[Cite as *Holt Co. v. Perry*, 2003-Ohio-7347.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

HOLT COMPANY OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 01CA9 & 01CA14
	:	(Consolidated)
v.	:	
	:	
DEBRA L. PERRY, ET AL.,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendants-Appellants.	:	**RELEASED 3/20/03**

APPEARANCES:

APPELLANTS PRO SE:
Debra L. Perry
4962 State Route 650
Ironton, Ohio 45638

Philip G. Kline
6016 State Route 650
Ironton, Ohio 45638

COUNSEL FOR APPELLEE:
Larry J. McClatchey
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EVANS, P.J.

{¶1} Defendants-Appellants Debra L. Perry and Philip G. Kline appeal the decision of the Lawrence County Court of Common Pleas, which entered default judgment against them and in favor of Plaintiff-Appellee Holt Company of Ohio. Appellants argue that the

judgment against them is void because they never received service of appellee's complaint.

{¶2} For the reasons that follow, we disagree with appellants and affirm the judgment of the trial court.

Procedural History

{¶3} This appeal has a long and tortuous history in this Court. Accordingly, while tedious, we find it necessary to provide a more detailed accounting of the case's procedural history before the trial court and this Court.

{¶4} On August 28, 2000, Plaintiff-Appellee Holt Company of Ohio filed in the Lawrence County Court of Common Pleas a complaint against Defendants-Appellants Debra L. Perry and Philip G. Kline and Defendant Ironton Country Club, Inc. Appellee sought to satisfy a judgment it had obtained against Kline in the Franklin County Court of Common Pleas.[1] Specifically, appellee sought the forced sale of certain real property in which Kline allegedly had an interest. Evidently, Kline purchased the property from the Ironton Country Club, but instructed that the deed be drafted so that Perry was named as the property's legal owner. The deed to this property was never recorded, leaving the Ironton Country Club listed as the legal owner of the property in the Lawrence County Recorder's Office.

[1] In *Holt Co. of Ohio v. Kline* (Apr. 7, 2000), Franklin C.P. No. 99CVH11-10064, appellee was awarded the following: (1) compensatory damages of $72,674.34, plus interest at 10 percent per annum; (2) punitive damages of $28,500; and, (3) attorney's fees and costs of $16,329.66. Appellee recorded a certificate of judgment with the clerk of the Lawrence County Court of Common Pleas, constituting

{¶5} Accordingly, appellee also named the Ironton Country Club as a defendant.

{¶6} Appellee simultaneously filed a praecipe with its complaint requesting that the sheriff make personal or residence service of the summons and complaint on both Perry and Ironton Country Club and that Kline be served via certified mail. Service on Ironton Country Club was completed on September 14, 2000, and the club's answer was subsequently filed. On September 18, 2000, postal authorities returned the envelope and documents sent to Kline by certified mail, indicating it was unclaimed.

{¶7} On October 20, 2000, appellee filed a request for service upon Kline by ordinary mail. The clerk filed a certificate of mailing indicating that a summons and complaint was sent to Kline via regular mail. On October 27, 2000, the summons and complaint sent to Kline via ordinary mail were returned to the clerk's office in the original envelope. Attached to the front of the envelope was a photocopy of a document titled "Third Party Affidavit of Mailing." The envelope bore no official endorsement by postal authorities indicating that it had not been delivered.

{¶8} On October 20, 2000, appellee filed another praecipe requesting again that the sheriff attempt personal or residence service of the summons and complaint on Perry. The praecipe also requested that service via certified mail be made upon Perry. On

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a lien upon any real property in Lawrence County in which Kline had an interest.

October 23, 2000, the sheriff filed its return of service indicating that Perry was not served because she supposedly did not live at the address given. Also, the certified mailing to Perry was returned to the clerk's office indicating that it had been unclaimed.

{¶9} Undeterred by the frustration of its prior efforts, appellee again requested the clerk's office to serve Perry via certified mail. These documents were again returned to the clerk indicating that they were unclaimed.

{¶10} Finally, appellee filed a request for service upon Perry via ordinary mail. Along with its request for service via ordinary mail, appellee included a confirmation from the postmaster in Ironton, Ohio, that Perry's mail was being delivered to the address given by appellee to the clerk. On November 16, 2000, the clerk filed a certificate of mailing indicating that the summons and complaint were sent to Perry via ordinary mail. This final mailing was returned to the clerk's office in its original envelope with no indication from postal authorities that delivery had failed. But, unlike the return of the ordinary mail sent to Kline, these documents were sent back to the clerk via certified mail in a manila envelope without a return address.

{¶11} On December 27, 2000, appellee filed a motion for default judgment. In addition to seeking default judgment against Perry and Kline, appellee moved to dismiss the Ironton Country Club from the action. The trial court granted appellee's motion and rendered

judgment in appellee's favor and against appellants. The trial court found that Perry and Kline were both served via ordinary mail, which had not been returned by the postal service with an endorsement showing a failure of delivery. The trial court further found that Perry had no beneficial interest in the property at issue and that it was in fact owned by Kline. Accordingly, the trial court dismissed the Ironton Country Club and ordered the sale of the property, with the proceeds, after taxes and court costs, being applied towards appellee's unsatisfied judgment.

{¶12} Subsequently, appellee filed another praecipe with the clerk of courts requesting that Perry and Kline be issued notice of the trial court's judgment and that an order of sale be issued as well. On January 23, 2001, the clerk sent copies of the trial court's decision to appellants via ordinary mail. Perry's envelope was returned on February 6, 2001, marked "refused" by postal authorities. Kline's envelope was returned on February 5, 2001, marked "return to sender" by its recipient.

{¶13} On January 22, 2001, appellants appealed the trial court's judgment granting default judgment to appellee. In addition, however, appellants filed several other documents with this Court, including a motion to stay the execution of the trial court's judgment pending appeal and a document titled "Interpleader."

{¶14} Appellee filed a memorandum in opposition to appellants' motion seeking the stay. On February 8, 2001, we declined to

consider appellants' motion for a stay because appellants had not sought a stay in the trial court as required by App.R. 7. At that time, we also noted that appellants' pro se notice of appeal was intended to be filed on behalf of both Kline and Perry, but the filing was only signed by Kline. Accordingly, we informed Kline in our entry that he was prohibited from practicing law (i.e., representing Perry) as he did not have a license to do so. Nevertheless, we held that appellants could submit an amended notice of appeal endorsed by both Perry and Kline, thus joining Perry as an appellant in the appeal.

{¶15} Subsequently, appellants filed a motion for a stay with the trial court. Also, appellants filed an amended notice of appeal endorsed by both Perry and Kline. Appellee filed a memorandum opposing appellants' motion and a motion to strike the document titled "Interpleader." Appellee asserted that the "Interpleader" was not proper as appellants had already appealed the trial court's judgment. Perry filed a document entitled "Amended Interpleader," which was essentially the same document as the original "Interpleader."

{¶16} On March 14, 2001, the trial court filed an entry denying appellants' motion for a stay and striking the "Interpleader" filed by Perry. On March 22, 2001, appellants appealed the trial court's denial of their motion for a stay and the trial court's decision to

strike the "Interpleader." This second appeal was subsequently consolidated with the initial appeal.

{¶17} Appellants renewed their motion for a stay with this Court. On March 27, 2001, we filed an entry granting the stay on the condition that appellants post a bond in the amount of $10,200, the appraised value of the property at issue. Appellants failed to post the bond required by this Court and the property was sold at a sheriff's sale. Thereafter, appellants moved this Court to issue an order demanding that appellee demonstrate why it should not be held in contempt due to the forced sale of the property at issue. We denied appellants' motion, indicating to appellants that the stay never became effective because they failed to secure a bond as instructed in our earlier entry.

{¶18} On June 29, 2001, we removed this appeal from our active docket based on information that appellants had an action pending in the Bankruptcy Court that was filed under Chapter 11 of the United States Bankruptcy Code. Pursuant to Title 11, Section 362(a) of the United States Code, this appeal was automatically stayed.

{¶19} On September 26, 2001, this Court was informed of the dismissal of appellants' bankruptcy action, but that the dismissal was being appealed to the Bankruptcy Appellate Panel. After discovering that the bankruptcy action had been terminated, we issued an entry asking appellants whether they intended to proceed with their appeals. On April 23, 2002, appellants filed their response

indicating that they were proceeding with their appeals. On May 13, 2002, we issued an entry placing the appeals back onto the Court's active docket, striking, for failure to comply with the appellate rules, certain briefs that had been previously filed by appellants, and setting forth the briefing schedule for issues raised in appellants' second appeal.

{¶20} On May 28, 2002, appellants filed a motion for reconsideration asking this Court to reconsider its decision to strike the briefs that did not comply with the appellate rules. Appellants' motion for reconsideration was denied. Appellants then filed a motion asking this Court to reconsider the denial of their prior motion for reconsideration. This motion was also denied.

{¶21} On July 26, 2002, appellants sent an affidavit of disqualification to the Supreme Court of Ohio, alleging that a number of the judges of this Court were biased. However, that affidavit was not accepted for filing because it failed to meet all of the requirements of the Ohio Revised Code. Appellants sent an amended affidavit of disqualification to the Supreme Court of Ohio, this time meeting the requirements of the Ohio Revised Code. Accordingly, no further rulings could be made in this matter until the Chief Justice of the Supreme Court of Ohio ruled on that affidavit.

{¶22} On October 23, 2002, the Chief Justice denied appellants' request for disqualification. Nevertheless, on November 8, 2002, appellants sent another affidavit of disqualification to the Supreme

Court of Ohio, alleging that the judges of this Court were biased and prejudiced. Appellants' second affidavit of disqualification was not accepted for filing as it did not meet the statutory requirements.

{¶23} Accordingly, we are now able to address the issues in appellants' appeals.

Analysis of the Issues Presented for Review

{¶24} As we already noted, appellants' appeals (01CA9 and 01CA14) were consolidated for all purposes. Those appeals were timely filed and present the following assignments of error for our review.

{¶25} First Assignment of Error: "The lower court lacked jurisdiction in this case due to the lack of service upon Appellants."

{¶26} Second Assignment of Error: "Denial of Motion To Stay Final …, was done in error including the lack of service and lack of jurisdiction."

{¶27} Third Assignment of Error: "The Interpleader was a proper venue for Debbie Perry, since the lower court left no other opportunities for her to be heard; including lack of service and jurisdiction."

I. Service Upon Appellants

{¶28} Ohio law clearly provides that a judgment rendered without personal jurisdiction over a defendant is void ab initio rather than voidable. See, e.g., *CompuServe, Inc. v. Trionfo* (1993), 91 Ohio App.3d 157, 161, 631 N.E.2d 1120. Accordingly, a judgment rendered

without proper service is a nullity and is void. See *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 64, 133 N.E.2d 606. The authority to vacate a void judgment, therefore, "is not derived from Civ.R. 60(B), but rather constitutes an inherent power possessed by Ohio courts." *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, at paragraph four of the syllabus.

{¶29} "Courts will presume service to be proper in cases where the civil rules are followed unless the defendant rebuts the presumption by sufficient evidence." *Bank One Cincinnati, N.A. v.. Wells* (Sept. 18, 1996), Hamilton App. No. C-950279, citing *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 650, 641 N.E.2d 739.

{¶30} Civ.R. 4.1 provides three methods of service of a summons and complaint upon a defendant: 1) certified mail; 2) personal service; and, 3) residence service. In the event that service upon a defendant is not accomplished via these means, service may also be made via ordinary mail. See Civ.R. 4.6. Civ.R. 4.6(D) provides that, "If a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint *** to the defendant at the address set forth in the caption, or at

the address set forth in written instructions furnished to the clerk."

{¶31} The record in this case reveals appellee's numerous and painstaking efforts to serve the complaint and summons upon appellants. Service was attempted as outlined in Civ.R. 4.1 (i.e., personal, residence, and certified mail). However, after those attempts to serve appellants were thwarted, appellee relied on Civ.R. 4.6 and requested service by ordinary mail.

{¶32} The clerk sent to each appellant a summons and complaint via ordinary mail and filed a certificate of mailing for each one. Eventually, both mailings were returned to the clerk. As we noted previously, one mailing was returned with a document stapled to it titled "Third Party Affidavit of Mailing," the other was returned in a manila envelope sent via certified mail.

{¶33} Civ.R. 4.6 provides in part, "Service 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." The "fact of mailing" was entered into the record by the clerk's certificate of mailing. Further, although both mailings were returned to the clerk's office, they were not returned by the postal authorities "with an endorsement showing failure of delivery." Accordingly, service was deemed complete as of the clerk's filing of a certificate of mailing. See Civ.R. 4.6(D).

{¶34} Nevertheless, appellants assert that they did not receive service of the complaint. Accordingly, appellants assert that the trial court lacked personal jurisdiction over them and that its entry of default judgment is void. As we have already found, service was deemed complete as of the filing of the clerk's certificate of mailing. We note that appellants do not specifically assert any facts that would explain or support their assertion that service upon them was not properly completed (e.g., the wrong mailing addresses were used). They only make the unsupported and general argument that they were not served with the complaint. The record, however, indicates that this is not the case.

{¶35} Appellants have failed to provide sufficient evidence to overcome the presumption that service was proper. Therefore, we overrule appellants' First Assignment of Error.[2]

II. Remaining Assignments of Error

{¶36} Based on our disposition of appellants' First Assignment of Error, we find that the remaining assignments of error are rendered moot. See App.R. 12(A)(1)(c).

Conclusion

{¶37} For the foregoing reasons, we affirm the decision of the trial court granting default judgment against appellants.

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[2] We note that Ohio courts prefer that cases be decided on the merits, as opposed to default judgments. See *Bank One Cincinnati*, supra, citing *Rice v. General Dynamics Land Systems* (1993), 86 Ohio App.3d 841, 844, 621 N.E.2d 1304. Despite this preference, however, we see no reason why the default judgment against appellants should be reversed.

Judgment affirmed.

Harsha, J., and Abele, J.: Concur in Judgment Only.

FOR THE COURT

BY: _____
David T. Evans
Presiding Judge