[Cite as *Eisel v. Austin*, 2010-Ohio-3458.]

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

STEPHANIE EISEL, et al.	C.A. No. 09CA009653
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DARRYL AUSTIN	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 00JJ33484

DECISION AND JOURNAL ENTRY

Dated: July 26, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Darryl Austin appeals from the ruling of the Lorain County Court of Common Pleas, Juvenile Division, which denied his motion for relief from judgment/motion to vacate. For reasons set forth below, we vacate the judgment and remand the matter for proceedings consistent with this opinion.

FACTS

{¶2} On September 20, 1984, Plaintiff-Appellee Stephanie Eisel and Plaintiff-Appellee Lorain County Child Support Enforcement Agency ("CSEA") filed a complaint for paternity seeking child support and alleging that Austin was the father of Eisel's son. Service of the summons and complaint were sent by certified mail to Austin at 500 W. Friendship Way in Medina, but were returned unclaimed. The summons and complaint were then sent by certified mail to Austin at 525 Apt. A-3 Birch Hill in Medina. Carl E. Ruhmad signed the signature card on June 27, 1985. Austin did not file an answer, nor did he make an appearance. Thereafter,

Appellees moved for default judgment. The trial court granted the motion on March 25, 1986 and ordered Austin to pay $25 per week in child support.

{¶3} Austin failed to pay the child support and the matter was referred to the Lorain County Prosecutor's Office. Subsequently, multiple contempt motions were filed against Austin. The Lorain County Sheriff's Department served Austin in November 1989 with a copy of the summons for contempt by delivering a copy to his mother at what was believed to be his residence. Another summons for contempt was sent by certified mail and signed for on February 7, 1992 by Daphne Austin. Finally, a summons for contempt was sent by certified mail to an address in Cleveland and was signed for on October 11, 2008 by Austin.

{¶4} Austin filed a motion for relief from judgment/motion to vacate "pursuant to Civil Rule 60(B)(5) and other applicable authority[,]" arguing that the default judgment against him was void as he was never properly served. Austin attached his affidavit to the motion averring that he never resided at the Birch Hill address, that he did not know Carl E. Ruhmad, that he was living in Oklahoma City from 1983 through 1985, and that he never received the summons and complaint.

{¶5} CSEA responded to the motion, arguing that the trial court should deny Austin's motion as untimely. The trial court set the matter for a hearing on May 28, 2009, which was continued sua sponte by the trial court until June 23, 2009 so that the parties could re-brief the issue. Both sides submitted additional briefs. Subsequent to the June 2009 hearing, the trial court issued an entry denying Austin's motion stating that the "Court finds that [Austin] was properly served in this matter and the Motion to Vacate is untimely pursuant to Civil Rule 60(B)."

{¶6} Austin appealed to this Court and we affirmed the decision of the trial court holding that the trial court did not err either in finding that Austin was properly served or in finding his motion to be untimely. *Eisel v. Austin*, 9th Dist. No. 09CA009653, 2010-Ohio-816, at ¶¶12, 14. Specifically, with respect to Austin's argument that he was never properly served, although we acknowledged that Austin submitted an affidavit in which he averred that he had never received the summons and complaint, we determined that it was necessary to affirm the trial court because Austin did not supply this Court with a transcript from the hearing that occurred before the trial court. Thus, we determined that "because we do not know what occurred during the hearing[], we are unable to determine whether Austin's statement that he never received service was truly uncontradicted." Id. at ¶12. Accordingly, this Court was required to "conclude that the trial court did not err in concluding that Austin was properly served, thus giving the trial court personal jurisdiction over him." Id.

{¶7} Austin subsequently filed a motion for reconsideration with this Court. We granted his motion and ordered him to supplement the record with a transcript of the June 2009 hearing. We now reconsider the merits of Austin's two assignments of error.

MOTION FOR RELIEF FROM JUDGMENT/MOTION TO VACATE

{¶8} In Austin's second assignment of error, he argues that the trial court erred in concluding that he was properly served. In his first assignment of error, Austin argues that the trial court erred in finding his motion untimely pursuant to Civ.R. 60(B). Essentially Austin alleges that the trial court erred in its ruling because the requirements of Civ.R. 60(B) did not apply to his case; he contends that the trial court lacked personal jurisdiction over him as he was never properly served, thereby rendering the default judgment void. We agree.

{¶9} "Challenges to a trial court's jurisdiction present questions of law and are reviewed by this Court de novo." *Lorain Cty. Treasurer v. Schultz*, 9th Dist. No. 08CA009487, 2009-Ohio-1828, at ¶10.

{¶10} "[I]n order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. "'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.'" *Asset Acceptance, L.L.C. v. Allen*, 9th Dist. No. 24676, 2009-Ohio-5150, at ¶3, quoting *Maryhew*, 11 Ohio St.3d at 156. "The latter may more accurately be referred to as a waiver of certain affirmative defenses, including jurisdiction over the person under the Rules of Civil Procedure." *Maryhew*, 11 Ohio St.3d at 156. Here, it is clear that Austin never appeared before the trial court prior to the entry of default judgment, and thus, we focus our analysis on whether Austin was properly served.

{¶11} Appellees sent a copy of the summons and complaint by certified mail to Austin at 500 W. Friendship Way in Medina, however, it was returned unclaimed. The summons and complaint were then sent by certified mail to Austin at 525 Apt. A-3 Birch Hill in Medina. Carl E. Ruhmad signed for the documents on the "Agent" line, as opposed to signing on the "Addressee" line, on June 27, 1985. We have stated that:

> "[n]otably, under the Ohio Rules of Civil Procedure, certified mail does not require actual service upon the party receiving the notice but rather is effective upon certified delivery. Moreover, service need not be to a party's actual address so long as it is made to an address where there is a reasonable expectation that it will be delivered to such party. Proper service of process is needed before a court can render a valid default judgment." (Internal citations omitted.) *Friedman v. Kalail* (Apr. 3, 2002), 9th Dist. No. 20657, at *3.

"'[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.'" *Jacobs v. Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312, at ¶14, quoting *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66.

> "'Where a party seeking a motion to vacate makes an uncontradicted sworn statement that [he] never received service of a complaint, [he] is entitled to have the judgment against [him] vacated even if [his] 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.'" *Jacobs* at ¶14, quoting *Rafalski*, 17 Ohio App.3d at 66-67.

{¶12} In Austin's affidavit, attached to his motion to vacate, he averred that he did not live at the Birch Hill address, that he did not know the person who signed the certified mail receipt, that he was living in Oklahoma City at the time, and that he never received the summons and the complaint. CSEA did not contradict Austin's affidavit as it did not attach any evidentiary materials to its brief in opposition.

{¶13} The transcript of the June 2009 hearing reveals that no evidence, contradictory or otherwise, was presented to the trial court. At the hearing, Austin's counsel inquired whether the trial court wished to hear testimony from his client. The trial court replied that it was counsel's choice but that it was satisfied with the affidavit that had been submitted. Counsel for CSEA did not indicate that it wished to present any evidence. Thus, the trial court only had before it Austin's uncontradicted affidavit stating that he never received the summons and the complaint. Therefore, the trial court erred in concluding that Austin received proper service. *First Merit Bank, N.A. v. Wood*, 9th Dist. No. 09CA009586, 2010-Ohio-1339, at ¶¶9, 12. Because Austin submitted an uncontradicted affidavit asserting that he never received service, we conclude service of the complaint was ineffective. See id. at ¶12. The judgment against Austin is thereby rendered void ab initio. Id. Further, because Austin established that service was never properly

made, the trial court lacked jurisdiction to consider the complaint; therefore, the trial court erred in concluding that Austin was required to satisfy the test set forth in Civ.R. 60(B) in order to have the judgment against him vacated. *Wood* at ¶13, quoting *Portfolio Recovery Assoc., L.L.C. v. Thacker,* 2nd Dist. No. 2008 CA 119, 2009-Ohio-4406, at ¶22. Under this Court's case law, Austin is entitled to have the judgment against him vacated. *Jacobs* at ¶14, quoting *Rafalski,* 17 Ohio App.3d at 66-67; see, also *Wood* at ¶¶12-15. Austin's assignments of error are sustained.

CONCLUSION

{¶14} In light of the foregoing, we vacate the judgment of the Lorain County Court of Common Pleas, Juvenile Division, and remand the matter for proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

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 Lorain, 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 Appellees.

EVE V. BELFANCE
FOR THE COURT

MOORE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶15} I respectfully dissent.

{¶16} The majority relies on this Court's prior decision in *Jacobs v. Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312, to reach its conclusion that service of the complaint was ineffective based on Austin's "uncontradicted affidavit asserting that he never received service[.]"

{¶17} As I previously stated, notwithstanding the broad statements of law enunciated in *Jacobs*, I would limit the holding of that case to its particular circumstances. *First Merit Bank, N.A. v. Wood*, 9th Dist. No. 09CA009586, 2010-Ohio-1339, at ¶18 (Carr, J., dissenting). In *Jacobs*, we concluded that service of the complaint was ineffective based on unrebutted evidence that not only did the appellant never receive service of the complaint, but that he did not live with his parents at the time the complaint was received at his parents' residence. *Jacobs* at ¶18. In that case, the appellant did not merely submit his own affidavit averring that he did not receive notice of the complaint and that he was not living with his parents at the time the complaint was filed or afterwards. Rather, both of his parents also submitted their own affidavits averring that, although they informed the postal carrier that the appellant did not live there, the postal carrier nevertheless instructed them to sign for the appellant's mail. Moreover, both parents averred that they would simply throw away any mail received at their residence for appellant. The appellee did not present any evidence to rebut those assertions. The instant case is distinguishable.

{¶18} The trial court found that Austin was properly served. "The determination by the trial court of the question of sufficiency of service of process is a matter in its sound discretion." *Thomas v. Corrigan* (1999), 135 Ohio App.3d 340, 344. Accordingly, an appellate court may not reverse a trial court's determination regarding sufficiency of service of process absent an abuse of discretion. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. 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, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶19} Notwithstanding the filing of an affidavit by the party asserting insufficiency of service of process, the trial court may still assess the competence and credibility of the evidence. *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 125. Moreover, Austin's affidavit in this case was not uncontradicted. Service was not merely attempted by regular mail after certified mail was returned unclaimed. Rather, the summons and complaint were delivered by way of certified mail. The certified mail receipt, signed by Carl Ruhmad as Austin's "Agent," provides some evidence that Austin received service of the complaint. There was no evidence that Mr. Ruhmad was compelled by the postal carrier to sign for the summons and complaint and that he then simply threw them away, as in *Jacobs*. In the absence of any evidence by Austin other than his self-serving affidavit, which was contradicted by evidence that an agent accepted receipt of the summons and complaint on his behalf, I do not believe that the trial court abused its discretion by finding that service was proper. Accordingly, I would affirm the judgment of the trial court.

APPEARANCES:

MARK S. O'BRIEN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney for Appellee.