

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

**MOTORISTS MUTUAL INSURANCE
COMPANY**

Plaintiff

vs.

CODY D. LAWSON

Defendant

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CASE NO. 2013 CVH 00233

Judge McBride

DECISION/ENTRY

Zeehandelar, Sabatino & Associates, LLC, Steven J. Zeehandelar and Philip L. Judy, counsel for the plaintiff Motorists Mutual Insurance Company, 471 East Broad Street, Suite 1500, Columbus, Ohio 43215.

Eagen & Wycoff Co., L.P.A., Jessica A. Curry, counsel for the defendant Cody D. Lawson, 632 Vine Street, Suite 900, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for relief from judgment filed by the defendant Cody Lawson.

The court scheduled an evidentiary hearing for February 14, 2014. When it was discovered that the defendant was not present at the hearing to provide testimony, counsel for both parties agreed to a continuance of the hearing. The court scheduled and held an evidentiary hearing on the motion for relief from judgment on March 4, 2014. At the conclusion of that hearing, the court took the matter under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Motorists Mutual Insurance Company filed the present action on February 1, 2013, bringing a claim for damages against defendant Cody Lawson for insurance payments made by the plaintiff in connection with a multi-vehicle accident that occurred on April 8, 2011.

A copy of the complaint and summons was sent via certified mail to 944 Richie Avenue, Lima, Ohio 45805. That certified mail was returned as "unclaimed." Service was then sent to the Richie Avenue address via ordinary mail and that envelope was not returned to the Clerk of Courts.

Thereafter, on May 20, 2013, the plaintiff filed a motion for default judgment. The court scheduled a hearing on the motion for default judgment and damages on July 8, 2013. The hearing was continued and the hearing was held instead on September 16, 2013. The court granted default judgment at the conclusion of the hearing and a default judgment entry was filed of record on the same date.

On December 31, 2013, Cody Lawson filed the present motion for relief from judgment. The motion, and the affidavit in support filed on January 23, 2014, allege that

the defendant moved from the Richie Avenue address shortly after the April 2011 accident and that he never received service of the complaint in this matter.¹

At the evidentiary hearing, the defendant testified that at some time in June or July of 2011, he moved from the Richie Avenue address to his parents' home at 7061 Cozaddale Road, Goshen, Ohio 45122. The defendant presented several letters from August and September 2011 which demonstrate that mail was forwarded to him at this Cozaddale Road address.²

The defendant testified that approximately three or four weeks after moving to the Cozaddale Road address, he then moved to 2003 Franklin Laurel Road, New Richmond, Ohio 45157. This address, with a clerical error as to the number, appears as the defendant's address on his 2011 federal tax return.³

After living at the Franklin Laurel Road residence, the defendant moved to his current residence at 1560 Bethel New Richmond Road, Lot 91, New Richmond, Ohio 45157⁴, where he has lived for one and a half to two years. The defendant testified at the evidentiary hearing that he changed his address for forwarding purposes at the Post Office each time he moved.

The defendant testified that he was never served with a copy of the complaint in the present matter and that he was not aware of the present lawsuit until November 2013, when he went to the Bureau of Motor Vehicles to renew his license registration and he was informed that his license was suspended. After making inquiries, he discovered that this suit existed and that judgment had been granted against him.

¹ Affidavit of Cody Lawson at ¶¶ 10-14.

² Defendant's Exhibit A.

³ Defendant's Exhibit B.

⁴ Defendant's Exhibit C.

The defendant also testified at the hearing on this matter that, on April 8, 2011, he was at a complete stop in the vehicle he was driving with his foot on the brake when he was struck from behind, causing his vehicle to hit the vehicle in front of him and, in turn, causing that vehicle to strike the vehicle in front of it.⁵ The defendant maintains in his affidavit that he was not negligent and that the accident was the result of the negligence of the driver who struck his vehicle from behind.⁶

STANDARD OF REVIEW

Pursuant to Civil Rule 60(B):

“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.”

“In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that [he] has a meritorious defense or claim to present if relief is granted; that [he] is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through

⁵ Id. at ¶¶ 3-7.

⁶ Id. at ¶¶ 8-9.

(5); and that the motion is made within a reasonable time.”⁷ “These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met.”⁸ “Civ.R. 60(B) is remedial and should be liberally construed so the ends of justice may be served.”⁹

LEGAL ANALYSIS

The defendant brings the present motion pursuant to Civ.R. 60(B)(5). Motions made pursuant to Civ.R. 60(B)(5) do not fall within the strict one-year requirement and, instead, must be filed within “a reasonable time.” The defendant brought this motion within approximately three months of the filing of the default judgment entry. The court finds that filing the present motion for relief from judgment within three months of judgment is within “a reasonable time” and, as such, the motion is timely.

The defendant has further alleged a meritorious defense in this matter, namely his argument that he was not negligent on the date in question and that, instead, the negligence of the driver who struck his vehicle caused the damages at issue in this case. This is sufficient to meet the meritorious defense requirement under the test cited in *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, and the plaintiff’s counsel noted at the evidentiary hearing that the plaintiff was not

⁷ *Washington Mutual Bank v. Christy* (Jan. 12, 2004), 12th Dist. Butler No. CA2003-03-075, 2004-Ohio-92, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, at paragraph two of the syllabus.

⁸ *Banfield v. Brodell* (Sept. 27, 2006), 7th Dist. Mahoning No. 06-MA-8, 2006-Ohio-5267, at ¶ 10, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914.

⁹ *Id.*, citing *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102.

disputing that the meritorious defense requirement has been met for the purposes of a Civ.R. 60(B) motion.

As a result, what remains for consideration is whether the defendant has established that he is entitled to relief under one of the subsections of Civ.R. 60(B). As noted above, the defendant argues that he is entitled to relief under Civ.R. 60(B)(5). “Civ.R. 60(B)(5) applies only when a more specific provision does not apply.”¹⁰

“When a hearing is held on a motion to vacate, a reviewing court must examine the evidence introduced at the hearing in addition to the evidentiary materials submitted with the motion itself.”¹¹ “Ultimately * * * the determination of whether relief from judgment should be granted is addressed to the sound discretion of the trial court * * *.”¹²

“Service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond.”¹³ “Civ.R. 4.6(D) provides that if certified mail is returned with an endorsement showing that the envelope was ‘unclaimed,’ the serving party can request that the complaint be served by ordinary mail service.”¹⁴ “Under that scenario, service is deemed complete ‘when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery.’”¹⁵

¹⁰ *Chase Home Fin. LLC v. Middleton* (Nov. 29, 2012), 5th Dist. No. 12-CA-10, 2012-Ohio-5547, ¶ 26, citing, *Caruso–Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66, 448 N.E.2d 1365.

¹¹ *Rafalski v. Oates*, 17 Ohio App.3d 65, 66, 477 N.E.2d 1212, 1214 (Ohio App. 8th Dist., 1984), citing *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223, 382 N.E.2d 1179 (Ohio App. 8th Dist., 1978).

¹² *Classic Oldsmobile, Inc. v. 21st Century Painting, Inc.* (Feb. 12, 1999), 11th Dist. No. 98-L-040, 1999 WL 545750, at *3, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.

¹³ *Tractor Servs. & Supply, Inc. v. Bill Newell Excavating*, 5th Dist. Fairfield No. 06-CA-48, 2007-Ohio-5255, ¶ 12, citing *Akron-Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406, 406 N.E.2d 811 (1980), quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed.2d 865.

¹⁴ *Id.* at ¶ 13, citing Civ.R. 4.6(D).

¹⁵ *Id.*, quoting *Cavalry Investments v. Clevenger*, 6th Dist. Lucas No. L-05-1103, 2005-Ohio-7003, ¶ 11.

“When a party challenges the existence or sufficiency of service of process, the court is “ ‘guided by the premise that service is proper where the civil rules on service are followed, unless sufficient evidence exists to rebut this principle.’ ”¹⁶ “ ‘In determining whether a defendant has sufficiently rebutted the presumption of valid service, a trial court may assess the credibility and competency of the submitted evidence demonstrating non-service.’ ”¹⁷ Generally, “when service ‘is made at an address reasonably calculated to reach the defendant, 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.’ ”¹⁸

In the case at bar, the defendant moved several times after the accident in April 2011 which gave rise to the present action. He moved briefly to his parents' home several months after the accident, then moved to Franklin Laurel Road in or around August of 2011, and then moved to his current residence thereafter. While he did inform the post office of his forwarding address with each move, it is certainly possible that the forwarding request expired by the time the plaintiff attempted service on the defendant in this case or that the defendant's multiple address changes simply led to the failure of the defendant receiving the complaint and summons sent to the Richie Avenue address. The defendant left that Richie Avenue residence around July 2011 and moved to three subsequent addresses. The court finds the defendant's testimony to be credible and finds that it is plausible and credible that mail sent to the Richie Avenue address in

¹⁶ *Green v. Huntley*, 10th Dist. Franklin No. 09AP-652, 2010-Ohio-1024, ¶ 13, quoting *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 05AP-51, 2005-Ohio-5924, ¶ 27, quoting *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9th Dist. Summit No. 21691, 2004-Ohio-3943, ¶ 4.

¹⁷ *Id.*, quoting *Bowling* at ¶ 33.

¹⁸ *Id.* at ¶ 14, quoting *Gupta v. Edgcombe*, 10th Dist. Franklin No. 03AP-807, 2004-Ohio-3227, ¶ 13, quoting *Wilson's Auto Serv., Inc. v. O'Brien*, 10th Dist. No. 92AP-1406 (March 4, 1993).

February and March 2013 did not reach the defendant at his Bethel New Richmond Road address.

As a result, the court finds that the defendant has presented sufficient competent and credible evidence to rebut the presumption of proper service and that the defendant is entitled to relief from judgment pursuant to Civ.R. 60(B)(5).

CONCLUSION

The motion to vacate judgment filed by defendant Cody Lawson is well-taken and is hereby granted.

Counsel are hereby directed to conference and call the Assignment Commissioner (732-7108) within seven days of the date of this decision to obtain a date for a case management conference and the date for that conference must be within thirty days of the date of this decision.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile this 22nd day of April 2014 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride