

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Raben Tire Company, Inc.

Court of Appeals No. S-09-017

Appellee

Trial Court No. 08 CVF 00391

v.

K & G Contracting Services, Inc.

DECISION AND JUDGMENT

Appellant

Decided: November 20, 2009

* * * * *

Linda R. Van Tine, for appellee.

Charles A. Bakula, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an accelerated appeal from a summary judgment issued by the Bellevue Municipal Court to a plaintiff in a suit on account.

{¶ 2} Appellee, Raben Tire Company, Inc., is an Indiana corporation. On December 16, 2008, appellee sued appellant, K & G Contracting Services, Inc., for

merchandise purchased on account in 2007. On February 4, 2009, appellant answered, denying the debt.

{¶ 3} The matter was set for a pretrial to be conducted on April 16, 2009. According to the record, the court notified counsel for both parties of the pretrial on February 9, 2009. A notation on the court's notice of pretrial states that counsel for appellant was a "no show" for the hearing. Also noted is that counsel for appellee, "* * * will send summary judgem [sic]."

{¶ 4} On April 29, 2009, appellee filed a motion for summary judgment, supported by account documents and the affidavit of appellee's counsel who averred that appellant's statutory agent acknowledged the debt orally and in writing. A copy of a July 30, 2008 written acknowledgment was attached. On April 30, 2009, the court entered summary judgment in favor of appellee, awarding \$8,283.98, plus interest and costs. On May 26, 2009, appellee began to execute on the judgment. On May 29, 2009, appellant instituted this appeal.

{¶ 5} In two assignments or error, appellant asserts that the trial court erred by failing to allow it time to respond to appellee's motion for summary judgment and by allowing appellee to file the motion without leave of the court as provided in Civ.R. 56(A).

I. Leave to File

{¶ 6} We shall discuss appellant's second assignment of error first. In material part, Civ.R. 56(A) provides:

{¶ 7} " * * * A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion for pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. *If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.*" (Emphasis added.)

{¶ 8} Appellant insists that since the case had been set for pretrial, it was error for the court to consider the motion without seeking leave.

{¶ 9} A court may, within its sound discretion, consider a motion for summary judgment that is within the rule and for which no express leave has been requested or granted. *Lachman v. Wietmarschen*, 1st Dist. No. C-020208, 2002-Ohio-6656, ¶ 6. Moreover, when the court accepts a motion for summary judgment filed without express leave of the court, it gives implicit and retroactive leave to file the motion. *Meyer v. Wabash Alloys, L.L.C.*, 8th Dist. No. 80884, 2003-Ohio-4400, ¶ 16. In our view, the court acted within its discretion in entertaining appellee's motion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 10} Accordingly, appellant's second assignment of error is not well-taken.

II. Summary Judgment

{¶ 11} Appellant, in its first assignment of error, insists that the trial court denied it the opportunity to be heard when it awarded summary judgment to appellee less than a day after the motion was tendered.

{¶ 12} Civ.R. 56(C) provides, in part:

{¶ 13} "The [summary judgment] motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. * * *." Implicit in the rule is the right of the defending party to respond to the summary judgment motion. *Willis and Linnen Co., L.P.A. v. Linnen*, 163 Ohio App.3d 400, 2005-Ohio-4943, ¶ 29.

{¶ 14} In this matter, the trial court granted the motion within a day of its filing. Clearly, appellant was not afforded an opportunity to respond within the time provided by rule. Indeed, it appears appellant was never granted any opportunity to respond. This violates the rule and fundamental due process. *Boddie v. Connecticut* (1971), 401 U.S. 371, 378; *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 313.

{¶ 15} Accordingly, appellant's first assignment of error is well-taken.

{¶ 16} On consideration whereof, the judgment of the Bellevue Municipal Court is reversed. This matter is remanded to said court for further proceedings consistent with this decision. Appellee is ordered to pay court costs, pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Rabin Tire Co., Inc. v. K & G
Contracting Servs., Inc.
C.A. No. S-09-017

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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