

1993 Ohio App. LEXIS 4138, \*

STEVE WATSON, et al., Plaintiffs-Appellees v. CEDARDALE HOMES (NC), INC., et al.,  
Defendants-Appellants

Case No. 92-CAE-11040

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, DELAWARE COUNTY

1993 Ohio App. LEXIS 4138

August 20, 1993, Entered

**PRIOR HISTORY: [\*1]**

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. 92-CVH-06-210

**DISPOSITION:** JUDGMENT: Reversed and Remanded

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellants, a judgment debtor's successors in interest, sought review of a default judgment in the Court of Common Pleas of Delaware County (Ohio), which was entered against them and in favor of appellee judgment creditor.


**OVERVIEW:** The judgment creditor obtained a judgment against the judgment debtor arising out of a contract for the purchase of a log home kit. The judgment debtor's successors in interest were not named as defendants in the complaint. However, by virtue of the judgment entry the successors in interest became judgment debtors in the action. They filed a conditional notice of appeal. While the action was on appeal and prior to the court's dismissal of the successors' appeal, the judgment creditor initiated a second lawsuit naming as defendants the now defunct judgment debtor and the successors in interest. The judgment creditor was granted a default judgment, and the successors in interest appealed the default judgment. In reversing and remanding, the court held that the judgment creditor's failure to endorse proof of service of the motion for default judgment was in derogation of [Ohio R. Civ. P. 5\(D\)](#). Thus, the default judgment motion contained no certificate or proof of service nor was a certificate or proof of service filed separately. The court held that the trial court should not have considered the motion for default because of the deficient service.

**OUTCOME:** The court reversed the judgment and remanded for further proceedings.

**CORE TERMS:** default judgment, proof of service, separately, motion to vacate, certificate, order of dismissal, valid judgment, initiated, successor

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[Civil Procedure](#) > [Pretrial Judgments](#) > [Default](#) > [Default Judgments](#) 

**HN1**  [Ohio R. Civ. P. 5](#) provides in part: (D) Filing. All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. [More Like This Headnote](#)

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**HN2**  A court abuses its discretion in overruling a party's motion to vacate a default judgment where that party has clearly demonstrated he received no notice of the claim against him. [More Like This Headnote](#)

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**HEADNOTES:** DEFAULT JUDGMENT; SERVICE

**COUNSEL:** For Plaintiffs-Appellees: STEVE & CLAUDETTE WATSON, 1964 Ford Road, Delaware, OH 43015. **PAUL CROUSHORE**, 601 South High St., Columbus, OH 43215.

For Defendants-Appellants: STEPHEN D. MARTIN, 69 East Wilson Bridge Rd., Worthington, OH 43085-0892.

**JUDGES:** Hon. W. Scott Gwin, P.J., Hon. William B. Hoffman, J., Hon. W. Don Reader, J.

**OPINIONBY:** WILLIAM B. HOFFMAN

**OPINION:** OPINION

HOFFMAN, J.

Plaintiffs-appellees are Steve Watson, et al. (appellee) and defendants-appellants are Cedardale Homes, Inc., et al. (appellant). Appellee filed a complaint in the Court of Common Pleas of Delaware County alleging in pertinent part that appellant was liable as a successor corporation to a valid judgment which he (appellee) had obtained against the former Cedardale Homes, Inc. aka Construction Housing, Inc. The complaint arose out of a contract between appellee and Cedardale Homes for a log home kit to be built by appellee. After certain other individuals were dismissed from the action, the only remaining defendant was Cedardale Homes which ultimately

failed to appear for [\*2] a trial. By judgment entry filed 12/30/91, the trial court ruled in favor of appellee and issued extensive findings of fact and conclusions of law. At this juncture we note that the entity called Cedardale Homes, Inc. was a North Carolina corporation (Cedardale (NC)). The successor corporations to Cedardale, (NC), i.e., Cedardale Homes (CT) and New England Log Homes, Inc. (NEHLI) were not named as defendants in the original complaint initiated by appellee. (Case No. 88-CIV-351, aka the 1988 merits suit). Although neither brief filed to this court in the case sub judice is a model of clarity, we at least can decipher that at the time of trial of the 1988 merits suit, the only defendant was the now defunct Cedardale Homes (NC). By virtue of the court's 12/30/91 judgment entry cited supra Cedardale (CT) became a judgment debtor in the action and filed a "conditional notice of appeal" to this court in Case No. 92-A-E-01-011. That appeal was stayed for the purpose of a limited remand to the trial court for adjudication of Cedardale's (CT) motion to vacate the judgment against it. (See Entry and Order of Remand filed April 13, 1992, attached to appellant's brief at A-17). By entry [\*3] filed 10/7/92, the trial court granted Cedardale (CT's) motion to vacate as being void ab initio. Thereafter this court dismissed Cedardale (CT's) appeal referred to supra as being moot. (Entry and order of dismissal filed 11/19/92).

However, while the 1988 merits action was on appeal to this court and prior to our order of dismissal referred to supra, appellee initiated a second law suit (Case No. 92CVH-06-210) naming as defendants Cedardale (NC), nka Construction Housing, Inc., Cedardale (CT), NEHLI, et al. alleging that the 12/30/91 judgment in the 1988 merits action was a valid judgment against Cedardale (CT) based upon its purchase of assets from Cedardale (NC) and furthermore that NEHLI was also liable for the judgment because Cedardale (CT) was a mere instrumentality and/or alter ego of NEHLI. On 10/14/92 appellee filed a motion for default judgment and by entry filed that same day, the trial court granted appellee's motion for default judgment against Cedardale (CT), NEHLI and others in the amount of some \$ 295,000. Thus while the validity of the 12/30/91 judgment against Cedardale (CT) in the 1988 merits suit was pending upon appeal, the trial court rendered a [\*4] default judgment against appellants in the instant appeal viz, Cedardale (CT) and NEHLI. Appellant appeals from that default judgment and raises the following:

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING DEFAULT JUDGMENT AGAINST CEDARDALE HOMES (CT) INC. AND NEW ENGLAND LOG HOMES, INC.

Appellant claims that appellee's failure to endorse proof of service of the motion for default judgment thereon or separately was in derogation of [Civ. R. 5\(D\)](#) which <sup>HN1</sup> provides in pertinent part:  
(D) Filing.

All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service . . . Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed.

The subject default judgment motion contains no certificate or proof of service nor was a certificate or proof of service separately filed. Although appellant inexplicably has not cited any authority for this alleged [Civ. R. 5\(D\)](#) violation, there is applicable case law viz., [Lin v. Reid \(1983\), 11 Ohio App.3d 232, 464 N.E.2d 189](#) <sup>HN2</sup> (a court abuses its discretion in overruling a party's motion to vacate [\*5] a default

judgment where that party has clearly demonstrated he received no notice of the claim against him).

Appellant's argument that the trial court should not have considered the motion for default because of deficient service is well taken and its assigned error is sustained. (Having sustained appellant's assignment of error I (precisely we have sustained I(A)), we need not reach the other branches of this claim of error.

The judgment of the Court of Common Pleas is reversed and this case is remanded to that court for further proceedings.

Gwin, P.J. and

Reader, J. concur.

#### JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Delaware County, Ohio is reversed and remanded for further proceedings.

William B. Hoffman

W. Scott Gwin

W. Don Reader

JUDGES