[Cite as *First Merit Bank v. Wood*, 2010-Ohio-1339.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

FIRST MERIT BANK, N.A. Appellee v. WILLIAM M. WOOD, et al. Appellants	C.A. No. 09CA009586 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 06CV145416

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

MOORE, Judge.

{¶1} Appellants, William and Vicki Wood, appeal from the judgment of the Lorain County Court of Common Pleas. This Court vacates and remands for proceedings consistent with this opinion.

I.

{¶2} On March 3, 2006, Appellee, FirstMerit Bank, filed a complaint against the Woods. On March 10, 2006, the Lorain County Clerk of Courts sent the complaint to the Woods via certified mail at the address listed on the complaint. The complaint was returned unclaimed. The Lorain County Clerk of Courts then sent the complaint by ordinary mail, again to the address listed on the complaint. The complaint was not returned by postal authorities with an endorsement showing a failure of delivery. The Woods did not respond to the complaint, and on July 28, 2006, FirstMerit filed a motion for default judgment. The motion was unopposed. The trial court granted the motion. Subsequently, on January 17, 2007, FirstMerit obtained an order

for examination of judgment debtor. On January 31, 2007, the Woods were personally served with notice of the examination at the address to which the original complaint was sent. The debtor examination, which the Woods attended, was held on February 2, 2007. On February 10, 2009, FirstMerit filed a writ of execution, which was again personally served on the Woods. The Woods filed a request for a hearing. Prior to the hearing on the writ, the Woods filed a motion to vacate the default judgment. The Woods attached to the motion their affidavits, wherein they each averred that "[n]o one has ever personally served me with the Summons or Complaint in the above-captioned matter. I have never received a copy of the Summons or Complaint by certified mail or by regular mail. Indeed, I have never received a copy of the Summons or Complaint in the above-captioned case."

{¶3} On April 29, 2009, the trial court denied the Woods' motion. The Woods timely appealed this decision. This Court affirmed the trial court's decision, explaining that we presumed regularity because the record did not contain the motion to vacate. The Woods moved this Court to reconsider. We granted their motion and ordered the Woods to supplement the record with the missing motion to vacate. We now reconsider the merits of the Woods' two assignments of error, which we have combined for ease of review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED, AS A MATTER OF LAW, AND ABUSED ITS DISCRETION WHEN IT DISREGARDED [THE WOOD'S] UNCHALLENGED SWORN STATEMENTS THAT THEY DID NOT RECEIVE SERVICE OF PROCESS AND DENIED [THE WOODS'] MOTION TO VACATE THE DEFAULT JUDGMENT WITHOUT EVIDENCE OF ACTUAL SERVICE OF PROCESS IN DIRECT CONTRAVENTION OF NINTH DISTRICT COURT OF APPEALS' PRECEDENT."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT BASED ITS DENIAL OF [THE WOODS'] MOTION TO VACATE ON CIV.R. 60(B) RATHER THAN UTILIZING ITS INHERENT POWER TO VACATE A JUDGMENT THAT WAS VOID AB INITIO."

{¶4} The Woods contend that the trial court erred when it determined that they were properly served, and that it abused its discretion when it disregarded sworn statements that they did not receive service of process. The Woods further contend that the trial court should have granted their motion to vacate based on the court's inherent authority, because without proper service, the trial court did not have personal jurisdiction over them, and thus, the default judgment was void ab initio. We agree.

{¶5} "Challenges to a trial court's jurisdiction present questions of law and are reviewed by this Court de novo." (Citation and quotations omitted) *Eisel v. Austin*, 9th Dist. No. 09CA009653, 2010-Ohio-816, ¶8.

{¶6} To properly enter judgment, the trial court was required to have personal jurisdiction over the Woods. Id. quoting *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. Personal jurisdiction "may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." (Citations omitted.) *Eisel*, supra, at ¶9. We do not conclude, as FirstMerit contends, that by appearing at the debtor's examination, post-judgment, that the Woods have voluntarily appeared and submitted to the jurisdiction of the court and thus waived any argument with regard to personal jurisdiction. The appearance at a post-judgment proceeding cannot be equated with an appearance at the actual proceeding that resulted in the judgment itself. We conclude that an appearance post-judgment does not waive the Woods'

argument that the trial court was without personal jurisdiction to enter the default judgment. As the Woods did not appear before the trial court prior to the default judgment, we will focus solely on whether the Woods were properly served. Id.

{¶7} Pursuant to Civ.R. 4.1, service may be made by certified or express mail, personal service, or residential service. If certified or express mail service is attempted and the envelope "is returned with an endorsement showing that the envelope was unclaimed," the party requesting service must be notified and that party may then request service by ordinary mail. Civ.R. 4.6(D).

> "[T]he clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. *** Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." Id.

{¶8} In the instant matter, the docket indicates that the clerk sent a copy of the complaint to the Woods via certified mail. See Civ.R. 4.1(A). Upon return of the complaint as "Unclaimed," the clerk properly served the Woods via regular mail. See Civ.R. 4.6(D). The complaint was not returned by postal authorities with an endorsement showing failure of delivery. Finally, the clerk certified on the record that the summons and complaint were sent to the Woods' home address. Thus, FirstMerit satisfied the mandates of the Civil Rules on service. "'[T]here is a presumption of proper service in cases where the Civil Rules on service are followed. However, this presumption is rebuttable by sufficient evidence.'" *Jacobs v. Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312, at ¶14 (hereinafter *Jacobs II)*, quoting *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66.

{¶9} The Woods contend that they presented sufficient evidence to rebut the presumption of proper service. "'Where [the parties] seeking a motion to vacate make[] an uncontradicted sworn statement that [they] never received service of a complaint, [they are] entitled to have the judgment against [them] vacated even if [their] opponent complied with Civ.R. 4.6 and had service made at an address where it could reasonably be anticipated that the defendant[s] would receive it.'" *Jacobs II* at ¶14, quoting *Rafalski*, 17 Ohio App.3d at 66-67. The Woods attached their affidavits to their motion to vacate, in which they averred that they did not receive service of the complaint. In response, FirstMerit simply stated that the complaint was sent to the Woods' current address and that the credibility of their "self-serving statements should be scrutinized by the [trial court] and their request to vacate the Judgment should be denied." Nothing in FirstMerit's response or attached affidavit contradicted the Woods' sworn statements that they did not receive service of the complaint. Instead, this affidavit offers competing statements that the Woods *should have* received the complaint. In *Hayes v. Kentucky Joint Stock Land Bank of Lexington* (1932), 125 Ohio St. 359, at 365, the Ohio Supreme Court stated:

> "The defendant, who challenged the jurisdiction over her person, testified in her own behalf. If another witness had given testimony which contradicted her upon essential points, or if she had contradicted herself, or had made admissions which tended to support the claim of residence in Canton, a wholly different situation would be presented. The trial court could not wholly disregard her uncontradicted testimony. Neither could it draw inferences directly contrary to her affirmative statements. The court therefore erred in finding that good and valid service was had upon her, and that the court had jurisdiction over her person."

Based upon the Woods' unrebutted affidavits that they did not receive service of the complaint, this Court must conclude that service was ineffective. See *Jacobs v. Szakal*, 9th Dist. No. 22219, 2005-Ohio-2146, at ¶17 (*Jacobs I*).

{¶10} We recognize the line of cases from other districts that criticizes the use of affidavits to rebut the presumption of receipt. See, e.g., *Infinity Broadcasting, Inc. v. Brewer*, 1st Dist. No. C-020329, 2003-Ohio-1022, at ¶8 (asserting that a trial court is not bound to accept a self-serving affidavit which states that the party did not receive notice). However, this Court has maintained that "[i]n a dispute over actual notice, an uncontradicted sworn statement is ordinarily sufficient to overcome a presumption that notice sent was actually received." *Mtge. Electronic Registration Sys., Inc. v. Akpele,* 9th Dist. No. 21822, 2004-Ohio-3411, at ¶13, citing *Grill v. Ohio Dept. of Job & Family Servs*., 9th Dist. No. 03CA0029-M, 2003-Ohio-5780, at ¶26. We are bound to follow our precedent. Although our precedent appears to propose a bright line test with regard to an uncontradicted sworn statement, we do not read the opinions as precluding a plaintiff from requesting a hearing to solicit contradictory testimony. Had FirstMerit requested and been granted a hearing on the issue, it could have introduced contradictory testimony, or solicited contradictory testimony from the Woods on cross examination. Instead, FirstMerit simply proffered a *competing* affidavit that did not point to any direct evidence to *contradict* the Woods' statement that they did not receive the complaint.

{¶11} The dissent points to the Woods' post-judgment appearances as evidence that the Woods have contradicted their own sworn affidavits that they did not receive the complaint. We note that the Woods never contended that they did not live at the address to which FirstMerit allegedly sent the complaint. Instead, they swore that they did not receive the complaint. Therefore, their post-judgment appearance at the debtor's examination hearing, after personal service was achieved at the address to which the complaint was sent, does not contradict this statement. This appearance offers support to FirstMerit's *competing* affidavit that the Woods *should have* received the complaint; not that they *did* receive the complaint. In sum, FirstMerit

never presented any evidence to contradict the Woods' sworn statements that they did not receive the complaint.

{¶12} In its denial of the Woods' motion to vacate, the trial court did not acknowledge their uncontradicted sworn statements that they did not receive the complaint. "It is reversible error for a trial court to disregard the unchallenged testimony that a person did not receive service." (Quotations and citations omitted.) *Jacobs II* at ¶17. The trial court erred when it did not acknowledge the uncontradicted sworn statement. As the Woods have rebutted the presumption of service, we conclude that service of the complaint was ineffective. *Jacobs II* at ¶18; but see *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. No. 06CA0044, 2007-Ohio-885, at ¶48-49 (appellant's own actions contradicted its assertion that it did not receive service of request for admissions.) "Therefore, the trial court's default judgment in favor of [FirstMerit] is rendered void ab initio." *Jacobs II*, at ¶18; *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 123.

{¶13} "Where service of process is not made in accordance with the Rules of Civil Procedure, the trial court lacks jurisdiction to consider the complaint, and any judgment on that complaint is void ab initio. Because a court has the inherent authority to vacate a void judgment, a party who asserts that the trial court lacks personal jurisdiction over him or her due to ineffective service of process need not satisfy the requirements of Civ.R. 60(B). Only lack of proper service must be established." (Internal citations omitted.) *Portfolio Recovery Assoc., L.L.C. v. Thacker*, 2d Dist. No. 2008 CA 119, 2009-Ohio-4406, at ¶22. As we have explained, the Woods established lack of proper service. Thus, the trial court should not have required the Woods to satisfy the requirements of Civ.R. 60(B).

{¶14} The Woods' assignments of error are sustained.

III.

{¶15} The Woods' assignments of error are sustained. The judgment of the Lorain County Court of Common Pleas is vacated, and the cause remanded to the trial court for proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

BELFANCE, P.J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶16} I respectfully dissent.

{¶17} The majority relies on two nearly identical prior decisions of this Court, *Jacobs v. Szakal*, 9th Dist. No. 22219, 2005-Ohio-2146 ("*Jacobs I*"), and *Jacobs v. Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312 ("*Jacobs II*"), to reach its conclusion that service of the complaint was ineffective based on the Woods' "unrebutted affidavits."

{¶18} First, notwithstanding the broad statements of law in *Jacobs I* and *II*, I would limit the holdings of those cases to their particular circumstances. In both cases, we concluded that service of the complaint (and crossclaim in *Jacobs I*) was ineffective based on unrebutted evidence, not only that the appellant never actually received service, but also that he did not live with his parents to whose address the complaint was mailed. *Jacobs I* at ¶17; *Jacobs II* at ¶18. Both *Jacobs* cases relied heavily on the law enunciated in the Eighth District's decision in *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, to reach their respective conclusions. In *Rafalski*, the plaintiff attempted to serve the complaint in February and March 1983. Significantly, the appellant in *Rafalski* also averred in an unrebutted affidavit that she no longer lived at the address listed in the complaint after December 1982. Accordingly, I would limit the holdings of these cases to situations in which the appellants have averred, not only that they never received the complaint, but also that they were not living at the address listed in the complaint at the time of attempted service.

{¶19} Even if this Court were to apply the broad statements of law enunciated in *Rafalski*, *Jacobs I*, and *Jacobs II* regarding unrebutted evidence of lack of service, I believe that this is not such a case. The issue of service is addressed by more than the Woods' bare affidavits. Rather, their appearance at the debtor's examination without question or objection

constitutes a contradiction in the evidence regarding service of the complaint. By the Woods' submission to the debtor's examination and their appearance in regard to the execution of judgment, their claim that they never received service of the complaint is simply incredible. Accordingly, I would affirm the judgment of the trial court.

APPEARANCES:

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