IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ADAM SCHIAVO and CHARLES SCHIAVO,	)	
	)	**C.A. No. 19A-12-007 DCS**
Appellant-Below, Appellant,	)	
	)	
v.	)	
	)	
DARRELL W. CLOUD,	)	
	)	
Appellee-Below, Appellee.	)	

Submitted: January 4, 2021
Decided: March 16, 2021

Upon Appeal from the Court of Common Pleas—
AFFIRMED

OPINION

Adam Schiavo, *Pro Se* Appellant
Donald L. Gouge, Jr., Esquire, Attorney for Appellee

STREETT, J.

Introduction

This is an appeal from a Court of Common Pleas' decision affirming the denial of a motion to vacate issued by the Justice of the Peace Court #9 ("JP Court"). The JP Court had denied Adam Schiavo's (the "Appellant") motion to vacate a default judgment arising from a summary possession proceeding. Upon consideration of the facts, arguments, and legal authorities set forth by the parties; statutory and decisional law; and the entire record in this case, the Court affirms the Court of Common Pleas' decision for the following reasons.

Factual and Procedural History[1]

On December 16, 2016, Appellant entered into a commercial lease agreement whereby Appellant[2] leased a unit at 4464 DuPont Parkway, Townsend, Delaware 19734 (the "Rental Premises") from Darrell W. Cloud (the "Appellee", "Cloud"). In the lease, Appellant provided 8 Wyndom Circle, Hockessin, Delaware 19707 as his address. Appellant defaulted on rent during the course of the lease period. The default is undisputed.

[1] The facts are taken from the Court of Common Pleas' decision.

[2] Appellant includes Charles Schiavo in this matter; however, there is no evidence that Charles Schiavo is a signatory to the lease, and the JP Court and the Court of Common Pleas do not acknowledge Charles Schiavo as a party in their decisions. Therefore, this Court will only address Adam Schiavo.

Thereafter, on March 21, 2019, Appellee sent a five-day letter to Appellant, via a certificate of mailing, to the Townsend Rental Premises and to the Hockessin address that Appellant had provided in the lease.

On April 5, 2019, Appellee filed a routine Landlord-Tenant summary possession complaint with JP Court for back rent and possession of the commercial rental unit against tenant, Appellant. The complaint listed both the Townsend Rental Premises as the address of Appellant and the Hockessin address as an alternative address.

The JP Court docket indicates that on April 10, 2019, service was issued to both the Townsend Rental Premises and the Hockessin address.

Appellant did not file an answer within the required period.

On April 11, 2019, the Constable posted a summons on the Townsend Rental Premises, notifying Appellant that trial was scheduled for April 29, 2019.

On April 22, 2019, the Court also sent notice to Appellant's Hockessin address, which was returned as vacant.

On April 29, 2019, Appellant failed to appear in court.

On May 3, 2019, the JP Court entered a default judgment in favor of Appellee based on Appellant's failure to appear for trial.

On May 14, 2019, after the requisite ten-day waiting period, Appellee filed a writ of possession.

On May 16, 2019, Appellant filed a Motion to Vacate Default Judgment. Appellant listed the Hockessin address as his address in his motion.

That same day, the JP Court denied Appellant's Motion. Appellant subsequently vacated the Townsend Rental Premises.

On May 24, 2019, Appellant appealed the denial of his Motion to Vacate Default Judgment to the Court of Common Pleas.

On December 13, 2019, the Court of Common Pleas affirmed the JP Court's denial of Appellant's Motion to Vacate Default Judgment.

On December 26, 2019, Appellant filed this present appeal.

On October 8, 2020, Appellant filed his Opening Brief.

On October 28, 2020, Appellee filed his Answer.

On November 17, 2020, Appellant filed his Reply.[3]

Parties' Contentions

Appellant contends that the Court of Common Pleas "ignored the law."[4] In both his Opening and Reply Briefs, Appellant argues that the Justice of the Peace Court made a number of "errors of the law" involving service. Specifically, Appellant asserts that (1) the JP Court erred in finding that the docket supports the

[3] That same day, Appellant also filed a Motion to Compel requesting that the Court order the JP Court and Appellee's counsel to "produce evidence the [Appellant was] ever served with a copy of the complaint." On December 7, 2020, Appellee filed his response to the Motion to Compel. On January 4, 2021, Appellant filed his Reply in support of his Motion to Compel.

[4] Appellant's Notice of Appeal, at 1.

presumption that Appellant was properly served; (2) it was improper for the JP Court to schedule a hearing before Appellant was properly served; (3) it was improper for the JP Court to conduct a hearing when there is no proof that Appellant was properly served; and (4) the JP Court erred in holding that the manner of service used by Appellee was proper.[5] Appellant also contends that the Court of Common Pleas improperly affirmed the JP Court decision.

In his Answering Brief, Appellee states that Appellant reiterates the same arguments that were twice rejected. Additionally, Appellee argues that the Court of Common Pleas' decision should be affirmed because Appellant has failed to demonstrate that the JP Court's decision was manifestly unreasonable, capricious, or an abuse of discretion and that the JP Court followed proper procedures and provided Appellant with sufficient notice.[6]

<u>Standard of Review</u>

Under Delaware law, the "standard of review by the Superior Court for an appeal from the Court of Common Pleas is the same standard applied by the Supreme Court to appeals from the Superior Court."[7] This Court "is limited to correcting errors of law and determining whether substantial evidence exists to support factual

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[5] Appellant's Opening Brief, at 11-14; Reply Brief, at 4-9.

[6] Appellee's Answering Brief, at 5.

[7] *Robert J. Smith Cos., Inc. v. Thomas*, 2001 WL 1729143, at *2 (Del. Super. Dec. 10, 2001).

findings."[8] "Questions of law are reviewed *de novo*."[9] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10]

Here, Appellant does not seem to challenge the rules for service; he disputes receiving notice pursuant to those rules. Therefore, the standard of review is abuse of discretion and this Court's review "is limited to the issue of whether the trier-of-fact abused its discretion in denying the motion to vacate the default judgment."

Accordingly, this Court will review the Court of Common Pleas' decision for abuse of discretion. As such, despite Appellant's use of the title "Brief in Support of Appeal to Overturn Plaintiff's Summary Judgment," this Court has no jurisdiction to vacate the default judgment entered by the JP Court.

<u>Discussion</u>

Appellant disparagingly asserts that the Court of Common Pleas' decision is contrary to the evidence and should be reversed.[11]

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[8] *Henry v. Nissan Motors Acceptance Corp.*, 1998 WL 961759, at *1 (Del. Super. Oct. 21, 1998).

[9] *Id.*

[10] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[11] Appellant declares that both the JP Court and the Court of Common Pleas are ignorant, incompetent, "asinine," "don't know what they [are] talking about when it comes to proof of service," and have acted "illogically." Reply Brief, at 18.

A careful review of the record and the parties' submissions, however, reflect that the Court of Common Pleas' factual findings are supported by the record and are the product of an orderly and logical reasoning process. Additionally, it did not commit legal error in holding that Appellant did not meet his burden of proof.

Procedurally, as both lower courts noted, a motion to vacate a default judgment in a summary possession proceeding must be filed no more than 10 days after the entry of the default judgment.[12] Here, default judgment was entered on May 3, 2019. Appellant did not file his Motion to Vacate until May 16, 2019 - more than ten (10) days after the default judgment was entered. Thus, the Motion was untimely.

Moreover, the JP Court found, and the Court of Common Pleas noted, that Appellant fails to assert any defense other than a denial of receipt of the mailing and offers no other basis upon which relief could be granted.[13] Nevertheless, this Court will briefly address Appellant's contention that the lower courts "ignored the law" pertaining to service of process and notice.

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[12] "For the reasons [above] in this Rule, a motion to vacate a default judgment shall be made . . . in summary possession actions, not more than 10 days after entry of the default judgment." Del. J.P. Ct. R. 60(c).

[13] JP Court Opinion, at 1 (May 16, 2019) ("JP Op."); Court of Common Pleas Opinion, at 7 (Dec. 13, 2019) ("CCP Op.").

Appellant's insistence that service was not proper is incorrect. The statutory language and the record below are clear.[14] The JP Court's docket reflects that notice was issued on April 10, 2019, by sending a summons to both the Hockessin address and the Townsend address (the Rental Premises). Notice was then posted by the Constable on the Townsend rental property, as authorized by statute, on April 11, 2019. Subsequently, service was mailed to Appellant's last known address (in Hockessin) on April 20, 2019, which was later returned as vacant. The JP Court record, as noted by the Court of Common Pleas, indicates that notice was perfected.[15]

Appellant asks this Court to find that the form of notice was improper and that he was not properly served as required by the lease terms.[16] This argument was considered by the Court of Common Pleas when it reviewed and affirmed the JP Court determination that:

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[14] "If no such person can be found after a reasonable effort, service may be made . . . by affixing a copy of the notice and complaint upon a conspicuous part of the rental unit, within 1 day thereafter and by sending by either certified mail or first class mail . . . an additional copy . . . to the rental unit." 25 *Del. C.* 5706(c)(1)).

[15] Appellant offers a bald denial of service. However, as set forth herein as well as in the lower courts' opinions, the record is clear that Appellee followed the proper procedure for service for a Landlord-Tenant summary possession proceeding pursuant to 25 *Del*. C. 5706(c)(1).

[16] The lease stated: "All notices required to be given by LESSOR to LESSEE may be given by leaving the same at the Premises, but notices given by LESSEE to LESSOR must be given by registered or certified mail . . . ." (attached as Exhibit B to the Opening Brief). Contrary to Appellant's assertion, the lease did not require Appellee (the lessor) to serve Appellant (the lessee) by certified mail. Furthermore, Appellant claims that the JP Court relied on information "that did not exist to deny the [Appellant's motion to vacate the default judgment]." Mot. to Compel at 1. However, despite contending that evidence of service is missing or undisclosed, Appellant does not clarify or explain what he believes is missing, needed, or nonexistent.

> In review of the docket, there is no evidence of wrong-doing on the part of [Cloud]. On the original complaint and praecipe, [Cloud] lists the Townsend address as the address for service. In fact, the unit was posted by April 11, 2019. Notice of the trial date sent via USPS to the Townsend address was returned to the Court as undeliverable on or about April 20, 2019 with a notation that the unit in question was now vacant and that no forwarding address had been given. Notice of the judgment was likewise returned on May 7, 2019 with the same notation. Given that the unit was posted, the Court must hold the notice adequate for its purpose. In point of fact, in filing of the motion, [A. Schiavo] himself used not the Townsend address for purpose of correspondence but the other one in Hockessin, DE. Lastly, given the time-period prescribed for motions offered pursuant to Rule 60(b)(3), the Court must hold that the motion is untimely filed and thus past consideration. Finally, the Court would hold that absent the notice issue, the Movant offers no other basis upon which relief could be granted. He does not anywhere in the motion assert either his intent to contest the claim nor asserts any defense. For those reasons, the Motion is denied.[17]

This Court agrees with the holding of the Court of Common Pleas and its analysis.[18] The Court of Common Pleas Decision on Appeal from the Justice of the Peace Court sets forth the applicable "manner of service" for Landlord-Tenant summary possession proceedings, which states in pertinent part: "If no such person

[17] JP Op., at 1.

[18] Appellant relies on cases that are either wholly or partially irrelevant. *Thomas v. Nationstar Mortgage, LLC*, 2015 WL 5766775 (Del. Ch. Sept. 18, 2015), a Court of Chancery case, cites Court of Chancery's rules; *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297 (7th Cir. 1991), is a federal case that is not binding on this *Court* or this *State*; and *Billinger v. Deshields*, 2008 WL 4662351 (Del. Super. Oct. 22, 2008), does not "mirror[] almost exactly" the instant case.
Indeed, the present case significantly differs from *Billinger*. The *Billinger* defendant acknowledged service and filed an answer, but failed to appear at trial. Furthermore, although the JP Court determined that his absence was excusable neglect (because he had temporarily changed his address and timely filed both of his motions to vacate), on appeal, the Court of Common Pleas found that the defendant's conduct did not constitute excusable neglect and ultimately affirmed the commissioner's recommendation to deny the motion to vacate the default judgment.

can be found after a reasonable effort, service may be made . . . by affixing a copy of the notice and complaint upon a conspicuous part of the rental unit, within 1 day thereafter and by sending by either certified mail or first class mail . . . an additional copy . . . to the rental unit."[19]

The record establishes that the JP Court docket reflects that reasonable efforts were made and that there was posting on the property. Notice was perfected and the Court of Common Pleas properly held that notice was proper under the Landlord-Tenant Code. Indeed, the Court of Common Pleas held that:

> These notices and posting is [sic] sufficient under the statute and constitute proper service. Appellant's mere denial of receipt of the mailing is not sufficient to rebut the presumption of receipt. The Justice of the Peace Court's order indicates the Court reviewed the docket and considered the notices and the failure to timely file the motion to vacate. This review is consistent with Justice of the Peace Court Rule 60.[20]

Appellant's assertion that the lower court erred as a matter of law when it found notice to be proper lacks merit.

[19] CCP Op., at 8 (citing 25 *Del. C.* 5706(c)(1)).

[20] CCP Op., at 9.

Conclusion

Accordingly, for the foregoing reasons, the decision of the Court of Common Pleas is **AFFIRMED**.

IT IS SO ORDERED.[21]

/s/ Diane Clarke Streett
Diane Clarke Streett, Judge

[21] Having affirmed that the Motion to Vacate the Default Judgment was untimely (and the service was proper), Appellant's Motion to Compel is **MOOT**.