

ORIGINAL

IN THE SUPREME COURT OF OHIO

BUCKINGHAM, DOOLITTLE &
BURROUGHS, LLP,

Plaintiff-Appellee,

v.

HEALTHCARE IMAGING SOLUTIONS,
LLC, et al.

and

JEFFREY M. MANDLER

Defendants-Appellants.

) CASE NO. 10-0526
)
) (On Appeal from the Summit County
) Court of Appeals)
)

) **PLAINTIFF-APPELLEE'S**
) **MEMORANDUM IN OPPOSITION TO**
) **MOTION OF DEFENDANTS-**
) **APPELLANTS' TO STAY**
) **EXECUTION OF JUDGMENT**
) **PENDING APPEAL**

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION

I. Appellants' Motion to Stay Should Be Denied.

Plaintiff-Appellee, Buckingham, Doolittle & Burroughs, LLP ("Buckingham"), opposes the Motion of Defendants-Appellants, Healthcare Imaging Solutions, LLC and Jeffrey M. Mandler ("Appellants"), to Stay Execution of Judgment Pending Appeal ("Motion to Stay").

Buckingham obtained a Default Judgment against Appellants on February 10, 2009. A copy of the Default Judgment is attached as Exhibit "A". Buckingham initiated garnishment proceedings. Then, on March 13, 2009, Appellants filed a Motion to Vacate Default Judgment ("Motion to Vacate") and Motion to Stay All Collection Proceedings. In the latter Motion, Appellants requested that the Trial Court "stay all collection proceedings brought by the aforementioned Plaintiff against the Defendants herein **until such time as the Motion to Vacate is resolved.**" (Emphasis added.)

The Trial Court resolved the Motion to Vacate by Judgment Entry filed on March 27, 2009, wherein the Trial Court granted the Motion to Vacate. The Trial Court also granted the Motion to Stay All Collection Proceedings in the same Judgment Entry, although it was not necessary given that the Default Judgment on which the collection proceedings were based had been vacated. A copy of the Judgment Entry is attached as Exhibit "B".

Buckingham appealed and, in its Appellant's Brief, requested the Ninth District Court of Appeals to reverse the Trial Court's March 27, 2009 Judgment Entry. On February 10, 2010, the Ninth District Court of Appeals reversed the Judgment Entry, stating, "the judgment of the Summit Count[y] Court of Common Pleas is reversed". A copy of the Decision and Judgment Entry is attached as Exhibit "C". The Court further ordered "that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this

judgment into execution. * * * Immediately upon the filing hereof, this document shall constitute the journal entry of judgment". Exhibit "C".

Thus, the Trial Court's March 27, 2009 Judgment Entry was not a stay pending appeal, which typically requires the posting of a bond, but a stay pending the Trial Court's ruling on Appellants' Motion to Vacate. Furthermore, even though the March 27, 2009 Judgment Entry granted Appellants' Motion to Stay All Collection Proceedings, that Judgment Entry was reversed and, in fact, replaced by the Ninth District Court of Appeals' February 10, 2010 Decision and Journal Entry.

In their Motion to Stay, Appellants do not directly request a stay of the Decision and Journal Entry or present any authority or cite any reasons why this Court should grant a stay. Appellants merely state their belief that the Trial Court stay "should have remained in effect." Clearly, that is not the case and their Motion to Stay should be denied.

II. Alternatively, the Court Should Condition the Stay Upon Appellants' Posting of an Adequate Bond.

Supreme Court Practice Rule 14.4(A) provides that a motion requesting a stay, such as Appellants' Motion to Stay, "shall include relevant information regarding bond." (Emphasis added.) Appellants attempt to "side-step" the issue of a bond by arguing in their Motion to Stay that the stay at the Trial Court level should have remained in effect. But as set forth above, Appellants' requested that stay only while the Trial Court considered the Motion to Vacate; it was not a stay pending appeal. In any event, the Judgment Entry granting the stay was reversed and replaced on appeal by the Court of Appeals' Decision and Journal Entry.

If the Court is nonetheless inclined to grant Appellants' a stay, the stay should be conditioned upon the posting of an adequate supersedeas bond. Buckingham obtained a judgment against Appellants in the amount of \$86,836.77, plus interest at the rate of 5% per

annum beginning August 20, 2008. Exhibit "A". Buckingham requests, therefore, that bond be set in the amount of at least \$86,836.77. See Civ.R. 62(B) ("appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond); *Ohio Carpenters' Pension Fund v. La Ctr.*, 8th Dist. Nos. 86597 and 86789, LLC, 2006-Ohio-2214, ¶32 (R.C. § 2505.09 provides that the minimum amount of an appeal bond should be the amount of the judgment); R.C. § 2505.09 (an appeal bond should be in the minimum amount of "the cumulative total for all claims").

Respectfully submitted,



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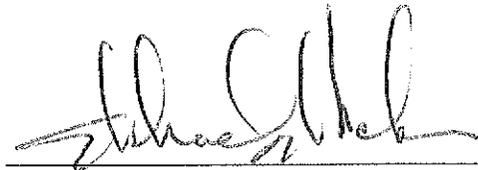
***Attorneys for Plaintiff-Appellee,
Buckingham, Doolittle & Burroughs, LLP***

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Plaintiff-Appellee's Memorandum in Opposition to Motion of Defendants-Appellants to Stay Execution of Judgment Pending Appeal** has been served by regular U.S. Mail, this 5th day of May, 2010, upon the following:

James R. Russell
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Akron, OH 44304

Attorney for Defendants-Appellants



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DANIEL M. HORRIGAN

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SUMMIT COUNTY
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

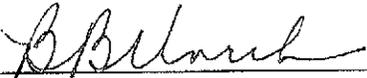
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP)	CASE NO.: CV-2008-12-8474
)	
Plaintiff,)	JUDGE BRENDA BURNHAM-UNRUH
)	
vs.)	
)	
HEALTHCARE IMAGING SOLUTIONS, LLC, et al.,)	<u>DEFAULT JUDGMENT ENTRY</u>
)	
Defendants.)	

This matter is before the Court upon the Motion for Default Judgment of Plaintiff, Buckingham, Doolittle & Burroughs, LLP ("Plaintiff"). The Court finds that it has subject matter jurisdiction and personal jurisdiction over Defendants, Healthcare Imaging Solutions, LLC and Jeffrey M. Mandler ("Defendants"). Furthermore, the Court's docket demonstrates that service of the Summons and Complaint was perfected upon Defendants more than 28 days prior to the filing of Plaintiff's Motion. Defendants have failed to answer, move or otherwise respond to Plaintiff's Complaint. Therefore, the Court finds Plaintiff's Motion to be well-taken and the same is hereby GRANTED.

It is ORDERED, ADJUDGED and DECREED that Plaintiff, Buckingham, Doolittle & Burroughs, LLP, is granted judgment against Defendants, Healthcare Imaging Solutions, LLC and Jeffrey M. Mandler, in the principal amount of \$86,836.77,

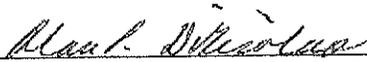
plus interest at the statutory rate of five percent (5%) per annum from August 20, 2008,
and Court costs.

IT IS SO ORDERED.



JUDGE BRENDA BURNHAM-UNRUH

APPROVED:



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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

BUCKINGHAM, DOOLITTLE &)
BURROUGHS, LLP,)

Plaintiff,)

vs.)

HEALTHCARE IMAGING SOLUTIONS,)
LLC, c/o THE CORPORATION TRUST)
CENTER, *et al.*,)

Defendants.)

CASE NO. CV 2008 12 8474

JUDGE BURNHAM UNRUH

JUDGMENT ENTRY

This matter comes before the Court on the Motion to Vacate Default Judgment and Motion for Stay filed by Defendants Healthcare Imaging Solutions, LLC and Jeffrey Mandler ("Defendants"). The Court has considered the Defendants' Motions, the Brief in Opposition filed by Plaintiff Buckingham, Doolittle and Burroughs, LLP ("Plaintiff"), the facts of this matter, Civil Rules 55 and 60(B), and applicable law. Upon due consideration, the Court:

- (1) GRANTS the Defendants' Motion to Vacate Default Judgment; and
- (2) GRANTS the Defendants' Motion for Stay.

It is hereby ORDERED that the Defendants have **fourteen (14) days** from the issuance of this Order to respond to the Plaintiffs' Complaint.

A pretrial conference has been scheduled in this matter for **April 29, 2009 at 8:45 a.m.** Please note this date on your calendars. **FAILURE TO APPEAR FOR ANY PRETRIAL CONFERENCE MAY RESULT IN SANCTIONS.**

STATEMENT OF CASE AND LAW

The Defendants retained the Plaintiff in the spring of 2006 to assist with the development of a healthcare imaging business. The Defendants paid the Plaintiff for legal services that were rendered from March of 2006 through June 5, 2007. The Plaintiffs allege that the Defendants failed to pay, however, for professional services that were rendered from June 6, 2007 through June 16, 2008. The Plaintiff alleges that it fully performed its obligations but that the Defendants breached the terms of the Agreement by failing to pay the outstanding balance due and owing. *See*, Complaint at ¶¶ 1-2. The Plaintiff alleges that the Defendants owe \$86,836.77 on their account. *Id.* at ¶ 4.

The Plaintiff commenced the instant litigation on December 9, 2008 when it filed a Complaint for Breach of Contract, on Account and Unjust Enrichment. The record reflects that Defendant Jeffrey M. Mandler was served with process by certified mail at 20 Mystic Lane, Second Floor, Malvern, Pennsylvania 19355 on December 15, 2008. A "Julie Grenier" signed the Certified Mail, Domestic Return Receipt. The record further reflects that Defendant Healthcare Imaging Solutions, LLC was served by certified mail at 20 Mystic Lane, Second Floor, Malvern, Pennsylvania 19355 on December 18, 2008. Defendant Healthcare was also served at the address of its statutory agent, at 1209 Orange Street, Wilmington, Delaware 19801, on December 17, 2008.

Because the Defendants failed to respond or otherwise appear in this litigation, the Plaintiff filed a Motion for Default Judgment on February 6, 2009. The Plaintiff's Motion for Default Judgment was granted on February 10, 2009. The Plaintiff was awarded judgment against the Defendants in the amount of \$86,836.77 and costs. Once judgment was awarded, the Plaintiff initiated collection proceedings.

On March 13, 2009, the Defendants filed a Motion to Vacate and Motion to Stay All Collection Proceedings. In their Motion, the Defendants argue that the February 10, 2009 Default Judgment is *void ab initio*. The Defendants argue that Defendant Mandler has never been properly served in this action. The Defendants further assert that the February 10, 2009 Judgment was prematurely issued as the Defendants were not provided with ten days to respond in accordance with Local Rule 7.14. The Defendants also request an order staying all collection proceedings.

Civ.R. 60 governs relief from judgments or orders. Civ.R. 60(B) states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, advertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; 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, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from judgment shall be by motion as prescribed in these rules.

GTE Automatic v. ARC Industries (1976), 47 Ohio St.2d 146, paragraph 2 of the syllabus.

The Defendants have requested relief from judgment under Civ.R. 60(B). When a party files a motion for relief from judgment under Civ.R. 60(B), they are not automatically entitled to relief on the motion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97. The decision whether to grant relief from judgment is addressed "to the sound discretion of the trial court." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

Because the movant has the burden of proving that he or she is entitled to the requested relief, the movant must submit factual material that demonstrates on its face three things:

- (1) *Timeliness of the motion.* The motion must be filed within a reasonable time and for reason stated in Civ.R. 60(B)(1), (2) and (3) not more than one year after the judgment or order or proceeding was entered or taken.
- (2) *Defense.* The party has a meritorious defense if relief is granted.
- (3) *Reasons for seeking relief.* The party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5).

GTE Automatic v. ARC Industries, supra, 47 Ohio St.2d 146 at paragraph 2 of the syllabus.

1. *Timeliness of the Defendants' Motion to Vacate Default Judgment.*

The Defendants' Motion to Vacate Default Judgment for Relief from Judgment was filed thirty-one (31) days after default judgment was granted. The Court finds that said Motion was filed within a reasonable time as it was not more than one year after the judgment. *See*, Civ.R. 60(B)(1), (2) and (3)

2. *Defense.*

Upon due consideration, the Court finds that if Civ.R. 60(B) relief is granted, the Defendants have a meritorious defense to assert. While an Agreement existed between Plaintiff and Defendant Healthcare, it is unclear as to what liability or responsibility Defendant Mandler personally has on the Agreement. Issues remain as to whether Defendant Mandler is personally liable for attorney fees incurred by Healthcare Imaging and whether any alleged agreement by Defendant Mandler is barred by the statute of frauds. Defendant Healthcare also argues that it has a statute of frauds defense and that it disputes the reasonableness of the charged fees. The Court notes that the Defendants do not have to actually show that they will prevail on the merits of their claims; they only need to allege

valid claims under Ohio law. *See, Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248. The Court finds that the Defendants have alleged valid claims and meritorious defenses.

3. *Reasons seeking relief.*

In their Motion to Vacate Default Judgment, the Defendants seek relief pursuant to Civ.R. 55 and Civ.R. 60(B). Although the Defendants do not reference a specific provision of Civ.R. 60(B), it appears that they are seeking relief pursuant to Civ.R. 60(B)(5). It is the Defendants' position that the February 10, 2009 Default Judgment is void *ab initio* on the basis that Defendant Mandler was not properly served herein. It is further asserted that the February 10, 2009 Default Judgment was prematurely issued as the Defendants were not afforded with a ten day response period in accordance with Local Rule 7.14. The Defendants explain in their Motion:

Because a court has the inherent power to vacate a void judgment, a movant does not have to strictly comply with the provisions of Rule 60(B). *Doolin v. Doolin* (1997), 123 Ohio App.3d 296, 300, 704 N.E.2d 51; *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 601 N.E.2d 138. *See also Ohio R. Civ.Pro. Rule 55(A)* (if party has appeared, he must be served with motion at least seven days prior to a hearing); *Local Rule 7.14(A)* (party entitled to ten days to respond to motion).

A plaintiff has the burden of serving process in a manner that is reasonably calculated to apprise interested parties of the action, and afford them an opportunity to respond. *Akron-Canton Regional Airport Authority v. Swinehart* (1980), 62 Ohio St.2d 403, 406, 406 N.E.2d 811. In most cases, service is accomplished by receipt of certified mail at the person's residence. *Ohio R.Civ.Pro. Rules 4.1.*

A person who signs for certified mail, other than the defendant, must reside with him at that address to effectuate residential service. *Ohio R.Civ.Pro. Rule 4.1(C).* Service upon a responsible member of the addressee's family is only proper if that address is the residence of the defendant. *Id.* An affidavit of a party which indicates that he was not served is generally sufficient evidence to find a default judgment void *ab initio*. *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 477 N.E.2d 1212. *See Grant v. Ivy* (1980), 69 Ohio App.2d 40, 43, 429 N.E.2d 1188, 1190 (it was

proper to grant motion to vacate where certified and ordinary mail was sent to an address where the defendant did not reside).

In the case *sub judice*, Mr. Mandler does not reside at 20 Mystic Lane, 2nd Floor, Malvern, PA 19355 (*Affidavit*, p. 1). A woman named Julie Grenier signed for certified mail receipt of the Complaint on December 15, 2008 (*Exhibit B*). BDB also submitted its Motion for Default at that same address on February 6, 2009.

As a result, Mr. Mandler was not properly served with the Complaint pursuant to Rule 4. He did not have amply opportunity to contest the Motion for Default Judgment pursuant to Rule 55 or Local rule 7.14(A), before it was granted. Since Mr. Mandler was not properly served or noticed, the Judgment is *void ab initio* and the Court may vacate the same without a hearing.

See, Defendants' Motion to Vacate Default Judgment at pages 5-6.

Upon due consideration, and upon a review of the facts and evidence produced, the Court finds that the February 10, 2009 Default Judgment is *void ab initio*. The Declaration submitted by Defendant Mandler establishes that service may have been improper as to this Defendant. Defendant Mandler has never resided at the address where he was allegedly served; Julie Grenier is not a member of Defendant Mandler's family; and Julie Grenier has never resided with the Defendant. Further, considering that the Defendants contacted and dealt with the Plaintiff's Columbus office at all times, the Defendants had no reason to anticipate litigation proceedings in Summit County, Ohio.

WHEREFORE, upon a finding of timeliness, excusable neglect, and a meritorious defense, the Court GRANTS the Defendants' Motion to Vacate Default Judgment.

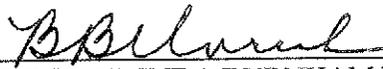
CONCLUSION

WHEREFORE, based upon the aforementioned facts and applicable law, the Court GRANTS the Defendants' Motion to Vacate Default Judgment. The Defendants' Motion to Stay All Collection Proceeding is GRANTED.

It is hereby ORDERED that the Defendants have **fourteen (14) days** from the issuance of this Order to respond to the Plaintiffs' Complaint.

A pretrial conference has been scheduled in this matter for **April 29, 2009 at 8:45 a.m.** Please note this date on your calendars. **FAILURE TO APPEAR FOR ANY PRETRIAL CONFERENCE MAY RESULT IN SANCTIONS.**

IT IS SO ORDERED.



JUDGE BRENDA BURNHAM UNRUH

Attorneys Alan P. DiGirolamo/Michael J. Matasich
Attorney James R. Russell, Jr.

STATE OF OHIO) COURT OF APPEALS
) DANIEL M. HORRIGAN
) IN THE COURT OF APPEALS
 COUNTY OF SUMMIT) NINTH JUDICIAL DISTRICT
) ss: 2010 FEB 10 AM 7:55

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP) SUMMIT COUNTY
) CLERK OF COURTS
 C. A. No. 24699

Appellant

v.

HEALTHCARE IMAGING SOLUTIONS
 LLC, C/O THE CORPORATION TRUST
 CENTER, et al.

APPEAL FROM JUDGMENT
 ENTERED IN THE
 COURT OF COMMON PLEAS
 COUNTY OF SUMMIT, OHIO
 CASE No. CV 2008 12 8474

Appellees

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

CARR, Judge.

{¶1} Appellant, Buckingham, Doolittle and Burroughs, L.L.P., appeals the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} In March of 2006, appellees, Healthcare Imaging Solutions L.L.C. (“Healthcare Imaging”) and Mr. Jeffrey M. Mandler, retained the law firm of Buckingham, Doolittle and Burroughs, L.L.P. (“Buckingham”) to assist with the development of a healthcare imaging business. Mr. Mandler served as the managing member of Healthcare Imaging. Appellees’ retention of Buckingham was evidenced by an engagement letter dated March 6, 2006. The letter was addressed to both Healthcare Imaging and Mr. Mandler and set forth the hourly rates of Buckingham’s attorneys, indicated that invoices were to be paid within thirty days of receipt, and outlined other terms of retention.

{¶3} On December 9, 2008, Buckingham filed suit against Healthcare Imaging and Mr. Mandler seeking to recover the principal amount of \$86,836.77 in unpaid legal fees. There was no dispute that Healthcare Imaging and Mr. Mandler paid Buckingham for services rendered from March of 2006 through June of 2007. However, Buckingham alleged that Healthcare Imaging and Mr. Mandler failed to pay for services rendered from June 6, 2007 through June 16, 2008. Because Healthcare Imaging and Mr. Mandler did not respond to the complaint, Buckingham filed a motion for default judgment on February 6, 2009. Healthcare Imaging and Mr. Mandler did not respond to the motion. On February 10, 2009, the trial court granted the motion and entered default judgment against Healthcare Imaging and Mr. Mandler in the amount of \$86,836.77, plus pre- and post-judgment interest at the statutory rate.

{¶4} On February 23, 2009, Buckingham started the process of executing the default judgment by filing bank attachment paperwork with the trial court. After Buckingham had initiated this process, Healthcare Imaging and Mr. Mandler entered a notice of appearance by filing a motion to vacate the default judgment, as well as a motion to stay, on March 13, 2009. Subsequently, on March 27, 2009, the trial court granted the motion to vacate judgment and the motion to stay. The trial court then vacated judgment against both Healthcare Imaging and Mr. Mandler. The trial court held that service of process on Mr. Mandler "may have been improper" and, furthermore, that Healthcare Imaging and Mandler had asserted a meritorious defense. Notably, service of process was never challenged with regard to Healthcare Imaging. On April 9, 2009, Buckingham filed a notice of appeal from the trial court's March 13, 2009 judgment entry.

{¶5} On appeal, Buckingham raises three assignments of error. This Court consolidates Buckingham's assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST HEALTHCARE IMAGING SOLUTIONS, LLC ON GROUNDS OF LACK OF SERVICE OF PROCESS BECAUSE HEALTHCARE IMAGING SOLUTIONS, LLC DID NOT ARGUE LACK OF SERVICE AND, IN FACT, IMPLICITLY ADMITTED THAT IT WAS PROPERLY SERVED.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST JEFFREY M. MANDLER LLC (sic) ON GROUNDS OF LACK OF SERVICE OF PROCESS BECAUSE HE ADMITTEDLY RECEIVED SERVICE OF PROCESS AND HAD ACTUAL NOTICE OF THE LAWSUIT.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST APPELLEES BECAUSE THEY FAILED TO SATISFY THE THREE ELEMENTS NECESSARY TO VACATE A DEFAULT JUDGMENT UNDER [CIV.R.] 60(B).”

{¶6} In its first and second assignments of error, Buckingham argues the trial court erred in finding that process had not been properly served on Healthcare Imaging and Mr. Mandler. In its third assignment of error, Buckingham argues the trial court erred in finding that Healthcare Imaging and Mr. Mandler satisfied the requirements necessary to grant a motion to vacate judgment pursuant to Civ.R. 60(B). This Court agrees with all three contentions.

{¶7} The trial court considered the issue of service of process within the context of its analysis of whether Healthcare Imaging and Mr. Mandler were entitled to relief from judgment pursuant to Civ.R. 60(B). After finding that the motion was timely filed and that Healthcare Imaging and Mr. Mandler had alleged meritorious defenses, the trial court found that the default judgment was void ab initio as to both appellees because of lack of service of process. Upon concluding this analysis, the trial court stated, “upon a finding of timeliness, excusable neglect,

and a meritorious defense, the Court GRANTS the Defendants' Motion to Vacate Default Judgment."

{¶8} The decision to grant or deny a motion to vacate judgment pursuant to Civ.R. 60(B) lies in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. The term "abuse of discretion" connotes more than an error of judgment; it implies 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.*

{¶9} Civ.R. 60(B) states:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; 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, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

"The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules"

{¶10} To prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate the following:

“(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, paragraph two of the syllabus.

{¶11} Generally, the moving party’s failure to satisfy any of the three requirements will result in the motion being overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A movant is no longer required to submit documentary evidence to support its contention that it can satisfy the requirements set forth in *GTE*. *Id.* at 20-21. “However, the movant must allege operative facts with enough specificity to allow the court to decide whether it has met that test.” *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 601, citing *Montpoint Properties, Inc. v. Waskowski* (Apr. 6, 1988), 9th Dist. No. 13320.

{¶12} As noted above, the trial court found that the Healthcare Imaging and Mr. Mandler had a valid reason for seeking relief from judgment because their failure to respond to the complaint was due to excusable neglect. This finding was premised on the trial court’s conclusion that “service may have been improper.” “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.’” *Asset Acceptance L.L.C. v. Allen*, 9th Dist. No 24676, 2009-Ohio-5150, at ¶8, quoting *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 21. “A mere allegation that the movant’s failure to file a timely answer was due to ‘excusable neglect and inadvertence,’ without any elucidation, cannot be expected to warrant relief.” *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 21.

{¶13} At the outset, this Court notes that it is unnecessary for a party to satisfy the requirements of Civ.R. 60(B) in order to obtain relief from judgment when the party can demonstrate that it was not properly served with process. This Court has held that a trial court “lacks jurisdiction to consider a complaint where service of process was defective, and any judgment rendered on the complaint is void ab initio.” *Keathley v. Bledsoe* (Feb. 7, 2001), 9th Dist. No. 19988, citing *Kurtz v. Kurtz* (1991), 71 Ohio App.3d 176, 182. In this case, the trial court analyzed the service of process issue within the context of its Civ.R. 60(B) inquiry. With regard to the Civ.R. 60(B) claim, Healthcare Imaging and Mr. Mandler attempt to satisfy the second prong of the *GTE* test by asserting they were not put on proper notice of the lawsuit because of inadequate service of process. Therefore, the critical question in this case is whether service of process was defective. If that question is answered in the affirmative, it would be unnecessary to consider the remaining prongs of the *GTE* test because the default judgment would be rendered void ab initio. If that question is answered in the negative, the default judgment would not be void and the trial court order vacating the default judgment would be reversed because Healthcare Imaging and Mr. Mandler would not have satisfied the second prong of the *GTE* test.

{¶14} Civ.R. 4.1 provides for three separate means for effecting service of process: (A) certified or express mail service; (B) personal service; and (C) residential service. In this case, Buckingham attempted to effect service of process upon Healthcare Imaging and Mr. Mandler pursuant to Civ.R. 4.1(A).

{¶15} “Service of process may be made at an individual’s business address pursuant to Civ.R. 4.1, but such service must comport with the requirements of due process.” *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, at syllabus. In order to meet

fundamental due process requirements, notice must be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 406, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314. Certified mail service sent to a business address complies with due process “if the circumstances are such that successful notification could be reasonably anticipated.” *Swinehart*, 62 Ohio St.2d at 406. Certified mail need not be delivered to and signed by the addressee only in order to be effective. See *Castellano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.

{¶16} This Court has held that “there is a presumption of proper service where the Civil Rules on service are followed.” *Erie Ins. v. Williams*, 9th Dist. No. 23157, 2006-Ohio-6754, at ¶6. However, this presumption is rebuttable if the defendant presents credible evidence that he or she did not, in fact, receive the summons and complaint. *Id.* In this case, the trial court found the February 10, 2009 default judgment to be void ab initio because “the Declaration submitted by Defendant Mandler establishe[d] that service may have been improper as to this Defendant.” In the motion to vacate the default judgment which was filed on March 13, 2009, Healthcare Imaging did not argue that it had not received the summons and the complaint. Therefore, no evidence was presented that Healthcare Imaging was not served with process. Notably, the trial court never made a finding that service was improper with regard to Healthcare Imaging prior to granting the motion to vacate the default judgment.

{¶17} The trial court did conclude that service of process may have been improper with regard to Mr. Mandler. In his motion for relief from judgment filed on March 13, 2009, Mr. Mandler cited *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, for the proposition that an affidavit of a party which indicates that he or she was not served is generally sufficient to find a default

judgment void ab initio. However, Mr. Mandler conceded that he reviewed the complaint in his affidavit which was attached to the motion to vacate the default judgment. Mr. Mandler averred that he "saw" the complaint and attempted to contact Buckingham on two occasions in December of 2008. A review of the complaint reveals that Mr. Mandler was named individually as a defendant and there were references to both Healthcare Imaging and Mr. Mandler in the body of the complaint. Mr. Mandler further averred that he had questions about the amount owed to Buckingham because he knew Healthcare Imaging could not pay the amount requested. Buckingham served Mr. Mandler with a copy of the complaint and summons at 20 Mystic Lane, 2nd Floor, Malvern, Pennsylvania. Buckingham used this address because they had sent virtually all communications to that address throughout the course of their relationship. In light of Mr. Mandler's averments, this Court concludes that Mr. Mandler was, in fact, properly served process and had notice of the lawsuit.

{¶18} Therefore, because Mr. Mandler conceded that he had received and reviewed the complaint, the trial court erred in finding that the default judgment was void. Furthermore, it was improper to grant the motion to vacate judgment pursuant to Civ.F. 60(B) as the failure of Mr. Mandler to respond to the complaint was not due to excusable neglect.

{¶19} It follows that Buckingham's assignments of error are sustained.

III.

{¶20} Buckingham's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed, and the cause remanded for further proceedings consistent with this decision.

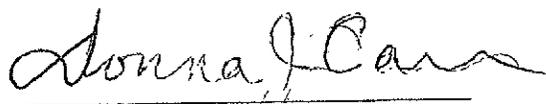
Judgment reversed,
and cause remanded.

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 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 Appellees.


DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶21} I concur in the majority's reversal and most of its opinion. While I acknowledge that the Ohio Supreme Court has written that an abuse of discretion standard applies to the review of a ruling on a motion for relief from judgment, in practice the Court has applied a de novo standard: "In order for a party to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate the following These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St. 3d 172, 174 (1994). In this case, Mr. Mandler and Healthcare Imaging

failed to prove that they were not properly served and, therefore, the default judgment against them was not void. They further failed to satisfy the three-part *GTE Automatic Test* and, therefore, were not entitled to relief under Rule 60(B). Accordingly, Mr. Mandler and Healthcare Imaging were not entitled to relief from judgment, and the trial court made a mistake of law by granting them that relief.

APPEARANCES:

ALAN P. DIGIROLAMO, and MICHAEL J. MATASICH, Attorneys at Law, for Appellant.

JAMES R. RUSSELL, Attorney at Law, for Appellees.