STATE OF MICHIGAN

COURT OF APPEALS

FARMERS INSURANCE EXCHANGE,
Subrogee of FELICIA DORSEY,

Plaintiff-Appellant,

v

GLORIA CONSTANCE CORBIN,

Defendant-Appellee,

and

GEORGE ATKINS,

Defendant.

UNPUBLISHED
November 15, 2005

No. 255482
Wayne Circuit Court
LC No. 98-833358-CZ

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order setting aside a default judgment, discharging and declaring null and void a certificate of levy on property for which a writ for seizure and sale had been issued, and dismissing this case as to defendant Gloria Constance Corbin.[1] We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After filing this lawsuit, plaintiff provided a return of service showing that defendant was served on October 24, 1998, at 5182 South Martindale in Detroit. A default was entered on November 28, 1998, followed on December 3, 1998, by a judgment for $39,233.40. In a second motion to set aside this judgment, evidence established that defendant did *not* live and was not present at 5182 Martindale on October 24, 1998. A moving van contract showed that she moved from the Martindale address to 235 Winward Court in May 1998. A September 22, 1998, deed, listing her address as the Winward Court address, showed that she sold the Martindale property on that date.

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[1] The accurate spelling of defendant's last name is in fact "Cobbin."

Finally, medical records showed that she was living at the Winward Court address in October 1998. These records also showed that she had a colectomy in September 1998, resulting in a permanent colostomy, that she was readmitted to the hospital on October 13, 1998, and discharged on October 15, 1998, with a home care nurse, and that a November 1, 1998, note admitting her to Henry Ford Hospital, just seven days after the purported service, stated that "she feels quite weak and is bed ridden." This suggests she would have had difficulty answering the door to accept service on the stated date.

Almost two years later, on September 12, 2000, the court clerk entered a writ of execution regarding the Winward Court property that correctly listed defendant's address as Winward Court. There is no endorsement on the form showing that defendant received the writ, and nothing else in the record to show that she was ever aware of this document. Defendant died in February 2001. The trial court determined that she was not personally served, and concluded that it did not have personal jurisdiction over her.

MCR 2.603(D) addresses motions to set aside default judgments. MCR 2.603(D)(2)(b) provides that a default judgment can only be set aside if a motion is filed within twenty-one days after entry; however, this restriction applies only "if personal service was made on the party against whom the default was taken." Personal service was not made on defendant and thus, the twenty-one-day deadline did not restrict the trial court from providing relief.

MCR 2.603(D)(3) provides that a default judgment can be set aside in accordance with MCR 2.612. MCR 2.612(B) provides for relief from judgment when "[a] defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, . . . enter[s] an appearance within 1 year after final judgment, and . . . shows reason justifying relief from the judgment and [that] innocent third persons will not be prejudiced." Moreover, MCR 2.612(C)(1)(d) and (f) provide for relief from judgment when a judgment is void or there is "any other reason justifying relief from the operation of the judgment." MCR 2.612(C)(2) does not impose a one-year limit, but provides that a motion for relief brought under subsections (C)(1)(d) and (f) must be made within a reasonable time.

These rules do not expressly speak to the acquisition of personal jurisdiction or relief from judgment when personal jurisdiction was not acquired. However, in *Alycekay Co v Hasko Constr Co,* 180 Mich App 502, 505-506; 448 NW2d 43 (1989), this Court stated:

> Where service of process is defective, the trial court may be deprived of personal jurisdiction over the defendant and left without legal authority to render a judgment. *Dogan v Michigan Basic Property Ins Ass'n*, 130 Mich App 313, 320; 343 NW2d 532 (1983).
>
> We conclude that the failure to mail a copy of the complaint to the principal office in this case did not deprive the trial court of personal jurisdiction. First, there is some indication that no corporate office for Jordan existed in November, 1986. Secondly, the record reveals the trustee received actual notice of the claim. Therefore, the service of process which was effected satisfied fundamental requirements of due process and was not a substantial defect.

In *Dogan*, *supra*, this Court stated:

> Under the present law, the proper basis for vacating the default judgment where service of process was defective is that the defective service deprived the trial court of personal jurisdiction over the defendant and the trial court was, therefore, without legal authority to render a judgment (by default or otherwise). In the present case, because we have found that defendant is estopped from raising the defense of improper service, we find the defendant's claim to be without merit. [130 Mich App at 320].

Unlike the defendant in *Alycekay Co*, *supra*, plaintiff has not shown that defendant received actual notice of the lawsuit. Moreover, there is no basis for finding that defendant should be estopped from raising the defense. Although defendant did not challenge the 1998 judgment or the 2000 writ of execution, there is no showing that she was ever aware of these documents before her death in February 2001.

Plaintiff's argument regarding actual notice rests on a post-mortem July 2001 contact from an attorney purporting to represent defendant's interests, and a post-mortem August 2001 garnishment. However, there has never been a substitution of parties or any documentation showing that anyone has been legally appointed to represent defendant's interests, let alone a showing that an attorney was authorized to speak on her behalf as of July 2001. Although defendant's daughter appears at least partially responsible for some mistaken information and delay, she is not a party and thus, an estoppel theory could not be based on her actions or inaction. Given that defendant was never served and there was no showing that she had actual notice of the lawsuit before her death, the trial court did not err in holding that it lacked personal jurisdiction over defendant and in dismissing the lawsuit against her.

Affirmed. Defendant may tax costs.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter