[Cite as *Jacobs v. Szakal*, 2005-Ohio-2146.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

WENDY M. JACOBS

Appellee

v.

JOHN R. SZAKAL

Appellant
C. A. No. 22219

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2000 10 4783

DECISION AND JOURNAL ENTRY

Dated: May 4, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Appellant, John R. Szakal, appeals the trial court's order denying his motion to vacate the judgment granted in favor of Appellee, Jeffrey Miller.

Appellant contends that the judgment is void ab initio because he was never served with either of Jacobs' complaints or Miller's crossclaim. We reverse.

{¶2} Appellee, Wendy Jacobs, field a complaint for personal injury on October 26, 2000, naming Appellant and Jeffrey Miller (Miller) as defendants. The complaint was served at Appellant's parents' house. Appellant, who was not living with his parents, never received notice of the pending suit. On November 11, 2000, Miller filed a crossclaim against Appellant seeking damages. Miller also listed Appellant's parents' address on his crossclaim. Appellant's parents, after notifying the postal carrier that Appellant did not live at the address listed, signed for the certified mail and threw away the certified mail and all other correspondence addressed to Appellant.

{¶3} On January 8, 2001, the court entered default judgment against Appellant in favor of Miller in the amount of $4,000.00. On July 17, Appellee voluntarily dismissed Miller. On July 17, 2001, the case was voluntarily dismissed on the day of arbitration.[1]

{¶4} Appellee re-filed her complaint on July 23, 2002, and was assigned a new case number: CV 2002-07-4077. She again served the complaint at Appellant's parents' residence and not that of Appellant. On February 12, 2003,

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[1] Appellant maintains that the July 17 voluntary dismissal did not serve to dismiss the case as to him, but only as to Miller. Thus, he says, the case remained pending against him and the trial court erred in allowing Appellee to refile a second complaint against Appellant. We make no ruling as to the effect of the dismissal or the propriety of Appellee's second complaint.

the trial court entered judgment against Appellant in the amount of $50,000. Appellant's driver's license was suspended as a result of the judgment.

{¶5} Appellant learned that two complaints had been filed against him and that two judgments had been issued against him on January 17, 2004, when he was cited by the Cuyahoga Falls Police Department for driving with a suspended license. Prior to being stopped by the police, Appellant had no idea that a complaint had been filed naming him as a defendant. On February 10, 2004, Appellant filed a motion to vacate judgment for lack of personal jurisdiction. The trial court denied Appellant's motion on May 17, 2004.

{¶6} Appellant thereafter filed additional motions seeking to have the default judgments vacated in both the original case, CV 2000-10-4783, and the re-filed case, CV 2002-07-4077, along with motions for additional time to file a responsive pleading, and to dismiss Appellee's complaint. On July 8, 2004, the trial court filed an order denying Appellant's motion to dismiss, his motion for extension of time within which to file a responsive pleading, and his motion to vacate judgment. Appellant now appeals the trial court's orders pertaining to the original case, CV 2000-10-4783, raising three assignments of error for our review. As an initial matter, we note that Appellant has presented arguments relating to case number CV 2002-07-4077. However, Appellant failed to appeal case number CV 2002-07-4077. Therefore, this Court is without jurisdiction to address any of Appellant's arguments relating to CV 2002-07-4077.

ASSIGNMENT OF ERROR I

> "The trial court's order filed July 8, 2004 denying [Appellant's] motion to dismiss pursuant to Civ.R. 12(B)(5)(7); his motion for extension of time to file responsive pleading pursuant to Civ.R. 6(B); and his motion to vacate the default judgment obtained against him by crossclaim, which was based on a determination that the [Appellant] had been voluntarily dismissed from the case, is error in that the plaintiff has never field a written notice of voluntary dismissal pursuant to Civ.R. 41(A) which named [Appellant], causing the case and its underlying claims to remain pending against [Appellant] before the trial court; and causing said order filed July 8, 2004 not to be a final appealable order."

{¶7} In his first assignment of error, Appellant argues, among many other things, that the trial court erred in denying his motion to vacate the default judgment entered against him in favor of Miller. We agree.

{¶8} Appellant maintains that he was never served with either Appellee's complaint or Miller's crossclaim. If Appellee and Miller never served Appellant, the court lacked personal jurisdiction over him, and could make no binding determinations regarding his rights. Any judgment rendered in an action where there has not been proper service is void ab initio. *Liberty Credit Services, Inc. v. Walsh*, 10th Dist. No. 04AP-360, 2005-Ohio-894, at ¶13; *Clark v. Marc Glassman, Inc*. 8th Dist. No. 82578, 2003-Ohio-4660, at ¶17.

{¶9} Personal jurisdiction is a basic tenent of law in the United States. A court acquires personal jurisdiction over a party in one of three ways: (1) proper and effective service of process, (2) voluntary appearance by the party, or (3) limited acts by the party or their counsel that involuntarily submit them to the court's jurisdiction. *Austin v. Payne* (1995), 107 Ohio App.3d 818, 821, citing

Maryhew v. Yova (1984), 11 Ohio St.3d 154, 156. Because Appellant never appeared before the court while either case was pending, we are concerned only with proper and effective service of process.

{¶10} The party effecting service must ensure complete and proper service. *King v. Hazra* (1993), 91 Ohio App.3d 534, 536. Under Civ.R. 3(A), an action is not deemed to be "commenced" unless service of process is obtained within one year from the date of the filing of the action. Where a party has not waived service by act or written waiver, the Rules of Civil Procedure dictate proper methods for effective service. See Civ.R. 4.1 through 4.6. Civ.R. 4.1(1) is the applicable provision in this case. It provides, in pertinent part:

> "[S]ervice of any process shall be by certified mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered."

{¶11} In this case, Appellee and Miller listed Appellant's parents' address in their claims, thus, the certified mail was delivered to Appellant's parents' residence, and not that of Appellant. "Valid service of process is presumed when the envelope is received by any person at the defendant's residence[.]" *Ohio Civil Rights Comm'n. v. First Am. Props.* (1996), 113 Ohio App.2d 233, 237. It is

uncontested that Appellant was not residing with his parents at the time Appellee filed either complaint.[2]

{¶12} "[T]here is a presumption of proper service in cases where the Civil Rules on service are followed. However, this presumption is rebuttable by sufficient evidence." *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, citing *Grant v. Ivy* (1980), 69 Ohio App. 2d 40 [23 O.O.3d 34].

> "Where a party seeking a motion to vacate makes an uncontradicted sworn statement that she never received service of a complaint, she is entitled to have the judgment against her vacated even if her opponent complied with Civ. R. 4.6 and had service made at an address where it could reasonably be anticipated that the defendant would receive it." *Rafalski*, 17 Ohio App.3d at 66-67, quoting *Cox v. Franklin* (Jan. 10, 1974), 8th Dist. No. 32982.

{¶13} In this case, as in *Rafalski*, Appellant has submitted uncontradicted evidence that he never received service. He submitted his own affidavit testifying that he never received notice of the complaint and that he did not live with his parents when the complaints were filed or anytime thereafter. Further, he submitted an affidavit of his father, Robert E. Szakal (Mr. Szakal), who stated that when he received certified mail for Appellant, he would "instruct the postal carrier that [Appellant] does not live at 2464 Benton Ave.[.]" Mr. Szakal stated that the postal carrier would always respond that it did not matter that Appellant no longer

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[2] Because neither Appellee nor Miller responded to Appellant's assignments of error in this court, we will presume that the operative facts alleged by Appellant concerning the service of process are correct.

lived at the address, and would instruct him to sign for the mail anyway. Mr. Szakal testified "I always throw away any mail I receive for [Appellant]."

{¶14} Appellant also submitted the affidavit of his mother, Gloria Szakal (Mrs. Szakal), who testified Appellant did not live with her at 2464 Benton Ave. when Appellee filed her complaints or anytime thereafter. She stated that when she was asked to sign to acknowledge receipt of certified mail for Appellant, she would tell the postal carrier that Appellant did not live at the address. She also testified that she would throw away any mail that she received for Appellant, including all certified mail.

{¶15} In addition to his own affidavit and those of his parents, Appellant submitted the affidavit of Angela Krueger who testified that during the first week of October 2000, she and Appellant were living at 1468 B Timber Trail, Akron, Ohio. The four affidavits all show that Appellant was not living with his parents at 2464 Benton Avenue when Appellee attempted to serve him there.

{¶16} Neither Appellee nor Miller presented any evidence to show that Appellant actually received service. "It is reversible error for a trial court to disregard unchallenged testimony that a person did not receive service." *Credit Trust Corp. v. Wright* (Feb. 6, 2002), 9th Dist. No. 20649 at 7, quoting *Rafalski v. Oates* (1984), 17 Ohio App. 3d 65, 67. In *Hayes v.. Kentucky Joint Stock Land Bank of Lexington* (1932), 125 Ohio St. 359, at 365, the Ohio Supreme Court stated:

> "* * * The defendant, who challenged the jurisdiction over her person, testified in her own behalf. If another witness had given testimony which contradicted her upon essential points, or if she had contradicted herself, or had made admissions which tended to support the claim of residence in Canton, a wholly different situation would be presented. The trial court could not wholly disregard her uncontradicted testimony. Neither could it draw inferences directly contrary to her affirmative statements. The court therefore erred in finding that good and valid service was had upon her, and that the court had jurisdiction over her person."

{¶17} Based on the unrebutted evidence before this Court showing that Appellant did not live with his parents and that he never actually received service, we conclude that service of process both for the original complaint and the crossclaim was ineffective. Therefore, the trial court's default judgment in favor of Miller is rendered void ab initio. *Miller v. Trust* (Nov. 8, 2000) 9th Dist. No. 19874, at 4-5, citing *Sampson v. Hooper Holmes, Inc.* (1993), 91 Ohio App.3d 538, 540.

{¶18} As mentioned above, Civ.R. 3(A) provides that an action is not deemed to be "commenced" unless service of process is obtained within one year from the date of the filing of the action. Since we find that Appellee did not perfect service upon Appellant within one year of filing her complaint in case number CV 2000 10 4783, the case was never properly commenced against Appellant.

ASSIGNMENT OF ERROR II

> "The trial court abused its discretion by denying [Appellant's] Civ.R. 60(B) motion challenging the amount of damages entered against [Appellant] in the amount of four thousand ($4,000) dollars pursuant to a default judgment on a crossclaim, without holding a

> hearing to accept evidence in order to determine the amount of damages as required."

{¶19} Given this court's resolution of Appellant's first assignment of error, his second assignment of error is rendered moot, and we decline to address it. See App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR III

> "The court abused its discretion, and was without jurisdiction in allowing Plaintiff to refile her complaint against [Appellant] in case No. CV 2002-07-4077 while the original case, having the same subject matter and parties, CV 2000-10-4783, remained pending before the court against [Appellant]; requiring the trial court to dismiss the re-filed case as being void ab initio."

{¶20} In this third assignment of error, Appellant contends that the trial court erred in failing to dismiss case number CV 2002-07-4077 as void ab initio. As we mentioned above, Appellant failed to appeal from CV 2002-07-4077, therefore we are without jurisdiction to address any of his arguments relating to that case.

{¶21} Appellant's first assignment of error is sustained as it pertains to the trial court's lack of personal jurisdiction over him. Having found the default judgment entered against him is void, the remaining issues raised in Appellant's first and second assignments of error are rendered moot and we decline to address them. We are without jurisdiction to address Appellant's third assignment of error, as he only appealed the trial court's decisions relating to CV 2000-10-4783.

Judgment reversed,

and cause remanded

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

Exceptions.

LYNN C. SLABY
FOR THE COURT

WHITMORE, J
BATCHELDER, J.
CONCUR

APPEARANCES:

JOHN R. SZAKAL, 132 Birchwood Avenue, Cuyahoga Falls, Ohio 44221, Appellant.

ROBERT G. MILLER, Attorney at Law, 1940 Huntington Building, 925 Euclid Avenue, Cleveland, Ohio 44115, for Appellee.