[Cite as *Hale v. Steri-Tec Servs., Inc.*, 2009-Ohio-3935.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

SHIRLEY J. HALE, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-G-2876**
- vs -	:	
STERI-TEC SERVICES, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 04 P 001155.

Judgment: Affirmed.

Paul A. Newman, Newman & Brice, L.P.A., 214 East Park Street, Chardon, OH 44024 (For Plaintiffs-Appellants).

Harvey Kugelman, Harvey Kugelman Co., L.P.A., 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Shirley J. and Leroy L. Hale, appeal from the April 10, 2008 judgment entry of the Geauga County Court of Common Pleas, denying their motion for default judgment, and from the November 21, 2008 judgment entry, in which the trial court entered judgment in favor of appellee, Steri-Tec Services, Inc.

{¶2} On December 14, 2004, appellants, along with plaintiffs, Amber, James, and Danielle Hale, filed a complaint against appellee on five counts: count one, breach of contract; count two, quantum meruit/unjust enrichment; count three, Consumer Sales

Practices Act; count four, U.C.C. violations; and count five, punitive damages.[1] On April 7, 2005, appellee filed an answer and counterclaim. Appellants filed an answer to appellee's counterclaim on April 11, 2005.

{¶3} On November 2, 2006, appellee filed an amended answer and counterclaim. On November 7, 2006, appellants filed an answer to appellee's amended counterclaim.

{¶4} After a number of trial dates were scheduled and canceled, the matter was ultimately set for a jury trial on March 10, 2008. Appellee and its counsel failed to show and the jury was discharged.

{¶5} On March 11, 2008, appellants filed a motion for default judgment. Appellee filed a brief in opposition on March 17, 2008.

{¶6} Pursuant to its April 10, 2008 judgment entry, the trial court denied appellants' motion for default judgment. The trial court determined that appellee's failure to appear for trial was inadvertent. The trial court ordered appellee to pay the Clerk of Courts the compensation paid to those prospective jurors who appeared for trial, as well as appellants for their out-of-pocket expenses incurred as a result of appellee's failure to appear for trial.[2]

{¶7} A jury trial commenced on November 17, 2008.

{¶8} At the conclusion of the trial, the jury awarded a verdict in favor of appellee.

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1. Amber, James, and Danielle Hale ultimately voluntarily dismissed their claims against appellee and are not named parties to the instant appeal. The action at issue stemmed from mold remediation work appellee had performed at the Hale residence in Chardon, Geauga County, Ohio.

2. The trial court ultimately determined that appellee pay $700 in jury fees and $300 to appellants for damages.

{¶9} Pursuant to its November 21, 2008 judgment entry, the trial court entered judgment in favor of appellee and against appellants, and ordered appellants to pay costs.

{¶10} It is from the foregoing April 10, 2008 and November 21, 2008 judgment entries that appellants filed the instant appeal, raising the following assignments of error for our review:

{¶11} "[1.] THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANTS] AS A MATTER OF LAW BY NOT GIVING [APPELLANTS] AN OPPORTUNITY TO PRESENT THEIR CASE AT THE SET TRIAL.

{¶12} "[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF [APPELLANTS] AND ABUSED THE DISCRETION IT HELD BY NOT GRANTING [APPELLANTS'] MOTION FOR DEFAULT JUDGMENT AND CONVERTING THE RESPONSE INTO A 60(B) RESPONSE WITHOUT PROVIDING [APPELLANTS] A BRIEFING SCHEDULE, AND FURTHER, WITHOUT SUFFICIENT FACTS TO SUPPORT ITS DECISION."

{¶13} In their first assignment of error, appellants argue that the trial court erred by not giving them an opportunity to present their case at the scheduled March 10, 2008 trial date.

{¶14} In *Marshall v. Firster* (Sept. 29, 2000), 11th Dist. No. 99-T-0147, 2000 Ohio App. LEXIS 4589, at 4-5, this court indicated:

{¶15} "[i]t is well established that errors arising in the trial court, which are not called to the court's attention at a time when the error could have been corrected or avoided, are waived, absent plain error. The Supreme Court of Ohio has stated:

{¶16} "'The plain error doctrine provides for the correction of errors clearly apparent on their face and prejudicial to the complaining party even though the complaining party failed to object to the error at trial. *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223 ***. The plain error doctrine may be utilized in civil cases only with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 275 ***.' (Citations and parallel citations omitted.) *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 124 ***." (Parallel citations omitted.); see, also, *Marks v. Swartz*, 174 Ohio App.3d 450, 2007-Ohio-6009, at ¶42.

{¶17} In the case at bar, the transcript from the March 10, 2008 trial reveals that the trial judge greeted the jury panel and acknowledged the absence of appellee and its counsel. The trial judge stated that he hoped the absence was not due to an accident or tragedy and that he was "hoping it's as simple as fining him a whole lot of money because he's late." He proceeded to thank the jury for coming and told them he intended to dismiss them. The trial judge then gave appellants' counsel the opportunity to comment about the adjournment of the proceedings for the day. The following exchange occurred:

{¶18} "THE COURT: So with that being said, Mr. Newman, anything you wish to say?

{¶19} "MR. NEWMAN: No, your Honor.

{¶20} "THE COURT: Okay."

{¶21} The trial judge then discharged the jury and concluded the proceedings.

{¶22} The record before us does not establish that appellants requested that the trial go forward and that they be permitted to submit evidence that day in support of their claims. Also, counsel for appellants failed to note any objection, even after given the opportunity by the trial court, to adjourn the matter to a future date and resolve appellee's absence through a financial penalty. Clearly, appellants waived their right to appeal their contention that the trial court erred by not giving them an opportunity to present their case at the scheduled March 10, 2008 trial date. We find no plain error in the trial court's decision to not immediately go forward with trial, despite appellee's absence.

{¶23} Appellants' first assignment of error is without merit.

{¶24} In their second assignment of error, appellants allege that the trial court abused its discretion by not granting their motion for default judgment and converting the response into a Civ.R. 60(B) response without providing them a briefing schedule, and without sufficient facts to support its decision.

{¶25} "'"*** [T]he granting of a default judgment, analogous to the granting of a dismissal, is a harsh remedy which should only be imposed when 'the actions of the defaulting party create a presumption of willfulness or bad faith.'"'" (Citations omitted.) *Johnson Controls, Inc. v. Cadle Co.*, 11th Dist. No. 2006-T-0030, 2007-Ohio-3382, at ¶16, quoting *Zimerman v. Group Maintenance Corp.*, 11th Dist. No. 2003-A-0105, 2005-Ohio-3539, at ¶21. A trial court's decision to grant or deny a motion for default judgment is reviewed under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes

an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶26} In the instant case, again, appellants waived their right to appeal the denial of the judgment by failing to object to the trial court's continuation of the matter, (i.e., by not requesting the opportunity to proffer evidence or go forward at the March 10, 2008 trial.) Even if this issue had been protected for purposes of this appeal, the trial court did not abuse its discretion in denying appellants' motion for default judgment. Also, the evidence does not support appellants' contention that the trial court applied the wrong law.

{¶27} Neither the record nor appellants themselves suggest any willfulness or bad faith on the part of appellee or its counsel. Appellee and its attorney were absent from the March 10, 2008 trial due to an inadvertent calendar error. However, appellee, through its representative, had appeared, answered appellants' complaint, and defended the matter after suit was filed. Even assuming arguendo that the trial court erred by continuing the trial to a later date, such "error" was harmless. Although appellee ultimately prevailed, appellants had the opportunity to present their case at the November 17, 2008 jury trial, and were awarded compensation for their damages. Thus, appellants were not prejudiced.

{¶28} Appellants' second assignment of error is without merit.

{¶29} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed. It is

ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.