

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

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| CONSOLIDATED INVESTMENT CORPORATION, | : | MEMORANDUM OPINION |
| | : | |
| Plaintiff-Appellee, | : | CASE NO. 2009-L-165 |
| | : | |
| - vs - | : | |
| | : | |
| OLIVE & THE GRAPE, d.b.a. EVERYTHING WINE AND MORE, INC., et al., | : | |
| | : | |
| Defendants-Appellants. | : | |

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 002479.

Judgment: Appeal dismissed.

David J. Richards, Jr., Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellee).

Olive & The Grape, d.b.a. Everything Wine and More, Inc., pro se, P.O. Box 1125, Mentor, OH 44061 (Defendant-Appellant).

Candace L. Berthold, pro se, P.O. Box 1125, Mentor, OH 44061 (Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} On December 1, 2009, appellants, Olive & The Grape, d.b.a. Everything Wine and More, Inc. and Candace L. Berthold, pro se, filed a notice of appeal from an October 26, 2009 entry of the Lake County Court of Common Pleas.

{¶2} Appellee, Consolidated Investment Corporation, filed a motion to dismiss the appeal as untimely on December 7, 2009.

{¶3} The notice of appeal was due on Wednesday, November 25, 2009, which was not a holiday or a weekend. App.R. 4(A) states that:

{¶4} “A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure.”

{¶5} Loc.R. 3(D)(2) of the Eleventh District Court of Appeals provides:

{¶6} “In the filing of a Notice of Appeal in civil cases in which the trial court clerk has not complied with Ohio Civ.R. 58(B), *and the Notice of Appeal is deemed to be filed out of rule*, appellant shall attach an affidavit from the trial court clerk stating that service was not perfected pursuant to Ohio App.R. 4(A). The clerk shall then perfect service and furnish this Court with a copy of the appearance docket in which date of service has been noted. Lack of compliance shall result in the *sua sponte* dismissal of the appeal under Ohio App.R. 4(A).” (Emphasis sic.)

{¶7} In the instant matter, the docket reveals that Olive & The Grape, d.b.a. Everything Wine and More, Inc., was properly served with the summons and complaint on August 20, 2009, via certified mail. Notation of this good service appears on the docket as of August 21, 2009. Olive & The Grape, d.b.a. Everything Wine and More, Inc., was also properly served with the notice of the October 26, 2009 judgment on October 28, 2009. Thus, there is no question that the business entity’s appeal filed on December 1, 2009, is untimely.

{¶8} Furthermore, although the individual defendant, Ms. Berthold, was not served with the summons and complaint despite three attempts at certified mail service, she was served with the notice of the October 26, 2009 judgment on October 28, 2009.

The docket does not reflect any failure of service of that notice. Ms. Berthold obviously became aware of the judgment at some point, which prompted the filing of her notice of appeal.

{¶9} Although Ms. Berthold was not properly served with the summons and complaint, case law provides that a Civ.R. 60(B) motion for relief from judgment is otherwise appropriate when a party has never been notified of the commencement of litigation and only learns of a judgment after it has been entered, or when the clerk has issued notice of the judgment, but the movant claims that it was never received. See *Frazier v. Cincinnati School of Med. Massage*, 1st Dist. No. C-060359, 2007-Ohio-2390. It is the service of notice, and adequate proof thereof, and not actual notice that is required by Civ.R. 58(B). See *In re L.B.*, 8th Dist. Nos. 79370 and 79942, 2002-Ohio-3767, at ¶11.

{¶10} Therefore, appellants have neither complied with the thirty-day rule set forth in App.R. 4(A) nor alleged that there was a failure by the trial court clerk to comply with Civ.R. 58(B). The time requirement is jurisdictional in nature and may not be enlarged by an appellate court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections* (1988), 40 Ohio St.3d 58, 60; App.R. 14(B).

{¶11} Accordingly, appellee's motion to dismiss is granted, and this appeal is dismissed pursuant to App.R. 4(A).

{¶12} Appeal dismissed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶13} I respectfully dissent.

{¶14} The record reveals the following:

{¶15} On July 30, 2009, appellee filed a complaint for breach of contract against appellants. However, the documents were returned as undeliverable. Therefore, service was not perfected.

{¶16} On October 16, 2009, appellee filed a motion for default judgment pursuant to Civ.R. 55 for the reason that appellants failed to answer, plead, move, or appear in response to its complaint. Again, appellants were not served and the documents were returned as undeliverable.

{¶17} Pursuant to its October 26, 2009 judgment entry, the trial court granted appellee's motion for default judgment against appellants, ordering appellants to pay \$21,403.33 plus costs due to their failure to answer, plead, move, or appear in response to appellee's complaint.

{¶18} Appellants filed a notice of appeal with this court on December 1, 2009.

{¶19} Appellee filed a motion to dismiss the appeal as untimely on December 7, 2009.

{¶20} However, as stated previously, a review of the record reveals that appellants were never served with appellee's complaint. Thus, because appellee never served appellants, the court lacked personal jurisdiction over them, and it could make no binding determinations regarding their rights. See *Jacobs v. Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312, at ¶9. "Any judgment rendered in an action where there has not been proper service is void ab initio." *Id.*, citing *Liberty Credit Servs., Inc. v. Walsh*,

10th Dist. No. 04AP-360, 2005-Ohio-894, at ¶13; *Clark v. Marc Glassman, Inc.*, 8th Dist. No. 82578, 2003-Ohio-4660, at ¶17.

{¶21} Because service of process was not perfected for the complaint, I believe the trial court's default judgment is rendered void.

{¶22} Accordingly, I believe the judgment of the Lake County Court of Common Pleas should be vacated and this matter remanded for further proceedings.

{¶23} I dissent.