

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

TOTAL QUALITY LOGISTICS, LLC :
 Plaintiff :
 vs. :
FRANK SCHIMPF, JR. dba F&T :
TRUCKING, :
 Defendant :
 :

CASE NO. 2011 CVH 02271

Judge McBride

DECISION/ENTRY

Lindhorst & Dreidame, Barry F. Fagel, attorney for the plaintiff Total Quality Logistics, LLC, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202.

Frank Schimpf Jr. dba F&T Trucking, *pro se* defendant, 7839 James Ford Road, Baltimore, Maryland 21222.

This cause is before the court for consideration of a motion for extension of time filed by the defendant Frank Schimpf and a motion for default judgment filed by the plaintiff Total Quality Logistics, LLC.

The court scheduled and held a hearing on the motions on December 21, 2012. At the conclusion of the hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the oral and written arguments of counsel and the *pro se* party, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The Plaintiff Total Quality Logistics, LLC (hereinafter “TQL”) filed the present action against the defendant Frank Schimpf, doing business as F&T Trucking, on December 20, 2011. The complaint lists the defendant’s address as 7939 James Ford Road, Baltimore, Maryland 21222. A complaint and summons to that address was issued on December 21, 2011, and they were returned as “unclaimed” on February 6, 2012. The returned certified mail envelope shows that the “7939” in the address was crossed out and the number “7839” was handwritten next to it.

TQL then filed a praecipe for ordinary mail service on February 27, 2012. The praecipe again lists the defendant’s address as 7939 James Ford Road and, consequently, this was the address to which the clerk of courts sent the summons and complaint by ordinary mail. The summons and complaint sent via ordinary mail was not returned to the clerk’s office.

The court held telephone conferences with the defendant Schimpf and TQL’s counsel on August 17th and September 24th. TQL then filed a motion for default judgment on October 26th. The motion for default judgment was originally set for hearing on November 26th, but that hearing was continued at the request of Schimpf, who indicated that he wanted to raise defenses to the motion. On December 4th, Schimpf

filed a motion for extension of time to respond to the complaint. In his letter attached to the motion, he stated that he was asking for an extension of time to answer because he was never served in this case. Schimpf has not filed an answer with the court as of the date of this decision.

At the hearing on the present matter, Schimpf indicated that he never received the summons and complaint in the present case. He noted that the ordinary mail service was sent to 7939 James Ford Road and that he actually lives at 7839 James Ford Road. He acknowledged that he received some notices from the court but he denied ever receiving service of the summons and complaint.

LEGAL ANALYSIS

The plaintiff TQL argues that service was proper and that its motion for default should be granted.

Pursuant to Civ.R. 4.6(D):

“If a United States certified or express mail envelope attempting service within or outside the state is returned with an endorsement stating that the envelope was unclaimed, the clerk shall forthwith notify the attorney of record * * *. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by United States ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk.”

Generally, “[i]f a plaintiff follows the civil rules governing service of process, a rebuttable presumption of proper service arises.”¹ A defendant can then rebut the presumption of proper service in several ways, one of which is to present sufficient evidence to demonstrate that that plaintiff failed “to direct the summons and complaint to the defendant’s residence or to an address where the plaintiff could reasonably expect that the summons and complaint would be delivered to the defendant.”²

In the case at bar, while the certified mail envelope was returned as unclaimed, the address was changed, presumably by a postal worker, to the defendant Schimpf’s correct address, 7839 James Ford Road. Yet, when ordinary mail service was requested, the defendant was again listed incorrectly on the praecipe as 7939 James Ford Road, an address at which Schimpf does not and has never lived.

TQL argues that, since the post office changed the address on the certified mail envelope, it can be presumed that the ordinary mail envelope was likewise corrected. However, this court has no basis in law to assume that a postal worker took it upon himself or herself to correct the wrongly addressed ordinary mail service simply because someone did so once before with the certified mail service.

Furthermore, TQL notes that the ordinary mail service was never returned to the court. However, this does not create a presumption of proper service upon the defendant. Instead, it creates a presumption of service at the address to which the summons was sent, which was 7939 James Ford Road, where Schimpf does not reside. While it is possible that the ordinary mail did, in fact, make its way to Schimpf, it

¹ *Erin Capital Mgmt., LLC v. Fournier* (March 8, 2012), 10th Dist. No. 11AP-483, 2012-Ohio-939, ¶ 18, citing, e.g., *Babbitt & Weiss, LLP v. Flynn*, 10th Dist. No. 11AP-2, 2011-Ohio-4835, ¶ 6.

² *Id.* at ¶ 19, citing *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 42, 429 N.E.2d 1188.

is equally possible that the ordinary mail envelope was simply discarded by the resident of 7939 James Ford Road.

Finally, the court cannot find that Schimpf has voluntarily submitted himself to the jurisdiction of this court as a result of two appearances for telephone conferences and one appearance at a hearing on the motion for default judgment, at which time he stated that he had several defenses he wished to raise to the default motion, which presumably included the lack of service argument raised in his filing shortly thereafter.³

Therefore, the court must find that the plaintiff TQL had not achieved service of the summons and complaint upon the defendant Frank Schimpf as of the filing of the motion for default judgment and, as such, the motion must be denied. This finding renders the defendant Schimpf's motion for extension of time moot.

The court notes for the record that, during the time this case has been under advisement, Schimpf was served with the summons and complaint via certified mail on January 8, 2013. By virtue of that service, he has 28 days from January 8, 2013 in which to file his answer in the present action.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

³ See, e.g., *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 464 N.E.2d 538.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 4th day of February 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride