[Cite as *Beck v. Lally*, 2020-Ohio-4305.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

SHAVONDA L. BECK,	:	
Plaintiff-Appellant,	:	Nos. 109374 and 109429
v.	:	
MARSHA LALLY, ET AL.	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 3, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-907741

Appearances:

Lawrence Mays, *for appellant*.

Law Offices of Terrence J. Kenneally & Associates Co., Terrence J. Kenneally, and Sean M. Kenneally, *for appellees*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant Shavonda Beck[1] brings this appeal challenging the trial court's judgment granting summary judgment in favor of defendant-appellee

[1] Notwithstanding the caption of this appeal, the record before this court contains two spellings of plaintiff-appellant's name: Shavonda Beck and Shavanda Beck.

Marsha Lally ("Marsha") on Beck's negligence claim and dismissing the negligence claim against defendant-appellee Karyn Lally ("Karyn") for insufficient service of process. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} This appeal involves a rear-end motor vehicle accident that occurred on December 3, 2015, on State Road in Parma, Ohio. Karyn collided with Beck. At the time, Karyn was operating a vehicle owned by Marsha.

{¶ 3} On November 30, 2018, Beck filed a complaint against Marsha, as owner of the vehicle involved in the accident, and Karyn, as operator of the vehicle involved in the accident. Beck asserted a single cause of action for negligence. Beck alleged that she was operating her vehicle in a "prudent and careful manner," and Karyn was operating her vehicle "in an inattentive manner[.]" Beck asserted that "[Karyn] with negligence and wanton disregard for the safety of other motorists navigated [her] vehicle to collide with great force and violence with [Beck's] automobile."

{¶ 4} Beck alleged that Karyn breached the duty she owed to Beck to operate her vehicle in a safe and reasonable manner, and that Karyn directly caused the December 3, 2015 accident by negligently operating her vehicle. Beck asserted that as a direct and proximate result of Karyn's "negligence and/or recklessness," she sustained "injuries to her person, experienced pain, suffering and disability, loss of enjoyment of life, and incurred expenses for her medical care and attention." Beck further alleged that she suffered "uncompensated property damage."

{¶ 5} Beck's complaint was sent by Federal Express to Marsha and Karyn at different locations on November 30, 2018. On December 8, 2018, a Federal Express receipt confirming delivery of the summons and complaint to Marsha was filed. On December 14, 2018, the following entry was docketed: "FX Receipt NO. 37161749 Returned 12/5/2018 Failure of Service on Party Lally/Karen/ - Bad Address After 8 Days." There is no evidence in the record that service was attempted upon Karyn at a different address or that service of the summons and complaint was ever perfected upon Karyn.

{¶ 6} On December 10, 2018, counsel filed a notice of appearance on behalf of Marsha and Karyn.

{¶ 7} On December 27, 2018, Marsha filed an answer to Beck's complaint. Therein, Marsha asserted several defenses, including the defense that Beck's complaint failed to state a claim upon which relief could be granted as the complaint pertained to Marsha.

{¶ 8} In March 2019, the matter was referred to mediation. A mediation hearing was held in September 2019. The parties did not resolve the matter through mediation. As a result, the case was returned to the trial court's docket on September 26, 2019.

{¶ 9} On October 1, 2019, Marsha and Karyn filed a motion for leave to file a motion for summary judgment. On the same day, Marsha filed a motion for summary judgment. Therein, Marsha argued that she was entitled to judgment as a matter of law because genuine issues of material fact did not exist regarding

whether she negligently entrusted Karyn with her vehicle. Marsha submitted an affidavit in support of her summary judgment motion. The trial court granted the motion for leave on October 15, 2019, and deemed Marsha's motion for summary judgment filed on October 1, 2019.

{¶ 10} On October 23, 2019, Beck filed a notice of voluntary dismissal of her negligent entrustment claim pursuant to Civ.R. 41(A)(1)(a).

{¶ 11} On the same day, the trial court struck Beck's notice of voluntarily dismissal. The trial court's judgment entry provided, in relevant part, that Beck's notice "is stricken by the court as being improperly filed. Civil Rule 41(A) only contemplates the dismissal of all claims against a defendant. Plaintiff's notice improperly seeks to dismiss a claim (that arguably may not even be contained in the complaint) against both defendants."

{¶ 12} Beck filed a brief in opposition to Marsha's summary judgment motion on October 29, 2019. Therein, Beck argued that genuine issues of material fact did exist regarding whether Marsha negligently entrusted her vehicle to Karyn, such that Marsha was not entitled to judgment as a matter of law. Specifically, Beck asserted that there was evidence in the record "indicat[ing] that [Marsha] had knowledge, actual or implied, that [Karyn] had a history of being an inexperienced or incompetent operator of a motor vehicle." In support of her brief in opposition, Beck directed the trial court to Marsha's affidavit in which Marsha averred, in relevant part, "to my knowledge, [Karyn] may have had 1 prior motor vehicle accident prior to the date of the [December 3, 2015 accident involving Beck]."

{¶ 13} On November 7, 2019, the trial court granted Marsha's motion for summary judgment. The trial court's judgment entry improperly referenced Karyn rather than Marsha. As a result, the trial court vacated its November 7, 2019 judgment entry, and issued a nunc pro tunc entry on December 13, 2019, reflecting that summary judgment was entered in favor of Marsha, not Karyn, and that Beck's claim against Marsha was dismissed.

{¶ 14} On December 13, 2019, Karyn filed a motion to dismiss the action, pursuant to Civ.R. 12(B)(5), based on insufficient service of process. Therein, Karyn argued that more than one year had passed since Beck refiled her complaint on November 30, 2018, and Beck failed to serve the summons and complaint upon her within one year of filing her complaint, as required by Civ.R. 3(A).[2]

{¶ 15} Beck filed a brief in opposition to Karyn's motion to dismiss on December 20, 2019. Therein, Beck argued that Karyn had notice of the lawsuit filed against her and waived the defense of insufficiency of service of process by participating in the case.

{¶ 16} On January 1, 2020, the trial court granted Karyn's motion to dismiss. The trial court's judgment entry provides, in relevant part, "motion to dismiss filed for insufficiency of service of process, filed 12/13/2019, is granted. Plaintiff has failed to commence this action as required by Civ.R. 3(A), and the court therefore

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[2] Beck originally filed a complaint on December 29, 2016, in Cuyahoga C.P. No. CV-16-873720. Beck voluntarily dismissed this case on May 22, 2018, before refiling her complaint on November 30, 2019 in Cuyahoga C.P. No. CV-18-907741.

lacks jurisdiction over the defendant [Karyn]. All remaining claims against Karyn Lally are dismissed."

{¶ 17} On January 9, 2020, Beck filed an appeal challenging the trial court's December 13, 2019 nunc pro tunc judgment entry granting Marsha's motion for summary judgment and dismissing Beck's claims against Marsha. *Beck v. Lally*, 8th Dist. Cuyahoga No. 109374. On January 24, 2020, Beck filed an appeal challenging the trial court's January 1, 2020 judgment granting Karyn's motion to dismiss. *Beck v. Lally*, 8th Dist. Cuyahoga No. 109429.

{¶ 18} On January 30, 2020, this court consolidated Beck's two appeals, 8th Dist. Cuyahoga Nos. 109374 and 109429, for purposes of briefing, hearing, and disposition.

{¶ 19} On April 1, 2020, Karyn filed a motion to dismiss, 8th Dist. Cuyahoga No. 109429, arguing that the trial court only issued one final appealable order, and as a result, appellant's second appeal was a "nullity." This court denied Karyn's motion to dismiss on April 28, 2020, noting that Beck's two appeals have been consolidated.

{¶ 20} In this appeal, Beck assigns two errors for review:

> I. The trial court erred in granting summary judgment for Marsha Lally on all claims in violation of [Civ.R. 56(C)].
>
> II. The trial court erred in dismissing Karyn Lally from Case No. CV-18-907741.

II. Law and Analysis

A. Final Appealable Order

{¶ 21} As an initial matter, we note that the consolidated appeals before this court involve a final, appealable order capable of invoking this court's jurisdiction.

> Our appellate jurisdiction is limited to reviewing orders that are both final and appealable. *See* Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.02, 2505.03. "'If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed.'" S*cheel v. Rock Ohio Caesars Cleveland, L.L.C.*, 8th Dist. Cuyahoga No. 105037, 2017-Ohio-7174, ¶ 7, quoting *Assn. of Cleveland Firefighters, #93 v. Campbell*, 8th Dist. Cuyahoga No. 84148, 2005-Ohio-1841, ¶ 6. This court has a duty to examine, sua sponte, potential deficiencies in jurisdiction. *See, e.g., Scheel* at ¶ 7; *Arch Bay Holdings, L.L.C. v. Goler*, 8th Dist. Cuyahoga No. 102455, 2015-Ohio-3036, ¶ 9; *see also Scanlon v. Scanlon*, 8th Dist. Cuyahoga No. 97724, 2012-Ohio-2514, ¶ 5 ("In the absence of a final, appealable order, the appellate court does not possess jurisdiction to review the matter and must dismiss the case sua sponte.").

Rae-Ann Suburban, Inc. v. Wolfe, 8th Dist. Cuyahoga No. 107536, 2019-Ohio-1451, ¶ 9.

> The Ohio Supreme Court has held that where multiple claims and/or parties exist, an order adjudicating one or more but fewer than all the claims or the rights and liabilities of fewer than all of the parties must meet the requirements of both R.C. 2505.02 and Civ.R. 54(B) in order to constitute a final appealable order. [*Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989)]. The court explained that Civ.R. 54(B) "makes mandatory the use of the language, 'there is no just reason for delay.' Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable." *Id*., quoting *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 20 Ohio St.3d 77, 486 N.E.2d 99 (1985), and *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 280 N.E.2d 922 (1972), syllabus. The court emphasized, however, that a trial court cannot turn an otherwise nonfinal order into a final appealable order by merely reciting the language required under Civ.R.

54(B). *Noble* at *id.*; *Cirino v. Ohio Bur. of Workers' Comp.*, 2016-Ohio-8323, 75 N.E.3d 965, ¶ 124 (8th Dist.).

Foster v. Foster, 2018-Ohio-1961, 113 N.E.3d 150, ¶ 18 (8th Dist.).

{¶ 22} In the instant matter, Beck's first appeal, 8th Dist. Cuyahoga No. 109374, was filed from the trial court's December 13, 2019 nunc pro tunc judgment entry granting summary judgment in favor of Marsha on Beck's negligent entrustment claim. The trial court's December 13, 2019 judgment was not a final appealable order. The trial court's judgment entry explicitly stated that the judgment was "partial" rather than final. Nor did the trial court's judgment entry contain the Civ.R. 54 language of no just reason for delay. Furthermore, the trial court's judgment was partial because Beck's negligence claim against Karyn remained pending.

{¶ 23} However, the trial court's December 13, 2019 judgment merged into the trial court's final order, issued on January 1, 2020, granting Karyn's motion to dismiss pursuant to Civ.R. 12(B)(5) and 3(A). The trial court's January 1, 2020 order, from which Beck filed her second appeal, 8th Dist. Cuyahoga No. 109429, was a final order as it disposed of Beck's negligence claim against Karyn and there were no remaining claims or defendants pending.

{¶ 24} There was only one final order issued in this case — the trial court's January 1, 2020 judgment granting Karyn's motion to dismiss. Beck prematurely filed her first appeal from an order that was not final and appealable. This error is harmless, however, because this court consolidated Beck's two appeals for purposes of briefing, hearing, and disposition.

{¶ 25} Accordingly, we will proceed to address the merits of Beck's appeal.

B. Summary Judgment

{¶ 26} In her first assignment of error, Beck argues that the trial court erred in granting Marsha's motion for summary judgment.

1. Standard of Review

{¶ 27} Summary judgment, governed by Civ.R. 56, provides for the expedited adjudication of matters where there is no material fact in dispute to be determined at trial. In order to obtain summary judgment, the moving party must show that "(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219, 631 N.E.2d 150 (1994).

{¶ 28} The moving party has the initial responsibility of establishing that it is entitled to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "[I]f the moving party meets this burden, summary judgment is appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact." *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 16, citing *Dresher* at 293.

{¶ 29} Once the moving party demonstrates no material issue of fact exists for trial and the party is entitled to judgment, the burden shifts to the nonmoving party to put forth evidence demonstrating the existence of a material issue of fact that would preclude judgment as a matter of law. *Dresher* at *id*. In order to meet his burden, the nonmoving party may not merely rely upon allegations or denials in his or her pleadings, and must set forth specific facts, by affidavit or as otherwise provided in Civ.R. 56(E), demonstrating the existence of a genuine issue of material fact for trial. *See Houston v. Morales*, 8th Dist. Cuyahoga No. 106086, 2018-Ohio-1505, ¶ 7, citing *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996).

2. Negligent Entrustment

{¶ 30} As an initial matter, we note, as the trial court appeared to acknowledge in its October 23, 2019 judgment entry denying Beck's notice to voluntarily dismiss her negligent entrustment claim, that Beck did not specifically assert a cause of action for negligent entrustment against Marsha in her complaint. Nor did Beck even imply in her complaint that Marsha negligently or improperly entrusted Karyn with her vehicle and granted Karyn permission to operate her vehicle. Beck made two assertions pertaining to Marsha in her complaint: (1) that Marsha resided in Parma, Ohio, and (2) that Marsha owned the vehicle that Karyn was driving at the time of the accident. Aside from the assertion that Marsha owned the vehicle that Karyn was driving, a review of Beck's complaint reveals no factual allegations to support a claim for negligent entrustment.

{¶ 31} Accordingly, even if Beck asserted a negligent entrustment claim against Marsha in her complaint, Beck's negligent entrustment claim was subject to sua sponte dismissal by the trial court pursuant to Civ.R. 12(B)(6). *See State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108, 647 N.E.2d 799 (1995) (generally, a trial court may sua sponte dismiss a complaint pursuant to Civ.R. 12(B)(6) after notifying the parties of the court's intention to dismiss the complaint and providing the parties an opportunity to respond); *X-S Merchandise, Inc. v. Wynne Pro, L.L.C.*, 8th Dist. Cuyahoga No. 97641, 2012-Ohio-2315, ¶ 17, fn. 2, citing *Dunn v. Marthers*, 9th Dist. Lorain No. 05CA008838, 2006-Ohio-4923 (a trial court may dismiss a complaint without notifying the parties or providing them with an opportunity to respond when the complaint is frivolous or the plaintiff cannot succeed based on the factual assertions in the complaint).

{¶ 32} Nevertheless, after reviewing the record, we find no basis upon which to conclude that the trial court erred in granting Marsha's motion for summary judgment.

> To establish a claim for negligent entrustment involving the operation of a motorized vehicle, the plaintiff must show that the vehicle was operated with permission of the owner, that the driver of the vehicle was incompetent to operate it, and that the owner of the vehicle knew — either through actual knowledge or through knowledge implied from known facts at the time of the entrustment — that the driver was unqualified or incompetent to operate the vehicle. *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E.2d 662 (1950), paragraph three of the syllabus. Additionally, the plaintiff must show that the vehicle owner's negligent entrustment caused the plaintiff's injury. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, 913 N.E.2d 426, ¶ 36. The failure to prove any one of these elements is fatal to a claim of negligent entrustment.

Rieger v. Giant Eagle, Inc., 157 Ohio St.3d 512, 2019-Ohio-3745, 138 N.E.3d 1121, ¶ 17.

{¶ 33} In her motion for summary judgment, Marsha acknowledged that she "gave permission to Karyn Lally to operate the vehicle for her regular use on the day of the accident." Nevertheless, she argued that Beck failed to present any evidence indicating that Marsha had actual or implied knowledge that Karyn was inexperienced or incompetent to operate a motor vehicle. Marsha asserted that she was aware of one prior accident that Karyn had been involved in, and Marsha was not aware of any moving violations Karyn received. In support of her motion for summary judgment, Marsha submitted an affidavit in which she averred, in relevant part:

> 3. That I knew [Karyn] was the holder of a valid driver's license at the time of the accident.
>
> 4. That to my knowledge, [Karyn] may have had 1 prior motor vehicle accident prior to the date of the accident involved herein.
>
> 5. That to my knowledge, [Karyn] had never received any moving violation citation from any law enforcement agency prior to the date of the accident herein.
>
> 6. That I had no reason to believe that [Karyn] was an incompetent, inexperienced or reckless driver.

{¶ 34} Marsha's affidavit demonstrated that Karyn was competent to operate the vehicle at the time of the accident, and that Marsha had no knowledge, actual or implied, that Karyn was either unqualified or incompetent to operate the vehicle at the time of the accident. Therefore, Marsha met her initial burden of demonstrating that she was entitled to summary judgment.

{¶ 35} In opposing Marsha's motion for summary judgment, Beck argued that there was evidence that Marsha "had knowledge, actual or implied, that [Karyn] had a history of being an inexperienced or incompetent operator of a motor vehicle." Beck did not submit any evidence supporting her brief in opposition. Rather, she relied upon Marsha's assertion in her affidavit that she was aware of one prior accident that Karyn had been involved in prior to the accident involving Beck.[3]

{¶ 36} After reviewing the record, we find that Beck failed to meet her burden of demonstrating the existence of a genuine issue of material fact regarding her negligent entrustment claim that remained for trial. Beck simply failed to present any evidence indicating that Karyn was an inexperienced or incompetent driver, much less that Marsha was aware of the fact that Karyn was inexperienced or incompetent when she permitted Karyn to drive her vehicle. Beck could have deposed Marsha and Karyn, but failed to do so. Beck did not introduce any other evidence pertaining to Karyn's inexperience or incompetence to operate a vehicle, such as documents pertaining to prior accidents, traffic infractions, or insurance records. Nor did Beck present any evidence that Karyn had any disabilities or medical conditions that would affect her ability to operate a motor vehicle. Finally, to the extent that Beck argues that Karyn was incompetent because she was involved in one accident prior to the accident with Beck, and that Marsha was aware of

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[3] In her brief in opposition, Beck references an affidavit that she executed: "Plaintiff Shavanda Beck in her Affidavit also supports the conclusion that [Marsha's] admitted prior knowledge of [Karyn's] driving accident history meets the other facts and circumstances test of *Gulla*." Beck's affidavit was not attached to her brief in opposition, and is not in the record before this court.

Karyn's prior accident, Beck fails to cite to any authority that stands for the proposition that an individual is unqualified or incompetent to operate a vehicle if they are in one motor vehicle accident.

{¶ 37} For all of the foregoing reasons, and viewing the evidence in favor of Beck as the nonmoving party, we find that there are no genuine issues of material fact that existed for trial. The trial court properly granted summary judgment in favor of Marsha on Beck's negligent entrustment claim.

{¶ 38} Beck's first assignment of error is overruled.

C. Motion to Dismiss

{¶ 39} In her second assignment of error, Beck argues that the trial court erred in granting Karyn's motion to dismiss pursuant to Civ.R. 12(B)(5) and 3(A).

{¶ 40} "A court's ruling under Civ.R. 12(B)(5) is reviewed for an abuse of discretion." *Matteo v. Principe,* 8th Dist. Cuyahoga No. 92894, 2010-Ohio-1204, ¶ 9, citing *Michigan Millers Mut. Ins. Co. v. Christian*, 153 Ohio App.3d 299, 2003-Ohio-2455, 794 N.E.2d 68, ¶ 9 (3d Dist.), and *Bell v. Midwestern Educational Servs., Inc.*, 89 Ohio App.3d 193, 203, 624 N.E.2d 196 (2d Dist.1993). However, this court reviews a trial court's dismissal based on lack of personal jurisdiction de novo. *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784; *see State ex rel. Kerr v. Kelsey*, 6th Dist. Wood No. WD-19-047, 2019-Ohio-3215, ¶ 13, citing *Hubiak v. Ohio Family Practice Ctr.*, 2014-Ohio-3116, 15 N.E.3d 1238, ¶ 7-11 (9th Dist.) (the defense of lack of service is an issue of law that is reviewed de novo on appeal).

{¶ 41} In her motion to dismiss, Karyn argued that Beck's complaint should be dismissed due to insufficiency of service of process pursuant to Civ.R. 12(B)(5). Karyn asserted that more than one year had passed since Beck filed her complaint on November 30, 2018, and Beck failed to serve the summons and complaint upon Karyn as required by Civ.R. 3(A). Therefore, Karyn contended that Beck's negligence claim should be dismissed because Beck failed to "commence" the action in compliance with the Civil Rules.

{¶ 42} Insufficiency of service of process is an affirmative defense that may be raised in a motion to dismiss. *See* Civ.R. 12(B)(5). Dismissal pursuant to a motion filed under Civ.R. 12(B)(5) is appropriate when a plaintiff fails to perfect service within the one-year period set forth in Civ.R. 3(A). *See Midland Funding, L.L.C. v. Cherrier*, 8th Dist. Cuyahoga No. 108595, 2020-Ohio-3280, ¶ 21. Civ.R. 3(A), governing the commencement of a civil action, provides, in relevant part, "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant[.]"

{¶ 43} In the instant matter, the record reflects that Beck properly commenced the action against Marsha. Beck filed her complaint on November 30, 2018, and a Federal Express receipt docketed on December 8, 2018, indicates that the complaint was served upon Marsha on December 6, 2018.

{¶ 44} Beck concedes that her attempt to serve the summons and complaint upon Karyn at a residence on Detroit Avenue in Cleveland, Ohio failed. On December 14, 2018, the following entry was docketed: "FX Receipt NO. 37161749

Returned 12/5/2018 Failure of Service on Party Lally/Karen/ - Bad Address After 8 Days." There is no evidence in the record that Beck attempted service upon Karyn at a different address or that service of the summons and complaint was ever perfected upon Karyn.

{¶ 45} The issue in Beck's second assignment of error is whether Karyn waived the defense of insufficiency of service of process. Beck contends that Karyn waived the defense of insufficiency of service of process because (1) Karyn's attorney filed a notice of appearance on December 10, 2018, (2) Karyn participated in mediation and case management conferences, and (3) Karyn jointly requested a continuance of trial with Marsha on October 28, 2019. Beck's arguments are misplaced.

{¶ 46} In *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, the Ohio Supreme Court held that the defense of insufficiency of service of process can be waived in two ways. First, the defense can be waived if a party files a motion raising other Civ.R. 12(B) defenses, and does not assert the defense of insufficient service of process under Civ.R. 12(B)(5). *Id*. at ¶ 9. Second, if no Civ.R. 12(B) motion is made, the defense can be waived if a party does not raise the defense in a separate motion or in the party's responsive pleading. *Id*.

{¶ 47} In the instant matter, Karyn did not waive the defense in either manner. Karyn did not file a motion raising Civ.R. 12(B) defenses without asserting the defense under Civ.R. 12(B)(5), and Karyn did not file an answer or responsive pleading in which she failed to raise the defense of insufficient service of process.

{¶ 48} To the extent that Beck argues that Karyn voluntarily submitted to the trial court's jurisdiction by participating in mediation and case management conferences, this argument is misplaced.

> In 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. *Maryhew v. Yova*[,11 Ohio St.3d 154, 156-157, 464 N.E.2d 538 (1984)]. The only way in which a party can voluntarily submit to a court's jurisdiction, however, is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions before any pleading. *Id.* at 157-158[.] *Only when a party submits to jurisdiction in one of these manners will the submission constitute a waiver of the defense.*

(Emphasis added.) *Gliozzo* at ¶ 13. The Ohio Supreme Court has held that when the affirmative defense of insufficiency of service of process is properly raised and preserved, a party does not waive the defense by actively participating in the litigation. *Id.* at syllabus.

{¶ 49} In the instant matter, as noted above, Karyn did not waive the defense of insufficiency of service of process in either of the two specified manners. Accordingly, by filing a notice of appearance through counsel, participating in mediation, and participating in case management conferences, Karyn did not waive the defense of insufficiency of service of process by voluntarily submitting to the trial court's jurisdiction.

{¶ 50} To the extent that Beck argues that Karyn waived the defense by joining in Marsha's motion for a continuance of trial without raising the defense of

insufficiency of service of process therein, Beck's argument is misplaced.[4] Motions for leave to plead and motions for continuances are not considered "responsive pleadings" under Civ.R. 7(A), or motions that would result in the waiver of the defense of insufficiency of service of process. *See Maryhew* at 158. The record reflects that Karyn raised the defense of insufficiency of service of process and Beck's failure to comply with Civ.R. 3(A) in the first motion she filed in the case — her motion to dismiss pursuant to Civ.R. 12(B)(5). Therefore, Karyn properly preserved the defense of insufficiency of service of process, and did not waive the defense by actively participating in the case.

{¶ 51} Beck argues that the trial court erred by granting Karyn's motion to dismiss because the record reflects that Karyn had actual or adequate notice of the lawsuit filed against her. In other words, Beck contends that because Karyn had notice of the lawsuit, Beck did not need to serve her complaint upon Karyn within one year of filing the complaint in order to commence the action pursuant to Civ.R. 3(A). In support of her argument, Beck cites *Mollette v. Portsmouth City Council*, 179 Ohio App.3d 455, 2008-Ohio-6342, 902 N.E.2d 515 (4th Dist.), and *Cecil v. Cottrill*, 67 Ohio St.3d 367, 371, 618 N.E.2d 133 (1993).

{¶ 52} *Mollette* and *Cecil* involve an application of Civ.R. 3(A) in conjunction with Civ.R. 15, governing amended and supplemental pleadings. In *Mollette*, the

[4] Karyn also joined in Marsha's motion for leave to file a motion for summary judgment, filed on October 1, 2019.

Fourth District explained that "Civ.R. 15(C) requires notice of the action — not personal service — within the time period provided in Civ.R. 3(A)." *Id*. at ¶ 42.

{¶ 53} Beck's "notice" argument and her reliance on Civ.R. 15 are misplaced. Civ.R. 3(A) provides that

> [a] civil action is commenced by filing a complaint with the court if service is obtained within one year from such filing upon a named defendant, or *upon an incorrectly named defendant* whose name is later corrected pursuant to Civ.R. 15(C), or upon *a defendant identified by a fictitious name* whose name is later corrected pursuant to Civ.R. 15(D).

(Emphasis added.)

{¶ 54} Karyn was named as a defendant in Beck's complaint. Karyn was neither incorrectly named, nor identified by a fictitious name in Beck's complaint. Furthermore, Beck did not file an amended complaint. Therefore, Civ.R. 15 is entirely inapplicable, and Beck's reliance on *Mollette* and *Cecil* are misplaced.

{¶ 55} Finally, Beck argues that by not raising the insufficient service issue and participating in the case for more than one year, and then only raising the issue after the claims against Marsha were dismissed, Karyn's request for a dismissal was a "last-ditch effort by [her attorneys] to circumvent justice," and a "'rabbit in the hat' type maneuver" that should not be permitted. Appellant's brief at 11-12.

{¶ 56} In *Gliozzo*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, the Ohio Supreme Court considered similar arguments. Gliozzo argued that "allowing a party to file a motion to dismiss based on insufficient service after that party has defended on the merits simply encourages legal gamesmanship and prevents the

efficient administration of justice," and "although appellants were aware of the deficient service, they did not move to dismiss the case on that basis until after the time to perfect service had expired, denying him an opportunity to remedy the error." *Id*. at ¶ 15. The Ohio Supreme Court rejected Gliozzo's arguments, concluding,

> [r]egardless of how appellants' behavior is characterized, the Ohio Rules of Civil Procedure govern the conduct of all parties equally, and "we cannot disregard [the] rules to assist a party who has failed to abide by them." *Bell*[, 89 Ohio App.3d at] 204, 624 N.E.2d 196. The rules clearly declare that an action is commenced when service is perfected. Civ.R. 3(A). Furthermore, we have held, "Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service." *Maryhew*, 11 Ohio St.3d at 157, 464 N.E.2d 538. The obligation is upon plaintiffs to perfect service of process; defendants have no duty to assist them in fulfilling this obligation. [*Id*. at 159.]
>
> Whether appellants' conduct constituted gamesmanship or good litigation strategy, they followed the rules. If such behavior should not be permitted in the future, the proper avenue for redress would be to seek to change those rules.

Gliozzo at ¶ 16-17.

{¶ 57} In the instant matter, we cannot disregard the Civil Rules to assist Beck, who failed to comply with them. Beck does not dispute that she failed to serve her complaint upon Karyn within one year of filing her complaint on November 30, 2018. Therefore, Beck failed to comply with Civ.R. 3(A).

{¶ 58} The record reflects that Beck never attempted to serve Karyn at a different address within one year of filing her original complaint. Beck failed to do so despite having notice of the failure to perfect service upon Karyn nearly one year *before* the one-year period of Civ.R. 3(A) elapsed. The summons and complaint

Beck attempted to serve on Karyn at the residence on Detroit Avenue in Cleveland, Ohio failed due to a "bad address." The Federal Express receipt indicating that service failed was docketed on December 14, 2018. The one-year period for obtaining service upon Karyn did not expire until November 30, 2019. Despite having notice that she did not obtain service of the complaint upon Karyn, Beck failed to accomplish service of process of the complaint within the one-year period required by Civ.R. 3(A). Therefore, Beck failed to "commence" the action as it pertained to Karyn.

{¶ 59} For all of the foregoing reasons, the trial court did not err or abuse its discretion in granting Karyn's motion to dismiss. Beck's second assignment of error is overruled.

III. Conclusion

{¶ 60} After thoroughly reviewing the record, we affirm the trial court's judgment. The trial court did not err in granting Marsha's motion for summary judgment, and the trial court did not err or abuse its discretion in granting Karyn's motion to dismiss based on insufficiency of service of process and Beck's failure to comply with Civ.R. 3(A).

{¶ 61} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

ANITA LASTER MAYS, P.J., and
LARRY A. JONES, SR., J., CONCUR