

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

JAN RAMSEY,	:	
	:	
Plaintiff-Appellant,	:	Case No. 09CA3094
	:	
vs.	:	Released: September 24, 2009
	:	
TIM RUTHERFORD,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellee.	:	

APPEARANCES:

Leo J. Hall, Margulis, Gussler and Hall, Ashville, Ohio, for the Appellant.

Mark A. Preston, Mann & Preston, LLP, Chillicothe, Ohio, for the Appellee.

Per Curiam:

{¶1} Appellant, Jan Ramsey, appeals the decision of the Ross County Court of Common Pleas denying her motion for default judgment. On appeal, Appellant contends the trial court erred in failing to sustain her motion for judgment by default where no excusable neglect for failure to plead or otherwise defend as provided by the Civil Rules was shown. Because we conclude that, contrary to Appellant’s argument, Appellee demonstrated excusable neglect, we cannot conclude that the trial court abused its discretion in denying Appellant’s motion for default judgment.

Accordingly, we affirm the trial court's decision with respect to the denial of Appellant's motion.

I. Facts

{¶2} As set forth in our prior decision regarding this matter, *Ramsey v. Rutherford*, Ross App. No. 06CA2936, 2008-Ohio-124, in 2002, Appellant entered into a home construction contract with Rutherford Construction Company, Inc. ("Company"), a corporation wholly-owned by Appellee. During construction of the home, it became apparent to Appellant that draining problems were not being adequately addressed, as evidenced by flooding in the basement of the new construction.

{¶3} When the Company refused to take corrective measures, Appellant called upon it to enter into arbitration proceedings, as agreed to in the construction contract. The court appointed a layman, Patrick Anderson, President of the Ross County Contractors Association, to serve as arbitrator. He awarded Appellant \$78,400.00. Ultimately, the trial court entered judgment in favor of Appellant in the amount of the arbitrator's award.

{¶4} After the arbitration was reduced to judgment, Appellee's testimony was taken under oath in a debtor's exam. During the course of the examination, Appellee was asked to produce his corporate records pertaining to statutorily required formal actions of corporations. Upon questioning by

Appellant's counsel, Appellee admitted that the records he produced were created for the debtor's exam and did not, in fact, exist prior to the time the exam was scheduled.

{¶5} On April 21, 2006, Appellant filed a complaint in the Ross County Court of Common Pleas against Appellee, alleging that Appellee's control over the Company was so complete that the Company had no separate mind, will, or existence of its own, and that such control was exercised by Appellee to commit a fraud against Appellant, resulting in a damage award of \$78,400.00. Appellee did not file an answer in response to the complaint. Instead, Appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6), alleging failure to state a claim upon which relief can be granted, and Civ.R. 12(B)(7), alleging failure to join a necessary party in accordance with Civ.R. 19 or 19.1. Appellee further moved the court to dismiss Appellant's complaint, alleging that Appellant had failed to comply with Civ.R. 9(B) with respect to her claim for fraud. On June 27, 2006, the trial court overruled the Appellee's motion, stating that Appellee's motion to dismiss "for failing to join or name the correct party is denied." The trial court did not address Appellee's additional bases for bringing the motion. Two days later, on June 29, 2006, Appellee filed a motion to vacate and/or for reconsideration, claiming that the court failed to fully address his motion

to dismiss. In the motion for reconsideration, Appellee requested that the court reconsider its June 27, 2006 ruling and also requested that the court address Appellee's Civ.R. 12(B)(6) and 9(B) arguments.

{¶6} Appellee also proceeded to file, on July 26, 2006, a supplemental motion to dismiss, raising for the first time the theory of res judicata. In the wake of the filing of the court's June 27, 2006, decision, as well as Appellee's June 29 and July 26, 2006 motions, Appellee failed to file an answer within the fourteen days as required by Civ.R. 12(A)(2)(a). Accordingly, on August 11, 2006, Appellant filed a Civ.R. 55 motion for default judgment. On October 23, 2006, the trial court granted Appellee's supplemental motion to dismiss on res judicata grounds, and further held that Appellant's motion for default was accordingly moot. The trial court additionally failed to pass on a motion to file an answer *instanter* filed by the Appellee after service of the Appellant's motion for default.

{¶7} Appellant appealed from the trial court's decision granting Appellee's motion to dismiss on res judicata grounds and we sustained Appellant's argument on appeal because Appellee had failed to raise the theory by pleading, rather than motion, as required by Civ.R. 8(C). However, we declined to address Appellant's second assignment of error, which alleged that the trial court erred in failing to sustain Appellant's

motion for judgment by default, based on our reasoning that this Court only acts as a reviewing court and should not consider issues on appeal that the trial court did not decide.

{¶8} On remand, the trial court permitted the parties to brief the issue of whether Appellant was entitled to default judgment under Civ.R. 55. In support of his brief, Appellee argued that default judgment was improper as his failure to file an answer within the prescribed limits constituted excusable neglect. He also argued that despite his failure to file an answer, in light of the numerous motions filed by him, Appellant could not demonstrate that he had failed to “otherwise defend” against the claims. On June 10, 2008, after considering the briefs, the trial court overruled Appellant’s motion for default judgment, finding excusable neglect on the part of Appellee. Appellee was ultimately permitted to file his answer, *instanter*, and the matter was scheduled for trial.

{¶9} After one continuance granted at the request of Appellant, the matter was tried on December 12, 2008. A review of the record indicates that Appellant, when asked to present her case, simply asked that the trial court reconsider its previous denial of her motion for judgment by default and then rested, without presenting any evidence. By entry dated January 15, 2009, the trial court denied Appellant’s motion for reconsideration and

rendered judgment in favor of Appellee, in light of Appellant's failure to present any evidence or meet her burden of proof. Appellant filed her notice of appeal on February 3, 2009, assigning a sole assignment of error for our review.

II. Assignment of Error

"I. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION FOR JUDGMENT BY DEFAULT."

III. Legal Analysis

{¶10} In her sole assignment of error, Appellant contends that the trial court erred in failing to sustain her motion for judgment by default. Motions for default judgment under Civ.R. 55 are relegated to the sound discretion of the trial court. See generally *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. We will not overturn a trial court's decision on a motion for default judgment absent an abuse of discretion. *Id.* The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶11} Civ.R. 55, which governs judgments by default, provides in section (A) that:

"When a party against whom a judgment for affirmative relief is sought *has failed to plead or otherwise defend* as provided by these rules, the party

entitled to a judgment by default shall apply in writing or orally to the court therefore[.]” (Emphasis added).

In addition to a review of Civ.R. 55, we must consider Civ.R. 12(A)(2)(a) and 6(B)(2), which are directly at issue. Civ.R. 12(A)(2)(a) provides as follows:

“* * * The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served *within fourteen days* after notice of the court's action[.] * * *” (Emphasis added).

Further, Civ.R. 6(B)(2) provides that if a party fails to act as required within the time specified, the court may, upon motion, “permit the act to be done where the failure to act was a result of excusable neglect.”

{¶12} The Supreme Court of Ohio has reasoned that “the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B).” *State ex rel. Lindenschmidt v. Board of Commissioners of Butler County*, 72 Ohio St.3d 464, 1995-Ohio-49, 650 N.E.2d 1343. Much like our standard of review related to Civ. 55 motions, “[a] Civ.R. 6(B)(2) motion ‘is addressed to the sound discretion of the trial court and will not be disturbed upon appeal absent a showing of abuse of discretion.’” *Duffy v. Nourse Family of Dealerships-Chillicothe, Inc.*, Ross App. No. 05CA2846, 2006-Ohio-2057; quoting *Marion Production Credit*

Assn. v. Cochran (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325, citing *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752; *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 135, 502 N.E.2d 1012; See, also, *State ex rel. Lindenschmidt*, supra, at 465. With these standards in mind, we turn our attention to the issues presented.

{¶13} Appellant contends that the trial court erred in denying her motion for judgment by default because Appellee did not file an answer to her complaint within fourteen days of the denial of his motion to dismiss, in accordance with Civ.R. 12(A)(2)(a), and because, in her view, he was unable to demonstrate excusable neglect in failing to file an answer or otherwise plead, as required by Civ.R. 6(B)(2). Appellee counters by asserting that his failure to file an answer was excusable neglect, as argued in his motion for leave to file answer instanter filed in the court below, and that he certainly did not fail to “otherwise plead,” as demonstrated by the several motions he did file, which included two motions to dismiss and a motion to vacate/for reconsideration. The trial court denied Appellant’s motion for default judgment based upon its reasoning that Appellee had demonstrated excusable neglect in failing to timely file his answer. Based on the following, we agree with the reasoning of the trial court and therefore cannot conclude that the trial court abused its discretion in reaching its decision.

{¶14} Prior to the filing of Appellant's motion for default judgment below, Appellee filed a motion to vacate or motion for reconsideration with respect to the trial court's denial of his motion for dismissal. In that motion, Appellee contended that the trial court did not dispose of all of the arguments set forth in his motion to dismiss, namely that the court failed to address his motion to dismiss for failure to state a claim upon which relief could be granted. Upon the filing of that motion, the court set the matter for a non-oral hearing on a date beyond the fourteen day filing requirement provided by Civ.R. 12(A)(2)(a). When Appellant subsequently filed a motion for default judgment based upon Appellee's failure to file an answer, Appellee filed a motion for leave to file an answer instanter, alleging excusable neglect as a result of his belief at the time that it was not necessary to file an answer before the scheduled hearing date. Because trial court's grant of Appellee's second motion to dismiss based upon res judicata grounds disposed of the case, the trial court did not rule on Appellant's motion to vacate/for reconsideration or Appellant's motion for default judgment until this Court remanded this matter after the initial appeal.

{¶15} On remand, the parties fully briefed the issue of whether Appellant was entitled to default judgment and whether Appellee had demonstrated excusable neglect. As set forth above, after considering the

briefs, the trial court denied Appellant's motion for default judgment, reasoning with respect to Appellee's excusable neglect argument that "Defendant would have a respectable argument that he was lulled into thinking that his motion to reconsider would be decided before an answer would be necessitated and therefore any charges of neglect would be excused under the provisions in Civ.R. 55 and 60(B). The court, however innocently, was complicit in this possible misunderstanding." The trial court further noted that "the law favors the resolution of cases on the merits rather than on technicalities." In light of Appellee's arguments below and on appeal that his failure to file an answer was excusable neglect in connection with his misunderstanding related the scheduling of a hearing on his motion, coupled with the trial court's failure to rule on all branches of his motion to dismiss, we find Appellee's failure to file an answer within the prescribed time limits constitutes excusable neglect. As such, we find no abuse of discretion by the trial court.

{¶16} Further, although not addressed by the trial court, we find this case to be distinguishable from a situation where a party completely fails to participate, by failing to appear, answer or otherwise defend. Here, despite Appellee's failure to file an answer, Appellee entered an appearance and filed three motions prior to Appellant's motion for default judgment. Thus,

we cannot conclude that Appellee failed to “otherwise defend,” as contemplated by Civ.R. 55. See *Gibbons v. Price* (1986), 33 Ohio App.3d 4, 514 N.E.2d 127 (reasoning that by filing a motion to strike and a motion for reconsideration the defendant had “entered a plea or otherwise defended the case.”). As such, we find no abuse of discretion on the part of the trial court and therefore overrule Appellant’s sole assignment of error. Accordingly, we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Kline, P.J., Abele, J., and McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Presiding Judge Roger L. Kline

BY: _____
Judge Peter B. Abele

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.