[Cite as *Fontanella v. Ambrosio*, 2002-Ohio-3144.]

COURT OF APPEALS

ELEVENTH DISTRICT

TRUMBULL COUNTY, OHIO

J U D G E S

DOMINIC F. FONTANELLA,

Plaintiff-Appellant,

- vs -

ZOE A. AMBROSIO,

Defendant-Appellee.

HON. DONALD R. FORD, P.J.,
HON. JUDITH A. CHRISTLEY, J.,
HON. DIANE V. GRENDELL, J.

ACCELERATED
CASE NO. 2001-T-0033

O P I N I O N

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 00 CV 721

JUDGMENT: Affirmed.

DOMINIC F. FONTANELLA, pro se
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Niles, OH 44446

(Plaintiff-Appellant)

ATTY. DENNIS A. DiMARTINO
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(For Defendant-Appellee)

JUDITH A. CHRISTLEY, J.

{¶1} In this accelerated calendar appeal submitted on the briefs of the parties, appellant, Dominic F. Fontanella, appeals the judgment rendered by the Trumbull County Court of Common Pleas, granting summary judgment in favor appellee, Zoe A. Ambrosio.

{¶2} In addition to the tortured procedural history of this case, the following is relevant to this appeal. On April 25, 2000, appellant filed a complaint for breach of contract against appellee. The record indicates that the complaint was served upon appellee on April 27, 2000.

{¶3} Thereafter, on May 30, 2000, appellee filed a "stipulation" for leave to answer the complaint. Although titled in that manner, there was no indication that this motion contained any such "stipulation" by opposing counsel. Rather, in this motion, appellee asked for an additional thirty days, or until June 30, 2000, to file her answer. However, no reason was given for her failure to file a timely answer. In a judgment entry dated June 6, 2000, the trial court granted appellee the additional thirty days she requested.

{¶4} Also, on June 6, 2000, appellant filed his notice regarding the filing of interrogatories with the trial court. Additionally, on June 19, 2000, prior to the expiration of the thirty day extension, appellant filed a motion for default judgment, asking the trial court to enter judgment against appellee because she had failed to plead or otherwise defend in the action.

{¶5} Then, on August 24, 2000, appellee filed a motion for leave to file answer instanter pursuant to Civ.R. 6(B), but no answer was attached. According to appellee's attorney, he was not retained by appellee until May 30, 2000. Defense counsel claimed that appellee's financial inability to retain counsel earlier constituted excusable neglect.

However, no reason was given as to why it took counsel from May 31, 2000, to August 24, 2000, to file this motion. Nevertheless, the trial court granted the motion for leave on September 5, 2000.

{¶6} Finally, on September 6, 2000, appellee filed her answer, which included the affirmative defense of res judicata. She also initiated a counterclaim against appellant alleging that he was a vexatious litigator and asking that he be prohibited from instituting additional legal proceedings against her.

{¶7} On September 12, 2000, approximately a week after the answer and counterclaim were filed, appellee filed a motion to compel answers to the June interrogatories. On September 27, 2000, the trial court granted appellant's motion to compel but denied his June 19, 2000 motion for default judgment. The interrogatories were to be answered by September 29, 2000. However, on October 20, 2000, appellant filed a motion for imposition of sanctions, claiming that appellee's response to the interrogatories was inadequate.

{¶8} In the interim, several pretrial or status conferences were held. Presumably, as a result of one of these conferences, the trial court granted appellee until

December 22, 2000, to file a motion for summary judgment. However, on January 4, 2001, appellee filed a motion for leave to file a motion for summary judgment instanter. Appellee's attorney claimed that the "hectic nature of the practice" and the holiday season constituted excusable neglect for not filing the motion by the court's due date. On January 10, 2001, the trial court granted the leave requested, and appellee ultimately filed her motion for summary judgment on January 16, 2001.

{¶9} Upon consideration, on March 6, 2001, the trial court granted summary judgment in favor of appellee on the issue of appellant's original breach of contract claim.[1] The trial court stated there was no just cause for delay as appellee's counterclaim remained pending, thereby rendering the decision a final appealable order.

{¶10} It is from this judgment appellant appeals, advancing two assignments of error for our consideration:

{¶11} "[1.] It was error for the court to not grant the plaintiff's default judgment.

{¶12} "[2.] Trail [sic] court erred by not imposing sanctions."

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1. Technically, the trial court's dismissal should have been framed as a "judgment granted for defendant as to plaintiff's claims."

{¶13} In his first assignment of error, appellant contends the trial court erred by not granting his motion for default judgment because appellee did not show excusable neglect as to why her answer was filed out of rule. Essentially, appellant contends that he was entitled to a default judgment once appellee failed to answer his complaint within twenty–eight days of service and because appellee's "stipulation" for leave to file an answer cited to a nonexistent Local Rule.

{¶14} Generally speaking, Civ.R. 6(B) governs the enlargement of time in which a party may comply with the civil rules. In relevant part to this appeal, Civ.R. 6(B)(2) provides that, after the expiration of the specified time period, a trial court may extend the time if a party files a motion for such and the failure to file within rule was the result of excusable neglect. Clearly, the preceding language falls significantly short of establishing a jurisdictional twenty-eight day limit.

{¶15} A determination under Civ.R. 6(B)(2) rests within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 465, 1995-Ohio-49. An abuse of discretion connotes more than an error of law or

judgment; rather it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112.

{¶16} In conjunction with this standard, additional factors of a showing of a meritorious defense as well as the showing of an absence of prejudice to the plaintiff can also be considered. "[T]he determination of whether neglect is excusable or inexcusable must take into consideration *all such surrounding facts and circumstances*." (Emphasis added.) *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271. "Courts must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds." Id.

{¶17} There is no question that the determination to allow this case to go forward on its merits was a close call. Had we been sitting as the trial judge, we might have viewed the dilatory responses of appellee's attorney as being unworthy of consideration. However, we are mindful of the fact that "[w]hen applying the abuse of discretion standard, a reviewing court is *not* free to merely substitute its judgment for that of the trial court." (Emphasis added.) *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138 *citing Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶18} Further, the merits of this case call out for a decision on those merits. This is because appellant failed to advise the trial court or this court of any prejudice sustained as a result of the delay which prevented him from being able to present his case on its merits. Thus, any error which may have occurred from the delay in allowing appellee to file an answer to the complaint was harmless. Civ.R. 61; App.R. 12(B) and (D). See, generally, *State v. Benner* (1988), 40 Ohio St.3d 301, 317; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149 (generally holding that reversal is not warranted when an error is deemed harmless and no prejudice occurs). See, also, *Grenga v. Smith*, 11th Dist. No. 2001-T-0040, 2002-Ohio-1179, at ¶61; *Caito v. Zucallo*, 11th Dist. No. 2000-P-0070, 2001-Ohio-8881, 2001 WL 1388377, at 3-4.

{¶19} Under such circumstances, the trial court did not abuse its discretion by granting appellee's first leave to answer and then granting her subsequent motions to file instanter.

{¶20} In a similar vein, appellant next asserts the trial court should have granted his motion for a default judgment because appellee did not answer his complaint within rule.

{¶21} Default judgment is governed by Civ.R. 55(A), which states, in pertinent part:

> **{¶22}** "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 therefor ***." (Emphasis added.)

{¶23} In accordance with Civ.R. 55, "a default judgment is only proper when a party [defending a claim] has 'failed to plead or otherwise defend.'" *Chase Manhattan Automotive Finance Corp. v. Glass* (July 13, 2001), 11th Dist. App. No. 2000-T-0090, 2001 WL 799875, at 1. See, also, *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 120; *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105; *Davis v. Immediate Med. Services, Inc.*, 80 Ohio St.3d 10, 14, 1997-Ohio-363, (holding that "[d]efault judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action.")

{¶24} While appellee failed to timely file an answer, she otherwise appeared and defended the action by filing a "stipulation" for leave to answer on May 20, 2000. A defendant who files a motion for an extension to plead or a motion to file answer instanter has appeared in the action and as such, entitles that party to notice and other due process

considerations. *Hardware & Supply Co. v. Edward Davidson, M.D., Inc.* (1985), 23 Ohio App.3d 145. Under these circumstances, the trial court did not abuse its discretion in denying appellant's motion for default judgment because appellee had appeared earlier.

{¶25} Appellant also suggests that Civ.R. 5(D) and (E) violations occurred. Appellant, however, overlooks the fact that he failed to bring these errors to the trial court's attention at a time when such errors could have been avoided and corrected by the court. *Abbott v. Haight Properties, Inc.* (Apr. 28, 2000), 6th Dist. App. No. L-98-1413, 2000 WL 491731, at 6, fn. 1. See, also, *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. App. No. 99-L-193, 2000 WL 1774136, at 2. Hence, it is unnecessary for this court to consider appellant's Civ.R. 5 arguments as he waived his right to raise these issues on appeal. *Lippy v. Soc. Natl. Bank* (1993), 88 Ohio App.3d 33, 40; *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43; *Nozik* at 2; *Geauga Metro. Hous. Auth. v. Biggs* (May 19, 2000), 11th Dist. No. 98-G-2207, 2000 WL 665567, at 5. Nevertheless, we will briefly address them below.

{¶26} Appellant first submits that appellee's pleadings and motions allegedly contained invalid certifications under Civ.R. 5(D). Even if this were true, appellant has

not demonstrated how this allegedly invalid certification prejudiced him. For instance, appellant does not allege that he did not receive service of appellee's motions or pleadings. Thus, any error which may have occurred was harmless because appellant has not shown that he suffered prejudice as a result of these events. Civ.R. 61; App.R. 12(B) and (D).

{¶27} Appellant also contends that appellee's May 30, 2000 "stipulation" for leave to answer the complaint was inappropriately filed in violation of Civ.R. 5(E) as it failed to indicate that the judge noted the date and transmitted a copy to the clerk. Although appellant also takes issue with the fact that appellee's May 30, 2000 motion does not indicate the exact minute it was filed, it is evident from the record that the clerk of courts stamped this document as filed with the Trumbull County Court of Common Pleas. Accordingly, the May 30, 2000 motion was, indeed, filed with the trial court.

{¶28} For all these reasons, appellant's first assignment of error, including all its sub-issues, are not well-taken.

{¶29} In his second assignment of error, appellant argues the trial court erred by not granting his October 20, 2000 motion to impose sanctions pursuant to Civ.R. 37 due

to appellee's failure to file timely responses to his interrogatories.[2] As to this point, the record indicates that appellee answered the interrogatories. Thus, appellant seems to suggest that appellee's response was insufficient.

{¶30} Generally speaking, Civ.R. 37 permits a trial court to sanction a party for a failure to comply with discovery orders. Absent an abuse of discretion, an appellate court will not reverse the trial court's determination on discovery sanctions. *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, syllabus, 1996-Ohio-159.

{¶31} For the reasons that follow, we hold that when appellant's motion for sanctions is considered in light of the trial court's determination that the instant cause was barred by the doctrine of res judicata, the trial court did not abuse its discretion in refusing to impose sanctions.[3]

{¶32} Appellee's motion for summary judgment addressed the single issue of res judicata. The thrust of appellee's motion was that the present action contained the same

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2. Because the record reveals that appellant filed only one motion for sanctions pursuant to Civ.R. 37, we will limit our analysis accordingly.

3. As an aside, we note that the trial court did not specifically rule on appellant's motion for sanctions until after granting appellee's motion for summary judgment. Specifically, in its March 6, 2001 judgment entry, the trial court stated that "[t]his entry makes any remaining motions moot."

allegations that were brought in a 1999 lawsuit maintained in Mahoning County. That earlier case resulted in an order of dismissal with prejudice, pursuant to settlement, which was signed by the trial judge and both parties. To support her position, appellee attached, inter alia, a copy of the 1999 complaint and a copy of the February 7, 2000 judgment entry dismissing the action with prejudice.[4]

{¶33} Appellant countered the motion for summary judgment with two major arguments. First, he maintained that he should have been granted a default judgment as a result of appellee's late answer. Second, he argued that appellee "[h]as not shown there ever existed a final judgment rendered upon the merits."

{¶34} Under the doctrine of res judicata, a subsequent action is barred if the following elements are demonstrated: (1) a final judgment is rendered on the merits by a court of competent jurisdiction; (2) concerning the same claim or cause of action as that now asserted; and (3) between the same parties as are in the current action or their privies. *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 2001-Ohio-168, quoting *Grava v. Parkman Twp.*,

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4. In his motion in opposition to the motion for summary judgment, appellant generally opposed the exhibits attached to appellee's motion for summary judgment as not of the type specified in Civ.R. 56(C). However, appellant did not object to the exhibits on the basis of their authenticity.

73 Ohio St.3d 379, syllabus, 1995-Ohio-331.

{¶35} As to the first element, the 1999 judgment entry issued by the Mahoning County Court of Common Pleas clearly indicates that "[the parties], pursuant to settlement discussions, have agreed to dismiss this action *with prejudice* ***. *Parties further waive any procedural requirements under the Ohio Civil Rules to accomplish these dismissals with prejudice*." (Emphasis added.) The trial court, appellant, and appellee's attorney signed this judgment entry.

{¶36} A dismissal of an action with prejudice is treated as an adjudication on the merits. *Thomas v. Freeman*, 79 Ohio St.3d 221, 225, fn. 2, 1997-Ohio-395; *Tower City Properties v. Cuyahoga Cty. Bd. of Revision* (1990), 49 Ohio St.3d 67, 69, citing *Chadwick v. Barba Lou, Inc.* (1982), 69 Ohio St.2d 222, 226 ("'*** an action dismissed "with prejudice" is vulnerable to the defense of *res judicata*. ***'"). Hence, we hold that the Mahoning County trial court's dismissal of appellant's action with prejudice constitutes a final judgment on the merits.

{¶37} Second, the present action involves the same cause of action that was brought in the 1999 Mahoning County lawsuit. Appellant's current claim is that appellee

breached a contract concerning the receipt of rental payments; that is the same contention raised by him in his 1999 lawsuit.

{¶38} Finally, the parties in the 1999 Mahoning County action and the present action are indisputably the same.

{¶39} In summation, because the dismissal of appellant's 1999 lawsuit by the Mahoning County trial court was treated as an adjudication on the merits, his present breach of contract lawsuit against appellee is now barred by the doctrine of res judicata. Accordingly, the trial court properly granted appellee's motion for summary judgment.

{¶40} As a result, when appellant's motion for sanctions is viewed in light of this affirmative defense, it is apparent that the trial court did not abuse its discretion in refusing to impose sanctions. Further, appellant's interrogatories were rendered moot as they were irrelevant to the issue of res judicata. Given that the affirmative defense of res judicata was meritorious, it precluded an analysis on the merits of appellant's motion for sanctions by the trial court. Accordingly, appellant's second assignment is without merit.

{¶41} Based on the foregoing analysis, appellant's assignments of error, including all subissues, lack merit, and the judgment of the trial court is affirmed in all

respects.

DONALD R. FORD, P.J., concurs.

DIANE V. GRENDELL, J., concurs and dissents with concurring/dissenting opinion.

DIANE V. GRENDELL, J., concurring and dissenting.

{¶42} While I concur with the majority with respect to appellant's second assignment of error, I respectfully dissent as to the first assignment of error.

{¶43} Appellee failed to file a timely answer in this case. The trial court generously granted appellee an additional 30 days to answer, even though appellee was tardy and out of rule in requesting such extension.

{¶44} Despite the trial court's generosity, appellee failed to file her answer until three months later. The claimed excuse for such tardiness was appellee's alleged financial inability to retain counsel. This "excuse" lacks merit under the circumstances. Appellee never explained why appellee's counsel, retained on May 30, 2000, failed to file an answer or motion for additional time to answer as soon as he was retained. The failure to

take any action until almost 3 months later (August 24, 2000) is inexcusable. Appellee's other failures to abide by other court deadlines only reinforces this conclusion.

{¶45} A defendant is required to serve his or her answer within 28 days after service of the summons and complaint. Civ.R. 12(A)(1). Service of the complaint was perfected upon appellee on April 27, 2000. Appellee's answer was due on May 25, 2000. Appellee filed a stipulation for leave to answer on May 30, 2000. She did not file her answer until September 6, 2000. Appellee's answer obviously was filed well past the date required by Civ.R. 12(A)(1) and the court's extension of that filing deadline.

{¶46} Civ.R. 6(B) applies to any enlargement of time in which a party may comply with the civil rules. Civ.R. 6(B) provides that, after the expiration of the specified time period, a trial court may extend the time if a party files a motion for such and the failure to file within rule was the result of "excusable neglect." A court may permit a defendant to file an untimely answer where there is sufficient evidence of excusable neglect on the record. *State ex rel. Lindenschmidt v. Bd. of Commrs. of Butler Cty.* (1995), 72 Ohio St.3d 464, 465. The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and

courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than on procedural grounds. *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271. Neglect has been described as conduct that falls substantially below what is reasonable under the circumstances. *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 473.

{¶47} A Civ.R. 6(B)(2) determination is within the sound discretion of the trial court. A reviewing court will not disturb that decision unless an abuse of discretion is shown. *Lindenschmidt*, supra. An abuse of discretion connotes more than an error of law or judgment; rather it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Rock v. Cabral* (1993), 67 Ohio St.3d 108.

{¶48} Appellee's stipulation for leave to answer was filed on May 30, 2000, or 5 days past when her answer had been due. The stipulation offers no explanation at all as to why any neglect in filing a timely answer was excusable. Even so, the trial court benevolently gave appellee until June 30, 2000, to plead, answer, or otherwise respond to appellant's complaint. Appellee did *not* file her answer before or on that date, but waited until August 24, 2000, before filing a motion for leave to file an answer instanter. In the

motion, appellee claimed service of the complaint was perfected on May 1, 2000, although the record shows service was obtained on April 27, 2000. Appellee also stated a local rule permitted her until June 1, 2000, to answer the complaint. No mention of Civ.R. 12(A)(1) is made in the motion. Appellee argued her neglect was excusable under Civ.R. 6(B) because she lacked the financial ability to retain counsel.

{¶49} The lack of legal counsel does not constitute excusable neglect. *Rudloff v. Rudloff* (Aug. 26, 1999), Mahoning App. No. 96 CA 60, 1999 Ohio App. LEXIS 4117. Moreover, a person's belief that a suit is frivolous does not allow a party to disregard judicial service. *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134.

{¶50} Appellee offered no legitimate explanation which would excuse her failure to answer within rule or request another extension within rule. Her stipulation for leave to answer never mentioned why her answer was not filed on time. Even after being granted an enlargement of time by the court, appellee still did not file within that time period. Her motion to file an answer instanter gave no explanation for her failure to answer by June 30, 2000.

{¶51} What is apparent from the file before this court, is that appellee demonstrated a lack of regard for procedures and deadlines throughout the proceedings below. She did not answer appellant's interrogatories until well after a motion to compel was filed. Appellee had to file a motion for leave to file summary judgment instanter after disregarding the filing date set by the court. The only reason given was the claimed hectic nature of her counsel's practice and the holiday season. If we cavalierly accept these excuses for dilatory litigation conduct, we might as well shut the courthouses down during the last two weeks of the year. This dilatory conduct evidences an unacceptable disregard for the legal system and the integrity of judicial process.

{¶52} Because appellee did not demonstrate excusable neglect in answering out of rule, the trial court abused its discretion by granting first her stipulation for leave to answer and then granting her belated Civ.R. 6(B) motion.