

[Cite as *Snyder Computer Sys. v. Sayas Auto Sales*, 2009-Ohio-6759.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SNYDER COMPUTER SYSTEMS,)
)
PLAINTIFF-APPELLANT,)
)
VS.)
)
SAYAS AUTO SALES,)
)
DEFENDANT-APPELLEE.)

CASE NO. 09-JE-6

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from County Court #1
Jefferson County, Ohio
Case No. 08CV1507

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellant

Attorney Robert J. D'Anniballe, Jr.
Pietragallo, Gordon, Alfano, Bosick &
Raspanti, LLP
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Steubenville, Ohio 43952

For Defendant-Appellee

Sayas Auto Sales – pro se
305 Factory Avenue
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 16, 2009

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DONOFRIO, J.

{¶1} Plaintiff-appellant, Snyder Computer Systems, appeals from a Jefferson County Court Number One judgment in favor of defendant-appellee, Sayas Auto Sales, on appellant's claim for an unpaid bill.

{¶2} Appellant is a business located in Steubenville, Ohio. Appellee is a business located in Syracuse, New York.

{¶3} Appellee purchased goods from appellant and failed to pay for the goods. Instead, appellee returned the goods to appellant. Appellant, pursuant to the terms of sale, sought to recover its freight charges of \$660.60 and a restocking fee of \$741.72 for a total of \$1,402.32.

{¶4} Appellant filed a complaint against appellee in small claims court to recover the above charges and fees, plus interest.

{¶5} In response, appellee's legal representative sent an ex parte letter to the court stating its belief that the court had no personal jurisdiction over appellee because appellee is not located in Ohio and does not conduct business in Ohio. Other than this letter, appellee made no other contact of record with the court or appellant. It did not file an answer or any responsive pleading.

{¶6} In a February 12, 2009 journal entry, the court found that because appellee did not retain the goods that it had ordered, appellee did not come within the purview of the long-arm statute. The court further found that because this matter dealt with freight and shipping charges, appellee did not avail itself of the court's jurisdiction. Therefore, the court dismissed appellant's claim for lack of personal jurisdiction over appellee.

{¶7} Appellant filed a timely notice of appeal on March, 16, 2009.

{¶8} Initially, it should be noted that appellee has failed to file a brief in this matter. Therefore, we may consider appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action. App.R. 18(C).

{¶9} Appellant raises two assignments of error, the first of which states:

{¶10} “THE TRIAL COURT ERRED IN HOLDING THAT SNYDER DID NOT ESTABLISH THAT IT HAD PERSONAL JURISDICTION OVER SAYAS UNDER SECTION 2307.382 OF THE OHIO REVISED CODE.”

{¶11} Personal jurisdiction is “the power of a court to enter a valid judgment against an individual.” *In re Shepard* (Mar. 26, 2001), 4th Dist. No. 00CA12, fn. 1, citing *Meadows v. Meadows* (1992), 73 Ohio App.3d 316. Whether a trial court has personal jurisdiction over a defendant is a matter of law that appellate courts review de novo. *Baird Bros. Sawmill, Inc. v. Augusta Constr.* (June 19, 2000), 7th Dist. No. 98-CA-152.

{¶12} Pursuant to Civ.R. 12(B), the defense of lack of personal jurisdiction must be raised either in the defendant’s answer or in a motion filed prior to the answer. In this case, appellee did not file either an answer or a motion. Appellee’s only communication with the court was by an ex parte letter where it asserted that the trial court did not have personal jurisdiction over it because it is not located in Ohio nor does it conduct business in Ohio. Importantly, appellee did not file this letter with the clerk of courts nor did it serve appellant with a copy of the letter. The trial court apparently treated this letter as a motion to dismiss for lack of personal jurisdiction.

{¶13} After the pleadings are closed but within such time as not to delay the trial, a party can move for judgment on the pleadings. Civ.R. 12©. This includes moving for a judgment on a defense of lack of personal jurisdiction. On the application of any party, the trial court shall then hear and determine, before trial, any claim raising lack of personal jurisdiction, whether made by pleading or motion. Civ.R. 12(D). At the hearing, the plaintiff then bears the burden of proving personal jurisdiction by a preponderance of the evidence. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307.

{¶14} Because appellee never filed a motion or an answer as is required by the Civil Rules, the trial court should not have proceeded as if appellee had filed a motion to dismiss for lack of personal jurisdiction. “A defense of lack of jurisdiction over the person, * * * is waived (a) if omitted from a motion in the circumstances

described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.” Civ.R. 12(H)(1). Civ.R. 12(H) clearly sets out the only two ways a party may raise the defense of lack of personal jurisdiction. Here, appellee did not raise the defense in either of the two ways set out by the Rule. Consequently, it failed to properly raise lack of personal jurisdiction as a defense.

{¶15} Furthermore, unlike subject matter jurisdiction which can be raised by the trial court sua sponte at any time during the proceedings, personal jurisdiction is waivable and need not be raised by the trial court sua sponte. *Snyder Computer Sys., Inc. v. Stives*, 175 Ohio App.3d 653, 2008-Ohio-1192, at ¶17; *NetJets, Inc. v. Binning*, 10th Dist. No. 04AP-1257, 2005-Ohio-3934, at ¶4; *Weiss, Inc. v. Pascal*, 8th Dist. No. 82565, 2003-Ohio-5824, at ¶7.

{¶16} Once a defendant properly challenges personal jurisdiction, the plaintiff has the burden of establishing that the trial court has jurisdiction. *Keybank Natl. Assn. v. Tawill* (1998), 128 Ohio App.3d 451, 455. But in this case, appellee never properly challenged personal jurisdiction. Therefore, appellant’s burden of proving personal jurisdiction never arose.

{¶17} Accordingly, appellant’s first assignment of error has merit.

{¶18} Based on our resolution of appellant’s first assignment of error, its second assignment of error is rendered moot. It states:

{¶19} “THE TRIAL COURT ERRED IN HOLDING THAT SAYAS’ CONTACTS WITH THE STATE OF OHIO DO NOT SATISFY CONSTITUTIONAL DUE PROCESS REQUIREMENTS CONCERNING PERSONAL JURISDICTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.”

{¶20} For the reasons stated above, the trial court’s judgment is hereby reversed and the matter is remanded to the trial court for further proceedings pursuant to law and consistent with this opinion.

Waite, J., concurs.

DeGenaro, J., concurs.