[Cite as *Young v. Young*, 2001-Ohio-3248.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RONALD YOUNG, et al.,	)	
	)	CASE NO. 00 BA 8
PLAINTIFFS-APPELLEES,	)	
	)	
- VS -	)	O P I N I O N
	)	
LARRY YOUNG, et al.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 96 CV 356.
JUDGMENT:	Reversed.
APPEARANCES:	
For Plaintiffs-Appellees:	Attorney Michael Shaheen 227 East Main Street P.O. Box 579 St. Clairsville, Ohio 43950
For Defendants-Appellants:	Attorney Rudy Bisciotti 2201 Riverside Drive, Suite 213 Columbus, Ohio 43221

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: May 7, 2001

VUKOVICH, P.J.

{¶1} Defendants-appellants Larry Young and Theresa Pilarsch Young appeal a judgment rendered by the Belmont County Common Pleas Court finding them in contempt. For the following reasons, the judgment of the trial court is reversed.

STATEMENT OF THE FACTS

{¶2} Plaintiffs-appellees Ronald Young and Patricia Young are Larry's parents. Larry and Theresa are married. Larry and appellees agreed to enter into a business relationship. As part of the endeavor, Ronald included Larry's name on the deed to his family farm so that Larry could obtain financing for the business. Larry borrowed $40,000 from Beneficial Financial ("Beneficial") giving them a mortgage on the farm.

{¶3} Appellees filed a complaint against appellants, alleging that the parties had an oral agreement, whereby appellants would make substantial payments to Beneficial in order to have the lien removed in a timely fashion. The complaint further alleged that appellants were obligated to pay appellees $1,000 each month that the lien remained on the property. The complaint alleged that appellants made regular payments to Beneficial, but ceased making substantial payments. It also alleged that appellants stopped making the $1,000 payments to appellees.

{¶4} Prior to trial, the parties notified the trial court that they had reached a settlement. On January 22, 1999, the trial court entered a judgment reflecting the terms of that agreement. The entry provided in pertinent part:

{¶5} "Within 15 days of the date of the Entry, Plaintiffs, Defendant Larry Young, and Theresa Dawn Young shall undertake to cooperate with Beneficial Finance and likewise shall provide appropriate, and necessary documentation, applications, information, etc. as requested by Beneficial Finance so as to assure a completion of the modification of security interest

applicable to the subject property. Furthermore, the parties herein agree that the above-referenced documentation etc. shall be completed and provided Beneficial in a timely fashion." (*Sic*).

{¶6} On March 22, 1999, appellees filed a motion for contempt against Larry. In the motion, appellees asserted that Larry violated the trial court's January 22, 1999 order because he failed to contact Beneficial within 15 days. That motion was later withdrawn.

{¶7} On June 24, 1999, appellees filed another motion for contempt against Larry. This motion also alleged that Larry violated the January 22, 1999 order. However, this motion claimed that Larry voluntarily quit his job. Appellees contended that Larry divested himself of all his assets, placing them in Theresa's name so that he would not be approved for financing. Larry's application for refinancing with Beneficial was denied. Appellees argued that such actions on the part of Larry were fraudulent and contemptuous.

{¶8} A hearing was held on the matter. The trial court entered a judgment finding both Larry and Theresa in contempt. They were ordered to pay attorney fees in the amount of $1,200 to appellees' counsel. This appeal followed.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

{¶9} Appellants allege three assignments of error on appeal. The first two have a common basis in law and fact and will therefore be discussed together. They respectively allege:

{¶10} "THE TRIAL COURT'S JANUARY 18, 2000 ORDER FINDING DEFENDANTS IN CONTEMPT OF COURT IS CONTRARY TO LAW AND REFUTED BY THE UNDISPUTED EVIDENCE AND FACTS."

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED PLAINTIFFS' MOTION FOR CONTEMPT."

{¶12} Appellants contend that the trial court ignored all the relevant and credible evidence at the hearing. They insist that

the evidence established that they complied with the January 22, 1999 order. As such, they argue that the trial court abused its discretion when it found them in contempt.

{¶13} Appellees note that the January 22, 1999 order reflected the settlement agreement between the parties. They argue that the agreement was made with the understanding that Larry would provide the necessary information to secure financing through Beneficial, regardless of whether the information was requested of him. They contend that because Larry left his employment and failed to notify Beneficial of this, his refinancing was denied.

STANDARD OF REVIEW

{¶14} In a civil contempt proceeding, the movant bears the initial burden of proving by clear and convincing evidence that the other party violated a court order. *Carroll v. Detty* (1996), 113 Ohio App.3d 708, 711 citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250. "Clear and convincing evidence" is a degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74. "Clear and convincing evidence" is that which will produce in the mind of the trier-of-fact a firm belief or conviction as to the facts sought to be established. *Id.* Once the *prima facie* case has been established by clear and convincing evidence, the burden shifts to the non-moving party to either rebut the initial showing of contempt or establish an affirmative defense by a preponderance of the evidence. *Pugh v. Pugh* (1984), 15 Ohio St.3d 136, 140; *Haynes v. Kaiser* (Oct. 18, 1996), Geauga App. No. 96-G-1984, unreported.

{¶15} A trial court's finding of contempt will not be reversed absent an abuse of discretion. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11. An abuse of discretion is more than an error of law or judgment; rather, it is an unreasonable,

arbitrary or unconscionable attitude by the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

LAW AND ANALYSIS

{¶16} In the trial court's opinion[1], it found that months lapsed before appellants commenced definitive action to comply with the January 22, 1999 order. In finding contempt, it held, "* * * this court further finds the settlement entry itself contemplated some delay occasioned by the outstanding obligations of the parties and the necessary cooperation from Beneficial Finance. However, the sixty day delay in commencing definite action and other dilatory actions constitute contempt of court."

{¶17} The trial court's opinion indicates the basis for finding appellants in contempt was a delay on their part in complying with the January 22, 1999 order. That order gave them 15 days to "undertake to cooperate with Beneficial * * *." While the order is dated January 22, 1999, appellants did not receive a copy of the order until February 18, 1999. This is acknowledged in a letter from appellees' counsel to appellants' counsel dated March 3, 1999. The letter further stated that appellees' position was that the 15 day time frame would commence on February 20, 1999. Therefore, appellants had until March 7, 1999 to commence cooperation with Beneficial. The record, however, is void of any evidence that appellants did not comply with this requirement. Larry testified that he first contacted Beneficial in the early part of February. (Tr. 38). He noted that, at that time, Beneficial was going through a restructuring, and he spoke to a girl in the office. (Tr. 38). This contention is not refuted. Don Marty ("Marty"), Beneficial's manager, testified that his first contact with Larry was May 13, 1999. (Tr. 14). He further testified that he did not know whether Larry contacted Beneficial

[1]This opinion is journalized and is in the file, but it is not signed by the trial judge.

prior to that date. (Tr. 14). He claimed that Larry may have spoken to others in his office prior to May 13, 1999. (Tr. 14).

{¶18} Marty issued a letter on April 12, 1999 addressed to "whom it may concern regarding Larry Young." That letter stated that Larry had contacted Marty on approximately March 29, 1999 concerning the release of part of the loan security. (Tr. 16). It appears that this letter is the basis for the trial court's conclusion that there was a sixty day delay in complying with the order. March 29, 1999 is the earliest *recorded* contact Larry had with Beneficial. However, given Larry's uncontroverted claim that he contacted Beneficial in early February and Marty's testimony that Larry may have spoken to others in the office, the trial court had no basis on which to conclude that appellants delayed.

{¶19} Furthermore, in the contempt motion upon which the judgment in this case was issued, appellees did not cite delay. If appellees had listed delay as a reason for their motion, appellants may have been able to gather more concrete evidence as to when they initiated cooperation with Beneficial. Instead, appellees complained that appellants failed to cooperate with Beneficial as Larry was not forthright concerning his employment status. Larry was discharged from his employment on May 15, 1999, subsequent to the date on which he submitted an application for financing to Beneficial. (Tr. 40). On June 8, 1999, while reviewing his application, Beneficial discovered that Larry had lost his job. They spoke with him the next day and indicated that his application was denied. (Tr. 8). On July 28, 1999, Larry contacted Beneficial to inform them that he had new employment. (Tr. 18). As of the date of the proceeding in this matter, a second application for financing was pending.

{¶20} Despite Larry's failure to immediately notify Beneficial that he lost his job, nothing in the record supports a finding that appellants violated the January 22, 1999 order. To the

contrary, the record demonstrates that appellants were in compliance with the order. That order required appellants to provide appropriate information "as requested by Beneficial Finance so as to assure a completion of the modification of security interest * * *." Marty testified that Larry cooperated with him and everyone under his supervision. (Tr. 17). He stated that Larry provided him with everything he asked for. (Tr. 17).

{¶21} The January 22, 1999 order was somewhat nebulous. In a nutshell, it required appellants to provide any information requested by Beneficial necessary to complete the application for the modification of security interest. It did not require Larry to notify Beneficial that he lost his job unless such information was requested of him. Based upon the record, no such request was made.

{¶22} We find that appellees did not establish a *prima facie* case of contempt. They did not establish by clear and convincing evidence that appellants failed to comply with the January 22, 1999 order. *Carroll*, *supra*. As such, it was unreasonable for the trial court to find appellants in contempt. Appellants' first two assignments of error are found to be with merit.

ASSIGNMENT OF ERROR NUMBER THREE

{¶23} Appellants' third assignment of error on appeal alleges:

{¶24} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED ITS DISCRETION BY IMPLYING AND/OR CONCLUDING THAT TERRI YOUNG IS SUBJECT TO THIS COURT'S JANUARY 18, 2000 ORDER OR ANY OTHER ORDER OF THE TRIAL COURT."

{¶25} Both Larry and Theresa were named as defendants in the complaint. The summons on the complaint listed separate addresses for Theresa and Larry. Larry was successfully served. However, process was never served upon Theresa. The notice of failed service indicated that she was out of the county. No further attempts were made to serve her, and she did not waive service.

{¶26} Theresa did not enter an appearance in this matter. No

attorney appeared on her behalf. Nonetheless, at the settlement hearing, appellees' counsel insisted that she be included as a party to the settlement. Larry's counsel argued that she should not be included because, having never been served, she was not a party to the action. The trial court took judicial notice that Theresa was present at proceedings in this case. This was reflected in the January 22, 1999 order which provided in part, "* * * Theresa D. Young, wife of Defendant, Larry Young, had indeed been present in Court for prior proceedings, and therefore was fully aware of all circumstances and issues relevant to this proceeding."

{¶27} Appellants contend that the trial court improperly substituted judicial notice, a rule of evidence, for service of process under Civ.R. 4. They argue that the trial court did not have jurisdiction over Theresa. They claim that she was not a party to the action and, thus, should not have been a party to the settlement as reflected in the January 22, 1999 order.

{¶28} Appellees argue that the trial court had the authority to take judicial notice that Theresa was present in court and aware of the circumstances. They also contend that Theresa failed to object to jurisdiction. They aver that the issue of service was not raised to the trial court and is not properly before this court. However, appellants argue that there is no basis for somebody who has never been served to object to the conclusion that she is nevertheless a party to the action. Moreover, appellants claim that Theresa did object to the trial court's jurisdiction.

LAW AND ANALYSIS

{¶29} Personal jurisdiction can be obtained through service of process, waiver or voluntary submission to the court's jurisdiction. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. In this case, appellees attempted to serve process upon Theresa

pursuant to Civ.R. 4.1(B), which allows for personal service. The process server notified the clerk of the failed service. Civ.R. 4.1(B) provides, "[i]n the event of failure of service, the clerk shall follow the notification procedure set forth in division (A) of this rule." Division (A) requires the clerk to send the complaint and the process through certified or express mail. The clerk then must enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. Pursuant to Civ.R. 4.6(D), if the certified or express mail is returned unclaimed, then the clerk must notify the serving party of the failed attempt. If that party files a written request for ordinary mail service, the clerk shall resend the summons and complaint by ordinary mail. The clerk must file a certificate of mailing to evidence the service. Service is not complete until the fact of mailing is entered on the record. If the mailing is not returned for failure of delivery, the defendant has twenty-eight days from the date of mailing to file an answer.

{¶30} This procedure was not followed in the case at bar. There is nothing in the record to indicate that an express or certified mailing was sent. Furthermore, the clerk did not enter a certificate of mailing.

{¶31} We have had occasion to address this issue before. In *Karas v. Roar* (Mar. 21, 2000), Jefferson App. No. 98JE4, unreported, this court reversed the denial of defendants' motion to dismiss a default judgment. We concluded that the trial court lacked personal jurisdiction as the clerk failed to comply with Civ.R. 4. In that case, the clerk did not notify plaintiffs that the attempt to serve by certified mail was returned unclaimed. Plaintiffs did not file a written request seeking service by ordinary mail. Additionally, no certificate of mailing was filed.

{¶32} Likewise, in *Compass Transp., Inc. v. Good* (May 22, 1995), Mahoning App. No. 93CA220, unreported, this court affirmed

the trial court's decision that service was irregular because the required certificate of mailing was not filed. We held that the absence of a certificate of mailing is apparent on the face of the record and is fatal to a finding of proper service.

{¶33} Moreover, the Staff Notes to Civ.R. 4.6(D) provide, "[t]he clerk's mailing is evidenced by a Postal Service 'Certificate of Mailing.' This certificate protects the clerk by providing objective evidence that the summons and complaint or other document was mailed on a day certain." Thus, as established by the plain language of the rule, the accompanying commentary, and the case law, the lack of a certificate of mailing renders the judgment void for lack of jurisdiction. *Karas*, *supra*.

{¶34} In this case, Theresa was not properly served. Personal service failed, and there is no evidence that she was served by mail. Furthermore, there is no indication that she waived service. Therefore, the trial court could have obtained personal jurisdiction over Theresa only if she voluntarily submitted herself to its jurisdiction. *Maryhew*, *supra*. The trial court took judicial notice of the fact that she was present at some of the proceedings in this case. However, merely being present at a proceeding is not sufficient to voluntarily submit to the court's jurisdiction. In *Maryhew*, *supra*, the defendant was not served with process. However, the defendant, on two occasions, came before the court through counsel to request the right to move or otherwise plead. The Ohio Supreme Court held that defendant did not waive the right to assert a lack of personal jurisdiction. It acknowledged that defendant knew of the action, but did not enter an appearance. It also recognized that defendant was engaging in "gamesmanship" by procuring an extension of time when such an extension was not needed. Nonetheless, the court noted that the duty to perfect service of process is upon plaintiffs. *Id*. No service was made within the one year period following the filing of the complaint. Therefore, the case was dismissed. Likewise,

in the case at bar, Theresa did not voluntarily submit to the jurisdiction of the trial court. While she may have been present at several of the proceedings against her husband, prior to the January 22, 1999 order, Theresa filed nothing with the court. She did not address the court, either personally, or through counsel. As such, she did not voluntarily avail herself of the court's jurisdiction.

{¶35} Furthermore, contrary to appellees' contention, Theresa did not waive the lack of personal jurisdiction defense. The proper method for challenging personal jurisdiction is found in Civ.R. 12(B)(2). That rule provides that such a defense may be raised by motion prior to pleading. If lack of personal jurisdiction is not raised in a responsive pleading or in a motion prior to pleading, it is waived. Civ.R. 12(H). Theresa never filed a pleading with the trial court. However, Larry's counsel submitted a motion for summary judgment on behalf of Larry.[2] In the memorandum in support, counsel stated, "[Theresa] Young was never served with the Complaint. Therefore, judgment in favor of [Theresa] Young is now appropriate pursuant to Civil Rule 3(A)." Appellees did not respond to this contention. The trial court did not rule upon this motion. Thus, it appears that Larry's counsel raised lack of personal jurisdiction on behalf of Theresa. Therefore, it was not waived.

{¶36} Because Theresa was not properly served and no evidence suggests that she waived either service or the personal jurisdiction defense, the trial court erred when it entered a

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[2]A copy of this motion is included as Exhibit C in appellants' reply brief. This copy is not time-stamped by the clerk. No copy can be found in the file. However, an entry appears on the docket that indicates that such a motion was filed on the same date Exhibit C was signed. Appellees do not object to appellants' contention that Exhibit C is a true copy of the actual motion for summary judgment filed by Larry.

judgment against her. As such, appellants' third assignment of error is found to have merit.

{¶37} For the foregoing reasons, the judgment of the trial court is hereby reversed.

Donofrio, J., concurs.
Waite, J., concurs.