

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

P.J.'s Corrugated, Inc.

Court of Appeals No. F-10-018

Appellee

Trial Court No. 07CV000158

v.

Kerr Construction, et al.

DECISION AND JUDGMENT

Appellant

Decided: January 21, 2011

* * * * *

W. David Arnold and Jason M. Van Dam, for appellee.

Jeremy Kerr, pro se.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the judgment of the Fulton County Court of Common Pleas, denying his motion to vacate a default judgment in a breach of contract claim. For the reasons that follow, we affirm.

{¶ 2} In June 2006 appellee, P.J.'s Corrugated, Inc., entered into a contract with appellant, Jeremy Kerr, as president of Kerr Construction Co., LLC¹, for the construction of an addition to appellee's building in Swanton, Ohio. Midway through the project a dispute between these parties over progress payments and the payment of subcontractors prompted appellant to pull his crew from the job. According to appellee's complaint, it was required to engage another contractor to complete the addition for \$29,639.57 more than the contract price.

{¶ 3} On June 1, 2007, appellee filed suit against Kerr Construction Co. Appellee also sued appellant personally on allegations that the construction company was not a registered limited liability company in Ohio.

{¶ 4} The clerk of the trial court sent the complaint and summons to appellant by certified mail. The envelope was returned marked "not deliverable as addressed." Alias service was returned marked "unclaimed." Appellee then directed service by ordinary mail. The record reflects that the clerk complied on July 11, 2007. The summons and complaint sent by ordinary mail were not returned.

{¶ 5} When appellant failed to answer or otherwise appear, appellee moved for and, on December 18, 2007, was granted a default judgment

¹Both appellant and the corporation were named parties below. However, "[i]n regard to corporations, a layperson generally may not represent the corporation or take any legal action on behalf of the corporation before a court or administrative agency." *Cleveland Bar Assn. v. CompManagment, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6801, ¶ 22. Since appellant is not an attorney, we construe his pro se appearance as representation of only himself, not the corporate entity.

{¶ 6} On June 16, 2010, appellant moved to vacate the default judgment. In support of the motion, appellant provided an affidavit in which he stated, "[f]rom June 1, 2010 [sic] to October 16, 2007 I lived and received mail at [an address other than the address on the complaint.]"

{¶ 7} Appellee filed a memorandum in opposition, insisting that it had complied with Civ.R. 4.6(D) and was, therefore, entitled to a presumption of service. Moreover, appellee asserted, appellant had actual notice of the suit because the parties and their counsel had met more than once to discuss a settlement.

{¶ 8} When the trial court denied appellant's motion to vacate the default judgment, this appeal followed. Appellant sets forth the following single assignment of error:

{¶ 9} "The trial court erred to the prejudice of Appellant by granting Appellee's Opposition to Motion to Vacate Default Judgment."

{¶ 10} In its judgment entry, the trial court noted that appellant had filed his motion without an apparently obligatory \$100 deposit for fees. When appellee responded with its memorandum in opposition, the deposit for fees was included. Nevertheless, the trial court found appellant's motion as "improvidently" filed, declared it "void" and dismissed it.

{¶ 11} The trial court's judgment is somewhat perplexing as it dismisses appellant's motion, without citation to authority, for want of a deposit even though there

was a deposit later filed. Nevertheless, as appellee points out, if the trial court's judgment is correct for reasons other than those stated by the court, it is not prejudicial to an appellant and the judgment must be affirmed. *Johnson v. Am. Family Ins.*, 160 Ohio App.3d 392, 2005-Ohio-1776, ¶ 29.

{¶ 12} "If service by certified mail is returned and marked unclaimed, Civ.R. 4.6(D) allows for service by ordinary mail upon a written request filed with the clerk. If the ordinary mail is not returned, service is deemed complete." *Cincinnati Ins. v. Emge* (1997), 124 Ohio App.3d 61, 63. When this procedure is followed, there arises a presumption that service is proper. This presumption remains effective until it is rebutted with sufficient evidence of non-service. *Cavalry Invest., L.L.C. v. Clevenger*, 6th Dist No. L-05-1103, 2005-Ohio-7003, ¶ 10.

{¶ 13} It is undisputed that appellee complied with Civ.R. 4.6(D). As a result, the presumption arises that service was proper. Since appellant failed to answer, plead or otherwise enter an appearance, appellee was entitled to a default judgment. Civ.R. 55. Appellant may only avoid that judgment by rebutting the presumption of service. That requires showing evidence of non-service.

{¶ 14} The evidence appellant presented was his own affidavit, but that affidavit asserts only that he lived somewhere else and received mail somewhere else when service by ordinary mail service was sent. At no point in his affidavit does appellant state that he did not receive the summons and complaint by ordinary mail. At a minimum, such a

denial is necessary to rebut the presumption of proper service that comes with compliance with the rule. See *Griffin v. Braswell*, 6th Dist. No. L-09-1261, 2010-Ohio-1597, ¶ 17. Accordingly, the trial court did not err in denying appellant's motion to vacate the default judgment.

{¶ 15} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.