[Cite as *Asset Acceptance L.L.C. v. Allen*, 2009-Ohio-5150.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ASSET ACCEPTANCE LLC	C.A. No. 24676
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DONALD ROSS ALLEN	AKRON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 08 CVF 03718

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Asset Acceptance LLC sued Donald Allen to recover the unpaid balance on a credit card account. When an attempt to serve Mr. Allen by certified mail was returned unclaimed, Asset Acceptance asked the clerk's office to serve him by regular mail. It complied, and the ordinary mail envelope was not returned. When Mr. Allen failed to respond, the municipal court granted Asset Acceptance a default judgment. After Asset Acceptance attempted to garnish Mr. Allen's wages, he moved for relief from judgment, arguing he had not been served and had a meritorious defense. Following a hearing, the court denied his motion. Mr. Allen has appealed, assigning three errors. This Court affirms because Mr. Allen was properly served and he has not established that his failure to appear was because of excusable neglect.

PERSONAL JURISDICTION

{¶2} Mr. Allen's third assignment of error is that the municipal court incorrectly denied his motion to vacate the default judgment and incorrectly determined that he was properly served. This Court will first consider the argument he made to the municipal court that there was no evidence that he "was served and had knowledge of this cause of action."

{¶3} "[I]n order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." *Maryhew v. Yova*, 11 Ohio St. 3d 154, 156 (1984). "This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." *Id*.

{¶4} Under Rule 3(A) of the Ohio Rules of Civil Procedure, a civil action is commenced by the filing of a complaint if service is completed within a year of that filing. "[If] service of the complaint is incomplete, a resulting default judgment is void ab initio." *Erie Ins. v. Williams*, 9th Dist. No. 23157, 2006-Ohio-6754, at ¶5. The authority to vacate such judgments "is not derived from Civ.R. 60(B) but rather constitutes an inherent power possessed by Ohio courts." *Patton v. Diemer*, 35 Ohio St. 3d 68, paragraph four of the syllabus (1988).

{¶5} Civil Rule 4.1(A) provides that "service of any process shall be by certified or express mail unless otherwise permitted by these rules." Under Civil Rule 4.6(D), "[i]f a certified or express mail envelope is returned . . . unclaimed," the plaintiff may file "a written request for ordinary mail service [and] the clerk shall send [the defendant] by ordinary mail a copy of the summons and complaint . . . ." "Service shall be deemed complete when the fact of

mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." *Id.*

{¶6} The record indicates that the postal service returned the certified mail envelope that had been sent to Mr. Allen with an endorsement explaining that it was unclaimed. A few weeks later, Asset Acceptance requested service by ordinary mail in writing and the clerk's office issued a summons by ordinary mail the following day. There is no evidence that the postal service returned the envelope to the clerk's office with an endorsement that it had not been delivered. A communication sent by ordinary mail that is not returned "bears a strong inference that the intended recipient received the letter." *In re Thompkins*, 115 Ohio St. 3d 409, 2007-Ohio-5238, at ¶23. Mr. Allen did not present any evidence to overcome the presumption. The municipal court, therefore, correctly presumed that he was properly served under Civil Rule 4.6(D).

EXCUSABLE NEGLECT

{¶7} Because Mr. Allen was properly served, the default judgment can only be set aside under Rule 60(B) of the Ohio Rules of Civil Procedure. That rule provides that "the court may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged . . . ; or (5) any other reason justifying relief from the judgment." "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment . . . was entered or taken." Civ. R. 60(B). Interpreting Civil Rule 60(B), the Ohio Supreme Court has held that, "[t]o prevail on a motion brought under [the rule], the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if

relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time . . . ." *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976).

{¶8} Mr. Allen argued in his motion for relief from judgment that "his failure to respond was due to excusable neglect." He did not elaborate about what he meant, however, in his motion or at the hearing on his motion. The Ohio Supreme Court has explained that, since "[t]he burden is upon the movant to demonstrate that the interests of justice demand the setting aside of a judgment normally accorded finality," "the least that can be required of [him] is to enlighten the court as to why relief should be granted." *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 21 (1988). "A mere allegation that [his] failure to file a timely answer was due to 'excusable neglect and inadvertence,' without any elucidation, cannot be expected to warrant relief." *Id*. "Although [he] is not required to support [his] motion with evidentiary materials, [he] must do more than make bare allegations that [he] is entitled to relief." *Kay v. Marc Glassman Inc.*, 76 Ohio St. 3d 18, 20 (1996).

{¶9} In his brief to this Court, Mr. Allen has argued for the first time that the reason he did not appear is that he receives a lot of mail and that any correspondence from the court probably got lost among the junk mail. According to Mr. Allen, "[he] does not have a mailbox per se. He has a repository for mostly unsolicited mail as well as monthly billings that arrives by the pound almost daily. Over the years he has developed a unique control technique for sorting. He clearly can recognize those envelopes that contain his bills and the various card envelopes from relatives. The rest is trash and junk. It is almost never reviewed and is discarded." Mr. Allen "believes that most of the [court's] documents were never mailed or a few were mistaken as the daily junk mail that we all must deal with incessantly today and that flows copiously into

our repository i.e. the mailbox. The small notice from the U.S. Postal Service that a certified item is waiting for the occupant gets lost with all the junk mail being delivered." He has further asserted that "[he] is not the [kind of] person that intentionally throws court orders in the trash in hopes that the issue will just dissipate and disappear."

{¶10} "[T]here is no bright line test for determining whether a party's reasons for failure to enter an appearance constitute mistake, inadvertence, or excusable neglect." *LaSalle Nat'l Bank v. Mesas*, 9th Dist. No. 02CA008028, 2002-Ohio-6117, at ¶13. Civil Rule 60(B), however, is "a remedial rule that must be liberally construed" and that "attempts to strike a balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Id*. Nevertheless, this Court concludes that Mr. Allen has not demonstrated excusable neglect. While Mr. Allen may think that his method of sorting mail is efficient, he has accepted a certain level of risk in not reviewing all of the mail he receives before discarding it. His reckless inattention to items he did not recognize or thought were junk mail led to him disregarding more than one notice from the court.

{¶11} The municipal court correctly denied Mr. Allen's motion for relief from judgment. His third assignment of error is overruled. Because his first and second assignments of error go to the merits of Asset Acceptance's claim, they are moot, and are overruled on that basis. See App. R. 12(A)(1)(c).

CONCLUSION

{¶12} Mr. Allen has not shown that he was not served or that his failure to appear was because of excusable neglect. The judgment of the Akron Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, 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 appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶13} Although I concur with the judgment of this Court, I do so solely on the basis that Mr. Allen did not demonstrate excusable neglect in the trial court.

APPEARANCES:

DONALD R. ALLEN, pro se, apellant.

JANELL DUNCAN, attorney at law, for appellee.