

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

HSBC MORTGAGE SERVICES, INC., :
 :
Plaintiff-Appellee, : CASE NO. CA2011-05-088
 :
- vs - : OPINION
 : 5/21/2012
 :
CAROL M. BALLARD, et al., :
 :
Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-04-1918

Frost Brown Todd LLC, Erika J. Schoenberger and Katherine M. Klingelhafer, 10 West Broad Street, Suite 2300, Columbus, Ohio 43215, for plaintiff-appellee

Carol M. Ballard, 681 Magie Avenue, Fairfield, Ohio 45014, defendant-appellant, *pro se*

Discover Bank, 6500 New Albany Road, New Albany, Ohio 43054, defendant

Michael T. Gmoser, Butler County Prosecuting Attorney, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for defendant, Butler County Treasurer

POWELL, P.J.

{¶ 1} Defendant-appellant, Carol M. Ballard, who is one of several named defendants, appeals a decision of the Butler County Court of Common Pleas granting default judgment in favor of plaintiff-appellee, HSBC Mortgage Services, Inc., in a foreclosure action.

{¶ 2} Appellant and her now deceased husband refinanced their home located at 681 Magie Avenue, Fairfield, Ohio 45014. In 2005, HSBC became the holder of a note and a mortgage securing the Magie Avenue property. Appellant and her husband allegedly defaulted on the note. On April 30, 2010, HSBC initiated a foreclosure action against appellant and her husband seeking judgment in the amount of \$175,915.72, plus interest, fees, and costs. However, upon learning of the death of appellant's husband, HSBC filed an amended complaint on May 28, 2010, naming the estate of appellant's husband, rather than appellant's husband personally, as a defendant. Appellant never responded to either the original or amended complaint.

{¶ 3} As a result of appellant's failure to respond, HSBC filed for default judgment, which was granted by the trial court on September 29, 2010. Following an order of sale, publication, and notice of sheriff's sale, appellant filed a motion to stay and a notice of appeal on March 30, 2011. Despite her filings, the property sold at the sheriff's sale the following day.

{¶ 4} Appellant now appeals, but fails to argue separate assignments of error as required by App.R. 16(A) and Loc.R. 11. While in the interest of justice we may construe appellant's arguments as assignments of error, before addressing those arguments we must first determine whether appellant filed a timely appeal in order for this court to have jurisdiction.

{¶ 5} App.R. 4(A) requires a notice of appeal to be filed within 30 days of the later of "(1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B)." *Murdock v. Hyde*, 12th Dist. No. CA2007-11-289, 2008-Ohio-4313, ¶ 3. In essence, the 30-day time frame to file an appeal allotted by App.R. 4(A) begins to run from the date of the

entry of the judgment unless notice is not effectuated on a party in accordance with Civ.R. 58(B) within three days of the judgment. See *id.* Civ.R. 58(B) only requires the court to "endorse thereon a direction to the clerk to serve upon all parties *not in default for failure to appear* notice of the judgment and its date of entry upon the journal." (Emphasis added.) Furthermore, "[t]he failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A)." Civ.R. 58(B).

{¶ 6} In this case, the entry of the judgment and decree of foreclosure was entered on September 29, 2010. While there is no notation in the record that the clerk was instructed to serve or did in fact serve appellant with the judgment and decree in foreclosure, such was not required by Civ.R. 58(B) as appellant was in default for failure to appear. *Aguirre v. Sandoval*, 5th Dist. No. 2010CA00001, 2010-Ohio-6006; *W. Publishing Co. v. McCrae*, 4th Dist. No. 91CA1971, 1991 WL 260826, *3 (Nov. 21, 1991). Consequently, the 30-day time frame to file a notice of appeal began to run with the entry of the judgment and decree of foreclosure on September 29, 2010, well before appellant's filing of her notice of appeal on March 30, 2011. Accordingly, appellant failed to file a timely notice of appeal under App.R. 4(A), thereby divesting this court of jurisdiction. *Aguirre* at ¶ 30; *McCrae* at *3. However, one of appellant's arguments on appeal is that she has "never been served any foreclosure proceedings by either a process server or certified mail or had received any documentation from the counsel of the Plaintiff/Appellee." [sic]

{¶ 7} If we construe this argument to mean that appellant was not properly served with the amended complaint, then the default judgment against appellant is void, and we have authority to vacate the judgment. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64 (1956); *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 368 (2000). While the record in this case indicates a copy of the original complaint and

summons was personally served on appellant, there is no indication of personal service or completed certified mail service of the amended complaint and summons. Completed service by a process server or certified mail is not required by due process or Civ.R. 4. *Everbank Mtge. Co. v. Sparks*, 12th Dist. No. CA2011-03-021, ¶ 10.

{¶ 8} Service of process is consistent with due process standards where it is reasonably calculated, under the circumstances, to give interested parties notice of a pending action and an opportunity to appear. *Samson Sales, Inc. v. Honeywell, Inc.*, 66 Ohio St.2d 290, 293 (1981), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950). Civ.R. 4.6(D) permits service to be made by ordinary mail if the attempted service by certified mail is returned unclaimed, and provides that "[s]ervice shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." *Lipton v. Castanias*, 12th Dist. No. CA2009-11-152, 2010-Ohio-4300, ¶ 9, quoting Civ.R. 4.6(D). If the ordinary mail envelope is not returned, there is a rebuttable presumption that service has been perfected. *Hamilton v. Digonno*, 12th Dist. No. CA2005-03-075, 2005-Ohio-6552, ¶ 10. When the facts of a case establish such a rebuttable presumption, then generally a party's unsupported argument that notice was not received is insufficient to rebut the presumption that service was perfected. *Lipton* at ¶ 11.

{¶ 9} In this case, the record indicates that on May 28, 2010, HSBC's counsel requested "Personal and/or Residential Service" of the amended complaint on appellant. In addition, a copy of the amended complaint and summons was sent to appellant at the Magie Avenue address by certified mail on June 7, 2010. However, on June 25, 2010, the process server indicated on the return that appellant was "avoiding service," and the attempted service by certified mail returned unclaimed on June 28, 2010. As a result, and upon the request of HSBC's counsel, a copy of the amended complaint and summons was sent to

appellant at the Magie Avenue address via ordinary mail on June 30, 2010. There is no evidence in the record that the ordinary mail envelope was returned by the postal authorities with an endorsement showing failure of delivery. Thus, there is a rebuttable presumption that service was perfected.

{¶ 10} Appellant does not dispute that 681 Magie Avenue, Fairfield, Ohio 45014 is her address. In fact, appellant used the Magie Avenue address in her pleadings at the trial court level. We find that serving appellant at the Magie Avenue address was reasonably calculated to apprise her of the pending action and to provide her with an opportunity to appear. Furthermore, we find that appellant's unsupported argument that she was not properly served fails to rebut the presumption that service of HSBC's amended complaint was perfected by ordinary mail on June 30, 2010.

{¶ 11} Because appellant was properly served with the amended complaint and summons, appellant's notice of appeal is untimely pursuant to App.R. 4(A), and we lack jurisdiction to consider this appeal.

{¶ 12} Accordingly, appellant's appeal is dismissed.

RINGLAND and PIPER, JJ., concur.