

46; *Ford v. Estate of Tonti* (Nov. 24, 1992), Franklin App. No. 91AP-715, 1992 Ohio App. LEXIS 6094.

Here, however, defendant's contention is that she was never served with legal commencement process as required by law and that as a consequence, this court does not possess the requisite jurisdiction over her to enter a judgment or an adjudication which serves as a precursor to a judgment. It is well established that a court lacks personal jurisdiction to enter a default judgment against a defendant where effective service of process has not been made upon the defendant and the defendant has not appeared in the case or otherwise waived service. *Rite Rug Co. v. Wilson* (1995), 106 Ohio App. 3d 59. Absent proper service of the summons and complaint, the trial court lacks jurisdiction to enter a judgment, and if a judgment is nevertheless rendered, it is a nullity and void ab initio. *O.B. Corp. v. Cordell* (1988), 47 Ohio App.3d 170, 171.

The court's authority to vacate a void judgment or to change its decision on a default finding is not derived from Civ. R. 60(B) but, rather, is an inherent power possessed by the court. *Lincoln Tavern v. Snader* (1956), 165 Ohio St. 61, paragraph one of the syllabus; see also, *Internatl Lottery, Inc. v. Kerouac* (1995), 102 Ohio App. 3d 660, 671. Further, because courts have the inherent power to vacate their own void judgments or improperly founded decisions on default status, motions to vacate void judgments "need not satisfy the requirements of Civ.R. 60(B)." *Id.*; *Community Ins. Co. v. Sullivan* (June 30, 1997), Franklin App. No. 96APE12-1750, 1997 Ohio App. LEXIS 2836. Thus, the appropriate recourse for challenging a void judgment or default adjudication that is encumbered by a

jurisdictional defect is to file a common law motion to vacate based upon the inherent power of a trial court to set aside a judgment. See *Molz v. Magdych* (Aug. 23, 1996), Trumbull App. No. 96-T-5396, 1996 Ohio App. LEXIS 3553; Fifth *Third Bank v. Hatfield*, 2004 Ohio 755, 2004 Ohio App. LEXIS 689 (Ohio Ct. App., Franklin County, Feb. 19, 2004). The magistrate has considered the instant motions in light of those decisions.

Here, the prima facie appearance of proper service of summons exists in the form of the "Return of service" ostensibly completed by one Charles Turner.¹ On that form which was returned to the court and filed herein, Turner avers that he served defendant with the summons and the complaint on August 17, 2008 at 1050 Mazepa Trail in Parma, Ohio. Turner's statement on the form is accompanied by his assertion that "I declare under penalty of perjury under the laws of the state of Ohio that the foregoing information is true and correct."

To rebut the presumption of proper service of process, the defendant and her former husband, Robert Tarnowski, testified at the hearing. Tarnowski related that he and the defendant separated in 2006 and that the defendant has resided at places other than the Mazepa Trail address where Tarnowski has continued to reside. Tarnowski recalled an incident in August 2008 when a male person came to the Mazepa Trail address looking for the defendant. Tarnowski related to the man that the defendant no longer lived there. The unnamed person then opened his file folder and gave Tarnowski a card requesting that if Tarnowski should have

¹ Turner is identified in the file as having been appointed as a special process server by a judge of this court on September 13, 2007. The appointment related to "civil actions that are pending" in this court. At the time of appointment, however, the instant action had not been filed.

contact with the defendant, she should be told to get ahold of the caller. Tarnowski denied receiving any papers other than the card.

Also to testify was the defendant. This party testified that after separating from her husband in 2006 and moving out of the Mazepa Trial address, she moved to Cuyahoga Falls, Ohio when she resided for two years, and then moved on to live in Florida, commencing in May 2008. To buttress her contention that she established residence in Florida, the defendant produced documentary evidence in the form of her Florida drivers license that was issued on June 26, 2008; an automobile insurance billing statement dated June 18, 2008 displaying her Florida residence address; another auto insurance form confirming a cancellation of the defendant's Ohio insurance policy effective June 18, 2008; and, inter alia, a letter from the defendant's Ohio bank sent to her address in Florida and dated June 12, 2008.

Other documentary evidence proffered by the defendant related more directly to challenge the prima facia evidence offered to show that the defendant was personally served with process by process server Turner on August 17, 2008. As mentioned, the defendant testified that she was residing in Florida in August 2008. She further testified that she was to come to Columbus, Ohio to testify in the lawsuit that is related to the instant suit. In that regard, on August 15, 2008 it appears by way of the documentary evidence the defendant submitted, that the defendant made Internet air flight reservations and confirmation that she would leave Florida on the evening of August 19, 2008 and travel to Columbus the same day. She was scheduled to return to Florida on August 23, 2008. A copy of a

booking and confirmation receipt providing the mentioned details was presented as substantiating evidence of the mentioned travel arrangements. When considering the evidence of the travel arrangements, it is found that they would not have been made if it were the case that defendant was in Parma, Ohio on August 17, 2008 as Turner contends.

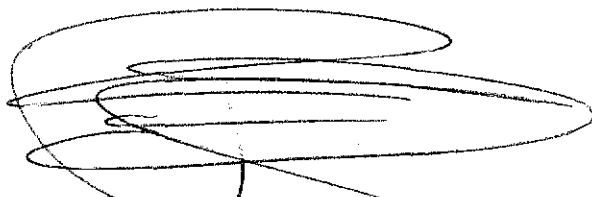
Upon consideration, it is found to be a near certainty that the defendant was in Florida at the time service of process was supposedly made on her in Parma, Ohio. The mere appearance of proper service was amply rebutted by the defendant's documentary and oral evidence presented at the hearing. Plaintiff offered nothing in terms of attempting to substantiate the claim of Turner that service was made on the defendant – not even the testimony of Turner himself.

Accordingly, the magistrate finds by clear and convincing evidence that service of summons and the complaint have not been properly made on the defendant and for that reason, this court did not possess the required jurisdiction over her to enter an adjudication of default and a finding of liability against her.² Thus, it is the decision of the magistrate that the court's finding of default and liability be vacated for the reasons mentioned and that the court consider further inquiry into the return of service filed by Turner.

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party

² There was some testimony given that would go to support the notion that the defendant may have received a copy of the complaint from a third party via facsimile transmission. Even if this were the case, such a circumstance falls far short of a demonstration of the necessary service of process as required by Ohio Civil Rules. See, *Maryhew v. Yova* (1984), 11 Ohio St. 3d 154, 1984 Ohio LEXIS 1124.

timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b). Any party may file written objections to this decision within fourteen days from the date this decision is filed.



Timothy P. McCarthy, Magistrate

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