

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

KENNETH JONES,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-02-017
- vs -	:	<u>OPINION</u>
	:	11/23/2009
CONTEMPORARY IMAGE LABELING, INC., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 06 CV 66937

Roger D. Staton, 355 Summit Street, Lebanon, Ohio 45036, for plaintiff-appellant

Charles L. Tate, 3532 Irwin Simpson Road, Mason, Ohio 45040, for defendant-appellee,
Douglas Wiedeman

Per Curiam.

{¶1} Plaintiff-appellant, Kenneth Jones, appeals the decision of the Warren County Court of Common Pleas vacating a default judgment and granting summary judgment to defendant-appellee, Douglas Wiedeman.

{¶2} Appellant filed a complaint for damages against appellee and Contemporary Image Labeling, Inc., a corporation in which appellee is the president and

majority shareholder, and appellant is the minority shareholder.¹

{¶13} Appellant's complaint alleged in part that appellee breached his fiduciary duty to appellant, diverted corporate assets and income, and diluted the ownership value of shareholders. A default judgment was granted against appellee and the corporation, but later vacated. Appellant voluntarily dismissed the corporation from the case. Both appellant and appellee moved for summary judgment. The trial court denied appellant's motion and granted appellee's summary judgment motion.²

{¶14} Appellant appealed, presenting six assignments of error. Appellant withdrew his fifth assignment of error at oral argument.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED WHEN IT VACATED A DEFAULT JUDGMENT THAT HAD BEEN ENTERED FOR APPELLANT AND AGAINST APPELLEES."³

{¶17} The trial court relied upon Civ.R. 54(B) to vacate the default judgment at issue. Civ.R.54(B) states, in part, that an order that adjudicates fewer than all claims or liabilities of fewer than all parties, shall not terminate the action as to any of the claims or parties, and is subject to revision at any time before the entry of judgment adjudicating all claims.

{¶18} The trial court found that appellee made an appearance for purposes of Civ.R. 55(A) and was entitled to, but did not receive, notice of the application for default judgment. See Civ.R. 55(A) (if a party against whom judgment is sought has appeared

1. Appellant is one of three shareholders in the corporation. Appellee's brother is the other shareholder.

2. The case was transferred to a visiting judge and it was the visiting judge who ruled on the summary judgment motions.

in the action, he shall be served with written notice of application for judgment); *Carroll v. Dairy Farmers of America, Inc.*, Auglaize App. No. 2-04-24, 2005-Ohio-671, ¶19; *Hover v. O'Hara*, Warren App. No. CA2006-06-077, 2007-Ohio-3614, ¶26.

{¶9} After reviewing the record, we find no error by the trial court in its decision to vacate the default finding, and accordingly, overrule appellant's first assignment of error. See *Withrow v. Elder Beerman Co.* (Dec. 23, 1985), Butler App. No. 85-02-016, 1985 WL 4640, *2 (default judgment leaving open issue of damages is not final appealable order); see *O'Donnell v. McQueen* (July 12, 1993), Butler App. No. CA92-12-251, 1993 WL 257234, *1 (generally, the law disfavors default judgments; the general policy in Ohio is to decide cases on their merits whenever possible); see *Miamisburg Motel v. Huntington Natl. Bank* (1993), 88 Ohio App.3d 117, 125-127 (party appears in an action for purposes of Civ.R. 55[A] when that party clearly expresses to the opposing party an intention and purpose to defend the suit, regardless of whether a formal filing is made); see *Baines v. Harwood* (1993), 87 Ohio App.3d 345, 347.

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES' RULE 60(B) MOTION."

{¶12} It appears from the record that the trial court did not grant appellee's Civ. R. 60 motion, but granted a Civ. R. 54(B) motion as discussed under the first assignment of error. Based upon our discussion and determination in the first assignment of error, appellant's second assignment is overruled.

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER

3. Appellant's assignments of error refer to appellees, but it appears from the record that while Wiedeman and the corporation were defendants during most of the case, Wiedeman is the only appellee in this

ADMITTED REQUESTS FOR ADMISSION."

{¶15} When a party fails to timely respond to a request for admissions, the admissions become facts of record, which the court must recognize. *Vilardo v. Sheets*, Clermont App. No. CA2005-09-091, 2006-Ohio-3473, ¶21-22; see Civ.R. 36. Admitted matters are conclusively established unless the court, on motion, permits withdrawal or amendment of an admission pursuant to Civ.R. 36(B). *Vilardo*.

{¶16} The decision whether to grant or deny a request for a withdrawal or amendment of an admission rests within the sound discretion of the trial court, and under compelling circumstances, the court may allow untimely replies to avoid the admissions. *Id.* at ¶23.

{¶17} The record contains an entry from the trial court dated January 15, 2008, which vacates its order deeming the requests admitted and sets aside the admissions pursuant to Civ.R. 36(B). The trial court indicated that it considered, but found no prejudice to appellant, and the decision to set aside the admissions was "the only way for this Court to undertake a reasonable analysis of the merits of [appellant's] claims against [appellee]."

{¶18} We find that the trial court did not abuse its discretion when it made this determination and appellant's third assignment of error is overruled. See *Nursing Staff of Cincinnati, Inc. v. Sherman* (1984), 13 Ohio App.3d 328, 330 (although there was not a formal request for such relief in compliance with the procedure set forth in the rule, court was unwilling to hold that this precluded the trial judge from acting to serve what he believed to be the best interests of justice, and court failed to see on the state of record how that error resulted in any substantial prejudice); see, also, *Balson v. Dodds* (1980), 62 Ohio St.2d 287, fn. 2.

{¶19} Assignment of Error No. 4:

{¶20} "THE TRIAL COURT ERRED WHEN IT REFUSED TO ENFORCE ITS ORDERS COMPELLING DISCOVERY REFUSED TO PERMIT APPELLANT TO COMPLETE HIS DISCOVERY AND FAILED TO IMPOSE SANCTIONS AGAINST APPELLEES. [sic]"⁴

{¶21} The trial court has broad discretion in regulating the discovery process and, therefore, the trial court's decisions on discovery matters will not be reversed absent an abuse of discretion. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 590-92, 1996-Ohio-265. The discretion of the trial court, however, is not without limits. An appellate court can reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights. *Id.*

{¶22} After reviewing the record, we find no abuse of discretion by the trial court in the regulation of the discovery process. Appellant's fourth assignment of error is overruled.

{¶23} Assignment of Error No. 6:

{¶24} "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE APPELLEES AND DENIED SUMMARY JUDGMENT TO APPELLANT."

{¶25} This court reviews a trial court's decision to grant summary judgment on a de novo basis, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, which means that we use the same standard the trial court should have used in ruling on the summary judgment motion. *Reese v. Barbieri*, Clermont App. No. CA2002-09-079,

4. The fourth assignment of error listed in the table of contents and the assignment of error stated in the body of the brief differ. We have used the language employed in the table of contents.

2003-Ohio-5110, ¶8. A trial court may award summary judgment only when (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, which must be viewed in a light most favorable to the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Grafton*. Trial courts must award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346.

{¶26} Claims of a breach of fiduciary duty alleged by minority shareholders against shareholders who control a majority of shares of a close corporation, and use their control to deprive minority shareholders of the benefits of their investment, may be brought as individual or direct actions and are not subject to the statute dealing with a shareholder derivative action. *Crosby v. Beam* (1989), 47 Ohio St.3d 105, paragraph three of the syllabus.

{¶27} The complaint must state an injury to the plaintiff upon an individual claim as distinguished from an injury which directly affects the corporation and only indirectly affects the plaintiff. *Id.* at 110. "Where majority or controlling shareholders breach their heightened fiduciary duty to minority shareholders by utilizing majority control to their own advantage, without providing minority shareholders with an equal opportunity to benefit, such breach, absent a legitimate business purpose, is actionable." *Id.* at 109.

{¶28} The trial court stated in its decision denying appellant's summary judgment motion and granting appellee's motion that the allegation that appellee's conduct devalued corporate stock was a derivative claim because that would be a loss suffered by all shareholders of the corporation and was not personal to appellant alone.

{¶29} The trial court further found that appellant had not demonstrated that the

lack of access to certain business records caused appellant an injury distinct from the majority shareholders or the corporation.

{¶30} Finally, the trial court stated that appellant's claims were speculative, his expert's opinions were conclusory without supporting facts, and appellant's evidence was insufficient to demonstrate that any alleged harm was separate and distinct to appellant as required by *Crosby*.

{¶31} Construing the evidence most favorably for the non-moving party with respect to the competing motions for summary judgment, we find that there are no genuine issues of material fact and reasonable minds could come to but one conclusion and that conclusion is adverse to appellant. The trial court's grant of summary judgment to appellee was appropriate as appellant failed to demonstrate that the alleged harm caused in this case was separate and distinct to appellant. Finding no error in the trial court's determination, appellant's fourth assignment of error is overruled.

{¶32} Judgment affirmed.

BRESSLER, P.J., YOUNG and RINGLAND, JJ., concur.