[Cite as *Wells Fargo Bank v. Sekulovski*, 2012-Ohio-5973.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A., as trustee for RMAC REMIC Trust, Series 2009-8,	:	
Plaintiff-Appellee,	:	No. 11AP-795
	:	(C.P.C. No. 10CV-5960)
v.	:	(REGULAR CALENDAR)
Tony V. Sekulovski,	:	
Defendant-Appellant,	:	
The Huntington National Bank et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 18, 2012

Manley, Deas, Kochalski, LLC, Andrew C. Clark, Angela D. Kirk and *Kevin L. Williams*, for appellee Wells Fargo Bank, N.A.

Jump Legal Group, LLC, and *John Sherrod*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendant-appellant, Tony V. Sekulovski, appeals from a judgment of the Franklin County Court of Common Pleas denying his Civ.R. 60(B) motion for relief from judgment the trial court granted to plaintiff-appellee, Wells Fargo Bank, N.A., not in its individual capacity but solely as trustee for RMAC REMIC Trust, Series 2009-8, on

defendant's unpaid note and in foreclosure on the property securing the note. Defendant assigns a single error:

> The trial court erred by failing to conduct an evidentiary hearing before denying Defendants-Appellants' motion to vacate judgment when Appellant Melody Sekulovski produced an affidavit stating she did not recall being served with the summons and complaint.

Because the trial court properly denied defendant's Civ.R. 60(B) motion for relief from judgment without conducting an evidentiary hearing, we affirm.

I. Facts and Procedural History

{¶ 2} On April 19, 2010, Wells Fargo Bank, N.A., as trustee for RMAC REMIC Trust, Series 2009-8, filed a complaint seeking not only judgment in the amount of $1,152,499.63 plus interest and other charges on a note defendant and his wife, Melody E. Sekulovski, executed, but also foreclosure on the property securing it. Plaintiff requested service through both certified mail and personal or residential service. According to the record, the process server achieved personal service on Melody on April 26, 2010 and also served her with defendant's copy of the summons and complaint on the same day; certified mail was unclaimed.

{¶ 3} After the court permitted plaintiff to substitute Wells Fargo Bank, N.A., not in its individual capacity but solely as trustee for RMAC REMIC Trust, Series 2009-8 as plaintiff, defendant and Melody filed a motion on May 24, 2010 seeking a 60-day extension of time to move or plead. On July 26, 2010, plaintiff moved for default judgment against defendant and Melody, given their failure to respond to the complaint. The trial court on August 2, 2010, granted the motion for an extension of 60 days to respond to the complaint, and the following day defendant and Melody moved the court to file their answer instanter. The same day, defendant and Melody filed an answer admitting they executed the note, it was in default, they executed a mortgage that conveyed an interest in the property to plaintiff, and the mortgage is a valid and subsisting first lien on the property, subject to any lien the county treasurer may have. Defendant and Melody, however, contested the amount due on the note.

{¶ 4} With defendant's answer, plaintiff withdrew its motion for default judgment and filed a summary judgment motion on August 18, 2010. Neither defendant nor Melody

responded, and the court granted the motion on September 10, 2010. A precipe for order of sale of the property was filed on September 14, 2010, and a sheriff's sale was scheduled for January 7, 2011 at 9:00 a.m. In response, defendant and Melody filed on December 27, 2010, a motion seeking to stay the sheriff's sale. On the same day, they filed a Civ.R. 60(B) motion contending they were not served with plaintiff's complaint. To support the motion, defendant filed Melody's affidavit stating she did not recall being served with the summons and complaint.

{¶ 5} After the parties fully briefed the motion, the trial court filed a decision and entry on August 19, 2011 resolving it. The court noted that, even if defendant were not personally served, defendant "clearly appeared in the action not once, but twice: first, by filing a motion for an extension of time in which to respond to the complaint, and second, by actually filing an Answer. It is wholly disingenuous for Defendants to assert that judgment against them is improper due to lack of service." (Decision and Entry, at 2-3.) Moreover, based on the factors set forth in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), the court determined defendant lacked a meritorious defense. Accordingly, the trial court denied the motion.

II. Assignment of Error - Service of Process

{¶ 6} Defendant's single assignment of error asserts the trial court erred in denying his Civ.R. 60(B) motion without an evidentiary hearing because defendant never was served with the summons and complaint in this matter.

A. *Standard of Review and Applicable Law*

{¶ 7} To prevail on a motion for relief from judgment under Civ.R. 60(B), a movant generally must demonstrate: (1) the movant has a meritorious defense or claim to present if relief is granted; (2) the movant is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within the time specified under the rule. *Perry v. Gen. Motors Corp.*, 113 Ohio App.3d 318, 320 (10th Dist.1996), citing *GTE Automatic*, paragraph two of the syllabus. The decision to grant or deny a Civ.R. 60(B) motion generally is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. *Perry* at 320.

{¶ 8} "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant." Civ.R. 3(A).

"Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue * * * against any defendant." Civ.R. 4(A). Pursuant to Civ.R. 4.1, the clerk may perfect service of the complaint and summons through certified or express mail or by commercial carrier service; a plaintiff also may request personal or residential service.

{¶ 9} "Service of the summons and complaint ' "is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." ' " *During v. Quoico*, 10th Dist. No. 11AP-735, 2012-Ohio-2990, ¶ 25, quoting *Omni Capital Internatl., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987), quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946). "In the absence of service of process or the waiver of service by the defendant, a court ordinarily may not exercise power over a party the complaint names as a defendant." *During*, citing *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). In such circumstances, a defendant would not need to meet all the prongs of a Civ.R. 60(B) motion. *Waterford Tower Condominium Assn. v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006-Ohio-508, ¶ 17.

{¶ 10} Generally, a plaintiff's failure to perfect service of its original complaint is waived when the defendant appears " 'for any other purpose than to object to jurisdiction.' " *St. Anthony the Great Romanian Orthodox Monastery, Inc. v. Somlea*, 8th Dist. No. 97955, 2012-Ohio-4162, ¶ 16, quoting *Slomovitz v. Slomovitz*, 8th Dist. No. 94499, 2010-Ohio-4361, ¶ 9. As a result, participation in a hearing without asserting the affirmative defense of failure of service of process waives the defense. *Davis v. Davis*, 8th Dist. No. 82343, 2003-Ohio-4657; *In re A.L.W.*, 11th Dist. No. 2011-P-0050, 2012-Ohio-1458, ¶ 37 (citing *Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984) and noting that "personal jurisdiction may be obtained by service of process, voluntary appearance, or waiver").

B. *Defendant Waived Service of Process*

{¶ 11} Here, defendant filed an answer to the complaint admitting nearly all the allegations except the amount still owing on the note at issue; in it, defendant raised the affirmative defense of lack of personal jurisdiction. By timely asserting the defense of lack

of personal jurisdiction, a defendant may preserve the right to contest a complete failure of service. *Confidential Servs., Inc. v. Dewey*, 10th Dist. No. 98AP-905 (Apr. 15, 1999).

{¶ 12} Were defendant's answer the only factor, defendant's contentions would be more persuasive. Defendant, however, waived service of process in two separate ways. Before filing an answer, defendant filed a motion for extension of time, seeking an additional 60 days in which to move or plead to plaintiff's complaint. In it, defendant did not mention any failure to serve him with the summons and complaint. In so doing, defendant waived the issue. *Somlea*.

{¶ 13} Equally as significant, defendant, in the memorandum supporting his motion for an extension of time to move or plead, stated that "[d]efendants were served with Plaintiff's Complaint via process server on or about April 23, 2010. Prior to and since having been served, Defendants have initiated an effort to work with Plaintiff to resolve this matter outside of the foreclosure proceeding." (R. 59, May 24, 2010 Motion.) Moreover, after plaintiff filed its motion for default judgment, defendant filed a motion for leave to file an answer instanter. In it, defendant again stated that "[d]efendants were served with Plaintiff's complaint via process server on or about April 23, 2010. On May 19, 2010, Defendants requested a 60 day extension so that Defendants could continue to resolve this matter directly with Plaintiff via a Motion for Extension." (R. 66, Aug. 3, 2010 Motion.)

{¶ 14} In filing both documents, defendant entered an appearance in the action without raising the defense of failure to serve him with the summons and complaint and then explicitly admitted he was served with process and was working with plaintiff's counsel in an effort to resolve the matter outside judicial proceedings. Under either defendant's general appearance without invoking his alleged failure to be served, or his explicit admission through counsel's filings that he was served, defendant waived the issue. Indeed, the record indicates a process server served defendant through Melody on April 26, 2010.

{¶ 15} Defendant nonetheless contends that his motion for relief from judgment under Civ.R. 60(B) raised sufficient factual issues that the court could not properly deny the motion without conducting an evidentiary hearing. He initially points to Melody's first affidavit that states: "I do not recall being served with papers with regard to this lawsuit. I

have never been served with papers in my life, so it is something I would recall if it happened to me." (R. 99, Sept. 30, 2011 Motion for Relief from Judgment, exhibit D, ¶ 2-3.)

{¶ 16} After plaintiff pointed out in its response to defendant's Civ.R. 60(B) motion that Melody's inability to recall service of process is insufficient under *Gupta v. Edgecombe*, 10th Dist. No. 03AP-807, 2004-Ohio-3227, ¶ 17, defendant filed a new affidavit to rebut the presumption of valid service. In it, Melody stated: "In my previous affidavit, I stated that I did not recall being served with papers in this lawsuit. After having some time to reflect, I know for a fact that I was not served with papers relative to this lawsuit." (R. 113, Sept. 30, 2011 Reply to Plaintiff's Memorandum in Opposition, exhibit A, ¶ 2-3.) She further averred: "I have **never** been served with papers before, and it is definitely something I would remember. At any rate, it is my understanding that Wells Fargo is saying someone **personally** served me with paperwork relative to this lawsuit. There is absolutely no way that happened." (Emphasis sic.) (R. 113, Sept. 30, 2011 Reply to Plaintiff's Memorandum in Opposition, exhibit A, ¶ 3-4.)

{¶ 17} Initially, we question whether Melody's conflicting affidavits are sufficient to require the trial court to conduct an evidentiary hearing. In the summary judgment context, a party cannot defeat summary judgment with affidavits that conflict with deposition testimony. *See Darden v. Columbus*, 10th Dist. No. 03AP-687, 2004-Ohio-2570, ¶ 28 (concluding that when a non-moving party's earlier statement conflicts with a later affidavit, the later affidavit "can not be used to create a reasonable issue of fact without specific sworn testimony delineating why the earlier statement was not true"); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28 (stating "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment").

{¶ 18} Whether the rule applied to affidavits and depositions in summary judgment proceedings should be applied in this context, and whether Melody's two affidavits bear the requisite conflict or the necessary explanation, we need not determine. Because defendant failed to raise the defense of failed service of process prior to his appearance, and because he specifically admitted service of process through his attorney's

filings with the court, defendant waived the issue, removing it as a basis for relief from judgment.

{¶ 19} We acknowledge the cases that suggest a hearing is appropriate in instances where a defendant contends he or she did not receive service of process. *See, e.g., Nationwide Ins. Co. v. Mahn*, 36 Ohio App.3d 251 (10th Dist.1987); *Rafalski v. Oates*, 17 Ohio App.3d 65 (8th Dist.1984); *New Co-Operative Co. v. Liquor Control Comm.*, 10th Dist. No. 01AP-1124, 2002-Ohio-2244. Unlike the present case, nothing in those cases suggests the defendants there waived service of process with appearances and admissions. Indeed, we would be hard pressed to conclude the trial court abused its discretion in light of a record reflecting personal service of process, defendant's failure to raise the issue in his first appearance, and counsel's explicit admissions of service. Accordingly, defendant's single assignment of error is overruled.

III. Sanctions

{¶ 20} Plaintiff filed a motion requesting sanctions against defendant for filing a frivolous appeal. We decline to award sanctions in this case because (1) defendant raised the issue, albeit untimely, in filing an answer that asserted lack of personal jurisdiction, and (2) defendant supported his Civ.R. 60(B) motion with affidavits that arguably address the issue.

IV. Disposition

{¶ 21} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motion denied;
judgment affirmed.

BROWN, P.J., and TYACK, J., concur.