

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DANNY'S TOWING, LLC	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10CA000032
BISHOP TOWING & BISHOP CRANE, et al.	:	
	:	
	:	
Defendants-Appellants	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Guernsey County Court of
Common Pleas, Case No. 09-CV-595

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: December 27, 2010

APPEARANCES:

For Defendants-Appellants:

ANDREW P. GEORGE
1160 E. Main, Box 36
Lebanon, OH 45036

For Plaintiff-Appellee:

DANIEL G. PADDEN
139 W. 8th St.
P.O. Box 640
Cambridge, OH 43725-0640

Delaney, J.

{¶1} Defendants-Appellants, Bishop Towing, Bishop Crane, and Joby Bishop appeal the July 30, 2010 judgment entry of the Guernsey County Court of Common Pleas.

{¶2} This case comes to us on the accelerated calendar. App. R. 11. 1, which governs accelerated calendar cases provides, in pertinent part:

{¶3} “(E) Determination and judgment on appeal.

{¶4} The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

{¶5} “The decision may be by judgment entry in which case it will not be published in any form.”

{¶6} This appeal shall be considered in accordance with the aforementioned rule.

STATEMENT OF THE FACTS AND CASE

{¶7} Appellee filed its complaint against Appellants in the Guernsey County Court of Common Pleas on October 16, 2009. Appellee alleged that Appellants made fraudulent misrepresentations in regards to Appellee's purchase of a 1978 GMC Brigadier Tandem Axle Wrecker from Appellants at auction. Appellee stated that the VIN on the vehicle was altered and the vehicle was really a 1987 GMC Brigadier Tandem Axle Wrecker. Because the VIN had been altered, Appellant could not get good title for the vehicle. Appellee attempted to contact Appellants to rescind the purchase, but Appellants did not respond.

{¶8} The complaint was served by certified mail on Appellant, Bishop Towing and Bishop Crane, on November 6, 2009. The complaint was served by certified mail on Appellant, Joby Bishop on December 22, 2009.

{¶9} Appellants filed a motion to dismiss for lack of jurisdiction on December 9, 2009. The trial court set the matter for a non-oral hearing on December 28, 2009 and on December 31, 2009, the trial court denied the motion to dismiss.

{¶10} On February 1, 2010, the trial court ordered Appellee to proceed with the case or it would be dismissed for want of prosecution.

{¶11} Appellee filed a motion for default judgment on February 12, 2010. The trial court set the motion for default judgment for non-oral hearing on March 5, 2010.

{¶12} Appellants filed an answer, without requesting prior leave of court, on March 18, 2010.

{¶13} The trial court granted the motion for default judgment on March 19, 2010. It set the matter for a damages hearing on May 13, 2010.

{¶14} On March 23, 2010, the trial court, sua sponte, filed a judgment entry after it had become aware of certain procedural matters. The trial court stated in the judgment entry that it had not received the March 18, 2010 answer filed by the Appellants before it ruled on the motion for default judgment. The trial court set the case for a non-oral hearing on April 5, 2010 for further proceedings so the trial court could consider a Civ.R. 60(B) motion to be possibly filed by Appellants.

{¶15} Appellee thereafter filed a motion to strike Appellants' answer. On April 22, 2010, the trial court granted Appellee's motion to strike Appellants' answer. Appellants did not file any further motions.

{¶16} A damages hearing was held on May 13, 2010. On May 20, 2010, the magistrate issued a decision awarding Appellee \$31,208.85 in damages, attorney fees, and costs.

{¶17} On June 2, 2010, Appellants filed a motion for extension to file objections to the Magistrate's Decision. The trial court granted the motion for extension and Appellants filed their objections. Appellants also filed a motion for leave to file an answer.

{¶18} On July 14, 2010, the trial court denied Appellants' objections to the Magistrate's Decision. The trial court also denied Appellants leave to file an answer.

{¶19} It is from this decision Appellants now appeal.

{¶20} Appellants raise three Assignments of Error:

{¶21} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT'S OBJECTIONS AND MOTION TO SET ASIDE MAGISTRATE'S DECISION.

{¶22} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE MOTION FOR LEAVE TO FILE ANSWER OF DEFENDANTS.

{¶23} "III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING JUDGMENT TO PLAINTIFF AGAINST DEFENDANTS."

I.

{¶24} Appellants argue in their first Assignment of Error that the trial court abused its discretion when it overruled Appellants' objections to the Magistrate's Decision. We disagree.

{¶25} Because default judgment on Appellee’s complaint had been awarded to Appellee, the Magistrate’s Decision concerned only damages awarded to Appellee. Upon review of the objections to the Magistrate’s Decision, we find that Appellants did not raise any objections to the issues in the Magistrate’s Decision as to the amount of damages awarded to Appellee, but rather made arguments for vacating the default judgment against Appellants. That matter was not before the magistrate. We find these arguments to be inappropriately raised under Civ.R. 53 and the trial court properly overruled Appellants’ objections.

{¶26} Appellants’ first Assignment of Error is overruled.

II.

{¶27} Appellants argue in their second Assignment of Error that the trial court erred in denying them leave to file an untimely answer to the complaint. We disagree.

{¶28} Civ.R. 6(B)(2) permits the court, within its discretion, to accept a late filing “upon motion made after the expiration of the specified period” and to “permit the act to be done where the failure to act was the result of excusable neglect * * *.” *Lewis v. Coup*, Sandusky App. S-10-0006, ¶17. Ohio courts have consistently held that a trial court abuses its discretion when it grants leave to file an answer out of rule absent a finding of excusable neglect. See *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009-Ohio-5087, ¶ 8, citing *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752, and *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14-15, 684 N.E.2d 292. However, the excusable neglect standard is lenient and a court may grant an untimely answer “where sufficient evidence of excusable neglect appears in the record.” *Id.* at ¶ 14, 684 N.E.2d 292.

{¶29} The trial court afforded Appellants multiple opportunities to present their defenses before the final decision in this case. Appellants filed an untimely answer, without prior leave of court, on March 18, 2010. The trial court instructed Appellants to raise their defenses in a Civ.R. 60(B) motion, but nothing was filed. Appellants argue it was their attorney's excusable neglect that action was not taken in this case, but as a general rule, the neglect of a party's attorney will be imputed to the party for purposes of Civ.R. 60(B)(1). *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. This general rule is founded on the view that the party, having "voluntarily chos[en] this attorney as his representative in the action, * * * cannot * * * avoid the consequences of the acts or omissions of this freely selected agent." *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 613 N.E.2d 667 citing *GTE*, supra.

{¶30} Appellants' second Assignment of Error is overruled.

III.

{¶31} Appellants argue in their third Assignment of Error that the trial court erred in granting judgment to Appellee. Appellants reiterate that they did not have an opportunity to defend themselves as to the factual issues and that the trial court should have permitted an opportunity to present evidence.

{¶32} In light of our overruling Appellants' first and second Assignments of Error, we find the third Assignment of Error to be without merit and therefore, it is overruled.

{¶33} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DANNY'S TOWING, LLC	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BISHOP TOWING & BISHOP CRANE,	:	
et al.	:	
	:	
	:	Case No. 10CA000032
Defendants-Appellants	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Guernsey County Court of Common Pleas is affirmed. Costs assessed to Appellants.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE