[Cite as *T.S. Expediting Serv., Inc. v. Mexican Indus., Inc.*, 2002-Ohio-2268.]

IN THE COURT OF APPEALS OF WOOD COUNTY

T.S. Expediting Services, Inc.

Appellee

v.

Mexican Industries, Inc., et al.

Appellant

Court of Appeals No. WD-01-060

Trial Court No. 01-CV-270

DECISION AND JUDGMENT ENTRY

Decided: May 10, 2002

* * * * *

Jeffrey M. Kerscher, for appellee.

Drew A. Hanna, for appellant Q Tech, Inc.

* * * * *

{¶1} HANDWORK, J.

{¶2} This is an appeal from a judgment of the Wood County Court of Common Pleas which granted a default judgment against appellant, Q Tech, Inc.("Q Tech"). For the reasons stated herein, this court affirms the judgment of the trial court.

{¶3} The following facts are relevant to this appeal. On May 30, 2001, appellee, T.S. Expediting Services, Inc., filed a complaint against Q Tech asserting claims of consignee liability.[i] Service was made on Q Tech by certified mail on June 4, 2001, and a return receipt was filed on June 7, 2001. On August 7, 2001, appellee filed motions for default judgment against Q Tech and other defendants.[ii] On August 10, 2001, the trial court entered a judgment entry ordering the defendants to

file any response to the default motions prior to August 22, 2001. On August 22, 2001, Q Tech filed a memorandum in opposition to the default judgment. In its memorandum, Q Tech's counsel stated:

{¶4} "From my investigation, *it appears* there are no contacts between Plaintiff and Defendant Q Tech Inc. which would give rise to this Court having jurisdiction over the alleged claims of the Plaintiff against Defendant Q Tech Inc. For this reason the Default Judgment should not be granted. Upon later Summary Judgment proceedings by Defendant Q Tech Inc. *I believe we can persuade* the Court this to be the case, thus requiring the dismissal of this action against Defendant Q Tech Inc." (Emphasis added.)

{¶5} Q Tech also argued that service of process was deficient for two reasons: 1) because the certified mail service was sent to a Q Tech warehouse where it was signed for by a truck driver who had no authority to serve as an agent and 2) because the complaint was not served on Q Tech's agent for service of process. Q Tech did not move to dismiss for lack of personal jurisdiction pursuant to Civ.R. 12(B)(2). On August 22, 2001, Q Tech also filed an answer but did not file a motion requesting leave of court pursuant to Civ.R. 6(B) to file its late answer.

{¶6} Appellee filed a reply memorandum indicating to the trial court that Q Tech was served at Q Tech's business address where shipments had been delivered. On October 17, 2001, the trial court granted appellee a default judgment against Q Tech. Q Tech filed a timely notice of appeal.

{¶7} Q Tech sets forth the following two assignments of error:

{¶8} "1. THE TRIAL COURT ERRED IN GRANTING DEFAULT JUDGMENT IN PLAINTIFF'S FAVOR AS THE COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT Q TECH

{¶9} "2. EVEN ASSUMING THE COURT HAD JURISDICTION, SERVICE OF PROCESS WAS DEFECTIVE UNDER CIV.R. 4.2"

{¶10} Civ.R. 12(A)(1) provides that a defendant shall serve his answer within twenty-eight days after service of the complaint. Service was made on Q Tech on June 4, 2001. Thus, Q Tech was required to file its answer or to request an extension on or before July 2, 2001. Q Tech did neither. Q Tech's attorney simply filed an untimely answer on August 22, 2001, over two months after appellee had filed its complaint and after appellee had filed its motion for default judgment. The answer was not filed with a motion for leave of court to file the answer out of time, as it should have been. Civ.R. 6(B).

{¶11} Pursuant to Civ.R. 6(B)(2)[iii], upon motion made after the expiration of the specified period, the trial court may permit a defendant to file an answer if his failure to do so was the result of excusable neglect. Although Civ.R. 6(B) grants broad discretion to the trial court, its discretion is not unlimited. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214. Generally, some showing of excusable neglect is a necessary prelude to the filing of an untimely answer. *Miller*, supra. See, also, *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14-15.

{¶12} Civ.R. 55(A)[iv] permits a trial court to enter a default judgment against a party who has failed to defend an action in compliance with the Ohio Rules of Civil Procedure. Proper service of process is needed before a trial court can render a valid default judgment. *Westmoreland v. Valley Homes Corp.* (1975), 42 Ohio St.2d 291, 293-294. If service is not made according to the Civil Rules, such service is improper and a valid judgment cannot be rendered against the defendant. *Household Retail Services, Inc. v. Colon* (July 5, 1991), Erie App. No. E-90-66.

{¶13} A trial court's decision to either grant a default judgment in favor of the moving party, or allow the defending party to file a late answer pursuant to Civ.R. 6(B)(2) upon a finding of

excusable neglect, will not be reversed absent an abuse of discretion. *Miller*, 62 Ohio St.2d at 214-15. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 506.

{¶14} In *Miller*, 62 Ohio St.2d at 214, the court determined that where the defendant failed to serve her answer within twenty-eight days after service of the summons and complaint upon her, then filed her answer late but not "upon motion" and without a demonstration that "the failure to act was the result of excusable neglect," as required by Civ.R. 6(B)(2), the defendant was subject to default judgment pursuant to Civ.R. 55(A). Accord *McDonald v. Berry* (1992), 84 Ohio App.3d 6, 9-10; *Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Ent., Inc.* (1982), 6 Ohio App.3d 43, 43-44.[v]

{¶15} Inexcusable neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances. *State ex rel. Weiss v. Indus. Comm.* (1992), 65 Ohio St.3d 470, 473. The Ohio Supreme Court defined the term "excusable neglect" in the negative in the case of *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20. The court stated as follows:

{¶16} "The term 'excusable neglect' is an elusive concept which has been difficult to define and to apply. Nevertheless, we have previously defined 'excusable neglect' in the negative and have stated that the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153." Id.

{¶17} Q Tech's inaction in this matter was a complete disregard for the judicial system. Q Tech was properly served by certified mail at one of "its usual places of business" pursuant to Civ.R.

4.2(F).[vi] Q Tech set forth no operable facts by affidavit or otherwise that would justify a decision finding its neglect excusable. See, e.g., *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 135 (Preferable to have an affidavit to support allegations of excusable neglect.) The return receipt indicates that someone in Q Tech's place of business received the complaint, even though, perhaps, as Q Tech argues, that person did not notify Q Tech of it until August 16, 2001.

{¶18} The issue concerning who signed the certified mail return is essentially irrelevant. Civ.R. 4.2 deals with who may be served with process. Under Civ.R. 4.2(F), a corporation can be served by certified mail "at any of its usual places of business." The fact that the certified mail return was signed by a truck driver, and not, as Q Tech argues, Q Tech's agent does not invalidate the service, as long as the receipt was signed by a person at the named defendant's place of business. *United Fairlawn Inc. v. HPA Partners* (1990), 68 Ohio App.3d 777, 781. The failure of a party's employee to transmit summons or any legal process to the employer is not automatically excusable neglect. *Wheeler v. Denny's, Inc.* (Mar. 11, 1993), Montgomery App. No. 13517. As the dissent noted in *Sycamore Messenger, Inc. v. Cattle Barons, Inc.* (1986), 31 Ohio App.3d 196, 198:

{¶19} "The failure to respond was neglectful, not willful, but it was not excusable, in my opinion. Inefficient, improper or negligent internal procedures in an organization cannot comprise excusable neglect ***.

{¶20} "***

{¶21} "We have never held that the unexplained inaction of a recipient who is duly served with a summons or complaint amounts to excusable neglect. It would undermine and subvert the judicial process if we allow the negligent handling of official court communications, in and by itself, to be a sufficient excuse for a failure to answer." (Citations omitted.)

{¶22} Having reviewed the record, this court finds that Q Tech was served by certified mail at one of "its usual places of business" pursuant to Civ.R. 4.2(F). Additionally, this court finds that Q Tech's answer was filed without leave pursuant to Civ.R. 6(B)(2) and without any demonstration of "excusable neglect."

{¶23} In regard to Q Tech's argument that the trial court lacks personal jurisdiction over it, service of process is essential for obtaining personal jurisdiction over a party and personal jurisdiction is essential to rendering a valid personal judgment. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. This court has already determined that service of process was proper.

{¶24} Unlike subject matter jurisdiction, personal jurisdiction can be waived. Civ.R. 12(H). The defense of lack of personal jurisdiction is waived if not raised in a motion to dismiss pursuant to Civ.R. 12 or made in a responsive pleading. See Civ.R. 12(H)(1);[vii] *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757, 780. A failure to timely present the defense of lack of personal jurisdiction results in a waiver. See *Detroit, Toledo & Ironton Ry. Co. v. Maxine's Potato Serv., Inc.* (1983), 13 Ohio App.3d 157, 161 (finding waiver of defense and noting the policy of encouraging diligence in challenging personal jurisdiction). Therefore, Q Tech was required to raise the defense of lack of personal jurisdiction by motion or in a response to the complaint. The record indicates that Q Tech did neither.

{¶25} As this court noted in *Kime v. Dierksheide* (May 24, 1985), Wood App. No. WD-85-7: "The untimely filing of an answer does not serve to fulfill the procedural obligations of Civ.R. 12(A)(1)." See, also, *McDonald v. Berry* (1992), 84 Ohio App.3d 6, 10: "Failure to file [an] answer in accordance with the Civil Rules [is] a failure to plead or otherwise defend." This court previously determined that Q Tech filed an untimely answer without leave of court and without the required demonstration of excusable neglect.[viii]

{¶26} If Q Tech truly believed the court lacked personal jurisdiction over it, Q Tech should have immediately filed a motion to dismiss. Q Tech failed to do so. Instead, Q Tech merely filed an opposition to the default judgment containing the verbiage set forth supra. However, more than unsubstantiated allegations in a memorandum or brief is required; Q Tech's vague and unsubstantiated statements were clearly insufficient to establish the lack of personal jurisdiction. Q Tech did not present any evidentiary materials through affidavit or otherwise to support its unsubstantiated statements. A motion to dismiss for lack of personal jurisdiction permits a court to consider matters outside the pleadings.[ix] More than unsubstantiated allegations in a memorandum or a brief is required. *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79, 85-87.

{¶27} Thus, this court finds that Q Tech has waived the defense of lack of personal jurisdiction by failing to properly raise it pursuant to Civ.R. 12(H)(1). Having found that Q Tech waived the right to challenge personal jurisdiction, this court has no occasion to consider whether the court's exercise of jurisdiction under Ohio's long-arm statute would offend due process. See *Am. Diversified Dev., Inc. v. Hilti Constr. Chem., Inc.* (Oct. 29, 1998), Cuyahoga App. Nos. 73116 and 73168 citing *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 472, fn. 14.

{¶28} As noted by the Ohio Supreme Court in *Miller v. Lint*, 62 Ohio St.2d at 214:

{¶29} "the failure of the defendant to comply, even substantially, with the procedures outlined in the Civil Rules subjected her to the motion for a default judgment, and the plaintiffs, having complied with the Civil Rules, had a right to have their motion heard and decided before the cause proceeded to trial on its merits."

{¶30} Therefore, the trial court did not abuse its discretion in granting a default judgment to appellee. Accordingly, Q Tech's assignments of error are found not well-taken.

{¶31} On consideration whereof, the court finds that substantial justice has been done the party complaining, and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, J. _____
JUDGE

Melvin L. Resnick, J. _____
JUDGE

Mark L. Pietrykowski, P.J. _____
JUDGE
CONCUR.

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[i] {¶a} The complaint also asserted claims of breach of contract and claims of consignor liability against other defendants not party to this appeal.

[ii] {¶b} Appellee also filed an affidavit of its accounts receivable supervisor who attested to the amount due for the shipments to Q Tech.

[iii] {¶c} Civ.R. 6(B)(2) permits a party to request, after the original time period for a response already has expired, additional time within which to respond, if the failure to respond was the result of excusable neglect. Civ.R. 6(B)(2) provides:

{¶d} "(B) Time: extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion *** (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ***."

[iv]{¶e} Civ.R. 55 states, in pertinent part:

{¶f} "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 (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. ***"

[v]{¶g} If no motion for default judgment is pending when a defendant files for leave to file a late answer, a different result may obtain if the trial court finds excusable neglect. See *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 135.

[vi]{¶h} Civ.R. 4.2(F) provides:

{¶i} "Service of process, except service by publication as provided in Civ.R. 4.4(A), pursuant to Civ.R. 4 through Civ.R. 4.6 shall be made as follows:

{¶j} "***

{¶k} "(F) Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or *by serving the corporation by certified or express mail at any of its usual places of business*; or by serving an officer or a managing or general agent of the corporation[.]" (Emphasis added.)

[vii]{¶l} Civ.R. 12(H)(1) states in pertinent part:

{¶m} "A defense of lack of jurisdiction over the person *** is waived *** if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course."

[viii]{¶n} The court in *Suki v. Blume* (1983), 9 Ohio App.3d 289, 290-91, in concluding that a pleading filed late should not simply be ignored by the entry of a default judgment, stated:

{¶o} "Where a party pleads before a default is

entered, though out of time and without leave, if the answer is good in form and substance, a default should not be entered as long as the answer stands as part of the record. The proper practice under the circumstances calls for a motion to strike the pleading from the files."

Suki can be distinguished from the case sub judice in that in *Suki* the defendant filed her answer and counterclaim beyond the time extension granted by the trial court but on the same day the plaintiff filed for default judgment. In the case sub judice, Q Tech's answer was not filed until after the motion for default judgment had been filed and after the date set by the trial court for responses to the motion for default judgment.

[ix] {¶p} This court notes that an oral evidentiary hearing is not required. See *McKinley Machinery, Inc. v. Acme Corrugated Box, Co., Inc.* (July 12, 2000), Lorain App. No. 98CA007160, in which the court stated:

{¶q} "[W]e conclude that, because '[t]he term "hearing" has been liberally construed and may be limited to a review of the record without oral argument,' the trial court did conduct a hearing on this issue. *In re Swain* (1991), 68 Ohio App.3d 737, 741. Moreover, Civ.R. 12(D) does not mandate that the trial court hold an oral hearing."

See, also, *Jurko v. Jobs Europe Agency* (1975), 43 Ohio App.2d 79, 87 (While preferable to hold hearing on factual issue of personal jurisdiction, within court's discretion in an appropriate case to decide Civ.R. 12(B)(2) challenge solely on unopposed affidavit.)