[Cite as *Allstate Ins., Co. v. Wilburn*, 2022-Ohio-2026.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

JA'QUAYNTAE CALVIN WILBURN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0079

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2014 CV 32

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Brian J. Green and *Atty. Sean C. Burke*, Shapero & Green LLC., Signature Square II, Suite 220, 25101 Chagrin Blvd., Cleveland, Ohio 44122 for Plaintiff-Appellee and

Ja'Quayntae Calvin Wilburn, 838 E. Midlothian Blvd., Apt. #53, Youngstown, Ohio 44502, Pro Se Defendant-Appellant.

Dated:
June 9, 2022

Donofrio, P. J.

{¶1} Defendant-Appellant, Ja'Quayntae Calvin Wilburn, appeals from a Mahoning County Common Pleas Court judgment striking his pro se filings and denying his request to vacate a default judgment against him and in favor of plaintiff-appellee, Allstate Insurance Company, on appellee's claim for subrogation.

{¶2} On January 6, 2014, appellee filed a complaint against appellant. The complaint alleged that on June 14, 2012, appellee's insured sustained damages to her property when appellant negligently operated a vehicle that went off the road and struck the insured's deck and garage. Pursuant to the terms of the insured's insurance policy, appellee paid the insured's claim of $5,197.90. Appellee sought subrogation in that amount from appellant. The docket indicates that the Mahoning County Sheriff's Department served appellant by residence service on March 3, 2014. Appellant did not answer the complaint or otherwise appear.

{¶3} Appellee filed a motion for default judgment on May 13, 2014. The trial court granted the motion on June 19, 2014. It entered judgment in favor of appellee in the amount of $5,197.90 plus interest.

{¶4} No action was taken in this case for almost seven years. Then on May 19, 2021, appellant, acting pro se, filed an affidavit seeking to have the default judgment against him vacated. Appellee filed a motion to strike the affidavit. Appellant filed another affidavit in response. On June 11, 2021, appellant filed an answer and counterclaim, which appellee moved to strike.

{¶5} On August 3, 2021, the trial court overruled appellant's request to vacate default judgment and ordered appellant's answers and claims stricken. The court found that appellant was served by residence service pursuant to Civ.R. 4.1(C) and that he failed to rebut the presumption of successful service by simply submitting a self-serving affidavit. Appellant filed a timely notice of appeal on August 6, 2021.

{¶6} Appellant, still proceeding pro se, does not set out a specific assignment of error. He states that he was never served with the complaint and that he is "an innocent man." Appellant's argument, however, focuses on the traffic offenses involved in the

incident and the police officers' conduct. Appellant claims that he was not involved in any traffic-related offenses in 2012, as was alleged in two juvenile cases against him. He then states that he was targeted by police. Finally, he asks that we vacate the judgment against him and requests "$24,000,000,000.00 in Relief For Damages/Civil Rights Deprivations Suffered/Negligent Infliction of Emotional Distress/Loss of Consortium, and Libel Prima Facie Defamation[.]"

{¶7} A trial court is without jurisdiction to render judgment against a person who was not served, did not appear, and was not a party in the court proceedings. *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990), at paragraph one of the syllabus. "A person against whom such judgment and findings are made is entitled to have the judgment vacated." *Id*. When a party claims the trial court lacked personal jurisdiction over them due to improper service of process, the appropriate challenge to such void judgment is by a common law motion to vacate as opposed to a Civ.R. 60(B) motion to vacate. *Chuang Dev. LLC v. Raina*, 10th Dist. Franklin No. 15AP-1062, 2017-Ohio-3000, 91 N.E.3d 230, ¶ 29.

{¶8} An appellate court reviews a trial court's decision to deny a motion to vacate judgment for an abuse of discretion whether that motion is made pursuant to Civ.R. 60(B) or pursuant to the court's inherent power at common law to vacate a void judgment. *Spotsylvania Mall Co. v. Nobahar*, 7th Dist. Mahoning No. 11 MA 82, 2013-Ohio-1280, ¶ 14. Abuse of discretion connotes more than an error of judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶9} A plaintiff must comply with Civ.R. 4.1 through 4.6 to perfect service. The burden is on the plaintiff to achieve proper service on a defendant. *Quick v. Jenkins*, 7th Dist. Columbiana No. 13 CO 4, 2013-Ohio-4371, ¶ 15, citing *Draghin v. Issa*, 8th Dist. Cuyahoga No. 98890, 2013-Ohio-1898, ¶ 21. When the plaintiff complies with the Civil Rules for service, there is a rebuttable presumption of proper service. *Id.*, citing *Draghin*, at ¶ 21. The defendant can rebut the presumption of proper service with sufficient evidence. *Nationwide Mut. Fire Ins. Co. v. Barrett*, 7th Dist. Mahoning No. 08 MA 130, 2008-Ohio-6588, ¶ 13. A self-serving affidavit averring the defendant did not receive service may be sufficient to overcome the presumption of service. *Id*., citing *Miller v.*

Booth, 5th Dist. Fairfield No. 06-CA-10, 2006-Ohio-5679, ¶¶ 35-36, *Deaton v. Brookover*, 8th Dist. Cuyahoga No. 83416, 2004-Ohio-4630, ¶ 8. In that case, the trial court is to hold a hearing to determine whether the defendant asserting that he was not properly served was truthful in that allegation. *Id*.

{¶10} In this case, as appellee points out, the docket reflects that appellee perfected service on appellant.

{¶11} Civ.R. 4.1 sets out the types of service permitted in Ohio. Appellee served appellant in compliance with Civ.R. 4.1(C), which provides:

> Residence Service. When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method.
>
> When process is to be served under this division, deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. * * * The person serving process shall effect service by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

{¶12} The docket in this case reflects that the county sheriff's department perfected residential service on March 3, 2014, and returned and filed proof of service on March 6, 2014.

{¶13} Appellant filed numerous affidavits with the trial court seeking to have the default judgment vacated.

{¶14} On May 19, 2021, appellant filed an affidavit in an attempt to say that he was not involved with the property damage at issue. This affidavit described various events involving his driver's license, a firearm, his brother, fleeing from police, and a

juvenile case against him. Appellant did not mention anything about service of the initial complaint.

{¶15} On May 21, 2021, appellant filed his "First Amended Affidavit." Again, he rehashed the various events set out previously. And again he did not make any mention of not being served with the initial complaint.

{¶16} On May 27, 2021, the trial court set the matter for a telephone hearing to be held July 1, 2021. It provided appellant with instructions on how to participate in the hearing.

{¶17} On June 9, 2021, appellant filed a "Demurrer to Evidence," which was essentially another affidavit. Once again, appellant did not mention service or any alleged lack thereof.

{¶18} Subsequently, appellee filed a motion to dismiss and strike appellant's filings. Appellant responded on June 23, 2021, by filing an "Opposition to Motion to Dismiss and Strike Answer and Counterclaim and Demurrer to Evidence." This was essentially another affidavit. For the first time, appellant averred that he did not receive service of the initial complaint until on or around May 17, 2021.

{¶19} On June 30, 2021, appellant moved the court to cancel the telephone hearing that it had scheduled for July 1. The court did not hold the scheduled hearing.

{¶20} Once appellant averred that he did not receive service of the initial complaint, the trial court was required to set a hearing to determine whether appellant's statement was credible. The court in this case did have a hearing scheduled. Appellant, however, asked the court to cancel the hearing. Given these circumstances, there was no obligation for the court to hold a hearing.

{¶21} In a somewhat similar case, the trial court set a motion to vacate default judgment for a hearing. *Barrett*, 7th Dist. Mahoning No. 08 MA 130, 2008-Ohio-6588. The day the hearing was scheduled to occur, the defendant filed a motion for a continuance. The trial court later denied the continuance and effectively denied the motion to vacate. On appeal, this court noted that this was not a case where the trial court ruled on the motion to vacate without setting a hearing. *Id.* at ¶ 15. We found that the trial court complied with its obligation to set the matter for a hearing and could not find

that the trial court committed any reversible error in failing to hold a hearing under these facts. *Id*. at ¶ 16.

{¶22} In an even more similar case, the Ninth District addressed a situation where the defendant argued that no hearing was required on his motion to vacate default judgment based on an alleged lack of service. *Runyon v. Hawley*, 9th Dist. Lorain No. 17CA011141, 2018-Ohio-2444. The appellate court held that, "[w]hen a plaintiff actively opposes a hearing, it is not an abuse of discretion to rule on the motion without holding a hearing." *Id*. at ¶ 42. The court also cited the "invited-error" doctrine noting that a party will not be allowed to benefit from an error that he himself invited or induced the trial court to make. *Id.* at ¶ 43, citing *State ex rel. Beaver v. Konteh*, 83 Ohio St.3d 519, 521, 700 N.E.2d 1256 (1998).

{¶23} In this case, appellant specifically requested that the court not hold the scheduled hearing. Thus, we do not find any error with the trial court ruling on the motion to vacate without holding a hearing. Moreover, as set out above, the record demonstrates that appellee perfected service on appellant in compliance with the Civil Rules. Thus, we cannot find that the trial court abused its discretion in overruling appellant's motion to vacate.

{¶24} Accordingly, appellant's argument is without merit and is overruled.

{¶25} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, appellant's argument is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.