint prior to this Court's April 2015 order of default judgment in favor of Plaintiff.
>
> This Magistrate further finds that Plaintiff filed her Complaint of November 2014, and used an address for Defendant that Defendant had last lived at in December 2011.
>
> This Magistrate further specifically finds that Defendant's actual (and current) address was revealed to Plaintiff at the time of the Real Property sale (i.e. December 2012) that gave rise to the filing of the instant lawsuit.

The Magistrate further specifically finds that Defendant, Martin Collins, first became aware of the existence of the Judgment that had been taken against him in April 2015 after he received the "summons" issued by a Plaintiff to order Defendant to appear at a Debtor's Examination on January 20, 2016. This summons was served by Plaintiff

> on Defendant Collins at Defendant's [current] address rather that at the [outdated] address.

{¶7} In July 2016, Hook filed objections to the magistrate's decision. The trial court overruled Hook's objections and adopted the magistrate's decision granting Collins's motion to vacate the default judgment.

{¶8} Hook now appeals from the trial court's judgment.

II. Law and Analysis

{¶9} In her sole assignment of error, Hook argues the trial court erred in granting Collins's motion to vacate the default judgment.

{¶10} On appeal, a reviewing court will not overturn the decision of a trial court regarding a motion to vacate a purportedly void judgment absent an abuse of discretion. *Miley v. STS Sys.*, 153 Ohio App.3d 752, 2003-Ohio-4409, 795 N.E.2d 1254, ¶ 7 (10th Dist.); *Hoffman v. New Life Fitness Ctrs.*,116 Ohio App.3d 737, 739, 689 N.E.2d 84 (3d Dist.1996).

{¶11} In this case, Collins moved to vacate the default judgment based on lack of personal jurisdiction asserting that he was not served with the complaint. Hook opposed the motion, arguing that she complied with Civ.R. 4.6(D) when serving Collins by regular mail.

> It is well accepted that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. Personal jurisdiction may only be acquired by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by an appearance that waives of [sic] certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure.

Abuhilwa v. O'Brien, 2d Dist. Montgomery No. 21603, 2007-Ohio-4328, ¶ 14, citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984).

{¶12} A trial court's authority to vacate a void judgment constitutes an inherent power possessed by Ohio courts. *Newark Orthopedics, Inc. v. Brock*, 92 Ohio App.3d 117, 123, 634 N.E.2d 278 (10th Dist.1994). A defendant may raise the issue of insufficient service of process through a Civ.R. 60(B) motion, but the defendant "need not establish either a meritorious defense or that the motion was timely under Civ.R. 60(B)." *CompuServe, Inc. v. Trionfo*, 91 Ohio App.3d 157, 161, 631 N.E.2d 1120 (10th Dist.1993).

{¶13} 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. *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980). The preferred method for serving a party in Ohio is by certified mail, which is evidenced by a signed return receipt. Individuals must be served at their "usual place of residence," and any person residing at that address who is of "suitable age and discretion" may receive such service. Civ.R. 4.1(A). If certified or express mail service is attempted and the envelope "is returned with an endorsement showing that the envelope was unclaimed," the party requesting service must be notified and that party may then request service by ordinary mail. Civ.R. 4.6(D).

{¶14} The plaintiff bears the burden of obtaining proper service on a defendant. *Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63, 705 N.E.2d 408 (1st Dist.1997). Where the plaintiff follows the civil rules governing service of process, courts presume that service is proper unless the defendant rebuts this presumption with sufficient evidence of non-service. *Carter-Jones Lumber Co. v. Meyers*, 2d Dist. Clark No. 2005

CA 97, 2006-Ohio-5380, ¶ 11. In order to rebut the presumption of proper service, the other party must produce evidentiary-quality information demonstrating that he or she did not receive service. *McWilliams v. Schumacher*, 8th Dist. Cuyahoga Nos. 98188, 98288, 98390, and 98423, 2013-Ohio-29, ¶ 51, citing *Thompson v. Bayer*, 5th Dist. Fairfield No. 2011-CA-00007, 2011-Ohio-5897, ¶ 23.

{¶15} Relevant to the circumstances presented in this case, the rebuttable presumption of proper service may be rebutted by evidence that the defendant did not reside, nor received mail, at the address to which such ordinary mail service was addressed. *Schumache*r at ¶ 49, citing *Cent. Ohio Sheet Metal, Inc. v. Walker*, 10th Dist. Franklin No. 03AP-951, 2004-Ohio-2816, ¶ 10. "Where the defendant files a motion to vacate judgment, and swears under oath that he or she did not reside at the address to which process was sent, the presumption is rebutted, and it is incumbent upon the plaintiff to produce evidence demonstrating that defendant resided at the address in question." *Watts v. Brown*, 8th Dist. Cuyahoga No. 45638, 1983 Ohio App. LEXIS 15311, 14-15 (Aug. 4, 1983).

{¶16} In this case, the record supports Hook's contention that she complied with Civ.R. 4.6(D) in her effort to serve Collins at the Kent address. However, Collins submitted an affidavit indicating that (1) he has not resided at, or worked out of, the Kent address since December 2011, (2) he was not served with the complaint in this case prior to the default judgment, and (3) he only became aware of the complaint and default judgment when he was served with a summons at his current address in December 2015.

{¶17} At the May 2016 evidentiary hearing, Collins reiterated his position that he did not reside at the Kent address at the time service was attempted in this case. Collins explained that he did not sell the subject property to Hook in his individual capacity. Rather, the property was sold to Hook under the corporate name, FAHE Management, Inc. ("FAHE"). Collins testified that his personal mailing address at the time Hook's complaint was filed was also FAHE's business address in Middleburg Heights, Ohio. According to Collins, the Middleburg Heights address was known by Hook at all times relevant to the allegations set forth in the complaint. In support of his testimony, Collins submitted copies of Hook's HUD-1 statement and other documents relevant to the sale of the subject property. Each document lists the Middleburg Heights address as the mailing address for FAHE.

{¶18} We recognize that although Hook did not appear at the evidentiary hearing, she did attach exhibits to her opposition brief in an effort to establish that Collins was residing at the Kent address at the time her complaint was filed. After careful review, however, we find the evidence attached to Hook's opposition brief to be unpersuasive. Significantly, the exhibits merely reflect that Hook was residing at the Kent address in July 2011, well before this case was initiated. In addition, while Hook has attached evidence that service was made to Collins at the Kent address in a prior case filed by Hook in 2014, we note that the receipt of service does not contain Collins's signature and suffers the same deficiencies that are present in this case. As noted by defense counsel

at the evidentiary hearing, that prior case was ultimately dismissed with prejudice before Collins had the opportunity to challenge the validly of the service in that matter.

{¶19} After careful review, we find Collins sufficiently rebutted the presumption of valid service by demonstrating that he did not reside or otherwise receive mail at the address to which the Civ.R. 4.6(D) regular mail service was addressed. Moreover, there is nothing in this record to suggest Collins appeared or waived service prior to the final judgment entry. Accordingly, we find the trial court did not abuse its discretion in granting Collins's motion to vacate the default judgment.

{¶20} Hook's sole assignment of error is overruled.

{¶21} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Berea Municipal 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.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
MELODY J. STEWART, J., CONCUR