[Cite as *Cleveland State Univ. v. Woods*, 2010-Ohio-5144.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94561

CLEVELAND STATE UNIVERSITY

PLAINTIFF-APPELLEE

vs.

WILLIAM D. WOODS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 2006CVF034024

BEFORE: Rocco, P.J., Kilbane, J., and Boyle, J.

RELEASED AND JOURNALIZED: October 21, 2010

APPELLANT

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KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant William Woods, proceeding pro se, appeals from the order of the Cleveland Municipal Court that denied his successive motion to vacate a default judgment rendered against him in favor of plaintiff-appellee Cleveland State University on its complaint for payment on a promissory note.

{¶ 2} Woods presents four assignments of error. In them, he claims the municipal court never obtained personal jurisdiction over him, erroneously granted CSU's motion for default judgment in the first place, improperly dismissed his answer and counterclaim, and wrongly denied his most recent motion to vacate the default judgment.

{¶ 3} Upon a review of the record, this court finds no error. Consequently, the municipal court's order is affirmed.

{¶ 4} The App.R. 9(A) record reflects CSU originally filed this action nearly four years ago, on December 27, 2006. CSU sought payment on a promissory note Woods executed in June 1995; CSU alleged that, as of December 7, 2006, Woods owed $2,531.54 on the account.[1]

{¶ 5} CSU attempted service of the complaint on Woods by certified mail sent to "4236 E. 188th St. Cleveland, OH 44122" but the post office returned the envelope as "Unclaimed" and "Unable to Forward." CSU then requested the municipal court clerk to reissue the summons by regular mail to the same address. The record reflects the clerk did so on January 31, 2007.

{¶ 6} There is a presumption of proper service when the civil rules governing service are followed. *State ex rel. Strothers v. Madden* (Oct. 22, 1998), Cuyahoga App. No. 74547. Woods's answer was due on March 14, 2007; he failed to respond.

{¶ 7} On May 25, 2007, CSU filed a motion for a default judgment against Woods. The motion was supported by, inter alia, copies of the necessary documents and the affidavit of CSU's Associate Director, who stated Woods owed $2,531.54 on the account as of December 6, 2006.

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[1]Although CSU neglected to attach copies of the pertinent documents as required by Civ.R. 10(D)(1), it later supplied these to the court.

{¶ 8} On July 30, 2007, a municipal court magistrate conducted a hearing on CSU's motion, and on August 27, 2007, recommended the motion be granted. On August 31, 2007, the municipal court granted CSU's motion for a default judgment against Woods in the amount of $2,531.54.

{¶ 9} On November 21, 2007, Woods filed a motion "to vacate" the default judgment, i.e., a Civ.R. 60(B) motion for relief from judgment. He asserted he did not reside at "the serviced address," and "never received a copy of the complaint." He provided a new address, but no affidavit to support his assertions.

{¶ 10} CSU filed a brief in opposition to Woods's motion. The record reflects the municipal court nevertheless granted it; the court's journal entry, filed on June 24, 2008, stated only as follows:

{¶ 11} "Hearing held on defendant's motion to vacate on April 16, 2008. For good cause shown, motion is granted. Case is re-set for evidentiary hearing on July 24, 2008 at 2:30 pm in Courtroom 12-D."

{¶ 12} Attached to the journal entry was an order directing the clerk of court to change Woods's address from the one to which CSU sent the complaint. However, since no transcript of the hearing appears in the App.R. 9(A) record, the basis for the trial court's decision remains unclear.

{¶ 13} The evidentiary hearing proceeded as scheduled. On August 1, 2008, the magistrate issued a decision that stated that Woods failed to appear at

the July 24, 2008 hearing; the magistrate therefore recommended that a default judgment again be rendered in favor of CSU on its complaint. The municipal court adopted the decision the same day.

{¶ 14} On August 11, 2008, Woods filed an untimely request for findings of fact and conclusions of law.[2] Two days later, on August 13, 2008, Woods filed timely "objections" to the magistrate's report. He additionally filed a "motion to reconsider" the second default judgment, and, separately and without leave of court, an "answer and counterclaim" against CSU.

{¶ 15} As grounds for his "objections," he asserted he failed to appear because "his vehicle was impaired" and that its "transmission went out while [he] was en route to the hearing * * *." Woods presented an affidavit in support of his assertion, but it was not his own, rather, it was that of a mechanic, and the notary's name affixed to the affidavit was neither legible nor printed.

{¶ 16} In his "motion to reconsider" the August 1, 2008 judgment entry, Woods again asserted he had been unable to attend the hearing due to car trouble. In his "answer and counterclaim," Woods denied the allegations of the complaint. Woods alleged CSU "at some time prior to June 6, 1995 * * * used [its] resources to acquire control over [his] own personally identifiable

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[2] At the bottom of the magistrate's decision, the following appeared: "Pursuant to Civil Rule 52 and local rules of court, requests for findings of fact and conclusions of law must be filed within seven (7) days of the filing of the magistrate's decision."

information." Thus, he *intimated* he, himself, had never signed the promissory note.

{¶ 17} On September 10, 2008, the magistrate issued an "amended decision" concerning the July 24, 2008 hearing. In more detail, the magistrate indicated the reasons CSU deserved a default judgment. The municipal court adopted the magistrate's decision the same day.[3]

{¶ 18} On September 25, 2008, Woods filed "objections to the amended magistrate's decision." The municipal court eventually acted upon the matter nearly a year later, on June 24, 2009, when it issued a journal entry overruling Woods's objections.

{¶ 19} On September 16, 2009, Woods filed another motion "to vacate" the default judgment. He set forth several grounds and attached several exhibits to his motion. None was verified, and he again failed to present his own affidavit.

{¶ 20} On October 6, 2009, CSU filed an opposition motion. On November 16, 2009, the municipal court issued a journal entry ordering Woods's counterclaim "stricken from the file" as untimely.

{¶ 21} The record reflects Woods's successive motion for relief from judgment proceeded to a hearing held on November 25, 2009.[4] On December

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[3]The journal entry mistakenly is stamped with the words "Findings of fact and conclusions of law are hereby filed."

[4]As previously mentioned, since this appeal proceeded pursuant to App.R.

24, 2009, the magistrate filed a written decision detailing the history of the case and recommending Woods's motion be denied for two reasons: 1) he used his motion as a substitute for an appeal; and, 2) his arguments were barred by the doctrine of res judicata.

{¶ 22} On December 24, 2009, the municipal court adopted the magistrate's report. Woods filed his notice of appeal from that order.

{¶ 23} He presents four assignments of error.

{¶ 24} "I. The Trial Court erred by failing to ensure proper commencement through effective service of process to Mr. Woods.

{¶ 25} "II. The Trial Court erred when it struck Defendant's Answer and Counterclaim which presented a meritorious defense and claim.

{¶ 26} "III. The Trial Court erred when it granted a second default judgment to the Plaintiff then failed to vacate its decision.

{¶ 27} "IV. The Trial Court erred when it granted to the Plaintiff, CSU, a default judgment that was based on fraud."

{¶ 28} In his first and third assignments of error, Woods essentially argues the municipal court incorrectly denied his motion for relief from judgment because he demonstrated a "reason justifying relief" pursuant to Civ.R. 60(B)(5), i.e., that

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9(A), the record contains no transcripts.

he never actually received CSU's original complaint. Woods's arguments cannot be addressed at this juncture.

{¶ 29} The record reflects on June 24, 2009, the municipal court filed its journal entry overruling Woods's objections to the second entry of default judgment in CSU's favor. This constituted a final order. Woods neither filed timely objections to that order, nor filed an appeal. Faced with a similar situation, this court observed as follows:

{¶ 30} "* * * App.R. 4(A) requires that a notice of appeal be filed within thirty days of the date of the judgment appealed from. This requirement is jurisdictional and may not be extended by the appellate court. Because [the instant] appeal * * * was filed a year and a half later, this court lacks jurisdiction to entertain * * * arguments contained in the [first] motion to vacate.

{¶ 31} "The second motion to vacate does not resolve the jurisdictional problem, because res judicata prevented [appellant] from reasserting the arguments that were raised or could have been raised in the first motion to vacate. 'Principles of res judicata prevent relief on successive, similar motions [to vacate] raising issues which were or could have been raised originally.' (Footnotes omitted.)" *D'Agnese v. Holleran*, Cuyahoga App. No. 83367, 2004-Ohio-1795, ¶19-20, citing *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 13, 448 N.E.2d 809. See, also, *Doe v. Winters* (Sept. 10, 1999), Cuyahoga App. No. 74384.

{¶ 32} Accordingly, Woods's first and third assignments of error are overruled.

{¶ 33} Woods argues in his second assignment of error that the municipal court acted improperly in striking his untimely pleadings. This argument also is rejected.

{¶ 34} Civ.R. 12 and 13 require answers and compulsory counterclaims to be filed within 28 days of service of the complaint. In the absence of competent evidence to the contrary, the record in this case demonstrates Woods's answer with counterclaim was due by March 14, 2007. *Cincinnati v. Emge* (1997), 124 Ohio App.3d 61, 705 N.E.2d 408. Since Woods never requested leave to file his untimely pleadings pursuant to Civ.R. 6(B), the municipal court justifiably struck them. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 404 N.E.2d 752.

{¶ 35} Woods argues in his fourth assignment of error that the municipal court acted improperly in denying his successive motion for relief from judgment because he demonstrated he was the victim of "fraud." This court disagrees.

{¶ 36} In *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 448 N.E.2d 809, at paragraph one of the syllabus, the supreme court held: "Pursuant to Civ.R. 60(B)(5), a court in appropriate circumstances may vacate a judgment vitiated by a fraud upon the court." However, that holding has been limited; it pertains only to acts of fraud that are perpetrated by an *officer* of the court. *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158.

{¶ 37} Moreover, even if it were not so limited, the movant bears the burden of supplying evidence to establish his claim. The record of this case shows Woods very carefully never submitted his own affidavit to support any of the claims he made in his motions, including his claim of "fraud." Under these circumstances, the municipal court properly denied his successive motion for relief from judgment. *Koly v. Nassif*, Cuyahoga App. No. 88399, 2007-Ohio-2505; *Dawson v. Udelsen* (1987), 37 Ohio App.3d 141, 524 N.E.2d 525.

{¶ 38} Woods's fourth assignment of error, accordingly, also is overruled.

{¶ 39} The municipal court's order is affirmed.

It is ordered that appellee recover from appellant 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.

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KENNETH A. ROCCO, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS
MARY EILEEN KILBANE, J., DISSENTS