**[Cite as *Hiener v. Moretti*, 2009-Ohio-5060.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**ASHTABULA COUNTY, OHIO**

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| MICHAEL A. HIENER, | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2009-A-0001** |
| - vs - | : | |
| RICHARD N. MORETTI, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Ashtabula County Court, Eastern Division, Case No. 2008 CVF 219.

Judgment: Affirmed.

*Michael A. Hiener*, pro se, P.O. Box 1, Jefferson, OH 44047 (Plaintiff-Appellant).

*Mark A. Ziccarelli*, Ziccarelli & Martello, 8754 Mentor Avenue, Mentor, OH 44060 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellant, Michael A. Hiener, appeals from the judgment of the Ashtabula County Court, Eastern Division, granting appellees', Richard N. Moretti, et al., motion for relief from judgment. We affirm.

**{¶2}** On April 18, 2008, appellant filed a complaint seeking payment of attorney fees. The record reflects appellees were served at different times between April 23, 2008 and April 25, 2008. On May 23, 2008, appellant moved the trial court for default judgment pursuant to Civ.R. 55. On May 29, 2008, appellees filed their answer with an

accompanying counterclaim alleging legal malpractice.[1] Later, on June 19, 2008, appellant filed his answer to appellees' counterclaim. On July 1, 2008, the trial court granted appellant's motion for default judgment, which included an award of the damages sought in the complaint. It is undisputed that appellees did not receive written notice of any actions or proceedings relating to appellant's Civ.R. 55 motion. On July 2, 2008, the municipal court transferred the counterclaim to the Ashtabula County Court of Common Pleas because the damages sought exceeded the court's jurisdiction.

**{¶3}** On July 21, 2008, appellees filed a motion for relief from judgment pursuant to Civ.R. 60(B). Primarily, appellees argued they were entitled to relief because, even though they filed their answer late, their untimeliness was a result of excusable neglect. On October 1, 2008, appellant filed his memorandum in opposition, asserting appellees failed to provide any justification upon which they premised their claim of excusable neglect. On October 2, 2008, the trial court granted appellees' Civ.R. 60(B) motion, concluding relief was appropriate because, by way of their untimely filing, they made an appearance and therefore, pursuant to Civ.R. 55(A), were entitled to notice of hearing on appellant's application for default.

**{¶4}** Appellant now appeals this order asserting the following assignment of error:

**{¶5}** "The trial court erred in granting [appellees'] motion for relief from judgment pursuant to Civ.R. 60(B)."

**{¶6}** Under his sole assignment of error, appellant argues that appellees' untimeliness in filing their answer, without leave of court pursuant to Civ.R. 6(B),

1. Appellees contend that they sent their answer and counterclaim to the Ashtabula County Clerk of Court on May 22, 2008; they further allege appellant's counsel was served with a copy of the pleading on the

rendered the answer a legal nullity. Appellant concludes appellees failed to make a proper appearance that would trigger Civ.R. 55(A) notice and therefore were not entitled to relief from judgment. We disagree.

**{¶7}** Before embarking upon a Civ.R. 60(B) analysis, we shall first discuss the procedural requirements of Civ.R. 55(A).

**{¶8}** Civ.R. 55(A) provides, in relevant part:

**{¶9}** "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 therefore; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. ***"

**{¶10}** Pursuant to this rule, if a party has appeared in an action, irrespective of his or her failure to plead or defend, that party must be served with written notice of the application for default judgment at least seven days prior to a hearing on the motion. *AMCA Internatl. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 91; see, also, *Fenner v. Kinney,* 10th Dist. Nos. 02AP-749 and 99CVF-036244, 2003-Ohio-989, at ¶17; *Schlosser v. Dick* (Aug. 15, 1991), 2d Dist. No. 12236, 1991 Ohio App. LEXIS 3842, *2.

**{¶11}** Appellant argues that appellees' failure to seek proper leave of court in filing their untimely answer requires the conclusion that they failed to appear for

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same date. However, for reasons unknown, the pleading was not time-stamped until May 29, 2008.

purposes of Civ.R. 55(A). The flaw in appellant's argument is his assumption that compliance with Civ.R. 6(B) is a necessary condition for an "appearance." Filing a pleading within the strictures of the civil rules is not legally synonymous with the concept of an "appearance."

**{¶12}** To explain, appellant is correct that an untimely filing of an answer does not act to fulfill a defendant's obligations under Civ.R. 12(A)(1). Rather, as appellant points out, an untimely answer may only be filed beyond the twenty-eight day period set forth under Civ.R. 12(A) after submission of a written motion and a finding of excusable neglect. See Civ.R. 7(B)(1) and Civ.R. 6(B); see, also, *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214. However, a trial court's decision granting or denying a party leave to file an answer late is a legally different question from whether an untimely answer constitutes an "appearance." *Kime v. Dierksheide* (May 24, 1985), 6th Dist. No. WD-85-7, 1985 Ohio App. LEXIS 7731, *4. Indeed, the distinction is implicit in the language of Civ.R. 55(A): The rule indicates a default judgment may be entered when a defendant has failed to plead or defend; however, once a defendant has "appeared" (without filing a responsive pleading or defending the action), he or she is then entitled to notice of at least seven days. While one necessarily "appears" via a proper pleading, one does not have to properly plead to "appear."

**{¶13}** With this in mind, "[a]n appearance is ordinarily made when a party comes into court by some overt act of that party that submits a presentation to the court." *Alliance Group, Inc. v. Rosenfield* (1996), 115 Ohio App.3d 380, 390. If a party (or that party's representative) has appeared as a matter of record *in any manner*, Civ.R. 55(A) mandates that notice be given to that party. *Plant Equip., Inc. v. Nationwide Control*

*Serv.*, 155 Ohio App.3d 46, 49, 2003-Ohio-5395, citing *Hartmann v. Ohio Crime Victims Reparations Fund* (2000), 138 Ohio App.3d 235, 238. Even where, as here, a defendant's filings occur subsequent to a plaintiff's motion for default judgment, the defendant is deemed to have made an appearance and is entitled to the notice and hearing required under Civ.R. 55(A). *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Robert Binns Assoc., Inc.* (Dec. 1, 1998), 10th Dist. No. 98AP-228, 1998 Ohio App. LEXIS 5718, *5; *Hartmann,* supra; *In re Forfeiture of $1952.00 U.S. Currency* (Nov. 16, 1993), 10th Dist. No. 93AP-957, 1993 Ohio App. LEXIS 5590, *3-*4; *Suki v. Blume* (1983), 9 Ohio App.3d 289, 290. In discussing the policy behind the notice requirement, the Supreme Court of Ohio has also intimated that the filing of untimely pleadings is sufficient to constitute an appearance:

**{¶14}** "[Fed.Civ.R. 55 incorporates] [a] notice requirement similar to the one in Civ.R. 55 [and] has been described as follows: It is '*** a device intended to protect those parties who although delaying in a formal sense by failing to file [timely] pleadings ***, have otherwise indicated to the moving party a clear purpose to defend the suit.'" *AMCA Internatl. Corp.,* supra, quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe* (C.A.D.C. 1970), 432 F.2d 689, 691.

**{¶15}** Appellees' late filing was submitted after appellant's motion for default, but before judgment was entered. The filings clearly manifested a definite intent to defend the lawsuit *prior to* the entry of default judgment. See *Kime,* supra. We therefore hold appellees' answer and counterclaim, time-stamped May 29, 2008, while improper to meet the requirements under Civ.R. 12(A) (without written leave to file pursuant to Civ.R. 7(B) and Civ.R. 6(B)), was sufficient to constitute an "appearance" for purposes

of Civ. R. 55(A). Not only is this conclusion consistent with precedent in this area of the law, it is supported by "the policy underlying the modernization of the Civil Rules - - i.e., the abandonment or relaxation of restrictive rules which prevent hearing of cases on their merits ***." *AMCA Internatl. Corp.,* supra. Accordingly, the trial court properly concluded that appellees' untimely filing was an "appearance" for purposes of Civ.R. 55(A).

**{¶16}** With this in mind, we proceed with our analysis of whether Civ.R. 60(B) relief was proper. Courts have held that, where a defendant makes an appearance in an action, but does not receive the requisite notice under Civ.R. 55(A), the award of default judgment is voidable and subject to being vacated under a Civ.R. 60(B) analysis. *Fenner,* supra; see, also, *Hall v. Parcels of Land Encumbered with Delinquent Tax Liens* (June 5, 1997), 10th Dist. No. 96APE11-1552, 1997 Ohio App. LEXIS 2437, *5-*6; *National City Mtge. Co. v. Johnson & Assoc. Fin. Serv., Inc.,* 2d Dist. No. 21164, 2006-Ohio-2364, ¶16.

**{¶17}** To prevail on a motion brought under Civ.R. 60(B), the moving party must show that: (1) he or she has a meritorious defense or claim to present if relief is granted; (2) he or she is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146.

**{¶18}** A motion filed pursuant to Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent

a showing of an abuse of discretion, i.e., a showing that the trial court's determination was either arbitrary, unreasonable, or unconscionable. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. In exercising its discretion, a trial court must keep in mind that the policy in Ohio is to decide cases on their merits and to afford Civ.R. 60(B) relief where equitable. In *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1993), 67 Ohio St.3d 134, the Supreme Court held that Civ.R. 60(B) is a remedial rule that is to be liberally construed with a view toward effecting a just result. Id. at 136. Moreover, Civ.R. 60(B) has been viewed as a mechanism to create a balance between the need for finality and the need for "fair and equitable decisions based upon full and accurate information." *In re Whitman* (1998), 81 Ohio St.3d 239, 242.

**{¶19}** In the current case, appellees' motion for relief from judgment was timely. Moreover, even though their answer was filed late, they completely denied appellant's allegations and asserted Civ.R. 12(B)(6) as an affirmative defense. They also asserted a counterclaim for legal malpractice which, while not technically a defense to appellant's allegations, suggests the facts, viewed in appellees' favor, would support their refusal to pay the fees at the heart of appellant's complaint. In short, the record indicates appellees have a meritorious defense to appellant's allegations.

**{¶20}** Finally, Civ.R. 60(B) may be used to correct an erroneous judgment that resulted from a mistake by a party or from a mistake by the court. *Martin v. Schaad,* 4th Dist. No. 02CA65, 2004-Ohio-124, at ¶26; see, also, *Thrasher v. Thrasher* (June 15, 2001), 11th Dist. No. 99-P-0103, 2001 Ohio App. LEXIS 2720 (holding relief from judgment pursuant to Civ.R. 60(B)(1) was properly granted where property division was

erroneous by virtue of the court's mistake). Under circumstances where a defendant enters an appearance, Civ.R. 55(A) requires a defendant be notified either directly by the court or by setting a hearing date on the docket. *LaSalle Bank Nat'l Ass'n v. Murray,* 179 Ohio App.3d 432, 436, 2008-Ohio-6097. As discussed above, appellees properly appeared, were entitled to notice, but were neither directly notified nor constructively notified by way of a formal docket entry. As a result, we hold, Civ.R. 60(B)(1) supports the trial court's decision to relieve appellees from its award of default judgment in appellant's favor. That portion of the rule provides:

**{¶21}** "*** The court may relieve a party or his legal representative from a final judgment, order or proceeding for *** (1) mistake, inadvertence, surprise, or excusable neglect ***'

**{¶22}** Given that appellees' were entitled to at least seven days notice of a hearing on appellant's application for default judgment, the conclusion can be reasonably drawn that they were entitled to relief due to surprise at *not* receiving notice. Additionally (or alternatively), courts have held that the failure to provide notice at least seven days prior to a hearing on defendant's application for default judgment can reasonably be seen as a mistake or a form of inadvertence on behalf of the court. *Fenner,* supra, at ¶22 (holding relief from judgment for failure to give notice of the application for default judgment must come from Civ.R. 60(B)(1)); accord, *Hall,* supra, at *6-*7; *Lexis-Nexis,* supra, at *7-*8; Whether by appellees' surprise at the lack of notice or by mistake of the court, appellees' were entitled to relief under Civ.R. 60(B)(1). *Fenner,* supra; however, c.f., *Miamisburg Motel v. Huntington Nat'l Bank* (1993), 88 Ohio App.3d 117, 124 (holding "[w]here a party alleges that it appeared in the action

otherwise than by a filing and was thus entitled to notice of the application of default judgment, the proper avenue for relief from judgment is a timely Civ.R. 60(B)(5) motion.")

**{¶23}** The trial court did not abuse its discretion in granting appellees' motion for relief from judgment and appellant's sole assignment of error is overruled.

**{¶24}** For the reasons expressed in this opinion, the judgment of the Ashtabula County Court, Eastern Division, is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.