[Cite as ***Buckingham, Doolittle & Burroughs, L.L.P. v. Healthcare Imaging Solutions, L.L.C.***, **2010-Ohio-418.]**

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP Appellant v. HEALTHCARE IMAGING SOLUTIONS LLC, C/O THE CORPORATION TRUST CENTER, et al. Appellees	C. A. No. 24699 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008 12 8474

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

CARR, Judge.

{¶1} Appellant, Buckingham, Doolittle and Burroughs, L.L.P., appeals the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} In March of 2006, appellees, Healthcare Imaging Solutions L.L.C. ("Healthcare Imaging") and Mr. Jeffrey M. Mandler, retained the law firm of Buckingham, Doolittle and Burroughs, L.L.P. ("Buckingham") to assist with the development of a healthcare imaging business. Mr. Mandler served as the managing member of Healthcare Imaging. Appellees' retention of Buckingham was evidenced by an engagement letter dated March 6, 2006. The letter was addressed to both Healthcare Imaging and Mr. Mandler and set forth the hourly rates of Buckingham's attorneys, indicated that invoices were to be paid within thirty days of receipt, and outlined other terms of retention.

{¶3} On December 9, 2008, Buckingham filed suit against Healthcare Imaging and Mr. Mandler seeking to recover the principal amount of $86,836.77 in unpaid legal fees. There was no dispute that Healthcare Imaging and Mr. Mandler paid Buckingham for services rendered from March of 2006 through June of 2007. However, Buckingham alleged that Healthcare Imaging and Mr. Mandler failed to pay for services rendered from June 6, 2007 through June 16, 2008. Because Healthcare Imaging and Mr. Mandler did not respond to the complaint, Buckingham filed a motion for default judgment on February 6, 2009. Healthcare Imaging and Mr. Mandler did not respond to the motion. On February 10, 2009, the trial court granted the motion and entered default judgment against Healthcare Imaging and Mr. Mandler in the amount of $86,836.77, plus pre- and post-judgment interest at the statutory rate.

{¶4} On February 23, 2009, Buckingham started the process of executing the default judgment by filing bank attachment paperwork with the trial court. After Buckingham had initiated this process, Healthcare Imaging and Mr. Mandler entered a notice of appearance by filing a motion to vacate the default judgment, as well as a motion to stay, on March 13, 2009. Subsequently, on March 27, 2009, the trial court granted the motion to vacate judgment and the motion to stay. The trial court then vacated judgment against both Healthcare Imaging and Mr. Mandler. The trial court held that service of process on Mr. Mandler "may have been improper" and, furthermore, that Healthcare Imaging and Mandler had asserted a meritorious defense. Notably, service of process was never challenged with regard to Healthcare Imaging. On April 9, 2009, Buckingham filed a notice of appeal from the trial court's March 13, 2009 judgment entry.

{¶5} On appeal, Buckingham raises three assignments of error. This Court consolidates Buckingham's assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST HEALTHCARE IMAGING SOLUTIONS, LLC ON GROUNDS OF LACK OF SERVICE OF PROCESS BECAUSE HEALTHCARE IMAGING SOLUTIONS, LLC DID NOT ARGUE LACK OF SERVICE AND, IN FACT, IMPLICITLY ADMITTED THAT IT WAS PROPERLY SERVED."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST JEFFREY M. MANDLER LLC (sic) ON GROUNDS OF LACK OF SERVICE OF PROCESS BECAUSE HE ADMITTEDLY RECEIVED SERVICE OF PROCESS AND HAD ACTUAL NOTICE OF THE LAWSUIT."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN VACATING THE DEFAULT JUDGMENT AGAINST APPELLEES BECAUSE THEY FAILED TO SATISFY THE THREE ELEMENTS NECESSARY TO VACATE A DEFAULT JUDGMENT UNDER [CIV.R.] 60(B)."

{¶6} In its first and second assignments of error, Buckingham argues the trial court erred in finding that process had not been properly served on Healthcare Imaging and Mr. Mandler. In its third assignment of error, Buckingham argues the trial court erred in finding that Healthcare Imaging and Mr. Mandler satisfied the requirements necessary to grant a motion to vacate judgment pursuant to Civ.R. 60(B). This Court agrees with all three contentions.

{¶7} The trial court considered the issue of service of process within the context of its analysis of whether Healthcare Imaging and Mr. Mandler were entitled to relief from judgment pursuant to Civ.R. 60(B). After finding that the motion was timely filed and that Healthcare Imaging and Mr. Mandler had alleged meritorious defenses, the trial court found that the default judgment was void ab initio as to both appellees because of lack of service of process. Upon concluding this analysis, the trial court stated, "upon a finding of timeliness, excusable neglect,

and a meritorious defense, the Court GRANTS the Defendants' Motion to Vacate Default Judgment."

{¶8} The decision to grant or deny a motion to vacate judgment pursuant to Civ.R. 60(B) lies in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. The term "abuse of discretion" connotes more than an error of judgment; it implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶9} Civ.R. 60(B) states:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.
>
> "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules"

{¶10} To prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate the following:

> "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶11} Generally, the moving party's failure to satisfy any of the three requirements will result in the motion being overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A movant is no longer required to submit documentary evidence to support its contention that it can satisfy the requirements set forth in *GTE*. Id. at 20-21. "However, the movant must allege operative facts with enough specificity to allow the court to decide whether it has met that test." *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 601, citing *Montpoint Properties, Inc. v. Waskowski* (Apr. 6, 1988), 9th Dist. No. 13320.

{¶12} As noted above, the trial court found that the Healthcare Imaging and Mr. Mandler had a valid reason for seeking relief from judgment because their failure to respond to the complaint was due to excusable neglect. This finding was premised on the trial court's conclusion that "service may have been improper." "The Ohio Supreme Court has explained that, since '[t]he burden is upon the movant to demonstrate that the interests of justice demand the setting aside of a judgment normally accorded finality,' 'the least that can be required of [him] is to enlighten the court as to why relief should be granted.'" *Asset Acceptance L.L.C. v. Allen*, 9th Dist. No 24676, 2009-Ohio-5150, at ¶8, quoting *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 21. "A mere allegation that the movant's failure to file a timely answer was due to 'excusable neglect and inadvertence,' without any elucidation, cannot be expected to warrant relief." *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 21.

{¶13} At the outset, this Court notes that it is unnecessary for a party to satisfy the requirements of Civ.R. 60(B) in order to obtain relief from judgment when the party can demonstrate that it was not properly served with process. This Court has held that a trial court "lacks jurisdiction to consider a complaint where service of process was defective, and any judgment rendered on the complaint is void ab initio." *Keathley v. Bledsoe* (Feb. 7, 2001), 9th Dist. No. 19988, citing *Kurtz v. Kurtz* (1991), 71 Ohio App.3d 176, 182. In this case, the trial court analyzed the service of process issue within the context of its Civ.R. 60(B) inquiry. With regard to the Civ.R. 60(B) claim, Healthcare Imaging and Mr. Mandler attempt to satisfy the second prong of the *GTE* test by asserting they were not put on proper notice of the lawsuit because of inadequate service of process. Therefore, the critical question in this case is whether service of process was defective. If that question is answered in the affirmative, it would be unnecessary to consider the remaining prongs of the *GTE* test because the default judgment would be rendered void ab initio. If that question is answered in the negative, the default judgment would not be void and the trial court order vacating the default judgment would be reversed because Healthcare Imaging and Mr. Mandler would not have satisfied the second prong of the *GTE* test.

{¶14} Civ.R. 4.1 provides for three separate means for effecting service of process: (A) certified or express mail service; (B) personal service; and (C) residential service. In this case, Buckingham attempted to effect service of process upon Healthcare Imaging and Mr. Mandler pursuant to Civ.R. 4.1(A).

{¶15} "Service of process may be made at an individual's business address pursuant to Civ.R. 4.1, but such service must comport with the requirements of due process." *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, at syllabus. In order to meet

fundamental due process requirements, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 406, quoting *Mullane v. Cent. Hanover Bank & Trust Co*. (1950), 339 U.S. 306, 314. Certified mail service sent to a business address complies with due process "if the circumstances are such that successful notification could be reasonably anticipated." *Swinehart*, 62 Ohio St.2d at 406. Certified mail need not be delivered to and signed by the addressee only in order to be effective. See *Castellano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.

{¶16} This Court has held that "there is a presumption of proper service where the Civil Rules on service are followed." *Erie Ins. v. Williams*, 9th Dist. No. 23157, 2006-Ohio-6754, at ¶6. However, this presumption is rebuttable if the defendant presents credible evidence that he or she did not, in fact, receive the summons and complaint. Id. In this case, the trial court found the February 10, 2009 default judgment to be void ab initio because "the Declaration submitted by Defendant Mandler establishe[d] that service may have been improper as to this Defendant." In the motion to vacate the default judgment which was filed on March 13, 2009, Healthcare Imaging did not argue that it had not received the summons and the complaint. Therefore, no evidence was presented that Healthcare Imaging was not served with process. Notably, the trial court never made a finding that service was improper with regard to Healthcare Imaging prior to granting the motion to vacate the default judgment.

{¶17} The trial court did conclude that service of process may have been improper with regard to Mr. Mandler. In his motion for relief from judgment filed on March 13, 2009, Mr. Mandler cited *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, for the proposition that an affidavit of a party which indicates that he or she was not served is generally sufficient to find a default

judgment void ab initio. However, Mr. Mandler conceded that he reviewed the complaint in his affidavit which was attached to the motion to vacate the default judgment. Mr. Mandler averred that he "saw" the complaint and attempted to contact Buckingham on two occasions in December of 2008. A review of the complaint reveals that Mr. Mandler was named individually as a defendant and there were references to both Healthcare Imaging and Mr. Mandler in the body of the complaint. Mr. Mandler further averred that he had questions about the amount owed to Buckingham because he knew Healthcare Imaging could not pay the amount requested. Buckingham served Mr. Mandler with a copy of the complaint and summons at 20 Mystic Lane, 2nd Floor, Malvern, Pennsylvania. Buckingham used this address because they had sent virtually all communications to that address throughout the course of their relationship. In light of Mr. Mandler's averments, this Court concludes that Mr. Mandler was, in fact, properly served process and had notice of the lawsuit.

{¶18} Therefore, because Mr. Mandler conceded that he had received and reviewed the complaint, the trial court erred in finding that the default judgment was void. Furthermore, it was improper to grant the motion to vacate judgment pursuant to Civ.R. 60(B) as the failure of Mr. Mandler to respond to the complaint was not due to excusable neglect.

{¶19} It follows that Buckingham's assignments of error are sustained.

III.

{¶20} Buckingham's assignments of error are sustained. The judgment of the Summit Count Court of Common Pleas is reversed, and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
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 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 Appellees.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

DICKINSON, J.
CONCURS, SAYING:

{¶21} I concur in the majority's reversal and most of its opinion. While I acknowledge that the Ohio Supreme Court has written that an abuse of discretion standard applies to the review of a ruling on a motion for relief from judgment, in practice the Court has applied a de novo standard: "In order for a party to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate the following . . . . These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St. 3d 172, 174 (1994). In this case, Mr. Mandler and Healthcare Imaging

failed to prove that they were not properly served and, therefore, the default judgment against them was not void. They further failed to satisfy the three-part *GTE Automatic Test* and, therefore, were not entitled to relief under Rule 60(B). Accordingly, Mr. Mandler and Healthcare Imaging were not entitled to relief from judgment, and the trial court made a mistake of law by granting them that relief.

APPEARANCES:

ALAN P. DIGIROLAMO, and MICHAEL J. MATASICH, Attorneys at Law, for Appellant.

JAMES R. RUSSELL, Attorney at Law, for Appellees.