[Cite as *Slomovitz v. Slomovitz*, 2010-Ohio-4361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94499

BRYAN SLOMOVITZ

PLAINTIFF-APPELLEE

vs.

DAWNA SLOMOVITZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-688225

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: September 16, 2010

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} In this accelerated appeal, appellant Dawna Slomovitz ("Dawna")[1] appeals the trial court's judgment refusing to vacate a judgment for lack of service and assigns the following error for our review:

> **"I. Whether a trial court may deny without hearing a motion to vacate or set aside a judgment where movant asserts by affidavit that the judgment is void for lack of service."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

[1]Because the parties share the same surname, they will be referred to by their first names to avoid confusion.

Facts

{¶ 3} Pursuant to the divorce decree entered between Bryan Slomovitz ("Bryan") and Dawna, Bryan had residential custody of their children. A visitation schedule was set up for Dawna, with the condition that she could not remove the children from Cuyahoga County, except for vacation.

{¶ 4} On March 24, 2009, Bryan filed a petition for a civil stalking protection order against Dawna on behalf of their children. The petition stated that Dawna had violated a restraining order and removed the children from Cuyahoga County and refused to return them. An ex parte order granting the restraining order was issued by the trial court. The matter was set for a full hearing on April 1, 2009.

{¶ 5} Dawna and Bryan were present at the hearing. The trial court informed Dawna that he was enforcing the visitation agreement the parties entered into in the domestic relations court, and emphasized, pursuant to the order, Dawna could not remove the children from Cuyahoga County, except for vacation periods. Dawna argued that she no longer resided in Cuyahoga County; the trial court explained that a change in the visitation agreement had to be done in the domestic relations court.

{¶ 6} On April 20, 2009, the trial court entered an order stating that neither party could remove the children from Cuyahoga County except for vacation periods of 14 days or less. On November 23, 2009, Dawna filed a motion to vacate or set aside the trial court's April 20, 2009 order based on

her contention the judgment was void because she was not served with notice of the hearing. The trial court denied the motion.

Failure to Hold a Hearing on a Motion to Vacate

{¶ 7} Dawna argues that the trial court abused its discretion by refusing to conduct a hearing prior to denying her motion to vacate its order prohibiting her from removing her children from Cuyahoga County.[2] She contends the trial court lacked personal jurisdiction over her due to ineffective service.

{¶ 8} Relying on *Money Tree Loan Co. v. Williams,* 169 Ohio App.3d 336, 2006-Ohio-5568, 862 N.E.2d 885, Dawna argues the trial court was obligated to conduct a hearing because she submitted an affidavit in which she denied receiving service. This court in *Money Tree*, stated:

> **"'It is reversible error for a trial court to disregard unchallenged testimony that a person did not receive service.' *Rafalski v. Oates,* 17 Ohio App.3d 65 at 67, 17 OBR 120, 477 N.E.2d 1212. Such a sworn statement at least warrants the trial court in conducting a hearing to determine the validity of the movant's statement. *Nationwide Ins. Co. v. Mahn* (1987), 36 Ohio App.3d 251, 522 N.E.2d 1096; *Wilson's Auto Serv., Inc. v. O'Brien* (Mar. 4, 1993), Franklin App. No. 92AP-1406, 1993 WL 54667."** Id. at ¶10.

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[2]We note that while Dawna filed a motion to vacate the judgment, she did not have to satisfy the requirements of Civ.R. 60(B). Trial courts have inherent authority to vacate a void judgment; thus a party who asserts a lack of jurisdiction by improper service does not need to meet the requirements of Civ.R. 60(B). *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph four of the syllabus; *Deutsche Bank Trust Co. Americas v. Pearlman*, 162 Ohio App.3d 164, 2005-Ohio-3545, 832 N.E.2d 1253, at ¶14.

{¶ 9} Dawna's counsel at oral argument admitted that when he made this argument, he was unaware that a hearing had been conducted regarding the protection order and that the transcript showed Dawna appeared at the hearing. This is a crucial fact. Because the trial court presided over the hearing on the protection order, it was able to determine that the affidavit Dawna attached to her motion to vacate was contradicted by the transcript.

{¶ 10} In order for a court to acquire personal jurisdiction over a party, there must be proper service of a summons and complaint, or the party must have entered an appearance, affirmatively waived service, or otherwise voluntarily submitted to the court's jurisdiction. Id. at ¶18; *Patterson v. Patterson*, Cuyahoga App. No. 86282, 2005-Ohio-5352, at ¶12, citing *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-157, 464 N.E.2d 538. A waiver by appearance is one where the party appears "for any other purpose than to object to jurisdiction." *Michigan Millers Mut. Ins. Co. v. Christian*, 153 Ohio App.3d 299, 2003-Ohio-2455, 794 N.E.2d 68, at ¶10. In spite of Dawna's allegation otherwise, she did appear at the hearing. The hearing transcript also indicates that she did not object to the court's jurisdiction. Instead, she participated in the hearing by setting forth her arguments against the enforcement of the protection order. Therefore, because the court was aware

that Dawna was present at the hearing and did not object to service, there was no need to conduct a hearing prior to denying the motion to vacate.[3]

{¶ 11} Moreover, because Dawna failed to challenge the trial court's jurisdiction at the hearing, she waived any argument as to the court's personal jurisdiction. As the court in *McBride v. Coble Express, Inc.* (1993), 92 Ohio App.3d 505, 510, 636 N.E.2d 356, held:

> **"A defendant may always concede personal jurisdiction; indeed, any objection to assumption of personal jurisdiction is waived by a party's failure to assert a challenge at its first appearance in the case, and such defendant is considered to have consented to the court's jurisdiction. Once an action has been determined on its merits, after the considerations of notice and due process have been satisfied without challenge, a defendant waives its right to contest personal jurisdiction and has impliedly consented to the forum's assumption of jurisdiction."**

{¶ 12} Because Dawna failed to object to the court's personal jurisdiction when she first appeared in the case, the issue is also waived for appellate

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[3]At oral argument, counsel for Dawna suggested a different standard should apply to pro se litigants. However, "pro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel and they are not to be accorded greater rights and must accept the results of their own mistakes and errors." *Cleveland v. Fritos*, Cuyahoga App. No. 81404, 2003-Ohio-33, at ¶15, citing *Meyers v. First Natl. Bank* (1981), 3 Ohio App.3d 209, 444 N.E.2d 412.

purposes. *McBride* at 510; *Columbus Homes Ltd. v. S.A.R. Constr. Co.*, 10th Dist. Nos. 06AP-759 and 06AP-760, 2007-Ohio-1702, ¶44. Even if we conducted a plain error analysis, the transcript of the hearing indicates that there was no merit to Dawna's allegation that the court lacked personal jurisdiction. Accordingly, Dawna's assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR