[Cite as *Smith v. Summerville*, 2015-Ohio-4153.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

WILLIAM R. SMITH, III, PLAINTIFF-APPELLANT, VS. STEVE W. SUMMERVILLE, et al., DEFENDANTS-APPELLEES.	)))))))))	CASE NO. 15 MA 10 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CV1595
JUDGMENT:	Reversed and Remanded in part, and Affirmed in part.
APPEARANCES:	
For Plaintiff-Appellant:	Atty. Cherie H. Howard P.O. Box 357 Youngstown, Ohio 44501
For Defendants-Appellees:	Atty. James S. Gentile 42 N. Phelps St. Youngstown, Ohio 44503

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 29, 2015

[Cite as *Smith v. Summerville*, 2015-Ohio-4153.]
ROBB, J.

{¶1} Plaintiff-Appellant William R. Smith, III appeals the decision of Mahoning County Common Pleas Court ordering attorney fees in the sum of $962.50 and dismissing his amended complaint, with prejudice, for failing to prosecute. Multiple issues are raised in this appeal. First, did the trial court err when it dismissed the lawsuit with prejudice. Second, did the trial court err when it failed to grant default judgment in his favor. Third, upon the trial court's finding that Appellees were entitled to sanctions, was the award unreasonable and excessive.

{¶2} For the reasons expressed below, the trial court's decision is reversed in part, remanded in part, and affirmed in part. The trial court's decision to dismiss the complaint, with prejudice, is reversed and remanded. Accordingly, the trial court's decision regarding sanctions and attorney fees is reversed. However, the trial court's decision to deny Appellant's request for default judgment is affirmed.

Statement of Facts

{¶3} In October 2011, Appellant purchased a 1999 Chevy Silverado K 150 truck from Anthony Kostoglou, doing business as Auto Plaza. Allegedly on September 14, 2012, Appellant took the truck to Faith Automotive to get an estimate for brake repairs. Appellant was informed the next day that the cost to repair the brakes would be $1,000.00. He declined to have Faith Automotive perform the service because he believed it was too expensive. The owners of Faith Automotive would not release the vehicle to Appellant until storage fees were paid. As of October 2, 2012, the storage fees were allegedly $2,025.00. The vehicle, which allegedly had a fair market value of $6,200.00 as of September 15, 2012, is still being held by the owners of Faith Automotive.

Statement of the Case

{¶4} Due to the above described actions, Appellant filed a complaint against Steve Faith, doing business as Faith Automotive, Selina Faith, doing business as Faith Automotive ("the Faiths"), and Anthony Kostoglou, doing business as Auto Plaza.[1] 6/12/13 Complaint. Appellant asserted that the Faiths violated the consumer

[1]This appeal does not involve Anthony Kostoglou. Likewise, there are no allegations of improper actions lodged against him in the complaint.

sales practice act because he was not given a written estimate, there was no sign informing him of his right to a written estimate, he was not advised that if he did not authorize completion of the repairs there would be a storage fee, and they knew that the estimate for the repairs was substantially in excess of similar services. 6/12/13 Complaint. He also alleged the Faiths committed the tort of conversion when they refused to return his vehicle to him until he paid the storage fees. 6/12/13 Complaint.

{¶5} The complaint was served by certified mail. Steve Summerville signed the return receipt for the summons and complaint directed to Selina Faith. Selina Summerville signed the return receipt for the complaint directed to Steve Faith.

{¶6} Appellees filed an answer in which they asserted as a defense they were improperly named as Steve Faith and Selina Faith; they are Steve and Selina Summerville. 7/11/13 Answer. Appellees asked for the complaint to be dismissed.

{¶7} Four days later, Appellant moved for leave to file an amended complaint. 7/15/13 Motion. The following day the trial court granted the motion. 7/16/13 J.E. The amended complaint was filed on July 16, 2013 and correctly named Appellees as the owners of Faith Automotive. The amended complaint is almost identical to the original complaint; the only substantive changes are the names Steve Faith and Selina Faith were changed to Steve Summerville and Selina Summerville.

{¶8} The amended complaint was not served by certified mail. Rather, it was mailed to Appellees' attorney through regular mail. 7/16/13 Amended Complaint, Certificate of Service.

{¶9} The same day the amended complaint was filed, Appellant filed a request for production of documents. Three months later, Appellees moved for an extension of time to respond to that request. 10/18/13 Motion. Appellees filed a notice of compliance with the request on November 7, 2013.

{¶10} On November 13, 2013, Appellant moved for default judgment claiming that Appellees had not answered or otherwise pled to Appellant's amended complaint.

{¶11} Appellees filed a motion in response asserting that no amended answer was due because the original complaint misidentified Appellees and although an amended complaint was filed on July 16, 2013 and it correctly named the parties, it

was not served on Appellees. 12/2/13 Motion. Thus, Appellees asserted that the trial court had not obtained personal jurisdiction over them. In the motion, it was further asserted that Appellant's counsel was aware of this fact, but still filed the motion for default judgment. Appellee's counsel asserted that Appellant's counsel's actions were a violation of Civ.R. 11 and asked for sanctions and attorney fees.

{¶12} Appellant filed a reply and asserted that the amended complaint relates back to the original complaint and that counsel was not required to serve Appellees by certified mail. Counsel asserted that it was permissible to serve the amended complaint on Appellee's counsel by regular mail. 12/10/13 Reply.

{¶13} After consideration of these motions, the magistrate issued its decision. 1/15/14 Decision. The magistrate found the amended complaint was required to be personally served on Appellees; the mere mailing to counsel for Appellees was insufficient; and the court did not have personal jurisdiction over Appellees. The motion for default judgment was overruled, as well as the motion for sanctions and attorney fees. 1/15/14 Decision.

{¶14} Both Appellant and Appellees filed objections to the magistrate's decision. 1/21/14 Plaintiff's Objections; 1/29/14 Defendants reply to objections and objections.

{¶15} After considering the objections, the trial court sustained the magistrate's decision overruling the motion for default judgment. However, as to sanctions and attorney fees, the trial court reversed the magistrate's decision. It held that sanctions and attorney fees were merited. Therefore, the court directed the magistrate to hold a hearing on appropriate sanctions and the assessment of attorney fees. 4/8/14 J.E.

{¶16} Appellant appealed that decision; however, the appeal was appropriately dismissed for lack of a final appealable order. 4/9/14 Notice of Appeal; 14MA38 5/16/14 J.E.

{¶17} On July 17, 2014, Appellees moved to dismiss the action for failing to perfect service within one year of the filing of the complaint. On July 23, 2014 Appellant filed a response to the motion to dismiss. Appellant reiterated that he was

not required to personally serve the amended complaint upon Appellees and that the court should reconsider its denial of the default motion.

{¶18} An evidentiary hearing to determine the appropriate sanctions and attorney fees was held on July 23, 2014. At this hearing, the parties also addressed the motion to dismiss and the response. Appellant argued that the trial court's determination that sanctions and attorney fees should be awarded to Appellees was incorrect. Appellees' counsel set forth that he expended 5.5 hours of work in response to the default judgment and objections and that he charged $175.00 per hour. He asked for $962.50 in attorney fees.

{¶19} On October 22, 2014, the Magistrate issued its decision finding sanctions and attorney fees were warranted as the law of the case. The magistrate found that 5.5 hours of work was reasonably expended and that the hourly rate of $175.00 was also reasonable. Thus, $962.50 was awarded as reasonable attorney fees. The magistrate also granted the request to dismiss the complaint because Appellees were not properly served. The magistrate stated that dismissal of the amended complaint operated with prejudice and as an adjudication upon the merits pursuant to Civ.R. 41(B)(1).

{¶20} Appellant objected to that decision. 11/5/14 Objections. Appellees filed a response to the objections. 12/26/14 Response.

{¶21} After reviewing the filings, the trial court adopted the magistrate's decision. 1/9/15 J.E. Appellant timely appealed that decision. The trial court stayed execution of judgment pending appeal. 1/20/15 J.E.

First Assignment of Error

"The trial court committed prejudicial error by dismissing plaintiff-appellant's lawsuit with prejudice."

{¶22} The trial court granted the motion to dismiss, and accordingly, dismissed the complaint on the basis of Civ.R. 41(B)(1), which states:

> (B) Involuntary dismissal: effect thereof
>
> (1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion

> of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

Civ.R. 41(B)(1).

{¶23} The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is reviewed for an abuse of discretion. *Snyder v. Belmont Natl. Bank*, 7th Dist. No. 09 BE 9, 2010-Ohio-1089, ¶ 14, citing *Jones v. Hartranft*, 78 Ohio St.3d 368, 371, 1997-Ohio-203, 678 N.E.2d 530. *See also Ocran v. Richlak*, 8th Dist. No. 99856, 2013-Ohio-4603, ¶ 12 (dismissal based on Civ.R. 41(B)(1) is reviewed under a "heightened" abuse of discretion standard); *Lykes v. Akron Dept. of Pub. Serv.*, 8 N.E.3d 422, 2014-Ohio-578, ¶ 17 (same). An abuse of discretion is more than an error of law or judgment, "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶24} Although we review for an abuse of discretion, the Ohio Supreme Court has explained that dismissal on the merits is a harsh remedy:

> The extremely harsh sanction of dismissal should be reserved for cases when an attorney's conduct falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party. In other words, dismissal is reserved for those cases in which the conduct of a party is so negligent, irresponsible, contumacious, or dilatory as to provide substantial grounds for a dismissal with prejudice for failure to prosecute or obey a court order. Absent such extreme circumstances, a court should first consider lesser sanctions before dismissing a case with prejudice.

(Quotations and citations omitted.) *Sazima v. Chalko*, 86 Ohio St.3d 151, 158, 712 N.E.2d 729 (1999).

{¶25} The issue raised in this assignment of error is whether or not effective service of process was made upon Appellees within one year of filing the original complaint.

Civ.R. 3(A) governs commencement of an action and provides:

> 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).

Civ.R.3(A).

{¶26} "Failure of proper service is not a minor, hypertechnical violation of the rules." *Cleveland v. Ohio Civil Rights Comm.*, 43 Ohio App.3d 153, 157, 540 N.E.2d 278 (8th Dist.1989). If service is not perfected under Civ.R. 3(A) within a year of filing the complaint, then dismissal of the complaint is appropriate. *DiDomenico v. Valentino*, 7th Dist. No. 11MA175, 2012–Ohio–5992, ¶ 11–14 ("An action is commenced only when effective service of process is obtained). Absent proper service of process on a defendant, a trial court lacks jurisdiction to enter a judgment against that defendant, and if the court nevertheless renders a judgment, the judgment is a nullity and is void ab initio. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956); *Tuckosh v. Cummings*, 7th Dist. No. 07HA9, 2008–Ohio–5819, ¶ 17. Thus, failing to perfect service deprives a court of personal jurisdiction over the defendant.

{¶27} Service of process and personal jurisdiction, however, may be waived. *Gonzales v. Perez*, 7th Dist. No. 13 CA 893, 2015-Ohio-1282, ¶ 11 (personal jurisdiction may be waived); *DiDomenico v. Valentino*, 7th Dist. No. 11 MA 175, 2012-Ohio-5992, ¶ 13 (service may be waived). Lack of personal jurisdiction must be raised in the answer or by a motion filed prior to the answer. Otherwise, the defense of lack of personal jurisdiction is waived *Brislin v. Albert*, 9th Dist. No. 27052, 2014–Ohio–3406, ¶ 6. Civ.R. 12 provides:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process 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). If the affirmative defense of insufficiency of service of process is properly raised in the answer, a party's active participation in the litigation does not constitute a waiver of that defense. *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007–Ohio–3762, 870 N.E.2d 714, syllabus. However, if a party fails to properly preserve the defense in a pre-answer motion or as a defense in the answer, then participation in the proceedings leads to waiver of proper service and the existence of personal jurisdiction over the party. *Hubiak v. Ohio Family Practice Ctr.*, 2014-Ohio-3116, 15 N.E.3d 1238, ¶14 (9th Dist.).

{¶28} Given the facts of this case, service of process and personal jurisdiction over Appellees were waived. Appellees did not file a pre-answer motion asserting that the trial court lacked personal jurisdiction over them or that service was insufficient because they were not properly named. Instead, they filed an answer. In the introductory paragraph of the answer, they indicated that in the complaint they were "improperly designated and named as Steve Faith, Individually and DBA Faith Automotive and Selina Faith, Individually and DBA as Faith Automotive, but who are in fact, Steve W. Summerville and Selina L. Summerville." Appellees then proceeded to assert a general denial of the claims. Appellees also asserted two defenses in the answer. The first defense stated, "Except for the business name of Faith Automotive, Plaintiff has incorrectly identified the Defendants as Steve Faith and Selina Faith, who are not the owners of Faith Automotive." The second defense stated, "Plaintiff's complaint fails to state a cause of action against the Defendants improperly named." Appellees then moved to have the complaint dismissed for suing "the wrong parties by naming Steve Faith and Selina Faith."

{¶29} The answer did not raise the affirmative defense of insufficiency of service of process, therefore, it did not preserve the insufficiency of service of process defense and lack of personal jurisdiction argument. Neither this answer nor subsequent pleadings by Appellees specify limited appearance thereby preserving an insufficiency of service of process defense or a lack of personal jurisdiction claim. The answer did not contain an affirmative defense that Appellees were not properly

served with process or that the trial court lacked jurisdiction over them. The answer states Appellant misnamed Appellees as Steve and Selina Faith. Appellees do not dispute that they are the owners of Faith Automotive; they received the complaint; they signed for the complaint; and they are the proper defendants. In addition to their appearance by filing an answer, Appellees complied with discovery requests, made their own discovery requests, filed their own motions and defended motions by Appellant. These participations, without a reservation, and the failure to assert the affirmative defense of insufficiency of service of process conferred personal jurisdiction upon the trial court over Appellees.

{¶30} Accordingly, a dismissal based upon Civ.R. 41(B) for failure to prosecute was not warranted. The trial court's decision to dismiss the complaint is reversed and the matter is remanded for further proceedings. This assignment of error has merit.

Second Assignment of Error

"The trial court committed prejudicial error by denying plaintiff-appellant's motion for default judgment."

{¶31} Appellant argues that the trial court erred when it determined that he was not entitled to a default judgment after Appellees failed to file an answer to the amended complaint.

{¶32} Appellate courts have stated that a trial court's decision "to grant or deny a motion for default judgment" is reviewed under an abuse of discretion standard. *Bank of Am., N.A. v. Malone*, 10th Dist. No. 11AP–860, 2012–Ohio–3585, ¶ 18; *Domadia v. Briggs*, 11th Dist. No. 2008-G-2847, 2009-Ohio-6510, ¶ 19; *Huffer v. Cicero*, 107 Ohio App.3d 65, 74, 667 N.E.2d 1031 (4th Dist.1995). An abuse of discretion is no mere error of law or judgment; rather it connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The Eleventh Appellate District has further explained that, "' The granting of a default judgment, analogous to the granting of a dismissal, is a harsh remedy which should only be imposed when 'the actions of the defaulting party create a presumption of willfulness or bad faith.'" *Hale v. Steri-Tec Services, Inc.,* 11th Dist. No. 2008-G-2876, 2009-Ohio-3935, ¶ 25,

quoting *Johnson Controls, Inc. v. Cadle Co.,* 11th Dist. No. 2006-T-0030, 2007-Ohio-3382, ¶ 16, quoting *Zimmerman v. Group Maintenance Corp.,* 11th Dist. No. 2003-A-0105, 2005-Ohio-3539, ¶ 21.

{¶33} Civ.R. 55 governs default judgments and provides that when a party against whom judgment is sought fails to plead or otherwise defend, the opposing party may apply to the court for a default judgment. Civ.R. 55(A).

{¶34} The Sixth Appellate District has stated default judgment is only proper under Civ.R. 55(A) where the nonmoving party has "failed to plead or otherwise defend." *JPMorgan Chase Bank, Natl. Assn. v. Swan*, 6th Dist. No. L-13-1064, 2014-Ohio-999, ¶ 21. The filing of a motion to dismiss in answer to the pleading is defending and making an appearance in the action. *Id*. In that case it was determined that the trial court abused its discretion in granting the motion for default judgment. *Id*.

{¶35} Here, although Appellees did not file an amended answer to the July 16, 2013 amended complaint, they did file an answer to the original complaint on July 11, 2013. Furthermore, on November 7, 2013, Appellees filed a notice of compliance with Appellant's request for production of documents.

{¶36} These filings support the position that Appellees were defending the action. Thus, the trial court did not abuse its discretion when it denied the motion for default judgment. This assignment of error lacks merit.

Third Assignment of Error

"The trial court committed prejudicial error in finding that appellees were entitled to sanctions and an award of attorney fees."

{¶37} The motion for sanctions and attorney fees was based on Civ.R. 11. Appellees asserted that they were never served with the order permitting Appellant to amend the complaint. Likewise, they contended that they were not personally served with the amended complaint. Therefore, Appellees argued that Appellant knew when the motion for default judgment was filed that the trial court had not acquired personal jurisdiction over Appellees. Appellees asserted Appellant's counsel's act of filing the motion for default judgment was a willful violation of Civ.R. 11.

{¶38} The trial court granted the motion and awarded $962.50 for attorney fees as a sanction.

{¶39} In the first assignment of error, we determined that service of process was waived and the trial court had personal jurisdiction over Appellees. Accordingly, there was a potential basis for Appellant to file a motion for default judgment, making, sanctions, i.e. attorney fees, unwarranted. This assignment of error has merit.

Fourth Assignment of Error

"The trial court committed prejudicial error by awarding unreasonable and excessive attorney fees."

{¶40} The sanction award, i.e. attorney fees, was reversed under the third assignment of error. Therefore, the issue raised under this assignment, whether or not the award of attorney fees was unreasonable and excessive, is moot.

Conclusion

{¶41} The trial court's decision is reversed in part, remanded in part, and affirmed in part. The first and third assignments of error have merit. The second assignment of error lacks merit. The fourth assignment of error is rendered moot by our resolution of the third assignment of error. The trial court's decision to dismiss the complaint for failure to prosecute is reversed and the cause is remanded for further proceedings. On the basis of that remand, the sanction order is reversed. The trial court's decision to deny Appellant's motion for default judgment is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.