[Cite as *Kennedy v. Kennedy*, 2010-Ohio-404.]

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

RENEE KENNEDY	C. A. No. 09CA009645
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BILLY KENNEDY	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 03DO062103

DECISION AND JOURNAL ENTRY

Dated: February 8, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Billy Kennedy ("Husband") appeals from the decision of the Lorain County Court of Common Pleas, Domestic Relations Division, denying his motion for relief from judgment. For reasons set forth below, we affirm.

FACTS

{¶2} Husband married Plaintiff-Appellee Renee Kennedy ("Wife") in 1981. The couple had one child, who has currently reached the age of majority. On May 2, 2003, Wife filed a complaint for divorce. A summons and a copy of the complaint were sent by certified mail to Husband at 36370 Chestnut Ridge Road in North Ridgeville. The mail went unclaimed. Thereafter, the summons and complaint were sent by regular mail to Husband at the same address.

{¶3} On June 26, 2003, a magistrate held a hearing on temporary orders which was attended by both Husband and Wife. In the entry from the hearing, the magistrate stated:

"Hearing on Temporary Orders had. Court to rule. CMC addressed at same time. Matter set for status conference – possible U/D on 9-11-03 at 8:30 A.M." Husband signed the entry issued by the magistrate. In a separate order, the magistrate issued temporary orders concluding that Husband could earn at least $30,000 per year and ordered Husband to pay $341.24 per month in child support.

{¶4} Husband failed to attend subsequent hearings and the trial court granted Wife a divorce on October 2, 2003. In August 2007, a summons for contempt was issued alleging that Husband failed to pay child support. The trial court issued a warrant for Husband's arrest after he failed to appear at the contempt hearing. Upon execution of the capias, Husband appeared in court and was found in contempt. On December 8, 2008, Husband moved the trial court for relief from judgment, alleging that the trial court lacked personal jurisdiction over him as he had never been properly served. The trial court denied Husband's motion and concluded that "[Husband] submitted himself to the personal jurisdiction of the Court by appearing before the Court on or about June 26, 2003[]" and that "[Husband's] Motion was not timely."

{¶5} Husband has appealed, raising one assignment of error for our review.

PERSONAL JURISDICTION

{¶6} Husband's assignment of error states that "[HUSBAND] WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR RELIEF FROM JUDGMENT." Specifically, Husband argues that the trial court erred in denying his motion for relief from judgment as the trial court did not have personal jurisdiction over him because he was never properly served with a summons and the complaint. "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.

{¶7} "[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.

{¶8} Here in Husband's motion for relief from judgment, he argued that the judgment against him was void as he never received notice of the proceedings. Husband attached two affidavits to his motion for relief from judgment averring that Husband did not live at the address where the complaint and summons were mailed at the time the action was filed. However, following the filing of Husband's motion for relief from judgment, the parties also filed a stipulation of fact which stated the following:

> "1. [Husband] did attend a Temporary Support Hearing in the within case before Magistrate Zafarana on June 26, 2003.
>
> "2. [Husband] did sign the Magistrate's Order dated June 26, 2003, a copy of which is attached hereto as 'Exhibit A.'
>
> "3. [Husband] appeared at the hearing for child support after [Wife] informed him of the hearing."

In ruling on Husband's motion, the trial court considered Husband's motion, the supplemental briefs of the parties, and the record. The trial court did not discuss in its entry whether it found that Husband had or had not been properly served. Instead, the trial court concluded that it had personal jurisdiction over Husband due to Husband's appearance at the June 23, 2006 hearing.

Thus, we will focus our examination of the matter on whether, regardless of the sufficiency of service, the trial court obtained personal jurisdiction over Husband.

{¶9} "In order for a judgment to be rendered against a defendant when he is not served with process, there must be a showing upon the record that the defendant has voluntarily submitted himself to the court's jurisdiction or committed other acts which constitute a waiver of the jurisdictional defense." Id. at 156-157. In the case sub judice we determine that Husband made a voluntary appearance before the trial court during the hearing held on June 26, 2003. Without a transcript of the hearing, this is the only conclusion this Court can make. It is the duty of the appellant to transmit the transcript of proceedings necessary to the determination of the appeal to the court of appeals. App.R. 10(A). "This duty falls to the appellant because the appellant has the burden of establishing error in the trial court." *FirstMerit Bank, N.A. v. Wood*, 9th Dist. No. 09CA09586, 2009-Ohio-5889, at ¶5, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "In the absence of an adequate record, we must presume regularity in the trial court proceedings." Id. Husband's attendance at the temporary orders hearing is confirmed by the parties' stipulations of fact, by his signature on the trial court's entry, and by the absence of any indication in the trial court's entries related to the hearing of any objection by Husband to the trial court's jurisdiction. Further, Husband makes no argument that he ever challenged the trial court's jurisdiction at the hearing. Absent a transcript of the hearing, we must presume that the trial court's finding that Husband "submitted himself to the personal jurisdiction of the Court by appearing before the Court" was proper. See *Wood* at ¶5, citing *Knapp*, 61 Ohio St.2d at 199. Thus, in light of the foregoing, we also conclude that the trial court did have personal jurisdiction over Husband. *Maryhew*, 11 Ohio St.3d at 156-157; see, also, *Mtge. Lenders Network USA, Inc. v. Riggins*, 9th Dist. No. 22901, 2006-Ohio-3292, at ¶8

(concluding that the trial court has personal jurisdiction over appellant "[n]otwithstanding [a]ppellant's arguments that the trial court did not obtain personal jurisdiction over her because there was insufficient process, it is clear that Appellant had notice of the proceedings and appeared before the court[]"); *In re B.B. & B.B.*, 9th Dist. No. 21447, 2003-Ohio-3314, at ¶6 ("Adams voluntarily attended and participated in the permanent custody hearing, and raised no claim at that time that the trial court lacked personal jurisdiction. Therefore, she allowed the trial court to acquire personal jurisdiction over her.").

{¶10} The cases Husband cites in support of his argument, including *Maryhew* and *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, are factually distinguishable from the instant case. *Maryhew* involved a defendant who was not properly served, but who nonetheless made two requests for leave of court to move or otherwise plead. *Maryhew*, 11 Ohio St.3d at syllabus. The trial court granted the requests, and several months later the defendant moved to dismiss the action due to lack of service and personal jurisdiction and an expired statute of limitations. Id. The trial court granted the motion to dismiss and the court of appeals affirmed. Id. The Supreme Court of Ohio also affirmed and held that "[a] request by a defendant to the trial court for leave to move or otherwise plead is not a motion or a responsive pleading contemplated by Civ.R. 7, and the obtaining of such order does not constitute waiver under Civ.R. 12(H) of any affirmative defenses, nor does it submit the defendant to the jurisdiction of the court." Id.

{¶11} Husband is unlike the defendant in *Maryhew*. The trial court here concluded that Husband voluntarily appeared before the trial court and participated in a hearing. The record before us supports such a conclusion. Husband has provided no evidence that his purpose for

appearing at the hearing was to object to the trial court's jurisdiction or to raise an affirmative defense. Nor did Husband ever move to dismiss the case for any reason prior to judgment.

{¶12} We also believe that the facts of *Gliozzo* are distinguishable from the facts of this case. In *Gliozzo*, the defendants were not properly served yet still filed an answer in which they raised several affirmative defenses including insufficiency of service of process. *Gliozzo* at ¶¶2-3. The defendants then proceeded to defend the case, but several days before trial, and again on the day of trial, the defendants moved the trial court to dismiss for lack of service. Id. at ¶4. The trial court dismissed the case, and the plaintiff "appealed, contending that because [the defendants] had actively participated in the case, they had submitted to the court's jurisdiction and had therefore waived the defense of insufficient service of process." Id. at ¶¶4-5. The court of appeals reversed; however, the Supreme Court reversed the court of appeals holding that "parties who assert an affirmative defense of insufficiency of process in their first responsive pleading do not waive that defense by actively participating in litigation of the case." Id. at ¶¶5-6.

{¶13} Husband is also unlike the defendants in *Gliozzo*. Husband did not file a responsive pleading and did not raise any affirmative defenses prior to judgment. Husband voluntarily appeared and participated in a hearing before the trial court and has provided us with no evidence that he challenged the trial court's jurisdiction at that hearing. The *Gliozzo* Court, citing *Maryhew*, reiterated that "[i]n some instances, a party who voluntarily submits to the court's jurisdiction may waive available defenses, such as insufficiency of service of process or lack of personal jurisdiction." *Gliozzo* at ¶13, citing *Maryhew*, 11 Ohio St.3d at 156-157. Husband's argument that the trial court lacked jurisdiction is thus without merit.

{¶14} After the trial court concluded it had personal jurisdiction over Husband, the court further concluded Husband's motion was untimely, presumably applying the Civ.R. 60(B) requirements to Husband's motion.

> "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 * * * .'" *Asset Acceptance, L.L.C.* at ¶7, quoting *GTE Automatic Elec. Inc. v. ARC Indus. Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶15} Husband's argument on appeal, and in the trial court, focused exclusively on the trial court's alleged lack of personal jurisdiction and in no way discusses how his motion satisfies any of the requirements needed to succeed on a Civ.R. 60(B) motion. It is true that if the trial court lacked personal jurisdiction over Husband, it would not be necessary for him to satisfy the Civ.R. 60(B) requirements. See *Asset Acceptance, L.L.C.* at ¶4, quoting *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph four of the syllabus ("The authority to vacate such judgments 'is not derived from Civ.R. 60(B) but rather constitutes an inherent power possessed by Ohio courts.'"). However, as we have determined that the trial court did have jurisdiction over Husband, in order to succeed on his motion Husband had to satisfy the requirements of Civ.R. 60(B). See *Asset Acceptance, L.L.C.* at ¶7. As Husband provided no discussion of how the facts of his case support a conclusion that the Civ.R. 60(B) requirements were satisfied, we cannot conclude that the trial court erred in denying the motion.

CONCLUSION

{¶16} In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas, Domestic Relations Division.

Judgment affirmed.

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 Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

PAUL MANCINO, JR., Attorney at Law, for Appellant.

KEITH R. HURLEY, Attorney at Law, for Appellee.