[Cite as *CitiMortgage, Inc. v. Bumphus*, 2011-Ohio-4858.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

CitiMortgage, Inc. successor by merger to CitiFinancial Mortgage Company, Inc.

Appellee

v.

Tom Bumphus, Jr., et al.

Appellant

Court of Appeals No. E-10-066

Trial Court No. 09 CV 0563

DECISION AND JUDGMENT

Decided: September 23, 2011

* * * * *

Thomas L. Henderson, for appellee.

Beverly Newell Hancock, for appellant Tom Bumphus.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the April 14, 2010 judgment of the Erie County Court of Common Pleas, which denied appellant, Tom Bumphus, an heir to Tom Bumphus, Jr. and Lila Bumphus, relief from the default judgment granted to appellee, CitiMortgage, Inc., in a foreclosure action. Upon consideration of the assignments of error, we reverse and

remand to the trial court for further proceedings. Appellant asserts the following assignments of error on appeal:

{¶ 2} "ASSIGNMENT OF ERROR NO. I

{¶ 3} "THE TRIAL COURT ERRED BY NOT GRANTING A MOVEANT'S MOTION FOR RELIEF JUDGMENT AND WHEN THE PLAINTIFF IS GRANTED A JUDGMENT AGAINST KNOWN DEAD PEOPLE.

{¶ 4} "ASSIGNMENT OF ERROR NO. II

{¶ 5} "THE TRIAL COURT ERRED BY NOT GRANTING TOM BUMPHUS [sic] MOTION FOR RELIEF FROM JUDGMENT.

{¶ 6} "ASSIGNMENT OF ERROR NO. III

{¶ 7} "THE TRIAL COURT ERRED BY NOT GRANTING TOM BUMPHUS [sic] MOTION FOR RELIEF FROM JUDGMENT. THE TRIAL COURT ERRED BY NOT DISMISSING PLAINTIFF'S COMPLAINT WHEN PLAINTIFF IMPROPERLY OBTAINED JUDGMENT AGAINST DEAD PEOPLE WITHOUT PROPERLY SUGGESTING [DEATH] [SIC]."

{¶ 8} On July 1, 2009, CitiMortgage, Inc. filed a complaint in foreclosure against Tom Bumphus, Jr. and Lila Bumphus. Uncertain of whether the Bumphuses were deceased, the complaint also named their "Unknown Heirs, Devisees, Legatees, Executors, Administrators, Spouses and Assigns and the Unknown Guardians of Minor and/or Incompetent Heirs" as party defendants. The complaint also named other

defendants who might have liens against the property, but they ultimately all disclaimed any interest in the property.

{¶ 9} CitiMortgage asserted that the Bumphuses had defaulted on a note secured by a mortgage lien upon the property at 1321 Huntington Avenue, Sandusky, Ohio, which was held by CitiMortgage, the successor by merger to CitiFinancial Mortgage Company, Inc. In their prayer for relief, CitiMortgage sought judgment against the Bumphuses on the note and foreclosure of the property securing the note.

{¶ 10} On July 16, 2009, the process server reported to the clerk of courts a purported personal good service on Tom Bumphus, Jr. and a residential service on Lila Bumphus. Thereafter, on July 20, 2009, appellant Tom Bumphus, the son of the Bumphuses, filed two letters with the clerk of court, both of which were recorded as "Answers" to the complaint by the clerk, but were not served upon CitiMortgage. One letter is missing from the record and the second letter indicated that appellant's parents were deceased (Tom Bumphus, Jr. passing away on August 31, 2008, and Lila Bumphus passing away February 16, 2009). The second letter also stated:

{¶ 11} "3. The Plaintiff's [sic] have no respect of person's [sic] they are acting on false accusation's [sic] and Greed, Whatsoever. And Rude. [sic]

{¶ 12} "4. There was never a mortgage, it was a Loan. From the beginnig [sic]. The Plaintiff have [sic] twisted things around [sic]

{¶ 13} "5. Son of Defendant's [sic]--Tom Bumphus"

{¶ 14} "1321 Huntington, Sandusky Ohio"

{¶ 15} "/s/ Tom Bumphus."

{¶ 16} On July 23, 2009, CitiMortgage filed an affidavit of its attorney who attested that she was unable to locate an address for the Bumphuses and sought to serve the Bumphuses and their unknown heirs notice by publication. This was finally accomplished in August 2009. On October 2, 2009, CitiMortgage filed a motion for default judgment, asserting that the Bumphuses had been duly served with a copy of the complaint and were in default. The motion was not served upon appellant. On March 2, 2010, CitiMortgage filed a "suggestion of death" for the Bumphuses based upon a search of the Social Security Death Index.

{¶ 17} On April 16, 2010, the trial court found that all of the parties had been properly served and that none had filed an answer to the complaint. The court further found that the allegations in the complaint were true. Therefore, the court granted a default judgment to CitiMortgage as to the note and ordered the mortgage foreclosed.

{¶ 18} On July 9, 2010, appellant filed a motion for relief from judgment and, conditioned upon a granting of that motion, a motion to dismiss, motion for summary judgment, and a motion for judgment on the pleadings. Appellant asserted that CitiMortgage never amended its complaint to include the proper party responsible for paying the debt even though it was notified that the debtors were deceased and later filed a suggestion of death. Since the Bumphuses were deceased at the time of the filing of the

complaint, appellant argues that the trial court could not render judgment in favor of CitiMortgage.

{¶ 19} On July 27, 2010, the trial court found Bumphus's motions groundless and denied all of the motions. Thereafter, CitiMortgage filed its opposition to appellant's motions and on November 22, 2010, the trial court again denied appellant's motions and appellant sought an appeal of the decision to this court.

{¶ 20} In all three assignments of error, appellant argues that the trial court erred by not granting his motion for relief from judgment. We will address the assignments of error together.

{¶ 21} On appeal, the court of appeals will not overturn the trial court's ruling on a motion for relief from judgment unless the trial court abused its discretion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. The abuse of discretion standard requires a showing of more than an error of law or judgment. The court's attitude must be shown to have been unreasonable, arbitrary, or unconscionable. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137.

{¶ 22} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, "* * * the movant must demonstrate that: (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. See, also, *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, and *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391. Generally, all three requirements must be proven to obtain relief. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 1996-Ohio-54. (Citation omitted.) However, a judgment rendered without proper jurisdiction over the action or the defendant is void rather than voidable. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70; *Rokakis v. Estate of Thomas*, 8th Dist. No. 89944, 2008-Ohio-5147, ¶ 7; and *Money Tree Loan Co. v. Williams*, 169 Ohio App.3d 336, 2006-Ohio-5568, ¶ 8. (Citation omitted.) If a judgment is void, the trial court has the inherent power to vacate the judgment and a party need not seek relief under Civ.R. 60(B). *Patton v. Diemer*, supra, at 70.

{¶ 23} Appellant first argues that the complaint was a nullity and should have been dismissed because the parties against whom CitiMortgage sought recovery were deceased and their estates had not been named as parties to the action. Furthermore, because CitiMortgage's prayer for relief was only for "judgment against Tom Bumphus, Jr. and Lila Bumphus," appellant argues that the court could not enter a valid judgment and should have dismissed the action. Second, appellant argues that the court did not have personal jurisdiction over the Bumphuses or their estates. Third, appellant argues that CitiMortgage never made a claim against the estates within the six-month time limit under R.C. 2117.06 for presenting claims to the decedent's estate representative and, therefore, is barred from recovery of the debt. Appellant argues that filing a suggestion

of death beyond the 90 day time limit of Civ.R. 25(A)(2) and without notice was improper.

{¶ 24} First, we find for the following reasons the complaint was not a nullity, but the default judgment rendered on the note is void for lack of personal jurisdiction over the estates of the Bumphuses. Although a deceased person may not be named as a party to an action, *Baker v. McKnight* (1983), 4 Ohio St.3d 125, syllabus (which overruled *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, cited by appellant), when a plaintiff names a deceased defendant in error, the plaintiff may substitute the real party in interest pursuant to Civ.R. 3(A) and 15(C). Id. Therefore, a complaint filed against a deceased party is not a nullity because the complaint may be amended to name the real party in interest.

{¶ 25} In an action to foreclose a mortgage brought after the death of the mortgagor, the heirs and devisees of the mortgagor are necessary parties. *Gary v. May* (1847), 16 Ohio 66, 76, and *Rinehart v. Wilkes* (May 23, 1985), 10th Dist. No. 84AP-952. It is only when the mortgagee seeks a money judgment that the estate must be made a party to the action. *Gary v. May*, supra, and *Ohio Sav. Bank v. Virden* (Feb. 26, 1997), 9th Dist. No. 17885.

{¶ 26} In this case, the Bumphuses were deceased at the time the complaint was filed. CitiMortgage did not seek to substitute their estates as the real parties in interest and, therefore, could seek only foreclosure on the mortgage against their heirs who were named as parties. CitiMortgage did, however, seek judgment on the promissory note,

which was granted by the court in its default judgment entry. To the extent that the court granted judgment against the Bumphuses on the note, the judgment is void ab initio.

{¶ 27} The complaint also named the heirs and devisees of the Bumphuses as parties and, since they were unknown at the time, served them notice by publication. Appellant also acknowledged notice of the pending action when he filed two letters with the court. Therefore, the court obtained personal jurisdiction over appellant through service by publication and his voluntary appearance. *Money Tree Loan Co. v. Williams*, supra. Therefore, we find that the complaint in this action was not a nullity and that the trial court did have personal jurisdiction over appellant as a Bumphus heir who had an interest in the property.

{¶ 28} Therefore, appellant's first and third assignments of error are well-taken in part and not well-taken in part.

{¶ 29} Only one issue remains in this case, which was raised in appellant's second assignment of error. Appellant argues that his letters constituted an answer pleading or an alternative means to "otherwise defend" the case so as to avoid a default judgment against him. CitiMortgage argues that the missing letter could not serve as an answer for the decedents because appellant was not an attorney. Since the letter is missing, we cannot speculate as to whether it concerned appellant's interests or whether he was attempting to represent his parents. However, the letter could serve as appellant's answer as an heir with an interest in the property.

{¶ 30} CitiMortgage also contends that the letters could not constitute pleadings because they did not meet the necessary requirements, such as the inclusion of a caption, numbering of paragraphs, and denial or general denials set forth in the proper format. Furthermore, CitiMortgage argues that Bumphus did not comply with Civ.R. 5, which mandates that any pleading submitted to the court must be brought to the opposing party's attention.

{¶ 31} Courts may afford pro se litigations reasonable leeway in the construction of their pleadings in order to reach the merits of the action. *IndyMac Fed. Bank, FSB v. OTM Invests., Inc*., 9th Dist. No. 10CA0056–M, 2011-Ohio-3742, ¶ 21, and *Martin v. Wayne Cty. Nat. Bank Trust,* 9th Dist. No. 03CA0079, 2004-Ohio-4194, ¶ 14. Therefore, the court could interpret appellant's letters as an answer raising the issue of whether there was a mortgage and whether his parents owed the debt, therefore meeting a basic requirement to constitute an answer. However, pro se litigants are required to follow the same rules and procedures as attorneys. *IndyMac*, supra; First *Resolution Invest. Corp. v. Salem*, 9th Dist. No. 24049, 2008-Ohio-2527, ¶ 7, and *Meyers v. First Natl. Bank* (1981), 3 Ohio App.3d 209, 210. Creating exceptions to the rules for pro se litigants would lead to the demise of the civil rules altogether. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214.

{¶ 32} It is readily apparent from the letter in the record that appellant failed to follow any of the formal requisites for a pleading required by the Ohio Civil Rules of Procedure. For example, the letter contained no captions as required by Civ.R. 10(A) and did not set out separate averments in numbered paragraphs as required by Civ.R. 10(B).

Furthermore, the purported answer failed to comport with the general rules of pleading contained in Civ.R. 8 as well as the methods of pleading defenses and objections set forth in Civ.R. 12.

{¶ 33} Most importantly, there was also no "proof of service" on appellee's counsel as required by Civ.R. 5(A). A trial court cannot consider pleadings filed without a certificate of service. Civ.R. 5(D); *Fischer v. Rings*, 9th Dist. No. 24545, 2009-Ohio-5538, ¶ 12 (except for some ex parte motions); *First Resolution Invest. Corp.*, supra, at ¶ 7; *Apps v. Apps*, 10th Dist. Nos. 02AP-1072, 03AP-242, 2003-Ohio-7154, ¶ 19-20 (letter mailed directly to judge and not served on the other party could not be considered by the trial court as a motion for a continuance); and *Erie Ins. Co. v. Bell*, 4th Dist. No. 01CA12, 2002-Ohio-6139, ¶ 26. Therefore, a court may not consider an "answer" that does not include a certificate of service and may grant default judgment against the defendant for failing to defend. *Discover Bank v. Schiefer*, 10th Dist. No. 09AP-1178, 2010-Ohio-2980, ¶ 11-12, *Erie Ins. Co.*, supra, at ¶ 26; and *Schneller v. Patten* (June 11, 1987), 8th Dist. No. 52369 (court refused to treat pro se litigant's personal letters as an "answer" in light of defendant's failure to comply with Civ.R. 5, 8, 10, and 12).

{¶ 34} In this case, appellant's letter in the record did not comply with Civ.R. 5 and, therefore, the trial court could not consider it as an answer to the complaint even though the court inserted such a label upon the documents upon filing. Nonetheless, we find plain error in rendering default judgment because CitiMortgage and the court could not simply disregard the letter.

{¶ 35} Civ.R. 55(A) requires that before a default judgment may be entered for failing to file an answer to the complaint, all parties who have "appeared in the action" must be "served with written notice of the application for judgment at least seven days prior to the hearing on such application." An appearance has been defined as an overt action by the party which clearly expresses an intention and purpose to defend the suit. *AMCA Intern. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 91; *Hyway Logistics Services, Inc. v. Ashcraft*, 3d Dist. No. 5-99-40, 2000-Ohio-1620. Filing an untimely answer can serve as an appearance. *Kime v. Dierksheide* (May 24, 1985), 6th Dist. No. WD-85-7. Filing a letter opposing the action and mailing a copy to opposing counsel has been sufficient to constitute an appearance. *Wood Cty. Furniture v. Baughman* (Aug. 5, 1983), 6th Dist. No. WD-83-17.

{¶ 36} We find that the letters in this case were sufficient to constitute an appearance in the action. Appellant made it clear in one of his letters that he intended to defend against CitiMortgage's action to foreclose the mortgage on his deceased parents' home. While the letter was not served upon CitiMortgage, parties are charged with the duty to keep themselves apprised of entries upon the docket and to monitor the progress of the suit. *Alborn v. Feeney*, 8th Dist. No. 79408, 2001-Ohio-4257, and *Ries Flooring Co., Inc. v. Dileno Constr. Co.* (1977), 53 Ohio App.2d 255, 259. Had CitiMortgage consulted the record before filing the motion for default judgment, it would have seen appellant's "Answer" filed in the record.

{¶ 37} Where a defendant has made an appearance, but has not filed an answer, a motion for default judgment must be made in writing and served upon the defendant at least seven days prior to the hearing. Civ.R. 55(A). If such notice is not given, the default judgment must be reversed on appeal because the judgment is void for lack of due process. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn*. (1986), 28 Ohio St.3d 118, 121; *AMCA Internatl. Corp.*, supra; and *Skinner v. Leyland*, 6th Dist. No. E-05-071, 2006-Ohio-3186, ¶ 16 citing *Plant Equip., Inc. v. Nationwide Control Serv., Inc*., 155 Ohio App.3d 46, 2003-Ohio-5395, ¶ 14-15 (failure to give proper notice makes the judgment void, not voidable; therefore it can be attacked at any time, even collaterally in a Civ.R. 60(B) motion and the party does not have to meet the requirements of Civ.R. 60(B)). Cf. *Aurora Loan Servs., L.L.C. v. Cart*, 11th Dist. No. 2010-A-0024, 2011-Ohio-2450, ¶ 23; *Fenner v. Kinney*, 10th Dist. No. 02AP-749, 2003-Ohio-989, ¶ 17; and *Travelers Ins. Co. v. Haida* (June 29, 1978), 8th Dist. No. 37373 (which hold that the default judgment is merely voidable and may be vacated under Civ.R. 60(B)(1) or (5)).

{¶ 38} Accordingly, we find that the trial court erred as a matter of law by not considering appellant's letter as an appearance in the action and providing him with the due process notice required by Civ.R. 55(A). Therefore, the default judgment entered against him is void ab initio and the trial court erred by failing to grant appellant relief from that judgment. Appellant's second assignment of error is found well-taken.

{¶ 39} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Erie County Court of Common Pleas is reversed. This case is

remanded to the trial court for further proceedings. CitiMortgage is ordered to pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE