

[Cite as *Adams v. Bennett*, 2009-Ohio-4039.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92709

IRA F. ADAMS

PLAINTIFF-APPELLEE

vs.

**ANGELA BENNETT DBA
NEW VISION ACADEMY**

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-638389

BEFORE: Stewart, J., McMonagle, P.J., and Blackmon, J.

RELEASED: August 13, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Angela Bennett, appeals from the judgment of the Cuyahoga County Court of Common Pleas denying her motion for relief from judgment. For the reasons stated below, we reverse and remand.

{¶ 2} On October 11, 2007, plaintiff-appellee, Ira Adams, filed a complaint on what he alleged to be a cognovit note against defendant-appellant, “Angela Bennett dba New Vision Academy.” On that same date, plaintiff also filed an answer and confession of judgment by warrant of attorney. The trial court granted judgment against appellant on the complaint in the amount of \$45,937.50 plus interest and costs.

{¶ 3} On October 25, 2007, Bennett filed a motion for relief from judgment in which she asserted that she was not notified of the action and, therefore, did not have an opportunity to defend her interests. Bennett argued that the note was not a valid cognovit note and, therefore, Adams had no authority to appoint someone to act as her attorney-in-fact and to waive service on her behalf. She further asserted that she was not personally liable on the promissory note, having signed the note only in her official capacity as general counsel for New Vision Academy. On June 6, 2008, the court granted Bennett relief from the judgment and returned the case to the docket for further proceedings.

{¶ 4} The trial court, noting that the answer reflected in the docket was a confession of judgment and not an answer to the complaint, granted Bennett leave until August 13, 2008 to file her answer to the complaint. The court stated that

failure to file an answer by that date would result in a default judgment being granted against her. The court also set a case management conference (“CMC”) for August 13, 2008 and warned Bennett if she failed to appear on that date, it would be the second time she failed to appear for a CMC and would result in a default judgment being rendered against her.

{¶ 5} The record reflects that Bennett did not file an answer, neither did she appear for the CMC on August 13, 2008. Adams did appear, and filed a motion for default judgment against Bennett. By journal entry dated August 19, 2008, the court noted that the CMC was called and Bennett failed to appear. Citing Bennett’s second failure to appear, the court stated, “default judgment granted against defendant Bennett. Formal entry of default judgment to follow.”

{¶ 6} On September 3, 2008, the trial court issued Adam’s default judgment against Bennett in the amount of \$45,937.50 plus interest and costs. On that date, Bennett filed a motion to dismiss, a motion for relief from judgment, and a motion to stay execution of judgment. In each of these motions, Bennett asserted that the trial court lacked jurisdiction over her. On December 22, 2008, the trial court denied Bennett’s motions.

{¶ 7} In this appeal, Bennett asserts three assignments of error as follows.

{¶ 8} “1. The trial court erred in granting default judgment against Appellant because the trial court did not have personal jurisdiction over the person of the Appellant.”

{¶ 9} “2. Assuming arguendo that the trial court had jurisdiction, the trial court abused its discretion in granting default judgment against Appellant since the trial court failed to comply with the notice provisions in Civ. R. 55(A).”

{¶ 10} “3. The trial court erred in denying Appellant’s Motion for Relief from Judgment since Appellant had a meritorious defense and the motion was made within a reasonable time.”

{¶ 11} “In order to render a valid judgment, a court must have jurisdiction over the defendant in the action.” *Jones v. Jordan*, Cuyahoga App. No. 88696, 2007-Ohio-2519, citing, *Beachler v. Beachler*, Preble App. No. CA2006-03-007, 2007-Ohio-1220. Personal jurisdiction may be acquired, “either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court.” *Money Tree Loan Co. v. Williams*, 169 Ohio App.3d 336, 341, 2006-Ohio-5568. A trial court lacks jurisdiction to render a judgment against a defendant if effective service of process has not been made on the defendant and the defendant has not appeared in the case or waived service. *Id.* Any judgment rendered by a court that has not acquired personal jurisdiction over the defendant is void, and not merely voidable. *Jordan, supra; Peoples Banking Co. v. Grumfield Hay & Grain Co.* (1961), 172 Ohio St. 545, at paragraph two of the syllabus (“Where a judgment in personam has been rendered against a defendant

who was not served with summons, who did not enter an appearance and who did not authorize anyone to enter an appearance for him, such judgment is void * * *.”)

{¶ 12} Adams filed his action as a complaint on a cognovit note. In an action on a cognovit note, the debtor waives service of process. However, the promissory note in the instant case is invalid as a cognovit note as a matter of law.

It contains neither a warrant of attorney, as required by R.C. 2323.13(A), nor the statutory warning language in bold print and set apart from the other terms of the note, as required by R.C. 2323.13(D). Accordingly, the note is insufficient to waive Bennett’s right to service of process.

{¶ 13} The record reflects that service of the complaint and summons were never attempted on Bennett. Bennett received notice of the action only after final judgment was granted and Adams attempted to execute on the judgment. Thereafter, Bennett made a voluntary appearance on October 25, 2007, when she filed her first Civ.R. 60(B) motion for relief from judgment, pro se, to contest her lack of notice and opportunity to be heard. According to Civ.R. 12(H), the defense of lack of personal jurisdiction must be raised either in the defendant’s answer or by motion prior to filing an answer or the defense is waived. Bennett objected to jurisdiction at her earliest opportunity, via a motion for relief from judgment. It is clear from her motion that Bennett did not intend to submit to or waive service in any manner.

{¶ 14} Even after Bennett was granted relief from judgment and the case was returned to the active docket, Adams did not attempt service on Bennett.

Neither did Bennett take any action that would indicate her waiver of service or voluntary submission to the jurisdiction of the court. As a result, on August 13, 2008, the trial court did not have personal jurisdiction over Bennett and was without authority to grant default judgment against her. Accordingly, the default judgment is void. Bennett's first assignment of error is sustained.

{¶ 15} We need not address the merits of appellant's remaining two assignments of error as our determination of appellant's first assignment of error renders them moot. See App.R. 12(A)(1)(c).

{¶ 16} The judgment of the trial court is reversed and this case is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee her costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE _____

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR