[Cite as *Tomcho v. ALTL, Inc.*, 2018-Ohio-4613.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106284 and 106562

ELIZABETH TOMCHO, ET AL.

PLAINTIFFS-APPELLEES

vs.

ALTL, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-873818

BEFORE: Jones, J., S. Gallagher, P.J., and Keough, J.

RELEASED AND JOURNALIZED: November 15, 2018

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Michael Howard, appeals the trial court's decision to grant default judgment against him in the amount of $5,886,540.29. For the reasons that follow, we reverse and remand.

Procedural History and Facts

{¶2} In 2016, plaintiffs-appellees Elizabeth Tomcho, Dave Tomcho, and Suzanne Tomcho filed a complaint against defendants-appellants, ALTL, Inc., Howard, and others for injuries Elizabeth sustained in a January 13, 2015 motor vehicle accident on Interstate 90 in Avon, Ohio. Howard, who was driving a tractor-trailer, crashed into the rear of Elizabeth's SUV. Howard was operating the truck in the scope of his employment with ALTL.

{¶3} The accident occurred during Howard's first week on the job with ALTL. According to Howard, he was training with another driver when they were rerouted so the driver could take over driving an abandoned ALTL truck. Howard was directed to drive the truck he was being trained on, which was "totally different" than what he was used to driving. Howard got lost and the accident occurred. Howard was cited by police. Howard alleged that ALTL told him they

would “take care of” any other legal obligations that arose from the accident. ALTL terminated his employment a week later.

{¶4} Howard lived in Michigan. Plaintiffs first attempted to serve Howard at his former residence in Bellaire, Michigan and then at his sister’s address on Clear Lake Road in Grass Lake, Michigan. The plaintiffs attempted service several times before attempting certified mail service at the Clear Lake Road address on May 3, 2017. It is undisputed that Howard’s girlfriend, Elizabeth Pomeroy, signed for the certified mail. It is also undisputed that at all relevant times, Howard’s sister lived at the residence on Clear Lake Road and Pomeroy never lived at that residence.

{¶5} Howard testified to the following: he lived in Bellaire until mid-September 2016. He then moved to his sister’s place on Clear Lake Road. He moved out of his sister’s place and in with his girlfriend “between the end of March and sometime in early April, 2017,” and was, therefore, not living at the Clear Lake Road property when Pomeroy signed for the complaint on May 3, 2017. Pomeroy lived on Lindsey Road in Jackson, Michigan, a 30 to 40 minute drive from his sister’s place.

{¶6} According to Pomeroy, Howard moved in with her sometime between his birthday on March 24, 2017, and a rabbit show at the Ionia County Fairgrounds that took place the weekend of April 22, 2017. Pomeroy testified that on May 3, 2017, she was at the Clear Lake Road property visiting Howard’s nephew when the postal carrier approached her with a certified letter while she was sitting in her car. Pomeroy signed for the letter, but never opened it or looked at it and left it there with the other mail, assuming someone would give it to Howard. Pomeroy admitted she knew she was signing for mail for Howard because the letter carrier told her so.

{¶7} Howard did not answer or otherwise appear or defend, and the plaintiffs moved for default judgment. They sent notice of the default judgment hearing to the Clear Lake Road address. The trial court held an off-the-record hearing on July 31, 2017. Counsels for plaintiffs and ALTL appeared. The attorney for ALTL informed the court that the company would not be representing Howard.

{¶8} The trial court granted the plaintiffs' motion finding, in part: "In summary, the court finds in favor of plaintiffs against defendant Michael Howard only, on plaintiffs' negligence and loss of consortium claims, for a collective final judgment in the amount of $5,886,540.29. Partial." The court subsequently issued a nunc pro tunc order stating that it was a "partial judgment" and "[t]here is no just reason for delay."

{¶9} Howard filed a notice of appeal with this court, and a motion to vacate, or in the alternative motion for relief from judgment pursuant to Civ.R. 60(B), with the trial court. This court remanded the case for the trial court to rule on the motion. The trial court denied the motion with a written opinion. In its opinion, the court determined that it had personal jurisdiction over Howard because service in the case was proper. The court found no merit to Howard's contention that he was not living on Clear Lake Road at the time the complaint was served to that address in May 2017. The court relied on the following information: although Howard claimed he moved out around his March 24 birthday, he used the Clear Lake Road address to renew his driver's license, file taxes with and receive a letter from the IRS, apply for jobs, and he did not change his address with the post office or for voter registration purposes. The court also noted that during his deposition, Howard stated that he did not move in with his girlfriend until June or July 2017. The court considered that Howard did not "engage in this

matter" until after Howard's sister received a postcard from the court, addressed to Howard, notifying him of the "near $6 million dollar judgment against him." Based on these facts, the court denied Howard's motion to vacate.

{¶10} The court also considered Howard's motion for relief from judgment pursuant to Civ.R. 60(B) and Howard's contention that he was entitled to relief based on excusable neglect. The court disagreed, finding that "overwhelming evidence" supported the fact that Howard was properly served, chose not to address the lawsuit until after default judgment was entered against him, and failed to correct his address with the "post office and other entities." Therefore, the court concluded, he was not entitled to relief pursuant to Civ.R. 60(B).

{¶11} Howard filed a second notice of appeal. This court consolidated the appeals.

{¶12} During the pendency of the appeal, the plaintiffs filed leave to file an amended complaint, which the trial court granted. Howard filed an answer to the amended complaint. Howard then asked this court to determine if his appeal was rendered moot by virtue of him answering the amended complaint. This court found that Howard's answer to the plaintiffs' amended complaint was a nullity, because, at the time the plaintiffs filed their amended complaint, there was a default judgment against Howard and, therefore, there were no longer any pending claims against him. Thus, this court decided, his consolidated appeals would go forward.

Assignments of Error

I. The trial court incorrectly entered default judgment against Howard.

II. The trial court incorrectly refused to vacate the default judgment against Howard.

III. The trial court incorrectly denied Howard relief from judgment under Civ.R. 60(B).

IV. The trial court incorrectly granted noneconomic damages in excess of the applicable damages cap in violation of both R.C. 2315.18 and Civ.R. 54(C).

V. The default judgment has been rendered moot because Howard timely answered the amended complaint.

Law and Analysis

Amended Complaint

{¶13} We first address the fifth assignment of error. In the fifth assignment of error, Howard claims that the default judgment has been rendered moot because he timely answered the amended complaint. As mentioned, however, this court has already determined that Howard's answer to the plaintiffs' amended complaint was a nullity because, at the time the plaintiffs filed their amended complaint, there was a default judgment against Howard. In other words, when plaintiffs filed their amended complaint, there were no pending claims against Howard. Howard claims that one claim remains outstanding — the plaintiffs' claim for "wanton and willful misconduct." The trial court's journal entry granting default judgment, however, stated that it was a "collective final judgment" against defendant Howard. Therefore, there are no claims remaining against Howard.

{¶14} Consequently, because Howard's answer was a nullity, it did not render his default judgment moot. *See Tomcho, et al. v. ALTL, Inc., et al.*, 8th Dist. Cuyahoga Nos. 106284 and 106562, Motion No. 514792 (Feb. 12, 2018) ("Because there was no longer any pending claim against appellant Howard at the time the complaint was amended due to the default judgment,

appellant Howard's answer to the complaint is a nullity.").

{¶15} The fifth assignment of error is overruled.

Motion to Vacate

{¶16} In the first assignment of error, Howard claims that the trial court erred when it entered default judgment against him. In the second assignment of error, Howard contends that the trial court erred when it did not grant his motion to vacate the default judgment.

{¶17} Appellate courts review the denial of a motion to vacate under an abuse of discretion standard. *Chilcote v. Kugelman*, 8th Dist. Cuyahoga No. 98873, 2013-Ohio-1896, ¶ 8; *see also Linquist v. Drossel*, 5th Dist. Stark No. 2006 CA 00119, 2006-Ohio-5712.

{¶18} "Ohio law provides that a judgment rendered without personal jurisdiction over a defendant is void ab initio rather than voidable." *Linquist* at ¶ 9, citing *State ex rel. Fairfield Cty. CSEA v. Landis*, 5th Dist. Fairfield No. 2002 CA 00014, 2002-Ohio-5432; *see also CompuServe, Inc. v. Trionfo*, 91 Ohio App.3d 157, 161, 631 N.E.2d 1120 (10th Dist.1993). Therefore, a judgment rendered without proper service is a nullity and is void. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956). The authority to vacate a void judgment "is not derived from Civ.R. 60(B), but rather constitutes an inherent power possessed by Ohio courts." *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of the syllabus.

{¶19} Civ.R. 4(A) provides that "[u]pon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption." Under Civ.R. 4.1(A), service may be made by certified or express mail, personal service, or residential service. Civ.R. 4.3, which governs out-of-state service, allows for service of process or other documents to

be served outside the state in the same manner as provided for in Civ.R. 4.1.

{¶20} "[S]ervice of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond." *Chilcote* at ¶ 23, citing *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980), and *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The plaintiff bears the burden of obtaining proper service on a defendant. *Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63, 705 N.E.2d 408 (1st Dist.1997). "[W]here the plaintiff follows the Civil Rules governing service of process, courts presume that service is proper unless the defendant rebuts this presumption with sufficient evidence of non-service." *Carter-Jones Lumber Co. v. Meyers*, 2d Dist. Clark No. 2005 CA 97, 2006-Ohio-5380, ¶ 11. "'Where the defendant files a motion to vacate judgment, and swears under oath that he or she did not reside at the address to which process was sent, the presumption is rebutted, and it is incumbent upon the plaintiff to produce evidence demonstrating that defendant resided at the address in question.'" *Hook v. Collins*, 8th Dist. Cuyahoga No. 104825, 2017-Ohio-976, ¶ 15, quoting *Watts v. Brown*, 8th Dist. Cuyahoga No. 45638, 1983 Ohio App. LEXIS 15311, 14-15 (Aug. 4, 1983).

{¶21} "The Civil Rules do not require that delivery be restricted to the defendant or to a person authorized by appointment or by law to receive service of process for the defendant." *Kaufman & Cumberland v. Jalisi*, 8th Dist. Cuyahoga No. 80389, 2002-Ohio-4087, ¶ 16. Nor do the rules require, as Howard contends, that delivery be restricted to a person that resides at the residence. *See Mitchell v. Mitchell*, 64 Ohio St.2d 49, 51, 413 N.E.2d 1182 (1980) (certified mail service under Civ.R. 4.3 is valid where the envelope containing the documents to be served

is delivered to a person other than the defendant, at the defendant's address).

{¶22} Howard claimed that he was not living at the Clear Lake Road address when the plaintiffs attempted to serve him there. The plaintiffs contended, and the trial court agreed, that Howard only provided self-serving testimony as evidence that he lived elsewhere and since his girlfriend signed for the certified mail, service on the complaint was perfected.

{¶23} Courts are to '"examine each case upon its particularized facts to determine if notice was reasonably calculated to reach the interested party."' *Chilcote*, 8th Dist. Cuyahoga No. 98873, 2013-Ohio-1896, at ¶ 19, quoting *Akron-Canton Regional Airport Auth.*, 62 Ohio St.2d 403, 406-407, 406 N.E.2d 811.

{¶24} In his deposition, Howard testified that he moved in with his sister in September 2016. He met Pomeroy online and they started dating sometime in March 2017, he thought the date was March 12, 2017. Howard admitted he renewed his driver's license on his birthday, March 24, 2017, using the Clear Lake Road address because that was where he lived at the time. Both he and Pomeroy testified that he moved in with Pomeroy sometime after his birthday. Pomeroy testified that she remembered he moved in before they went to the rabbit show at the Ionia County Fairgrounds the weekend of April 22, 2017.

{¶25} During his deposition, Howard testified that he had a falling out with his sister after he moved out and had not spoken with her or received mail from her house. He also testified that his sister did not notify that he had any mail at her house until after default judgment was entered against him.[1]

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[1]Apparently, Howard's sister contacted Pomeroy after receiving a postcard addressed to Howard from a private investigator with regard to the default judgment against him.

{¶26} Howard was asked by plaintiffs' counsel, as to the Clear Lake Road address:

Q: "If you were photographed or videotaped after April 15th is it your claim you were only visiting?" * * *

Howard: "Yeah."

Q: "Ok. Do you know if — "

Howard: "April 15 it was still — I didn't moved until July, June and July."

{¶27} Later during the deposition, counsel for ALTL asked Howard to clear up the confusion about when he moved out of his sister's house:

Q: "And in late March or early April of 2017, you then moved out of Clear Lake and into the Lindsey Road address?"

Howard: "That is right."

Q: "At some point during your deposition today I thought I heard you say that you didn't move out until June or July of 2017. Did I mishear you or did you mispeak if that's what you said?"

Howard: "I mispoke that. Yes."

Q: "Alright. So and you've lived at the Lindsey Road address since late March or early April of 2017?"

Howard: "That is correct."

{¶28} At a later point in his deposition, Howard was asked, by plaintiffs' counsel:

Q: "Earlier you had — at one point you said you moved out in April of '17 and then later in your depo you said you moved out in June or July. You don't know an exact date?"

Howard: "I mispoke that because it was shortly after my birthday so it was around April."

{¶29} The plaintiffs argued that Howard's testimony lacks merit because he identified the Clear Lake Road address as his address when he registered to vote, filed his taxes, as his

mailing address, and when he applied for his hunting and fishing licenses, and, moreover, that he did not change his address with any of these governmental agencies when he moved in with Pomeroy. They also point to the fact that Howard testified at deposition that the first time he identified Pomeroy's address as his was in July 2017, when he gave that address to a potential employer. The trial court agreed, finding that his deposition was not credible and he received proper service.

{¶30} We disagree with the trial court's assessment that Howard set forth only self-serving testimony. Although he did contradict himself at one point on what month he moved out of the Clear Lake Road house, he later testified that he had misspoke. He further testified that he had a falling out with his sister and did not speak to her once he moved out of her house and did not receive further communication or mail from her. We are also not persuaded by the fact that Howard did not immediately change his mailing address, driver's license registration, or hunting and fishing registrations. The plaintiffs have not shown that he was required by law to do so.

{¶31} We also find that Howard was not properly notified of the default hearing. Civ.R. 55(A) provides that a party is entitled to notice of a default hearing only if the party has appeared in the action, and, as the dissent mentions, Howard did not enter an appearance in this action. Howard testified that he was not even aware of the lawsuit until after judgment was entered against him. Although Civ.R. 55(A) did not require the plaintiffs to serve notice, the trial court made notice a requirement by ordering plaintiffs to notify Howard of the default hearing. The notice for the default hearing was sent by certified mail to the Clear Lake Road address. The record contains a return receipt with a signature on it dated July 8, 2017, but the record does not reflect who signed for it — the signature is illegible and the plaintiffs failed to provide any

evidence identifying who signed for it or other evidence that Howard was notified of the default judgment hearing.

{¶32} Thus, because the record shows that Howard moved to the Lindsey Road address before the notice of the hearing was delivered to the Clear Lake Road address on July 8, 2017, the plaintiffs failed to establish that they notified Howard of the default hearing.

{¶33} Default judgments are not favored in the law; cases should be decided on their merits rather than on technical grounds. *Rice v. Gen. Dynamics Land Sys.*, 86 Ohio App.3d 841, 844, 621 N.E.2d 1304 (3d Dist.1993); *see also GGNSC Lima, L.L.C. v. LMOP, L.L.C.*, 8th Dist. Cuyahoga No. 105910, 2018-Ohio-1298, ¶ 24, and *Rafalski v. Oates*, 17 Ohio App.3d 65, 67, 477 N.E.2d 1212 (8th Dist.1984) (when possible, cases should be decided on their merits). This court has also recognized the importance of adjudicating cases on their merits where, as here, large sums of money are at issue. *GGNSC Lima, L.L.C.* at *id.*, citing *Draghin v. Issa*, 8th Dist. Cuyahoga No. 98890, 2013-Ohio-1898, ¶ 23 (default judgments are not favored where large sums of money are at issue).

{¶34} Upon the particular facts and circumstances presented and the large amount at issue in this case, we find that the trial court abused its discretion in denying Howard's motion to vacate the default judgment.

{¶35} The first and second assignments of error are sustained.

Mootness

{¶36} In the third assignment of error, Howard claims that the trial court erred when it denied his motion for relief from judgment. The fourth assignment of error challenges the amount of the damage award. Because we are reversing the case based on the motion to vacate,

the third and fourth assignments of error are moot. *See* App.R. 12(A)(1)(c).

{¶37} Accordingly, we reverse the decision of the trial court and remand the matter for proceedings on the merits of the case.

{¶38} Judgment reversed; case remanded.

It is ordered that appellant recover of appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS
WITH SEPARATE OPINION;
SEAN C. GALLAGHER, P.J., DISSENTS
WITH SEPARATE OPINION

KATHLEEN ANN KEOUGH, J., CONCURRING:

{¶39} I concur but write separately to address several issues.

{¶40} The dissent recognizes that because Howard had not appeared in the action, the civil rules did not require notice of the default hearing. Under Civ.R. 55(A), a party is entitled to notice of a default hearing only if the party has appeared in the action. In this case, however, even though Howard had not appeared, the trial court ordered plaintiffs to notify him of the

default hearing. Because the record reflects that Howard moved to the Lindsey Road address well before July 8, 2017, when notice of the hearing was delivered by certified mail to the Clear Lake Road address, I concur that plaintiffs failed to establish that they properly notified Howard of the default hearing, as ordered, and that the trial court therefore abused its discretion in denying the motion to vacate the default judgment.

{¶41} I also find that the trial court abused its discretion in denying the motion to vacate because plaintiffs did not produce evidence demonstrating that Howard lived at the address in question in May 2017, when they attempted service of the summons and complaint at the Clear Lake Road address.

{¶42} The record reflects that plaintiffs complied with Civ.R. 4.1(A), regarding service by certified mail, in attempting to serve Howard at the Clear Lake Road address on May 3, 2017. However, Howard submitted a sworn affidavit with his motion to vacate in which he averred that (1) he did not live at the Clear Lake Road address on that date, (2) he was not served with the summons and complaint in this case prior to the default judgment against him, and (3) he first became aware of the case after default judgment had been rendered against him. Howard therefore rebutted the presumption of valid service, and it was incumbent upon plaintiffs to produce evidence that Howard lived at the address in question on May 3, 2017. They did not do so.

{¶43} Howard testified that although he did not know the exact date, he moved in with Pomeroy at the Lindsey Road address at the end of March or early April 2017. Although at one point in his deposition, Howard stated that he did not move from Clear Lake Road until June or July, upon questioning by counsel for ALTL (not Howard's counsel, as asserted by the dissent),

Howard clarified that he simply misspoke about that date, and that he knew he moved to Lindsey Road in late March or early April, because he moved shortly after his birthday on March 24. Pomeroy testified that she knew Howard moved in with her sometime before the weekend of April 22, 2017, when they went to a rabbit show together.

{¶44} The plaintiffs argued at the hearing on Howard's motion to vacate that Howard's affidavit was not credible because he did not change his mailing address for purposes of voter registration, obtaining hunting and fishing licenses, filing and receiving notices for his federal taxes, and employment. I disagree that Howard's failure to change his address for these purposes is evidence that he still lived at the Clear Lake Road address.

{¶45} It was apparently not important to Howard to change his address for voter registration; he testified that the last time he voted was in 2012, five years before he moved in with Pomeroy. There was also no reason for Howard to change his address for his hunting and fishing licenses; he testified that the licenses were annual licenses that expired each year, and that as of his deposition in October 2017, he had not renewed his hunting license.

{¶46} With respect to his federal taxes, Howard testified that he filed his federal tax return before the April 17 deadline, using the Clear Lake Road address. But he also testified that although he had a refund coming, he never received that refund because it was automatically paid to a judgment creditor. In fact, Howard testified that he had not received a refund for years. He said that he had defaulted in 2009 on payments for a truck he had purchased, and "every year I get a statement saying you're not getting your tax refund because of this loan." Despite Howard's testimony, plaintiffs' counsel argued at the hearing that Howard's use of the Clear Lake Road address in April 2017 obviously meant he still lived there because "he's expecting a refund. * *

* What's more important to a guy living paycheck to paycheck than his tax return refund?"

{¶47} With respect to changing his mailing address for employment purposes, there was also apparently no need for Howard to change his address with Manpower. Howard testified that he worked for Manpower through June 2017, and that although he never changed his address with Manpower after he moved to Lindsey Road, he picked up his check every two weeks and cashed it; Manpower did not mail his checks to him. Howard testified further upon questioning by counsel for ALTL that from March through June 2017, he submitted multiple employment applications through a website called Indeed and that he used the Lindsey Road address for those applications. He also said that the employers responded to his applications by email, not by regular mail.

{¶48} Finally, Howard testified that as of his deposition and well after he had moved in with Pomeroy, he still had not filed a change of address with the United States Post Office because the only mail he received at the Clear Lake Road address was junk mail or sometimes a magazine. He said he does not receive bills in the mail because he does not have any.

{¶49} Howard's deposition was videotaped, and at the hearing, plaintiffs' counsel showed significant portions of Howard's testimony regarding what happened on the day of the accident. Plaintiffs' counsel argued that Howard's testimony about the accident established his liability for the accident, and demonstrated that he did not have a meritorious defense to the claim under his Civ.R. 60(B) motion for relief from judgment. I find it curious, however, that plaintiffs' counsel apparently accepts as truthful the entirety of Howard's deposition testimony regarding the accident, but adamantly disputes the veracity of Howard's deposition testimony regarding when he moved from Clear Lake Road to Lindsey Road.

{¶50} Plaintiffs' counsel also argued at the hearing that Howard's assertion that he no longer lived at the Clear Lake Road address in May 2017, was not credible because Pomeroy testified that she continued to meet Howard at the Clear Lake Road property once a week even after when Howard claimed he had moved from that address. But Pomeroy's testimony did not indicate that Howard still lived at the Clear Lake Road address.

{¶51} Pomeroy testified that in May 2017, Howard worked each day in Ann Arbor, Michigan, and she worked as a courier, beginning her workday at 5 p.m. Pomeroy testified that she delivers pharmaceuticals to nursing homes throughout the state of Michigan, and that she drives from Chelsea, Michigan to and from Bad Axe, Michigan almost every night. She said that even after Howard moved in with her, she would occasionally meet him at the Clear Lake Road address or in the parking lot of her employer, and they would spend her lunch hour together before she "took off." Pomeroy said that, "if I waited for him to come to Jackson to our home, that would have set me back another 45, 50 minutes. So we met where I was at or some place closer." Despite counsel's argument, Pomeroy's testimony did not establish that Howard still lived at the Clear Lake Road address in May 2017, when Pomeroy signed the certified receipt for the summons and complaint. It merely established that Howard and Pomeroy looked for a way to spend time together despite their work schedules.

{¶52} This court reviews a trial court's decision regarding a motion to vacate a purportedly void judgment for an abuse of discretion. *Adams v. McElroy*, 8th Dist. Cuyahoga No. 105399, 2018-Ohio-89, ¶ 12, citing *Hook*, 8th Dist. Cuyahoga No. 104825, 2017-Ohio-976, at ¶ 10. The term "abuse of discretion" implies that the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶53} Because plaintiffs did not produce credible evidence to rebut Howard's affidavit, the trial court abused its discretion in denying Howard's motion to vacate the default judgment.

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶54} I respectfully dissent. Howard used the address at which service was perfected for the purposes of voter registration, obtaining hunting and fishing licensing, filing and receiving notices for his federal taxes and for employment purposes that ran through at least June 2017. Further, Howard failed to notify the post office of his changed address and there is no evidence that he notified the Bureau of Motor Vehicles of the changed address within the statutory time frame. At his deposition and with what was supposed to add clarity to his claim, Howard was unable to testify when he actually moved from the Clear Lake Road address and even admitted that he moved after service had been perfected. This is dispositive. Defendants cannot turn a blind eye to proper service and then seek to vacate the resulting default judgment with equivocal evidence that the service was improper. The default judgment was also sent to and received at the Clear Lake Road address, which prompted Howard to enter an appearance to challenge the judgment, despite his testimony that he did not receive any mail from his sister after moving out.

{¶55} Howard's claim of not receiving service rests with his credibility, and after a hearing on the matter, the trial court found Howard's and Pomeroy's credibility to be lacking. A trial court does not abuse its discretion in finding witnesses incredible, especially when that resolution is based on competent evidence. Howard testified under oath that he did not move until the summer, although he clarified that to mean "early April," and that testimony directly conflicted with his unsworn affidavit attached to the motion to vacate, in which Howard

unequivocally claimed to have moved at the end of March. In her sworn statements, also attached to the motion to vacate, Pomeroy unequivocally agreed that Howard moved at the end of March, but during her testimony, she claimed the move may have happened sometime in April. The affidavits Howard and Pomeroy submitted for the purpose of demonstrating that service was not proper, turned out to be unsupported with evidence. Neither Pomeroy nor Howard could testify in support of the unequivocal statements that Howard moved at the end of March. Their credibility is an issue, and appellate courts cannot substitute their judgment for that of the trier of fact.

{¶56} Howard's inadvertent disclosure during his testimony, that he moved sometime in the summer, is bolstered by his use of the Clear Lake Road address as his residence for employment and other official purposes through at least June 2017, after service was completed. Although his counsel attempted to rehabilitate Howard, the vacillating testimony added to the dispute that required the trial court to consider credibility of the witnesses — an issue resolved against Howard. Appellate courts do not review the factual underpinnings de novo; we defer to the credibility determinations made by the trial court. Credibility was the linchpin of the service issue.

{¶57} All of the cases cited in support of Howard's position are unambiguous — a trial court errs by ignoring "uncontroverted" evidence of the failure of service. Howard was unable to cite any authority for the proposition that a trial court must disregard credibility issues with witnesses whose affidavits conflict with later sworn testimony. Service was perfected, and although Howard may have provided some evidence that he may not have lived at the Clear Lake Road address at the time of service, ample evidence was presented to undermine those claims. A

defendant is not entitled to use an address when it benefits him and then claim not to live there for the purpose of evading service of process.

{¶58} All of the foregoing is recognized by the lead opinions, but as an additional basis for reversing, it is sua sponte concluded that the default judgment was improper because notice of the default hearing was sent to the Clear Lake Road address in July after Howard undisputedly claimed to have moved. Neither party discussed that issue in the appellate briefing, and importantly the appellees have not had the opportunity to brief this issue. *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 21. Notwithstanding, notice of the default hearing was not required under the civil rules in this case and cannot be the basis for finding reversible error. Howard never entered an appearance in the matter, and therefore, he was not entitled to notice of the default hearing under Civ.R. 55 (advanced written notice is required only if the party against whom default is sought appears in the matter). Failure to provide written notice is not dispositive nor is it a consideration. The notice of the default hearing was sent at the trial court's behest in advance of the default hearing, and the failure to provide notice became an issue within the trial court's discretion, not one mandated by rule. There is no reversible error with respect to the notice of the default hearing.

{¶59} I dissent and would address the several remaining issues presented in Howard's appeal.