[Cite as *Shikner v. S & P Solutions*, 2006-Ohio-127.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JAMES SHIKNER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2004-L-108**
S & P SOLUTIONS, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 03 CV 001535.

Judgment: Reversed and remanded.

Nate N. Malek, Malek, Dean & Associates, L.L.C., 113 St. Clair Avenue, #305, Cleveland, OH 44114 (For Plaintiff-Appellant).

Gary B. Kabat and *Kevin R. McMillan*, Kabat, Mielziner & Sobel, 25550 Chagrin Boulevard, #403, Beachwood, OH 44122 (For Defendant-Appellee).

COLLEEN M. O'TOOLE, J.

{¶1} Appellant, James Shikner ("Shikner"), appeals from a judgment of the Lake County Court of Common Pleas, granting default judgment in favor of appellee, S & P Solutions ("S & P"), on its counterclaim. For the following we reasons, we reverse the judgment of the trial court and remand this matter for further proceedings.

{¶2} Shikner worked for S & P from January 1995 until May 2001. On May 6, 2003, Shikner filed a complaint in the Cuyahoga County Court of Common Pleas

against S & P, alleging conversion, breach of contract, and nonpayment of wages. Shikner's complaint requested damages in excess of $428,000 plus interest.

{¶3} On June 4, 2003, S & P moved to transfer the case to the Lake County Court of Common Pleas, for lack of proper venue. Shikner filed a response to Defendant's motion to transfer venue and an amended complaint. The amended complaint added Gary Bates ("Bates"), President of S & P, as a defendant, and added a fourth claim of unjust enrichment. The response agreed to transfer venue to Lake County.

{¶4} On July 24, 2003, the Cuyahoga County Court granted the motion to transfer the matter to Lake County. The case was then transferred to the docket of the Lake County Court of Common Pleas.

{¶5} The respective parties filed a stipulation for leave to plead, or otherwise respond, to Shikner's amended complaint. On November 25, 2003, defendant S & P filed an answer and a counterclaim for "breach of agreement" and unjust enrichment. The counterclaim requested damages in the amount of $13,581.65. On the same date, Bates filed his answer to Shikner's amended complaint.

{¶6} On April 23, 2004, Shikner filed another motion for leave to file an amended complaint with the court. Shikner also moved to have venue transferred back to Cuyahoga County. Thereafter, Shikner filed a notice of dismissal of his amended complaint, pursuant to Civ.R. 41. As a result, his claims against S & P and Bates were dismissed.

{¶7} On June 8, 2004, the remaining matters of venue and S & P's pending counterclaim proceeded to trial, with both parties present. At trial, S & P noted that

Shikner failed to answer its counterclaim. Accordingly, S & P orally moved for default judgment and requested that Shikner be precluded from introducing evidence of an affirmative defense.

{¶8} Shikner's counsel stated that he believed an answer to the counterclaim had been filed. But upon further review of the court's docket, it was determined that Shikner had failed to file a responsive pleading to the counterclaim. Shikner argued that despite the absence of an answer, he could assert an affirmative defense to S & P's counterclaim. The trial court disagreed.

{¶9} Prior to resolving S & P's oral motion for default judgment, the court ruled that venue was proper. The court then proceeded to grant S & P's oral default judgment on the counterclaim, finding that Shikner failed to answer. A short recess was called prior to a hearing on the remaining issue of damages. After returning from the recess, it was determined that Shikner and his counsel had left. Nevertheless, the trial court proceeded to conduct a hearing as to the issue of damages. After evidence was taken, the trial court awarded S & P $13,581 in damages.

{¶10} From this judgment, Shikner timely appealed and assigns the following three assignments of error:

{¶11} "[1.] The trial court erred to the prejudice of plaintiff-appellant in granting defendant-appellee's motion for default judgment since the issue was only that of damages.

{¶12} "[2.] The trial court abused its discretion in failing to allow plaintiff-appellant the ability to provide an answer asserting an affirmative defense on the day of trial.

{¶13} "[3.] The trial court erred to the prejudice of the plaintiff-appellant in granting default judgment in favor of defendant-appellees [sic] where the record demonstrates that the default was granted without first providing notice to defendants or their counsel in violation of their due process rights, Ohio Rule of Civil Procedure 55, and Local Rule VI (A)."

{¶14} We will first address Shikner's third assignment of error as it is dispositive of this appeal. Under his third assignment of error, Shikner argues that the trial court erred and abused its discretion by granting default judgment in favor of S & P. Specifically, he argues that S & P's oral motion for default judgment, made on the day of trial, violated the seven-day written notice requirement of Civ.R. 55(A). We agree.

{¶15} Civ.R. 7(A) provides in relevant part, that "there shall be *** a reply to a counterclaim denominated as such." Civ.R. 12(A)(2) and (B) state, "[t]he plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service ***," and that "[e]very defense, in law or fact, to a *** counterclaim, shall be asserted in a responsive pleading thereto ***."

{¶16} Clearly, Shikner was required to file a responsive pleading within twenty-eight days of service of S & P's counterclaim. Based upon Shikner's failure to plead, the mandates of Civ.R. 55(A), which governs motions for default judgment, are applicable. In relevant part, Civ.R. 55(A) states as follows:

{¶17} "When a party against whom a judgment for affirmative relief has failed to plead or otherwise defend as provided by the rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; *** If the party against whom judgment by default is sought has appeared in the action, *he *** shall be served with*

written notice of the application for judgment at least seven days prior to the hearing on such application." (Emphasis added.)

{¶18} Civ.R. 55(A) is consistent with Civ.R. 8(D), which provides in pertinent part that "averments in a pleading to which a responsive pleading is required *** are admitted when not denied in the responsive pleading." See, e.g., *Ohio Valley Radiology Assoc*., *Inc. v Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118. Likewise, Civ.R. 55(A) is consistent with Civ.R. 7(B) which requires a responsive pleading to include any affirmative defense. Thus, when a defendant fails to answer, default judgment under Civ.R. 55(A) is appropriate because the defendant has admitted liability to the averments of the plaintiff's pleading and the defendant is precluded from raising an affirmative defense.

{¶19} Here, the record establishes that Shikner had appeared in the action and had failed to file a responsive pleading to S & P's counterclaim. Therefore, Civ.R. 55(A) required that Shikner be provided with written notice of the motion for default at least seven days prior to a hearing on the default motion. This requirement was not met, as the trial court granted S & P's oral motion for default judgment on the day it was made.

{¶20} In *AMCA Intl. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 90, the Ohio Supreme Court held that when the defendant has made an appearance, the "plain language" of Civ.R. 55(A) "demands" that the defendant receive at least a seven-day written notice of an application for default. The Court reasoned that the purpose of the seven-day written notice requirement is to allow the defaulting party the opportunity to show good cause for the absence of a responsive pleading. Id. at 91. Thus, "[t]he

purpose of the notice requirement will be emasculated if [the defendant] is not given sufficient time (*i.e.,* seven days) to show cause[.]" Id.

{¶21} S & P argues in rebuttal that although seven-day written notice was not provided, the purpose of the notice requirement was met. Further, S & P contends that the notice requirement was not violated because the court allowed Shikner to contest damages and because Shikner failed to object to the alleged error.

{¶22} The instant case illustrates the importance of, and reason for, the seven-day notice requirement. After S & P orally moved for a default judgment, Shikner's counsel informed the trial court that he believed a reply to the counterclaim had been filed. When unable to find a responsive pleading in the court's docket, Shikner's counsel stated, "[t]his is the first time this issue has been brought up." Nevertheless, the trial court proceeded to grant S & P's default judgment on the day it was made.

{¶23} Clearly, Shikner's counsel was not afforded sufficient time to show good cause relating to his failure to answer and relating to why leave to plead would be appropriate. Absent proper notice, Shikner's ability to show cause under Civ.R. 55(A) was emasculated.

{¶24} Moreover, Shikner's ability to contest damages is irrelevant to the issue of notice. It is well-established that once a default judgment has been entered, the only remaining triable issue is the amount of damages. See, e.g., *Girard v. Leatherworks Partnership*, 11th Dist. No. 2004-T-0010, 2005-Ohio-4779, at ¶38. However, as stated previously, the default judgment effectively admitted the averments of S & P's counterclaim and precluded Shikner from asserting any affirmative defense which would be considered an avoidance of S & P's counterclaim. Civ.R. 8(C); Civ.R. 7(B).

Consequently, the prejudice resulting from the lack of notice lies in the admission of the counterclaim averments and preclusion of an affirmative defense, not the issue of damages.

{¶25} Finally, the record establishes that although Shikner's counsel did not specifically mention the seven-day notice requirement, his statements prior to the court's ruling on default judgment inherently raised the issue of notice. Specifically, throughout the trial, Shikner's counsel repeatedly requested additional time to rebut S & P's oral motion for default judgment. The trial court denied the requests for additional time. Thus, the issue of whether the notice requirement was adhered to was sufficiently preserved for purposes of appeal.

{¶26} We hold that despite Shikner's apparent failure to properly respond, Civ.R. 55(A) demands at least seven-day written notice of an application for default, as Shikner had made an appearance in this matter. Because Shikner was not afforded at least seven-day written notice, his third assignment of error is with merit.

{¶27} As a brief aside, we note that our holding under Shikner's first assignment of error makes no determination as to whether Shikner has shown good cause to file a late answer and avoid default judgment. That issue is to be resolved by the trial court once the notice requirement of Civ.R. 55(A) has been satisfied. Furthermore, our holding in no way condones the conduct of Shikner's counsel during the trial; namely, his refusal to participate in the damages hearing, following the court's grant of default judgment.

{¶28} Shikner's first and second assignments of error have been rendered moot.

{¶29} Based upon the foregoing analysis, Shikner's third assignment of error is with merit and his first and second assignments of error have been rendered moot. We hereby reverse the trial court's default judgment and remand this matter for further proceedings consistent with our opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶30} I respectfully dissent.

{¶31} The majority holds that the court erred and denied Shikner his due process rights by granting "default judgment" because the notice requirements of Civ.R. 55 were not satisfied, and S & P failed to make a written motion for default judgment, as required by Local Rule VI(A). I disagree.

{¶32} Contrary to the majority's conclusion, Shikner did not raise these issues in the trial court. Ordinarily, "an appellate court will not consider any error which [the complaining party] could have called *** to the trial court's attention at a time when such error could have been avoided or corrected ***." *State v. Glaros* (1960), 170 Ohio St. 471, at paragraph one of the syllabus. Such errors are waived and cannot be raised upon appeal. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. However,

even if this court is required to address these issues, I would nevertheless hold, that appellant was not denied his due process rights under the facts of this case.

{¶33} It is well-settled that the fundamental requirements of procedural due process are adequate notice and an opportunity to be heard. *In re Adoption of Greer*, 70 Ohio St.3d 293, 301, 1994-Ohio-69, citing *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532, 542.

{¶34} In the instant matter, S & P's counterclaim was for money damages resulting from Shikner's use of S & P's American Express account for personal expenses. S & P's counterclaim was an independent claim for relief against an opposing party, which did not depend on the success or failure of Shikner's original complaint, and was the only surviving claim following Shikner's voluntary dismissal of his original complaint. See *Alliance Group, Inc. v. Rosenfield* (1996), 115 Ohio App.3d 380, 388, ("[a] counterclaim, properly filed and served, prior to the dismissal of the complaint, that states a legally sufficient basis to confer jurisdiction on the court survives the dismissal.")

{¶35} Civil Rule 7 governs pleadings and provides in relevant part, that "there *shall be* *** a reply to a counterclaim denominated as such." Civ.R. 7(A) (emphasis added). Civil Rule 12 governs defenses and objections, and states, in relevant part, that "[t]he plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service ***, and that "[e]very defense, in law or fact, to a *** counterclaim *** shall be asserted in the responsive pleading thereto ***." Civ.R. 12(A)(2) and (B). Civ.R. 8(C) states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively *** any *** matter constituting an *** affirmative defense."

Civ.R. 8(B) states that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Civ.R. 8(D) states that the effect of a failure to deny the averments made in a pleading, "other than those as to the amount of damage, are admitted when not denied ***." Thus, the burden is clearly on the answering party to specifically set forth those portions of the averments in the complaint which the defendant intends to deny, otherwise, they are deemed admitted. *Coburn v. Grimshaw* (Jun. 27, 1995), 4th Dist. No. 94CA 2278, 1995 Ohio App. LEXIS 2870, at *7.

{¶36} There is no dispute that Shikner failed to file an answer to S & P's counterclaim in the intervening *eleven months* between when he voluntarily agreed to transfer venue to the Lake County Court, up until the time the matter proceeded to trial on June 8, 2005. His failure to respond to the counterclaim waived all affirmative defenses. The record at trial reveals that, after the court was *notified* by appellee that Shikner had failed to file an answer, Shikner's attorney requested leave to amend his pleading pursuant to Civ.R. 15.

{¶37} A decision whether to grant a motion for leave to file a pleading out of rule is within the sound discretion of the trial court, and an appellate court will not reverse the trial court's decision absent an abuse of this discretion. *Cincinnati Spring Svc. v. Meister Sand & Gravel, Inc.* (Jun. 3, 1991), 12th Dist. Nos. CA90-06-112, CA90-06-126, 1991 Ohio App. LEXIS 2556, at *3-*4, citing *Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 95. An abuse of discretion consists of more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169 (citation omitted).

{¶38} "Civ.R. 15 discusses amendment of pleadings that have *already been timely filed*[,]" on the other hand, "Civ.R. 6(B) governs when a party wishes to file a pleading out of time, and it clearly requires a finding of excusable neglect." *Cincinnati Spring*, 1991 Ohio App. LEXIS 2556, at *5. "A sufficient showing of excusable neglect is a necessary prelude to the granting of a motion to file an answer made after the period of time provided in Civ.R. 12 *** for filing such answer." *Jenkins*, 7 Ohio App.3d at 95. Based on the record before us, Shikner made no showing of excusable neglect. Thus, the trial court did not abuse its discretion by not allowing Shikner leave to plead on the date trial on the merits commenced.

{¶39} With respect to the majority's holding that the trial court granted a default judgment in violation of the requisite notice provision, we note that *the matter proceeded to trial at which both parties were present*. It is only through the most liberal reading of the trial transcript that one could conclude that S & P's counsel *orally moved* for a default judgment.

{¶40} However, even if the majority's position were accepted as true, appellant has failed to demonstrate how the trial court's actions prejudiced him. It is well established that the seven day notice provision in Civ.R. 55, "was not intended to prevent a trial court from proceeding to enter a judgment in a case that is at issue and set for trial *** and a party absents himself from the trial." *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 123, quoting *Ries Flooring Co., Inc. v. Dileno Construction Co.* (1977), 53 Ohio App.2d 255, 265 (Corrigan, J., dissenting). That is precisely what occurred here.

{¶41} After Shikner and his attorney voluntarily left the proceedings, the trial court proceeded ex parte, at which time S & P adduced evidence of the American Express billing statements, along with the amounts of the personal charges attributable to Shikner. The billing statements contained Shikner's initials next to each of the relevant charges. Nowhere in the record of the trial court does Shikner ever contest his liability for the charges, merely the extent of the damages.[1]

{¶42} It is likewise well-settled that a defendant in default on the pleadings retains "a right to appear *** at a trial of the cause for the assessment of damages, to object to the introduction of evidence that is improper and to participate in the trial in an effort to minimize the damages." *Marquis Oil Co., Inc. v. Country Estates Health Care, Inc.* (Feb. 13, 1979), 7th Dist. No. 1213, 1979 Ohio App. LEXIS 9256 at *3, quoting *Stockhaus v. K & G Trucking Co.* (App.1939), 29 Ohio Law Abs. 24, at paragraph two of the syllabus. However, a litigant's willful and deliberate failure to avail himself of that right does not constitute error. See *G. Herschman Architects v. Ringco, Inc.* (Dec. 16, 1999), 8th Dist. No. 75174/75175/75321, 1999 Ohio App. LEXIS 6086, at *12 (a court may proceed ex parte where defendant absconded from the hearing rather than remaining in the courtroom and entering his objections at the hearing).

{¶43} Here, Shikner was present at trial, at which time the court listened to arguments from both parties concerning venue and the court's jurisdiction to hear the merits of the counterclaim. After the trial court ruled in favor of S & P on its counterclaim, a short recess was declared prior to a hearing on the issue of damages.

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1. To the contrary, a careful review of the record reveals that Shikner admitted in his deposition that he routinely used S & P's American Express account for personal charges, pursuant to his employment agreement with the company. Shikner further admitted that he did, in fact, owe the company for personal charges made on the account. Shikner only disagreed as to the *amount* of money owed.

When the trial reconvened, it was determined that Shikner and his counsel had deliberately left, so the trial court elected to conduct a hearing as to the issue of damages without them. After evidence was taken, the trial court awarded S & P $13,581.00 in damages. Since Shikner deliberately failed to avail himself of his opportunity to contest the extent of damages, he cannot demonstrate that his due process rights were violated in any way.

{¶44} Accordingly, I would affirm the judgment of the Lake County Court of Common Pleas.