[Cite as *Eisel v. Austin*, 2010-Ohio-816.]

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

STEPHANIE EISEL	C.A. No. 09CA009653
Appellee	
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: March 8, 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 affirm.

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 on November 3, 1989 with a copy of the summons for contempt by delivering a copy to his mother at 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 has timely appealed, raising two assignments of error for our review which we will address in concert.

MOTION FOR RELIEF FROM JUDGMENT/MOTION TO VACATE

{¶7} 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 disagree.

{¶8} "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.

{¶9} "[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.

{¶10} 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.

{¶11} 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 attach any evidentiary materials to its brief in opposition.

{¶12} However, this was not the only evidence before the trial court. The trial court scheduled a hearing in May 2009, which it continued to June 2009. Austin asserts in his reply brief that there was no testimony presented at the hearings to contradict his affidavit. However,

Austin has not provided this Court with a transcript of either of the hearings. Thus, because we do not know what occurred during the hearings, we are unable to determine whether Austin's statement that he never received service was truly uncontradicted. "When portions of the transcript which are necessary to resolve assignments of error are not included in the record on appeal, the reviewing court has no choice but to presume the validity of the [trial] court's proceedings, and affirm." (Internal quotations and citation omitted.) *Hudson Omni III, Ltd. v. Vista Financial Group, Inc.*, 9th Dist. No. 24048, 2008-Ohio-6933, at ¶9. Thus, because Austin did not supply this Court with a transcript from the hearings, and it was his duty to do so, App.R. 10(A), we can only conclude that the trial court did not err in concluding that Austin was properly served, thus giving the trial court personal jurisdiction over him.

{¶13} "Because [Austin] was properly served, the default judgment can only be set aside under Rule 60(B) of the Ohio Rules of Civil Procedure." *Asset Acceptance, L.L.C.* at ¶7. We review a trial court's decision to grant or deny a Civ.R. 60(B) motion under an abuse of discretion standard. *Citibank (S. Dakota), N.A. v. Masters*, 9th Dist. No. 07CA0055-M, 2008-Ohio-1001, at ¶14. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

> "To prevail on his motion under Civ.R. 60(B), 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, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150,151.

A movant must meet all three requirements to succeed on his motion. *Masters* at ¶13, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174.

{¶14} Here the trial court denied Austin's motion pursuant to Civ.R. 60(B) because it found it untimely. We cannot conclude that the trial court abused its discretion in this determination.

{¶15} The trial court entered default judgment in favor of Eisel in 1986. Austin did not file his motion for relief from judgment/motion to vacate until 2008; a delay of over twenty years. While Austin argues that he was not properly served, the trial court concluded otherwise, and based upon the record before us, we conclude there is no error in that finding. Further, Austin was personally served at his residence in 1989 and served by certified mail in 1992, each time with a summons for contempt. Thus, we do not see how Austin's lengthy delay in filing his motion can be deemed reasonable. Austin's assignments of error are overruled.

CONCLUSION

{¶16} In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas, Juvenile 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.
MOORE, J.
CONCUR

APPEARANCES:

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

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