[Cite as *Mateyko v. Crain*, 2012-Ohio-1133.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

GEORGE L. MATEYKO, JR.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-T-0036**
- vs -	:	
BRYAN CRAIN,	:	
Defendant-Appellee.	:	

Civil Appeal from the Girard Municipal Court, Case No. 2010 CVF 00618.

Judgment: Affirmed.

Stephen A. Turner and *William M. Flevares*, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481-1219 (For Plaintiff-Appellant).

Thomas E. Schubert, 138 East Market Street, Warren, OH 44481 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} Appellant, George L. Mateyko, Jr., appeals from a judgment of the Girard Municipal Court, granting appellee's, Bryan Crain's, motion to vacate judgment.

{¶2} Mateyko and Crain are neighbors. Both men are farmers. Beginning in 2006, the parties began borrowing each other's farm equipment, with permission. Mateyko claims that Crain has not returned the equipment that he borrowed, and that most of the items have been damaged and are no longer usable.

{¶3} As a result, Mateyko filed a complaint against Crain for conversion. Mateyko prayed for $13,353.15 in actual damages, $1,500 in punitive damages, court costs, attorney fees, and interest.

{¶4} After receiving certified mail service of the complaint, Crain went to the Girard Municipal Court for assistance. Crain asserts that the court advised him to contact Mateyko's counsel. Crain met with Mateyko's counsel to dispute the matter, but told him that he was willing to return the farm equipment. Mateyko's counsel responded that he would speak with his client and get back to him. Mateyko's counsel advised Crain to seek and consult with an attorney of his own.

{¶5} Crain did not hire an attorney at that time. Crain also did not file an answer to the complaint or take any further action at that time. He claims he waited to hear back from Mateyko's counsel. In the meantime, however, Mateyko filed a motion for default judgment. Crain did not receive service of that motion. Nevertheless, the trial court granted the motion and ordered Crain to pay $13,353.15 plus interest and costs.

{¶6} Thereafter, Mateyko filed for a court order and notice of garnishment. In his pro se response, Crain requested a hearing, as he was not notified of the motion for default judgment. He stated that most of the allegations and prices listed in the complaint were incorrect, and claimed that he paid Mateyko for most of the items.

{¶7} Crain subsequently obtained counsel. After being granted leave, Crain, by and through his counsel, filed an answer to the complaint and a motion to vacate judgment pursuant to Civ.R. 60(B)(1), (3), and (5). In his answer, Crain denied that he refused to return the items and that he damaged them. In his motion to vacate

judgment, Crain asserted that he attempted to return the farm equipment but was not permitted access to Mateyko's premises. Crain also stated that he was never served with Mateyko's motion for default judgment.

{¶8} In support of Crain's 60(B) motion, he attached his affidavit along with an affidavit from Mateyko's brother, James. In James' affidavit, he stated that Crain and Mateyko have used each other's farm equipment for years. James said that he was personally aware that Crain attempted to return the equipment but Mateyko refused it. James further stated that Mateyko suffers from mental issues and believes Mateyko's actions in this matter are related to those issues.

{¶9} Mateyko filed a reply to Crain's 60(B) motion alleging that Crain failed to satisfy the requirements of that rule.

{¶10} The trial court stayed execution of the default judgment pending further order and set the matter for a hearing on Crain's 60(B) motion. Each party and their respective counsels were notified and attended.

{¶11} At that hearing, the trial judge asked Mateyko's counsel if he served Crain with the motion for default judgment. Mateyko's counsel responded that he did not because Crain did not file a timely answer to the complaint. Crain's counsel said that after Crain received the complaint, Crain, acting in a pro se manner, went to court seeking assistance. The court advised Crain to speak with Mateyko's attorney. Crain took the court's advice and met with Mateyko's counsel. Crain told Mateyko's attorney that he was willing to return the farm equipment. Mateyko's counsel told Crain that he should seek counsel of his own, but that he would look into the matter and get back to him. In reliance on that statement, Crain assumed the matter was resolved. Thus,

Crain did not seek his own counsel at that time. The next thing Crain knew, default judgment was granted against him. Thereafter, Crain obtained counsel and filed an answer to the complaint. Crain testified that he thought the value of the equipment was very overstated.

{¶12} The trial court found that Crain had a meritorious defense or claim; was entitled to relief under 60(B); and his motion was made within a reasonable period of time. The trial court further found that Crain made a mistake in not initially seeking the assistance of his own counsel; he inadvertently tried to settle the case with Mateyko's counsel; he neglected to file a timely answer to the complaint, which was excusable due to the fact that the parties are farmers; each of the parties shared equipment since 2006; Crain offered to return much of the items but Mateyko refused to accept them; and Mateyko more than likely overstated the value of his farm equipment. The trial court vacated the prior order of default judgment in Mateyko's favor, and granted Crain's 60(B) motion. Mateyko filed a timely appeal, asserting the following assignment of error:

{¶13} "The trial court abused its discretion in granting appellee's motion for relief under Rule 60(B)(1) of the Ohio Rules of Civil Procedure."

{¶14} Before embarking upon a Civ.R. 60(B) analysis, we shall first discuss the procedural requirements of Civ.R. 55(A), which states in relevant part:

{¶15} "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; *** 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. ***"

{¶16} "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." *Hiener v. Moretti*, 11th Dist. No. 2009-A-0001, 2009-Ohio-5060, at ¶10, citing *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 91(1984). "While one necessarily 'appears' via a proper pleading, one does not have to properly plead to 'appear.'" *Hiener* at ¶12. After properly being served with a complaint, a defendant's meeting or telephone conversation with opposing counsel constitutes an "appearance" for purposes of Civ.R. 55, thereby entitling the defendant to the seven-day notice requirement under Civ.R. 55(A). *AMCA* at 90; *Baines v. Harwood*, 87 Ohio App.3d 345, 347 (1993).

{¶17} With this in mind, we proceed with our analysis of whether Civ.R. 60(B) relief was proper. "[W]here 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." *Hiener* at ¶16, citing *Fenner v. Kinney*, 10th Dist. Nos. 02AP-749 and 99CVF-036244, 2003-Ohio-989.

{¶18} "Under Ohio law, it is well-settled that relief from a prior final judgment can only be granted when the moving party has shown that [he] is entitled to relief under one of the five possible grounds stated in Civ.R. 60(B), that [he] has a meritorious claim or defense, and that the motion was filed in a timely manner. See, e.g., *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565 ***. It is equally well-settled that the disposition of a 60(B) motion lies within the sound discretion of the trial court;

accordingly, the ruling on such a motion will not be reversed on appeal unless an abuse of that discretion can be shown. *Meslat v. Amster-Kirtz Co*., 5th Dist. Nos. 2007 CA 00189 & 2007 CA 00190, 2008-Ohio-4058, at ¶26, quoting *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77 ***. Under a 60(B) analysis, an abuse of discretion occurs when the trial court exhibits an attitude that is unreasonable, arbitrary or unconscionable. *Cannell v. Robert L. Bates Co*. (Mar. 8, 2001), 10th Dist. Nos. 00AP-915, 00AP-916, & 00AP-917, 2001 Ohio App. LEXIS 835, at *4." *Natl. City Bank v. Graham*, 11th Dist. No. 2010-L-047, 2011-Ohio-2584, at ¶15. (Parallel citations omitted.)

{¶19} Thus, "[i]n order to be entitled to relief under Civ.R. 60(B), the moving party must be able to satisfy all three prongs of the governing standard." *Graham* at ¶21, citing *Fouts*. In our case, Mateyko does not contend that Crain failed to demonstrate or that the trial court erred in finding that the motion was filed within a reasonable time. Rather, Mateyko specifically contends that Crain failed to set forth sufficient operative facts to warrant a finding of "excusable neglect" under Civ.R. 60(B)(1), which states, in part:

{¶20} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect[.]"

{¶21} "What constitutes 'excusable neglect' depends on the facts and circumstances of each case." *Katko v. Modic*, 85 Ohio App.3d 834, 837 (1993). "'The term "excusable neglect" is an elusive concept and has not been sufficiently defined, *Kay v. Marc Glassman, Inc*., 76 Ohio St.3d 18, 20 (1996). Consequently, there is no clear and established standard as to what constitutes "excusable neglect and therefore

it is a determination left to the discretion of the trial court. *Lewis v. Auto. Techs*., 2d Dist. No. 19423, 2003-Ohio-1263, at ¶10. The Ohio Supreme Court, however, has "defined 'excusable neglect' in the negative and has stated that the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Seven Seventeen Credit Union, Inc. v. Dickey,* 11th Dist. No. 2008-T-0107, 2009-Ohio-2946, at ¶20*,* quoting *Technical Servs. Co. v. Trinitech Internatl., Inc.,* 9th Dist. No. 21648, 2004-Ohio-965, at ¶18. (Parallel citation omitted.)

{¶22} Based on the facts and circumstances of this case, Crain demonstrated sufficient operative facts to warrant a finding of excusable neglect and therefore, was entitled to relief under Civ.R. 60(B)(1). Although the record does not reveal what exact knowledge Crain possesses of legal matters, the record reveals that both Crain and Mateyko are farmers. As a layman, Crain's experience and understanding with respect to litigation matters is a relevant consideration. *Katko*, *supra*, at 838.

{¶23} Although previously addressed, the following facts bear repeating. Crain failed to file his answer within 28 days after service of the complaint pursuant to Civ.R. 12(A). However, it was undisputed that he went to the court for assistance, as he was acting in a pro se manner at that time. Crain followed the court's advice and contacted Mateyko's counsel. Crain told Mateyko's counsel that he was willing to return the farm equipment. Crain relied on Mateyko's counsel's statement that he would speak with his client and get back to him. He never did. Mateyko then filed a motion for default judgment but never served Crain, although Mateyko was required to under Civ.R. 55(A) since Crain's pro se meeting with Mateyko's counsel after the complaint was filed constituted an "appearance." *AMCA*, *supra*, at 90; *Baines*, *supra*, at 347. The trial court

granted that motion, but later vacated it. Mateyko's subsequent filing for a court order and notice of garnishment prompted Crain to obtain counsel.

{¶24} Crain, by and through his counsel, filed an answer and a motion to vacate judgment. Crain claimed that he attempted to return the undamaged farm equipment, whose value was overstated, but Mateyko did not permit him access to the premises. Mateyko's brother stated in his affidavit, which was attached to Crain's 60(B) motion, that the parties have shared each other's farm equipment for years; that he was personally aware that Crain attempted to return the equipment but Mateyko refused it; and that Mateyko suffers from mental issues.

{¶25} Nothing about these facts reveals a "'complete disregard for the judicial system.'" *See Dickey*, *supra*, at ¶20, quoting *Technical Servs.*, *supra*, at ¶18. Crain did not willfully disregard or deliberately ignore the complaint, nor was his conduct dilatory. Moreover, the trial court was aware that Crain actively sought to participate in the proceedings, was never served with Mateyko's motion for default judgment pursuant to Civ.R. 55(A), and Mateyko suffered no prejudice due to the delayed answer. Crain's diligent efforts to answer the complaint, his good faith reliance on the court's advisement to contact Mateyko's counsel, and his assumption that the matter was resolved after never hearing back from Mateyko's counsel, were excusable under the circumstances. *See Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP-1006, 2011-Ohio-3163, at ¶20.

{¶26} Therefore, because Crain set forth sufficient operative facts to warrant a finding of excusable neglect, the trial court did not abuse its discretion in granting his motion.

{¶27} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Girard Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶28} I concur in the judgment reached by the majority, affirming the trial court's decision to vacate the default judgment. I do so, however, for reasons other than those relied upon by the majority and the trial court.

{¶29} The majority found that Crain had demonstrated excusable neglect pursuant to Civ.R. 60(B)(1) based, in part, on Crain's status as a layman/farmer. *But see Katko v. Modic*, 85 Ohio App.3d 834, 838, 621 N.E.2d 809 (11th Dist.1993) ("the experience and understanding of the defendant with respect to litigation matters is a relevant consideration *but not a decisive one*") (emphasis sic).

{¶30} Rather, Crain is entitled to have the default judgment against him vacated on the grounds of due process, i.e., the trial court's mistake and/or inadvertence in not providing Crain with notice of the default hearing as required by Civ.R. 55(A) ("[i]f 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").

{¶31} It is the established precedent of this court 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." *Hiener v. Moretti*, 11th Dist. No. 2009-A-0001, 2009-Ohio-5060, ¶ 16; *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2010-A-0024, 2011-Ohio-2450, ¶ 23 (citing cases).

{¶32} Accordingly, this court and other appellate districts "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." *Hiener* at ¶ 22 (citing cases). On this basis, I affirm the decision of the lower court.