[Cite as *Woods Cove III, L.L.C. v. Diblasi*, 2018-Ohio-3184.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106526

WOODS COVE III, L.L.C.

PLAINTIFF-APPELLEE

vs.

FRANCESCA DIBLASI, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-870473

BEFORE: McCormack, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: August 9, 2018

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Francesca DiBlasi appeals from the trial court's denial of her motion for relief from default judgment. For the reasons that follow, we dismiss the appeal.

Procedural History and Substantive Facts

{¶2} In December 2005, DiBlasi purchased the property located on Commonwealth Avenue in Mayfield Heights, Ohio. She acquired two mortgages in order to purchase the property. The first mortgage was for $117,000, and the second mortgage was for $29,250, thus totaling $146,250. The mortgage contained an occupancy clause that required DiBlasi, the mortgagee, to maintain the property as her principal residence for at least one year. At all times relevant to this action, DiBlasi was the sole titleholder for the property and the official tax mailing address was the Commonwealth Avenue address.

{¶3} On October 13, 2016, plaintiff-appellee Woods Cove III, L.L.C., filed a complaint for foreclosure due to delinquent taxes on the property. Attached to the complaint was a notice of intent to foreclose. On October 18, 2016, the complaint was served upon DiBlasi via certified mail at the property. On October 23, 2016, the complaint was also served upon DiBlasi via special process server. The special process server filed an affidavit with the court stating that DiBlasi was "personally served" at the Commonwealth Avenue address that is the subject of the within dispute. On November 2, 2016, the court received a USPS receipt indicating that the certified mail was delivered to the property on October 24, 2016.

{¶4} On December 1, 2016, the court found that Woods Cove had perfected service upon all of the defendants. Thereafter, Woods Cove filed a motion for default judgment. On January 19, 2017, the magistrate found in favor of Woods Cove and recommended the property be referred to the sheriff for sale. On February 7, 2017, the court adopted the magistrate's decision, granting the plaintiff's motion for default judgment in the amount of $8,741.05, plus interest, costs, and attorney fees.

{¶5} On February 23, 2017, the court issued an order of sale to the sheriff, and on April 10, 2017, appellee Telecom Acquisition Corp. I, Inc. ("TAC") purchased the Commonwealth Avenue property. On April 19, 2017, the court issued a decree of confirmation of sale directing the sheriff to issue a deed to TAC. On July 27, 2017, DiBlasi filed a motion for relief from judgment pursuant to Civ.R. 60(B)(5). TAC filed a motion to intervene and brief in opposition to DiBlasi's motion for relief. The court granted TAC's motion to intervene and scheduled the matter for a hearing before the magistrate.

{¶6} At the hearing, DiBlasi testified that she purchased the Commonwealth Avenue property to provide a home for her sister, Mary, who did not have the means to purchase a home.

DiBlasi never intended to live on the property. DiBlasi stated that she had an oral agreement with her sister that Mary was to pay all expenses associated with the property, including the mortgage, utilities, and taxes. DiBlasi never notified the county of this arrangement or amended her tax mailing address for the property.

{¶7} DiBlasi testified that sometime after her purchase of the property, she began to receive phone calls from the mortgage company regarding late mortgage payments. DiBlasi confirmed with her sister that Mary was late in making the mortgage payments. DiBlasi also confirmed the late payments by "periodically" checking her own credit report. DiBlasi ultimately paid off both mortgages, and her sister continued to live on the property. DiBlasi testified that her sister did not inform her of the unpaid taxes; rather, she did not become aware of the delinquent taxes until July 2017, after TAC had purchased the property upon foreclosure.

{¶8} Michael Tricarichi, president of TAC, testified that after TAC purchased the Commonwealth Avenue property, he discovered someone living on the property. Tricarichi stated that he offered the individual, who held herself out as DiBlasi, a lease of the property, which she signed as "Francesca DiBlasi." At the hearing, DiBlasi denied signing the lease.

{¶9} On September 28, 2017, the magistrate granted DiBlasi's motion for relief from judgment, finding that Woods Cove failed to perfect service of the summons or complaint and, therefore, the court never acquired personal jurisdiction over DiBlasi. TAC filed objections to the magistrate's decision and replied to its objections.

{¶10} On October 31, 2017, the trial court sustained TAC's objections, rejected the magistrate's decision, and denied DiBlasi's motion for relief from judgment. The court found that plaintiff Woods Cove served DiBlasi at the property address in accordance with Civ.R. 4.1. The court further found as follows:

> Plaintiff's attempts to serve Defendant Francesca DiBlasi at the property, via certified mail and special process server, reached the tax mailing address of the property owner, Defendant Francesca DiBlasi; the court notes that the tax mailing address was provided to Cuyahoga County officials by Defendant DiBlasi when the property was purchased in December 2005. The court also finds that no review of the public record would reveal either the fact that Defendant DiBlasi's sister (rather than Defendant DiBlasi herself) resided at the property at issue or that the siblings had entered into a personal agreement regarding payment of any taxes owed for the property.
>
> While the court acknowledges the unfortunate personal circumstances that led to the unpaid taxes and eventual foreclosure in this case, it cannot deem Defendant Francesca DiBlasi's misfortune a sufficient basis upon which to overcome the presumption of proper service by Plaintiff in this case, nor require the Plaintiff to take affirmative steps to effect service which [is] not mandated by the Ohio Rules of Civil Procedure.

{¶11} On November 22, 2017, DiBlasi appealed the trial court's denial of her motion for relief from judgment, alleging that the trial court abused its discretion in denying her motion for relief from judgment. Specifically, DiBlasi argued that the court never acquired personal jurisdiction over her and therefore the default judgment against her was void.

{¶12} On May 22, 2018, TAC sold the property to an unrelated third party for $142,300. And on June 13, 2018, TAC filed a motion to dismiss the appeal as moot.

Law and Analysis

{¶13} We first address TAC's motion to dismiss the appeal. TAC contends that DiBlasi's appeal is now moot because the property at issue has been sold to an unrelated third party. In opposition, DiBlasi argues that the lack of proper service rendered the default judgment void and, in such cases, a legal remedy is available. Thus, according to DiBlasi, the appeal is not moot.

{¶14} An appeal is moot "'where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.'" *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245, 551 N.E.2d 1249 (1990), quoting *Rauch v. Noble*, 169 Ohio St. 314, 316, 159 N.E.2d 451 (1959), and *Lynch v. Bd. of Edn.*, 116 Ohio St. 361, 156 N.E. 188 (1927), paragraph three of the syllabus.

{¶15} Generally, in a foreclosure action, an appeal from a foreclosure is moot where the debtors fail to obtain a stay from the distribution of proceeds or the confirmation of sale by posting the required bond. *U.S. Bank Trust Natl. Assn. v. Janossy*, 8th Dist. Cuyahoga No. 106361, 2018-Ohio-2228, ¶ 7, citing *Provident Funding Assocs., L.P. v. Turner*, 8th Dist. Cuyahoga No. 100153, 2014-Ohio-2529, ¶ 6; *Blisswood Village Home Owners Assn. v. Genesis Real Estate Holdings Group, L.L.C.*, 8th Dist. Cuyahoga No. 105861, 2018-Ohio-1092, ¶ 11 ("Where a defendant in a foreclosure action fails to obtain a stay of the distribution of the proceeds, R.C. 2329.45 does not apply and any appeal therefrom is moot.").

{¶16} R.C. 2329.45, which governs the reversal of judgments in foreclosure cases, provides a remedy for an appellant in a foreclosure case after the property has been sold and the proceeds have been distributed. The statute provides that

> [i]f a judgment in satisfaction of which lands or tenements are sold is reversed on appeal, such reversal shall not defeat or affect the title of the purchaser. In such case restitution in an amount equal to the money for which such lands or tenements were sold, with interest from the day of sale, must be made by the judgment creditor. In ordering restitution, the court shall take into consideration

all persons who lost an interest in the property by reason of the judgment and sale and the order of the priority of those interests.

Id.

{¶17} Therefore, the statute provides an alternative remedy, i.e. restitution, for an appellant even when the property is no longer recoverable. *Turner*, citing R.C. 2329.45. The remedy is available, however, only where the appealing party has obtained a stay of the distribution of the proceeds. *Id.*

{¶18} Here, DiBlasi had not obtained a stay of the proceedings at any time and she concedes that the property has been sold and the proceeds from the sale were distributed. However, DiBlasi claims that restitution is available to her because there was no voluntary satisfaction of judgment, because she was never properly served, and the judgment is void.

{¶19} A judgment rendered without personal jurisdiction over a defendant is void. *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988). A court acquires personal jurisdiction over a party by proper service, and where the plaintiff has not perfected service on a defendant, the court lacks jurisdiction to enter a default judgment against the defendant. *See GGNSC Lima, L.L.C. v. LMOP, L.L.C.*, 8th Dist. Cuyahoga No. 105910, 2018-Ohio-1298, ¶ 14. Thus, "[a] default judgment rendered by a court without obtaining service over the defendant is void, and the party is entitled to vacation of the judgment." *Id.* at ¶ 15, citing *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 553 N.E.2d 650 (1990), syllabus. A trial court's decision regarding the validity of service is reviewed for an abuse of discretion. *Id.*

{¶20} 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). Service of process must be "'reasonably calculated to apprise interested parties of the action and to afford

them an opportunity to respond.'" *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980), quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

{¶21} Civ.R. 4.1 outlines the proper methods of service, including certified mail, personal service, and residence service. If service is attempted via certified mail pursuant to Civ.R. 4.1(A), valid service is presumed to have been made "when the envelope is received by any person at the defendant's address." *Rokakis v. Estate of Thomas*, 8th Dist. Cuyahoga No. 89944, 2008-Ohio-5147, ¶ 12. Also, if service is attempted via residence service pursuant to Civ.R. 4.1(C), valid service is presumed when the process server leaves the complaint "with some person of suitable age and discretion then residing therein." Moreover, where a taxpayer provides an official with an address, specifically the tax mailing address, "'it may be fairly presumed that the taxpayer can be reached at such address.'" *Id.* at ¶ 13, quoting *In re Foreclosure of Liens*, 62 Ohio St.2d 333, 337, 405 N.E.2d 1030 (1980).

{¶22} Where the plaintiff follows the Ohio rules governing service of process, courts presume that service is proper, unless the defendant rebuts this presumption with sufficient evidence of nonservice. *Mitchell v. Babickas*, 8th Dist. Cuyahoga No. 105294, 2018-Ohio-383, ¶ 10, citing *McWilliams v. Schumacher*, 8th Dist. Cuyahoga Nos. 98188, 98288, 98390, 98423, 2013-Ohio-29, ¶ 49-50. To rebut the presumption of proper service, the defendant must produce "evidentiary-quality information" that demonstrates she did not receive service. *Mitchell*, citing *Thompson v. Bayer*, 5th Dist. Fairfield No. 2011-CA-00007, 2011-Ohio-5897, ¶ 23. This evidence must be uncontradicted. *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212 (8th Dist.1984). "It is reversible error for a trial court to disregard unchallenged testimony that a person did not receive service." *Id.* The party attempting to avoid jurisdiction

bears the burden of demonstrating a defect in the process. *Wells Fargo Bank, N.A. v. Fusco Properties, L.L.C.*, 8th Dist. Cuyahoga Nos. 92689 and 93164, 2010-Ohio-1417, ¶ 16.

{¶23} Here, the record demonstrates that DiBlasi provided the county with the Commonwealth Avenue address as her tax mailing address and the mortgage contained an occupancy clause that required DiBlasi to live in the property for at least one year. Further, the summons and complaint were sent to the property via certified mail and were also delivered to the property by a process server, in accordance with Civ.R. 4.1. In complying with the Ohio rules governing service of process, as well as following the instructions for service at the address provided by the defendant herself, service was "reasonably calculated" to apprise the defendant of the action. Furthermore, the affidavit of the special process server stated that DiBlasi was "personally served." This affidavit directly contradicts DiBlasi's testimony that she never actually received the complaint in foreclosure. She has therefore failed to rebut the presumption of proper service. *See Baumgardner v. Norris*, 8th Dist. Cuyahoga No. 62821, 1992 Ohio App. LEXIS 3309 (June 25, 1992). Moreover, DiBlasi has failed to establish a defect in the process.

{¶24} Under the circumstances of this case, we find that service of process was reasonably calculated to apprise DiBlasi of the intent to foreclose on her property and DiBlasi could not overcome the presumption of proper service perfected by the plaintiff. Default judgment rendered against DiBlasi was therefore not void for lacking personal jurisdiction. Because the property has been sold and the proceeds distributed, and DiBlasi failed to obtain a stay in the proceedings, the issues presented for review regarding the foreclosure are moot.

{¶25} Appeal dismissed.

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

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

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TIM McCORMACK, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR