

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gary Galbreath,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-348
Marcus Martin,	:	(M.C. No. M2008-CVF-9354)
Defendant-Appellant,	:	(REGULAR CALENDAR)
Galilee Missionary Baptist Church, Inc.,	:	
et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 10, 2011

David M. Neubauer, for appellee.

The Isaac Firm, L.L.C., Kendall D. Isaac and Michel M. Jendretzky, for appellant.

APPEAL from the Franklin County Municipal Court.

DORRIAN, J.

{¶ 1} Defendant-appellant, Marcus Martin ("appellant"), appeals from a decision of the Franklin County Municipal Court denying appellant's motion for relief from judgment and/or motion to vacate judgment. For the following reasons, we reverse.

{¶ 2} On February 28, 2008, plaintiff-appellee, Gary Galbreath ("appellee"), filed a complaint against defendants-appellees Galilee Missionary Baptist Church, Inc., and

Galilee Baptist Church, for (1) an account due and owing in the amount of \$9,369.02, plus interest and costs, (2) breach of contract, and (3) unjust enrichment. Appellee's claims for damages arise from the installation of flooring materials at Galilee Baptist Church ("church"), where appellant is the pastor. In his complaint, appellee alleged that he entered into an oral agreement with appellant regarding the installation of certain flooring materials at the church. (See Complaint.) On March 3, 2008, service of process by certified mail was attempted on appellant at the church's address, 2121 Joyce Avenue, Columbus, Ohio 43219. On March 15, 2008, the certified mail was returned as unclaimed. Pursuant to Civ.R. 4.6(D), on March 18, 2008, service of process by ordinary mail was issued to appellant at the Joyce Avenue address, evidenced in the record by the certificate of mailing. Because the record is void of any indication that ordinary mail was returned, service upon appellant was deemed proper. The record indicates that appellant did not file an answer.

{¶ 3} On April 22, 2008, appellee filed a motion for default judgment against appellant and the other defendants. On April 24, 2008, the trial court granted appellee's motion for default judgment in the amount of \$9,369.02, plus interest and costs. On December 13, 2010, appellee filed a non-wage garnishment against appellant's checking account at The Huntington National Bank. However, the bank indicated that there was "nothing under judgment debtor with information provided." (See Dec. 28, 2010 Answer of Garnishee.) Therefore, appellee was unable to garnish any funds from appellant's bank account.

{¶ 4} On March 2, 2011, appellant filed a motion for relief from judgment and/or motion to vacate judgment ("motion"), pursuant to Civ.R. 60(B)(4) and (5). In support of

his motion, appellant attached an affidavit stating, in relevant part, that "I was never personally served with a copy of the Complaint. When I was made aware of the litigation, I assumed that the case was against the church and not against me." (See Affidavit attached to Motion for Relief from Judgment and/or Motion to Vacate Judgment.) Also, appellant argues throughout his motion that the judgment is void due to a lack of subject-matter jurisdiction. (See Motion for Relief from Judgment and/or Motion to Vacate Judgment, 3, 5.) On March 15, 2011, appellee filed a memorandum contra appellant's motion for relief from judgment and/or to vacate judgment, claiming in the body of the memorandum that appellant was served by ordinary mail on March 18, 2008. However, the affidavit of Jeff Galbreath, attached to appellee's memorandum contra, does not address the issue of service.

{¶ 5} According to the record, the trial court denied appellant's motion on March 28, 2011, without first holding a hearing regarding whether appellant was properly served with notice of the lawsuit.

{¶ 6} On April 7, 2011, appellant filed a timely notice of appeal, setting forth two assignments of error for our consideration:

1. Judge erred in not finding that Defendant's meritorious defenses of no contract, statute of frauds, improper service were insufficient to grant Rule 60(B) relief.
2. Judge erred in failing to articulate reasoning for his Decision.

{¶ 7} In his first assignment of error, appellant argues, in part, that the trial court's judgment should be vacated because he was never properly served with the summons and complaint, thus rendering the judgment void. (Appellant's brief, 11.) In response,

appellee contends that service was perfected by ordinary mail on appellant on March 19, 2008.

{¶ 8} In *Oxley v. Zacks* (Sept. 29, 2000), 10th Dist. No. 00AP-247, this court stated that "a default judgment entered without proper service of process is void and that the authority to vacate such a judgment is not derived from Civ. R. 60(B) but, rather, constitutes an inherent power of the court." See also *Rite Rug Co., Inc. v. Wilson* (1995), 106 Ohio App.3d 59, 62-63. "Thus, a motion to vacate judgment for improper service need not satisfy all the requirements of Civ.R. 60(B). In particular, the movant need not set forth a meritorious defense, nor is it necessary that the motion be timely filed." *Oxley*, citing *Rite Rug* and *CompuServe, Inc. v. Trionfo* (1993), 91 Ohio App.3d. 157, 161. Further, if an uncontroverted affidavit stating that the movant did not receive service of process is attached to a motion to vacate judgment, the movant " 'should be afforded the opportunity at an evidentiary hearing to contest the issue of notice.' " *Oxley*, quoting *Nationwide Ins. Co. v. Mahn* (1987), 36 Ohio App.3d 251, 252.

{¶ 9} In the present matter, the issue is whether appellant was ever properly served with the summons and complaint. The record indicates that, on March 15, 2008, the certified mail addressed to appellant, sent to 2121 Joyce Avenue, Columbus, Ohio 43219, was returned as unclaimed. On March 18, 2008, service to appellant was attempted once again, at the same address, by ordinary mail. According to the record, the ordinary mail was never returned. Therefore, pursuant to Civ.R. 4.6(D), a rebuttable presumption exists that appellant was properly served with the summons and complaint. See *Oxley*.

{¶ 10} However, in the affidavit attached to appellant's motion, appellant attests that he "was never personally served with a copy of the Complaint." Further, the affidavit attached to appellee's memorandum contra does not address the issue of service and, therefore, appellant's statement regarding service remains uncontroverted. As such, prior to denying appellant's motion, the trial court should have held an evidentiary hearing in order to determine whether appellant was ever properly served and whether the trial court had subject-matter jurisdiction. In *Oxley*, this court stated that "a trial court is not required to give preclusive effect to a movant's sworn affidavit statement that he did not receive service of process when the record contained no other indication that service by ordinary mail was ineffectual. * * * [T]he affidavit merely entitles the movant to a hearing on the motion, but the trial court need not accept, as credible, the movant's testimony that he did not receive process." *Id.* Therefore, upon holding an evidentiary hearing in this matter, the trial court must determine whether appellant's claim of no service is credible.

{¶ 11} For the foregoing reasons, that portion of appellant's first assignment of error claiming he was not properly served is sustained. The remaining portions of appellant's first assignment of error and his second assignment of error are thus rendered moot. The judgment of the Franklin County Municipal Court is hereby reversed, and this cause is remanded to that court with instructions to conduct an evidentiary hearing.

*Judgment reversed and cause
remanded with instructions.*

BROWN and KLATT, JJ., concur.
