

[Cite as *Green v. Huntley*, 2010-Ohio-1024.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Belinda Green,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-652
v.	:	(C.P.C. No. 02JU-01-1017)
	:	
Sean Huntley,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 16, 2010

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*Tammie M. Osler*, for appellant.

*Melissa A. Waterfield*, for Franklin County Child Support Enforcement Agency.

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations, Juvenile Branch.

FRENCH, J.

{¶1} Defendant-appellant, Sean Huntley ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, denying his motion to vacate a judgment regarding child support rendered against him on March 21, 2002. For the following reasons, we reverse.

{¶2} On January 17, 2002, the Franklin County Child Support Enforcement Agency ("FCCSEA") filed a Complaint to Set Support against appellant for a minor child, C.B. In its complaint, which listed C.B.'s mother, Belinda Green ("Green"), as the plaintiff, FCCSEA alleged that appellant acknowledged paternity of C.B. in the Centralized Paternity Registry. A hearing on FCCSEA's complaint was held on March 13, 2002, but appellant did not appear. Nevertheless, the magistrate found that appellant had been served by certified mail and personal service and proceeded to hear sworn testimony from Green. The magistrate issued a decision on March 21, 2002, ordering, in part, that appellant pay child support in the amount of \$477.33 per month, plus processing charge, effective January 17, 2002, and that appellant liquidate the support arrearage by paying an additional \$95.46 per month, plus processing charge. The trial court adopted the magistrate's decision in a judgment entry filed March 21, 2002.

{¶3} On June 4, 2003, appellant filed in the trial court a Complaint to Establish Non-Existence of Father and Child Relationship with respect to C.B. In his complaint, appellant acknowledged the support judgment against him, stating that he "had paternity established by default," but he alleged that he was not C.B.'s biological father. Appellant's complaint was eventually dismissed with no resolution of the paternity issue.

{¶4} On October 12, 2007, FCCSEA filed a motion to vacate the March 21, 2002 judgment and to set aside its January 17, 2002 complaint, stating that the evidence attached to the complaint did not establish appellant's paternity of C.B., but, instead, established appellant's paternity of a different minor child, J.H. FCCSEA's

motion was unopposed. On March 14, 2008, FCCSEA commenced a new case against appellant by filing a Complaint to Establish the Father-Child Relationship and to Set Support with respect to C.B. See *Green v. Huntley*, Franklin C.P. No. 08JU-03-3612.

{¶5} On February 25, 2009, appellant filed his own motion to vacate the March 21, 2002 judgment. Appellant argued that the judgment was void because he was not properly served with a summons and complaint. Alternatively, appellant argued that he was entitled to relief from judgment pursuant to Civ.R. 60(B)(5). Appellant attached to his motion an affidavit, in which he stated, in part, that he was not personally served with the complaint, that he did not receive a copy of the complaint by either certified or ordinary mail, and that he had no advance knowledge of the magistrate's hearing. Appellant also stated that, at the relevant time, he did not live at the address where he was purportedly served. Neither Green nor FCCSEA filed a memorandum in opposition to appellant's motion to vacate.

{¶6} The trial court held a hearing on the motions to vacate on May 29, 2009, during which it heard arguments from counsel for all parties. FCCSEA's counsel stated that the 2002 Complaint to Set Support incorrectly assumed appellant's paternity of C.B. and that judgment was essentially entered without proving paternity. Appellant's counsel agreed and further argued that appellant was not served with the complaint, did not receive notice of the hearing to set support, and did not learn of the action against him until after the judgment of support had been entered. Appellant's counsel additionally argued that the support judgment was based on incorrect evidence of his income. Green's counsel added, however, that appellant paid support, pursuant to the

March 21, 2002 judgment, sporadically from May 2003 through 2009. While FCCSEA's counsel disputed appellant's contention that he was not served, stating that appellant was personally served at his parent's address, which was listed on his driver's license, both FCCSEA and appellant urged the court to vacate the 2002 judgment, dismiss the 2002 complaint, and proceed on the 2008 case against appellant.

{¶7} When appellant's counsel requested permission to present evidence at the May 29, 2009 hearing, the trial court responded that it was "not sure" it would "let [appellant] put on evidence on a Motion to Vacate." (Tr. 13.) The court went on to state, "I am not required on a Motion to Set Aside to allow evidence to be taken – additional evidence to be taken. That's up to my discretion. I don't believe that that's necessary for me to make a decision in this case." (Tr. 15.) Appellant's counsel nevertheless proffered evidence that appellant had not lived at the address where service was attempted since August 2001 and that appellant was never actually personally served with a copy of the complaint and had no advance notice of the magistrate's hearing to set support.

{¶8} On June 12, 2009, the trial court issued a decision and judgment entry denying the motions to vacate. The trial court summarily rejected appellant's claim that he was not served, based on indications in the court file that appellant was served personally and by certified mail. The court went on to deny appellant's motion because it was not filed within a reasonable time, as required for relief under Civ.R. 60(B)(5). The court also denied FCCSEA's motion as untimely and not in furtherance of the interests of justice.

{¶9} Appellant filed a timely notice of appeal, and he asserts the following assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in applying the standard for deciding a Civ. R. 60(B) motion due to lack of personal jurisdiction over Appellant.

SECOND ASSIGNMENT OF ERROR

The trial court abused its discretion when it failed to grant Appellant a hearing on his Motion to Vacate.

THIRD ASSIGNMENT OF ERROR

The trial court erred and abused its discretion in denying Appellant's Motion to Vacate.

Appellant's assignments of error are interrelated, and we address them together.

{¶10} Appellant moved the trial court to vacate the 2002 judgment as void for lack of service of process or, alternatively, pursuant to Civ.R. 60(B)(5), which authorizes relief from a final judgment for any reason justifying relief but not otherwise listed in Civ.R. 60(B). Although the trial court focused primarily on appellant's compliance with Civ.R. 60(B), we begin with appellant's contention that the trial court lacked personal jurisdiction over him, based on failure of service of process.

{¶11} Under Ohio law, a judgment rendered without personal jurisdiction over the defendant is void, and Ohio courts have inherent power to vacate a void judgment. *Gupta v. Edgcombe*, 10th Dist. No. 03AP-807, 2004-Ohio-3227, ¶12, citing *CompuServe, Inc. v. Trionfo* (1993), 91 Ohio App.3d 157, 161; *TCC Mgt., Inc v. Clapp*, 10th Dist. No. 05AP-42, 2005-Ohio-4357, ¶9-10. While a party against whom a void

judgment has been rendered must file a motion to vacate, the movant need not present a meritorious defense or establish that the motion was timely under Civ.R. 60(B) to be entitled to relief. *Id.*

{¶12} Personal jurisdiction is the authority of a court to enter a constitutionally binding judgment on a particular defendant, and it is an affirmative defense that may be waived. *Harris v. Mapp*, 10th Dist. No. 05AP-1347, 2006-Ohio-5515, ¶9, citing *NetJets, Inc. v. Binning*, 10th Dist. No 04AP-1257, 2005-Ohio-3934, ¶4; Civ.R. 12(H). A court may acquire personal judgment over a defendant in one of three ways: (1) proper service of process; (2) the defendant's voluntary appearance and submission; or (3) acts by the defendant or his counsel that involuntarily subject the defendant to the court's jurisdiction. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. "Where a defendant appears and participates in the case without objection, he waives the defense of lack of personal jurisdiction due to failure of service." *Harris* at ¶11. For a court to render judgment against a defendant who has not been served with process, the record must demonstrate that the defendant voluntarily submitted to the court's jurisdiction or committed other acts to constitute a waiver of the defense of lack of personal jurisdiction. *Id.* at ¶10, citing *Nichols, Rogers & Knipper LLP v. Warren*, 2d Dist. No. 18917, 2002-Ohio-107. "[A] defendant is considered to have waived his defense of lack of personal jurisdiction when his conduct does not reflect a continuing objection to the power of the court to act over the defendant's person." *Id.*

{¶13} When a party challenges the existence or sufficiency of service of process, the court is " 'guided by the premise that service is proper where the civil rules

on service are followed, unless sufficient evidence exists to rebut this principle.' " *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. No. 05AP-51, 2005-Ohio-5924, ¶27, quoting *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9th Dist. No. 21691, 2004-Ohio-3943, ¶4. "In determining whether a defendant has sufficiently rebutted the presumption of valid service, a trial court may assess the credibility and competency of the submitted evidence demonstrating non-service." *Bowling* at ¶33, citing *Clapp*.

{¶14} This court has held that, when service " 'is made at an address reasonably calculated to reach the defendant, a sworn statement by a defendant that he or she never was served with the complaint at least warrants the trial court's conducting a hearing to determine the validity of defendant's assertions.' " *Gupta* at ¶13, quoting *Wilson's Auto Serv., Inc. v. O'Brien* (Mar. 4, 1993), 10th Dist. No. 92AP-1406. See also *Nationwide Ins. Co. v. Mahn* (1987), 36 Ohio App.3d 251, 252. Thus, "a trial court errs in summarily overruling a defendant's motion to set aside a judgment for lack of service, when the defendant submits a sworn statement that she did not receive service of process, without affording the defendant a hearing." *Clapp* at ¶15, citing *Baumann v. Purchase Plus Buyer's Group, Inc.* (Nov. 29, 2001), 10th Dist. No. 01AP-297.

{¶15} In *Mahn*, the defendant in a subrogation action moved to vacate a default judgment for failure of service of process. The defendant asserted, via affidavit, that she neither resided at nor received mail at the address to which the summons and complaint were sent. Upon review, we stated that the defendant's uncontradicted affidavit should have, at least, afforded the defendant the opportunity to contest the issue of service at an evidentiary hearing. Similarly, in *Baumann*, this court reversed

where the trial court did not expressly rule on motions to set aside default judgments based, in part, on lack of proper service. At least one defendant in *Baumann* supported his motion with an affidavit, stating that he was not served by certified mail, personal service or residence service. While acknowledging that the court need not ultimately accept the defendant's claims as credible, we held that "the trial court erred in failing to conduct an evidentiary hearing to determine the validity of [the movant's] assertions concerning failure of service." See also *BancOhio Natl. Bank v. Lewis* (Jan. 27, 1981), 10th Dist. No. 80AP-665 (stating that a trial court cannot determine the credibility of an affidavit stating that the defendant did not receive service without an evidentiary hearing).

{¶16} Here, there is no suggestion that FCCSEA did not comply with the Ohio Rules of Civil Procedure in its attempts to serve appellant. The court file contains a certified mail receipt showing that the complaint and notice of the magistrate's hearing were delivered to 889 Caroway Boulevard in Gahanna, Ohio, the address listed on appellant's driver's license, and were signed for by someone with the last name of Huntley on January 26, 2002. When service is attempted via certified mail, a signed receipt returned to the sender establishes a prima facie case of delivery to the addressee. *Clapp* at ¶11. Valid service is presumed when any person at the defendant's address received the certified mail. *Id.* In addition to the evidence of certified mail service, the court file also contains a personal service return, stating that appellant was personally served at the same address on February 3, 2002.

Accordingly, there arose a presumption, albeit rebuttable by sufficient evidence, that appellant was properly served.

{¶17} Appellant supported his motion to vacate with an affidavit containing a sworn statement that he did not reside at the Caroway Boulevard address at the time of the alleged service and that he did not receive a copy of the complaint as a result of personal service, certified mail or ordinary mail. Based on his sworn statement, and pursuant to the above-stated authority, appellant was entitled to an evidentiary hearing in order for the trial court to properly evaluate and determine the credibility of his affidavit concerning failure of service. Although the trial court did hold a hearing on the motions to vacate, it refused appellant the opportunity to present evidence regarding the alleged failure of service, despite appellant's express request to present evidence. Instead, the court summarily rejected appellant's claimed lack of service based solely on the court file. Without an evidentiary hearing, however, "the trial court could not have appropriately assessed [appellant's] credibility or the persuasiveness of [appellant's] evidence and could not have determined whether [appellant] was truthful in alleging that he did not receive proper service of process." *Cincinnati Ins. Co. v. Emge* (1997), 124 Ohio App.3d 61, 64. See also *Wilson's Auto Serv., Inc.* For this reason, we sustain appellant's second assignment of error, reverse the trial court's judgment, and remand this matter for the trial court to conduct an evidentiary hearing on appellant's motion to vacate.

{¶18} Having determined that the trial court erred by not affording appellant an evidentiary hearing regarding failure of service, we conclude that appellant's first and

third assignments of error are moot because their resolution is dependent on the outcome of the evidentiary hearing on remand. Appellant's first assignment of error takes issue with the trial court's application of the Civ.R. 60(B) standards for relief from judgment, including the requirement that a motion for relief from judgment be filed within a reasonable time. Applicability of the standards for Civ.R. 60(B) relief depends upon the trial court's conclusion regarding service because, if the trial court were to conclude that appellant was not properly served and did not otherwise waive personal jurisdiction or voluntarily submit to the court's jurisdiction, appellant would not be required to meet the requirements for relief under Civ.R. 60(B).<sup>1</sup> Further, despite appellant's entitlement to an evidentiary hearing, the trial court is not required to credit appellant's denial of service. While a trial court may not summarily overrule a motion to vacate supported by an affidavit denying service, depending on the evidence presented at the hearing, the trial court need not believe the defendant's testimony that he was not served. *Gupta* at ¶13. Rather, the trial court may apply the standard measures for assessing credibility of evidence. See *Baumann*; *Clapp*. Thus, the trial court may ultimately conclude that service was properly perfected upon appellant, in which case the court may appropriately consider whether appellant was entitled to relief under Civ.R. 60(B) and may, if warranted, deny appellant's motion. Accordingly, we decline any further discussion of appellant's first and third assignments of error.

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<sup>1</sup> The trial court did not expressly consider whether, separate from the service issue, it possessed personal jurisdiction over appellant, and we decline to address that issue for the first time on appeal.

{¶19} In conclusion, we sustain appellant's second assignment of error and render moot appellant's first and third assignments of error. Consequently, we reverse the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, and remand this matter for further proceedings consistent with this decision.

*Judgment reversed and cause remanded.*

TYACK, P.J., and SADLER, J., concur.

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