

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

Thomas Conlin, et al.

Court of Appeals No. L-10-1208

Appellant

Trial Court Nos. CI0200602839
CI0200902879

v.

Vivian Gumpf, et al.

DECISION AND JUDGMENT

Appellees

Decided: March 18, 2011

* * * * *

Stephen D. Hartman and Khary L. Hanible, for appellant.

Anthony J. Calamunci and Amy L. Butler, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which denied appellant's motion to vacate pursuant to Civ.R. 60(B). For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Thomas Conlin, sets forth the following sole assignment of error:

{¶ 3} "The trial court erred in not vacating the May 7, 2010 Order of dismissal of Plaintiff/Appellants [sic] action against the defendant Gumpf & Co. Construction in finding an action had not been commenced within the period prescribed by Ohio Rule of Civil Procedure 3(A), where valid personal service was made upon the corporation statutory agent and acceptance was refused by the agent, thus violating the doctrines of Ohio Corporation Law and preventing Plaintiff/Appellants [sic] right to due process and fair trial as assured in the Fifth and Seventh Amendments of the United States Constitution."

{¶ 4} The following undisputed facts are relevant to this appeal. On April 6, 2006, appellant filed suit against multiple parties involved in the construction and sale of appellant's residence. Appellant alleged breach of implied warranty of habitability and negligence. Subsequently, the matter was voluntarily dismissed pursuant to Civ.R. 41(A).

{¶ 5} On March 19, 2009, appellant refiled the action. The named defendants in the refiling were Vivian Gumpf, Gumpf & Co., and Reiser Custom Homes. In the refiling, the complaint alleged breach of implied warranty of habitability, negligence, and breach of contract.

{¶ 6} On March 21, 2009, service was perfected on Vivian Gumpf. In June 2009, noticed of failed service was filed reflecting refusal of service as to Gumpf & Co. and an incorrect address as to Reiser Custom Homes. The record reflects no additional or

alternative methods of service being pursued so as to perfect service on these remaining two parties.

{¶ 7} On June 5, 2009, Vivian Gumpf filed for judgment on the pleadings. On July 13, 2009, appellant filed a brief in opposition. On September 30, 2009, Gumpf's motion was granted.

{¶ 8} On April 7, 2010, with no perfection of service on the remaining two defendants, the trial court dismissed the matter for failure to perfect service within the requisite one year service deadline established pursuant to Civ.R. 3(A).

{¶ 9} On May 21, 2010, appellant filed a motion to vacate the dismissal judgment pursuant to Civ.R. 60(B). On July 21, 2010, the trial court denied the motion. In its denial, the trial court specifically noted that appellant failed to utilize available, alternative statutory methods of service perfection. The court further found no evidence sufficient to constitute compliance with Civ.R. 3(A) so as to enable commencement of the matter. This appeal ensued.

{¶ 10} In the sole assignment of error, appellant argues that the trial court erred in denying his Civ.R. 60(B) motion to vacate judgment. It is well-established that appellate review of such matters is conducted pursuant to the abuse of discretion standard. *Scheper v. McKinnon*, 177 Ohio App.3d 820, 2008-Ohio-3964. An abuse of discretion connotes more than a mere error in law or judgment. It requires demonstration that the disputed trial court action was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219.

{¶ 11} Appellant relies predominantly upon the fact that the attempted service upon Gump & Co. was refused. In essence, appellant asserts that his constitutional rights were somehow compromised given that the failure of service stemming from the refusal of service culminated in dismissal of the case for the failure to perfect service. Acceptance of appellant's position would necessitate finding that the service deadline is tolled or the perfection requirement waived in scenarios where a refusal has occurred. There is no compelling or relevant evidence or precedent in support of this notion.

{¶ 12} Civ.R. 3(A) establishes the requisite timeframe for perfection of service upon the filing of litigation. It states in relevant part, "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." Given that service was perfected with respect to defendant Vivian Gumpf, we will accordingly limit our consideration to the failure of service and dismissal in connection to the remaining corporate defendants.

{¶ 13} Civ.R. 4.2(F) establishes the parameters for service to be made upon a corporation. It states in relevant part, "Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified or express mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation."

{¶ 14} In conjunction with this, R.C. 1701.07(H) sets forth an alternative method of perfecting service in scenarios in which difficulty doing so has arisen. It establishes in pertinent part, "If (1) the agent cannot be found, or (2) the agent no longer has that

address, or (3) the corporation has failed to maintain an agent as required by this section, and if in any such case the party desiring that the process, notice, or demand be served, or the agent or representative of the party, shall have filed with the secretary of state an affidavit stating that one of the foregoing conditions exists and stating the most recent address of the corporation that the party after diligent search has been able to ascertain, then service of process, notice, or demand upon the secretary of state, as the agent of the corporation, may be initiated by delivering to the secretary of state or at the secretary of state's office quadruplicate copies of such process, notice, or demand and by paying to the secretary of state a fee of five dollars * * * and thereupon service upon the corporation shall be deemed to have been made."

{¶ 15} We have carefully reviewed and considered the record of evidence in this matter. We find no evidence constituting legal grounds to consider the statute of limitations for perfection of service to have been tolled. We find no evidence constituting legal grounds to consider service perfected prior to the deadline with respect to the two corporate defendants. On the contrary, the record reflects that appellant failed to perfect service within the timeframe dictated by Civ.R. 3(A) pursuant to the perfection of service via one of the methods delineated in Civ.R. 4.2(F) or via the alternative method for perfecting service upon a corporate defendant for which difficulty in perfecting service has occurred, as established by R.C. 1701.07(H).

{¶ 16} Based upon the foregoing, we find no evidence in the record from which it could be construed that the trial court was arbitrary, unreasonable or unconscionable in its

denial of the motion to vacate the order of dismissal for failure to perfect service within the requisite timeframe.

{¶ 17} Wherefore, we find appellant's assignment of error not well-taken. The judgment of the trial court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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