**[Cite as *Bentley v. Miller*, 2010-Ohio-2735.]**

| | | |
|---|---|---|
| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

| | |
|---|---|
| LINDA C. BENTLEY | C. A. No. 25039 |
| Appellant | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| SHERRY L. MILLER | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellee | CASE No. CV 2007 04 2699 |

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

---

WHITMORE, Judge.

**{¶1}** Appellant, Linda Bentley, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

**{¶2}** Bentley and Sherry Miller were involved in a motor vehicle collision on April 10, 2005. Bentley suffered numerous injuries as a result of the collision and brought a personal injury suit against Miller on April 9, 2007, one day before the statute of limitations was to expire. Bentley attempted to serve Miller by certified mail and later by regular mail, but neither service attempt succeeded. On January 18, 2008, the court issued an order, notifying Bentley that her case would be dismissed within seven days unless she explained why she had not taken any further action on her complaint. In response, Bentley filed a notice of intent to serve Miller by publication. On February 12, 2008, the court ordered Bentley to proceed with the service by publication within twenty-one days.

**{¶3}** Rather than attempt service by publication, Bentley filed an amended complaint on April 23, 2008. The amended complaint mirrored Bentley's initial complaint, but added "Sherry Miller C/O Allstate Insurance Company" as a defendant. At the time of Bentley and Miller's collision, Allstate Insurance Company ("Allstate") insured both drivers, and Bentley believed she could serve Miller through Allstate. Bentley served the amended complaint via certified mail upon Miller at the same residential address that had previously failed and at Allstate's Hudson office. Service failed at Miller's residential address, but an Allstate representative accepted the certified mail sent to Allstate's Hudson office. Miller did not file an answer to the amended complaint.

**{¶4}** On June 30, 2008, the court issued an order informing Bentley that her complaint would be dismissed without prejudice if she did not seek a motion for default as a result of Miller's failure to answer the complaint. Bentley did not respond and the court dismissed the case. Thereafter, Bentley filed a motion to reconsider/vacate the dismissal because her counsel never received the court's order. The court granted Bentley's motion on October 3, 2008 and gave her fourteen days to seek a default judgment. Bentley sought a default on the basis that "on April 25, 2008, [Miller] accepted certified mail service of the complaint" and failed to file a response. In support of her motion for default, Bentley attached the certified mail receipt that the Allstate representative had signed. The court granted the default judgment and set the matter for a hearing on damages.

**{¶5}** On January 5, 2009, Miller filed a motion to vacate the default judgment pursuant to Civ.R. 60(B) and later filed an affidavit in support of her motion. Miller specified in the affidavit that she never received a copy of Bentley's complaint and never authorized anyone at Allstate to act as her agent and accept service on her behalf. Miller further specified that she had

lived at her present address in Akron since September 2006. Bentley served Miller at her address with a copy of the amended complaint in April 2009. Additionally, Bentley responded to Miller's motion to vacate, arguing that Miller received service of process by virtue of Allstate accepting certified mail service on April 23, 2008.

**{¶6}** On May 14, 2009, Miller filed a motion to dismiss Bentley's complaint and a proposed answer in which Miller asserted insufficiency of service of process. Bentley filed a response to Miller's motion and requested leave to take Miller's deposition "in order to ascertain whether any of the tolling factors contained in *** [R.C.] 2305.15 are applicable in the instant case." On September 11, 2009, the court issued a final judgment granting Miller's motion to vacate the default judgment against her and granting Miller's motion to dismiss due to Bentley's failure to perfect service within one year from the date of filing.

**{¶7}** Bentley now appeals from the trial court's judgment and raises four assignments of error for our review. For ease of analysis, this Court consolidates several of the assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT'S DECISION GRANTING APPELLEE MILLER'S MOTION TO DISMISS WAS CONTRARY TO LAW, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND/OR CONSTITUTED AN ABUSE OF DISCRETION."

Assignment of Error Number Two

"THE TRIAL COURT'S DECISION GRANTING APPELLEE MILLER'S MOTION TO DISMISS WAS AGAINST PUBLIC POLICY."

Assignment of Error Number Three

"THE TRIAL COURT'S DECISION GRANTING APPELLEE ALLSTATE'S 60(B) MOTION TO VACATE THE DEFAULT JUDGMENT PREVIOUSLY

GRANTED ON NOVEMBER 17, 2008, WAS CONTRARY TO LAW, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND/OR CONSTITUTED AN ABUSE OF DISCRETION."

**{¶8}** In her first and second assignment of error, Bentley argues that the trial court erred by granting Miller's motion to dismiss. Specifically, she argues that: (1) by filing a praecipe for regular mail service on June 14, 2007, Bentley restarted the one year time period in which she had to perfect service upon Miller under Civ.R. 3(A) and R.C. 2305.19; and (2) she perfected service by serving Allstate in April 2008 because such service was reasonably calculated to apprise Miller of the suit. In her third assignment of error, Bentley argues that the court erred by granting Miller's Civ.R. 60(B) motion to vacate because Bentley exercised due diligence and perfected service upon Miller by serving Allstate. We disagree.

**{¶9}** Generally, "to be entitled to relief under [Civ.R.] 60(B) ***, a moving party must satisfy each of the three prongs of the test established by the Ohio Supreme Court in *GTE Automatic Elec. Inc. v. ARC Indus.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus." *Espino v. Siladi*, 9th Dist. No. 24441, 2009-Ohio-3005, at ¶18. Yet, to issue a "valid personal judgment, a court must have personal jurisdiction over the defendant." *Asset Acceptance L.L.C. v. Allen*, 9th Dist. No. 24676, 2009-Ohio-5150, at ¶3, quoting *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. If a court does not have personal jurisdiction over a defendant, any judgment the court enters against the defendant is void, and a defendant need not satisfy the Civ.R. 60(B) requirements in order to have the judgment vacated. *Kennedy v. Kennedy*, 9th Dist. No. 09CA009645, 2010-Ohio-404, at ¶15. Rather, the court may vacate such a judgment pursuant to its inherent authority to vacate void judgments. *Asset Acceptance L.L.C.* at ¶4.

**{¶10}** "Civ.R. 3(A) provides that an action is not deemed to be 'commenced' unless service of process is obtained within one year from the date of the filing of the action." *Jacobs v.*

*Szakal*, 9th Dist. No. 22903, 2006-Ohio-1312, at ¶19. A litigant's filing of a praecipe is irrelevant under the rule because the rule "does not require a praecipe to be filed." *Seger v. For Women, Inc.*, 110 Ohio St.3d 451, 2006-Ohio-4855, at ¶7. See, also, Civ.R. 3(A) ("A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant[.]"). Rather, a suit "commences" upon the filing of a complaint so long as a plaintiff obtains service of process within one year of its filing. Id. at ¶8. If a plaintiff files a complaint and either never obtains service or obtains it after one year, the suit never "commences" under Civ.R. 3(A). Id.

**{¶11}** Even assuming that Bentley could serve Allstate in order to bring suit against Miller, the record reflects that Allstate did not accept service until April 23, 2008, more than one year after Bentley filed suit. Bentley acknowledges Civ.R. 3(A)'s filing requirements and the fact that she did not obtain service within one year of filing her complaint. Even so, she argues that she timely served Miller because when she filed a new praecipe for residential service on June 14, 2007 that praecipe "had the legal effect of a dismissal and [the] refiling of [her] complaint" and gave her an additional year within which to obtain service of process. Therefore, Bentley argues that she had until June 14, 2008 to perfect service. Bentley relies upon *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St.3d 549, in support of this argument.

**{¶12}** In *Goolsby*, the plaintiff filed a personal injury suit against the defendant on February 6, 1986, well within the two year statute of limitations period that was scheduled to end on July 19, 1987. By virtue of Civ.R. 3(A), the plaintiff had until February 7, 1987 to obtain services of process upon the defendant in order to commence the suit. The plaintiff, however, did not ask the clerk of courts to serve the defendant until July 17, 1987, two days before the statute of limitations period was to end and over five months from February 6, 1987, the date that

constituted exactly one year from the date of the filing of the action. The defendant received service of process on July 23, 1987. When the plaintiff later dismissed her complaint and refiled it via the savings statute, the defendant sought to bar the complaint on the basis that the statute of limitations had expired and the plaintiff never complied with Civ.R. 3(A).

**{¶13}** The Ohio Supreme Court noted that the plaintiff did not technically comply with Civ.R. 3(A) because she did not obtain service within one year of filing the action. *Goolsby*, 61 Ohio St.3d at 550. Even so, the Court refused to bar the plaintiff's complaint on the basis of a "purely technical application of Civ.R. 3(A)." Id. The Court noted that, had the plaintiff dismissed her complaint and refiled it in addition to asking the clerk of courts to serve the defendant on July 17, 1987, she would have satisfied Civ.R. 3(A). Id. at 550-51. At that point, the statute of limitations had not yet run and the plaintiff would have "commenced" the action within a year of filing because the defendant received service of process on July 23, 1987. Id. Rather than require a litigant in the plaintiff's position to dismiss and refile an identical complaint just to restart the one-year time period under Civ.R. 3(A), the Court held that:

> "[W]hen service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint." Id. at 551.

Contrary to Bentley's assertion, *Goolsby* does not stand for the proposition that every new filing of a praecipe has "the legal effect of a dismissal and [the] refiling of [a] complaint." *Goolsby* merely recognizes the Supreme Court's unwillingness to engage litigants in the exercise of superfluous and impractical refiling.

**{¶14}** Bentley filed her complaint on April 9, 2007, one day before the statute of limitations was to end. She did not request service until April 17, 2007 and did not obtain

service on Allstate until April 23, 2008. Bentley's filing a praecipe to request residential service on June 14, 2007 did not restart her time to commence service under Civ.R. 3(A). By June 14, 2007, both the statute of limitations period and the time for obtaining service under Civ.R. 3(A) had elapsed. The refiling of an identical complaint on June 14, 2007 would not have provided Bentley with an additional year to obtain service because the statute of limitation had expired by then. Compare *Goolsby,* 61 Ohio St.3d at 550-51 (noting that plaintiff requested service before the statute of limitations lapsed). Bentley's argument that she perfected service within one year because she filed a new praecipe on July 14, 2007 lacks merit.

**{¶15}** Next, Bentley relies upon R.C. 2305.19(A) to argue that she had until July 14, 2008 to perfect service upon Miller. R.C. 2305.19(A) provides, in relevant part, as follows:

> "In any action that is commenced or attempted to be commenced, if in due time *** the plaintiff fails otherwise than upon the merits, the plaintiff *** may commence a new action within one year after the date of *** plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later."

Even if Bentley attempted to commence her suit by filing her complaint and trying to serve it upon Miller, she did not "fail[] otherwise than upon the merits" until the court actually vacated her default judgment against Miller and granted Miller's motion to dismiss on September 11, 2009. R.C. 2305.19(A). Because Bentley had not yet "fail[ed] otherwise than upon the merits" on or before July 14, 2008, she could not have commenced a new action on that date for purposes of the foregoing statute. Id. Therefore, her second argument lacks merit.

**{¶16}** The trial court correctly determined that it lacked personal jurisdiction over Miller because Bentley failed to obtain service of process. Consequently, Bentley's first, second, and third assignments of error are overruled.

Assignment of Error Number Four

> "THE TRIAL COURT ERRED IN DENYING APPELLANT BENTLEY'S MOTION FOR LEAVE TO TAKE THE DEPOSITION OF APPELLEE MILLER BEFORE RULING ON APPELLEE MILLER/ALLSTATE'S 60(B) MOTION TO VACATE AND MOTION TO DISMISS."

**{¶17}** In her fourth assignment of error, Bentley argues that the trial court abused its discretion by not granting her motion to depose Miller for the purpose of possibly identifying a tolling event under R.C. 2305.15(A). We disagree.

**{¶18}** "This court generally reviews discovery orders for an abuse of discretion." *Giusti v. Akron Gen. Med. Ctr.*, 9th Dist. No. 24023, 2008-Ohio-4333, at ¶12. "[A]bsent an abuse of discretion, a reviewing court must affirm a trial court's disposition of discovery issues." *Novak v. Studebaker*, 9th Dist. No. 24615, 2009-Ohio-5337, at ¶16. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶19}** R.C. 2305.15(A) provides, in relevant part, as follows:

> "When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought."

If applicable, R.C. 2301.15(A) will toll a statute of limitations so as to give the complainant the benefit of any time lost by virtue of the defendant's absence. *Barker v. Strunk*, 9th Dist. No. 06CA008939, 2007-Ohio-884, at ¶10. Savings statutes should be liberally construed. Id. at ¶9. Yet, "[s]tatutes of limitations *** do serve a legitimate purpose and cannot be ignored. A statute of limitations is intended to put defendants on notice of adverse claims and to prevent plaintiffs

from sleeping on their rights." Id., quoting *Crown, Cork & Seal, Co., Inc. v. Parker* (1984), 462 U.S. 345, 352.

**{¶20}** Bentley did not seek to depose Miller until April 17, 2009, four years after their motor vehicle collision and four months after Miller sought to vacate the default judgment. Bentley could have sought to depose Miller immediately after she filed her motion to vacate, but she did not. Moreover, any suggestion that Miller left Ohio, absconded, or concealed herself is pure speculation. Miller filed an affidavit, which indicated that she got married in November 2007, changed her last name, and had "been living at [her] present address in Akron, Ohio since September 01, 2006." Bentley did not contest Miller's affidavit and did not produce a shred of evidence that Miller was ever unavailable for purposes of R.C. 2305.15(A). The court was not required to grant Bentley's motion to depose based on pure speculation. Bentley's assignment of error lacks merit.

III

**{¶21}** Bentley's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

---

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 Summit, 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 Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR IN JUDGMENT ONLY

APPEARANCES:

JAMES K. REED, Attorney at Law, for Appellant.

MELISSA DAY, Attorney at Law, for Appellee.