

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                               |   |                            |
|-------------------------------|---|----------------------------|
| Great Seneca Financial Corp., | : |                            |
| Plaintiff-Appellee,           | : |                            |
| v.                            | : | No. 12AP-4                 |
| Donald E. Bishop,             | : | (M.C. No. 2004 CVF 007428) |
| Defendant-Appellant.          | : | (REGULAR CALENDAR)         |

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D E C I S I O N

Rendered on August 9, 2012

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*Scherner & Sybert LLC, and Dave Lackey, for appellant.*

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APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Defendant-appellant, Donald E. Bishop ("appellant"), appeals from a judgment of the Franklin County Municipal Court denying his motion under Civ.R. 60(B) for relief from judgment.

{¶ 2} Plaintiff-appellee, Great Seneca Financial Corporation ("Seneca"), began this collection action in 2004 with a complaint stating claims upon two accounts. The initial complaint, although served upon appellant by certified mail, listed an incorrect defendant. Seneca then filed an amended complaint listing appellant as the defendant. Seneca attempted service by certified mail of the amended complaint, without success. Seneca then undertook service via ordinary mail. This mailing appeared successful to the extent that it was not returned as undelivered by postal authorities, although appellant now claims he never received the amended complaint and thus was never served.

{¶ 3} Proceeding upon this apparent successful service by ordinary mail, and in the absence of an answer or other appearance by appellant, Seneca filed a motion for default judgment, which was granted on August 3, 2004. Seneca's subsequent attempts at non-wage garnishment failed, and Seneca took no action to collect this judgment for some time thereafter.

{¶ 4} On August 4, 2011, Seneca filed for revivor of judgment. This was successfully served upon appellant at his current address. Appellant then filed a memorandum contra revivor of judgment and, in the alternative, a motion for relief from the original judgment. The motion for relief from judgment asserted that in the absence of successful service of the amended complaint, the trial court never acquired jurisdiction over him and the grant of default judgment was void. Appellant supported this motion with his own affidavit averring that he never received service of the amended complaint in 2004. The trial court summarily denied the motion for relief from judgment without a hearing.

{¶ 5} Appellant has timely appealed and brings the following assignment of error:  
**The Trial Court Erred and Abused Its Discretion When It Denied Defendant-Appellant's Motion for Relief from Judgment Without Holding an Evidentiary Hearing.**

Seneca has not filed a brief in the matter.

{¶ 6} Appellant argues that service of the amended complaint was never perfected, and that the trial court therefore did not have jurisdiction to enter default judgment against him in 2004. Appellant asserts that under Ohio precedent he was entitled, at a minimum, to an evidentiary hearing on his Civ.R. 60(B) motion for relief from judgment once he submitted his personal affidavit that he had never been served with the amended complaint.

{¶ 7} Our decision in *Green v. Huntley*, 10th Dist. No. 09AP-652, 2010-Ohio-1024, is directly on point. In *Green*, we noted that a judgment rendered without personal jurisdiction over the defendant is void, and that a party against whom a void judgment has been rendered need not present any further meritorious defense when bringing a motion for relief from the allegedly void judgment under Civ.R. 60(B). We also held that

the movant need not establish that the motion was otherwise timely filed under Civ.R. 60(B) to be entitled to relief. *Id.* at ¶ 11.

{¶ 8} When such a Civ.R. 60(B) motion is made, we held in *Green* that when service by ordinary mail, without any indication of failure, is undertaken by the plaintiff, " 'a sworn statement by a defendant that he or she never was served with the complaint at least warrants the trial court's conducting a hearing to determine the validity of defendant's assertions.' " *Id.* at ¶ 14, quoting *Gupta v. Edgecombe*, 10th Dist. No. 03AP-807, 2004-Ohio-3227, ¶ 13, quoting *Wilson's Auto Serv., Inc. v. O'Brien*, 10th Dist. No. 92AP-1406 (Mar. 4, 1993).

{¶ 9} In accordance with our clear precedent set forth in *Green*, we find that the trial court erred in summarily overruling appellant's motion for relief from judgment without conducting a hearing. Once appellant had submitted a sworn statement in support of his affidavit asserting that he had never been served with the amended complaint in the matter, the trial court should have conducted a hearing to assess the relative credibility of the evidence proving or disproving service. We remand the matter to the trial court to conduct an evidentiary hearing and assess the credibility of appellant's denial of service. The trial court will thereafter resolve appellant's Civ.R. 60(B) motion accordingly. Appellant's assignment of error is sustained, and we remand this matter to the Franklin County Municipal Court.

*Judgment reversed;  
cause remanded with instructions.*

KLATT and TYACK, JJ., concur.

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