

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Folly Tomety, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 09AP-982  
 : (M.C. No. 2009 CVI 017404)  
 Dynamic Auto Service, : (ACCELERATED CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on August 10, 2010

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*Folly Tomety*, pro se.

*John C. Cahill*, for appellant.

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APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Defendant-appellant, Dynamic Auto Service ("DAS"), a dba for its proprietor, Vincent Leke, appeals from a judgment of the Franklin County Municipal Court, Small Claims Division, entered for plaintiff-appellee, Folly Tomety, in the amount of \$3,000, plus interest and costs. Because the trial court did not err in (1) entering judgment for plaintiff on plaintiff's claim, and (2) dismissing defendant's counterclaim, we affirm.

## I. Facts and Procedural History

{¶2} On April 23, 2009, plaintiff filed a complaint in the Small Claims Division of the Franklin County Municipal Court alleging that the repairs defendant performed on plaintiff's automobile resulted in \$3,000 of further damage to the automobile. After being served with the complaint by certified mail, defendant filed a counterclaim on May 20, 2009 that sought judgment against plaintiff in the amount of \$475.32 for unpaid parts and labor arising from repairs defendant performed on plaintiff's vehicle.

{¶3} The parties acknowledge that on June 1, 2009 both plaintiff and defendant appeared for trial before a magistrate of the municipal court; for reasons undisclosed in the record, the trial was continued until July 13, 2009. Plaintiff appeared for trial on July 13, 2009. Defendant did not appear, asserting in his appellate brief that he did not receive notice of the new trial date. As a result of the July 13 trial, the magistrate issued a decision on July 16, 2009 awarding plaintiff judgment against defendant in the amount of \$3,000, plus interest and costs.

{¶4} The trial court adopted the magistrate's decision and entered judgment for plaintiff on July 16, 2009 in accord with the magistrate's decision. The trial court's clerk notified the parties by ordinary mail the same day. On October 19, 2009, the trial court entered a final judgment against defendant by dismissing defendant's counterclaim with prejudice and instructing the clerk to notify the parties by ordinary mail.

{¶5} Defendant filed a notice of appeal on October 21, 2009. On October 22, 2009, defendant filed in the trial court an objection to the magistrate's decision. The trial court reopened the case and overruled defendant's objection on October 29, 2009 as untimely filed under Civ.R. 53(D)(3)(b).

## II. Assignments of Error

{¶6} Defendant appeals, assigning the following errors:

1. Because the Defendant made an appearance in the case, it was error for the trial court to enter a default judgment against the Defendant without providing a written notice of the application for judgment and scheduling a hearing on such application.
2. Because the Defendant made an appearance in the case, it was error for the trial court to fail to recognize the Plaintiff's default was void.
3. It was error for the trial court to fail to vacate the trial Court's judgment against Dynamic Auto Service.
4. It was error for the trial court to fail to provide written notice to the Defendant of the application of judgment at least seven day[s] prior [to] the hearing on such application.
5. It was error for the trial court to overrule Defendant's objection to Plaintiff's void default judgment.
6. Because the Defendant made an appearance in the case, it was error for the trial court to enter a default judgment dismissing Defendant's counterclaim without notice and a hearing.
7. Because the Defendant made an appearance in the case, it was error for the trial court to fail to recognize that the entry dismissing the Defendant's counterclaim was void.

Defendant's assignments of error collectively raise two issues: (1) the propriety of the trial court's judgment for plaintiff on plaintiff's complaint, and (2) the propriety of the trial court's judgment for plaintiff on defendant's counterclaim. Both determinations hinge on the procedural rules governing actions in the small claims division of a municipal court.

### III. Judgment on Plaintiff's Claim

{¶7} Defendant's first, second, third, fourth, and fifth assignments of error assert the trial court erred in entering a default judgment for plaintiff on plaintiff's complaint, as defendant appeared in the action when he filed his counterclaim and was present in court for the first trial date. Defendant argues that, because he appeared, the trial court could not properly enter a default judgment against him until the court gave him notice under Civ.R. 55(A).

{¶8} Civ.R. 55(A) authorizes the trial court to grant a judgment to "the party entitled to a judgment by default" when the adverse party "has failed to plead or otherwise defend as provided" under the Rules of Civil Procedure. A default judgment for failure to plead generally does not apply to actions in the small claims division of the municipal court, since "[a] small claims action does not contemplate the use of a formal answer served upon the plaintiff and filed with the court prior to trial." *Bodmann v. Locations, Ltd.*, 10th Dist. No. 03AP-910, 2005-Ohio-1511, ¶15; *Miller v. McStay*, 9th Dist. No. 23369, 2007-Ohio-369, ¶13 (concluding Civ.R. 55(A) does not apply to small claims matters); *Shokles v. Beatley* (Dec. 19, 1995), 10th Dist. No. 95APG05-665 (noting "R.C. Chapter 1925 sets out procedures for the small claims division of the municipal court" and "the Ohio Rules of Civil Procedure apply to actions in the Small Claims Court to the extent they are not inconsistent with the procedures provided in R.C. Chapter 1925"); Civ.R. 1(C) (providing the Civil Rules, "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedures \* \* \* in small claims matters under Chapter 1925, Revised Code"); Loc.R. 11.01, Franklin County Municipal Court.

{¶9} Thus, the Supreme Court of Ohio in *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, without considering R.C. Chapter 1925, suggested "a hearing in the small claims division involving a defendant who fails to appear for trial is an ex parte proceeding, rather than a default" under Civ.R. 55(A). *Shokles*, supra. As a result, where the small claims division of the court grants judgment to a plaintiff when the defendant fails to appear at trial, the defendant is not entitled to notice of the application for judgment pursuant to Civ.R. 55(A). Although a default judgment under Civ.R. 55(A) generally does not apply to proceedings before the small claims court, a defendant in the small claims division of the municipal court may have judgment entered against it by default for failure to appear at trial. *Shokles*, citing R.C. 1925.05(A).

{¶10} Here, plaintiff initially served defendant by certified mail with the complaint and summons. In those documents was the required notice regarding failure to appear for trial. See R.C. 1925.05 (providing that notice in a small claims action "shall read substantially" that if the adverse party does "not appear at the trial, judgment may be entered against you by default"). Defendant does not contend he was not served with plaintiff's complaint. To the contrary, defendant filed a counterclaim and appeared on June 1, 2009 when the case originally was scheduled for trial. When the magistrate continued the trial date, the trial court clerk issued notice on June 2, 2009 to plaintiff and defendant at the addresses previously used, advising of the July 13, 2009 trial date. Plaintiff appeared for trial; defendant did not.

{¶11} When defendant failed to appear on July 13, 2009, the trial court could have proceeded with a default judgment under R.C. 1925.05 or with an ex parte trial. The

magistrate's decision does not state which alternative the magistrate used, the magistrate's decision simply indicating the magistrate recommended judgment for plaintiff in the amount of \$3,000, plus interest and costs. The trial court adopted the magistrate's findings on July 16, 2009 and issued notice of the decision to defendant that same day. (R. 9.) Whether the trial court, through its magistrate, granted a default judgment under R.C. 1925.05 or conducted an ex parte trial, the trial court properly entered judgment for plaintiff on this record.

{¶12} Indeed, the trial court did not use the phrase "default judgment" until its final judgment entry filed October 19, 2009. The court, however, had no basis to insert default language into its last judgment entry. The magistrate's decision did not suggest the matter was conducted as default proceedings, the record contains no motion for default judgment, and the trial court did not have a transcript of the proceedings from which it could determine plaintiff's claim was resolved by default proceedings. "[S]imply because the trial court used the phrase 'default judgment' does not mean that it granted 'default judgment' pursuant to Civ.R. 55(A)." *United Midwest Sav. v. Hanson*, 3d Dist. No. 8-04-38, 2005-Ohio-1424, ¶7, n.1 (stating "[a] review of the record indicates that [plaintiff] did not, at any time, file a motion for 'default judgment' pursuant to the Ohio Civil Rules" and "the trial court's entry does not indicate that it granted judgment pursuant to Civ.R. 55(A)").

{¶13} The propriety of the trial court's judgment is further grounded in defendant's failure to file timely objections to the magistrate's decision until October 22, 2009, even though notice of the judgment was mailed to both parties on July 16, 2009. Pursuant to Civ.R. 53(D)(3)(b), "[a] party may file written objections to a magistrate's decision within

fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period." Defendant filed his objections well outside the fourteen-day limit and sought no extension of time for the purpose of filing objections. Defendant thus not only waived any error in the proceedings before the trial court, but the trial court properly overruled defendant's objections. See, e.g., *State ex rel. Rosch v. Ohio Civ. Rights Comm.*, 10th Dist. No. 04AP-340, 2004-Ohio-1625, ¶6 (concluding a court need not address untimely objections to a magistrate's decision); Civ.R. 53(D)(3)(b)(iv) (stating that, absent plain error, "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion \* \* \* unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)").

{¶14} Because the trial court did not err in entering judgment in favor of plaintiff on plaintiff's claim, we overrule defendant's first, second, third, fourth, and fifth assignments of error.

#### **IV. Dismissal of Defendant's Counterclaim**

{¶15} In its sixth and seventh assignments of error, defendant contends the trial court erred in dismissing his counterclaim with prejudice. Defendant again argues that because defendant appeared in the matter, the trial court could not enter a default judgment against defendant without notice and hearing pursuant to Civ.R. 55(A).

{¶16} Defendant's argument again misapplies the provisions of Civ.R. 55(A). Defendant assumed the role of the plaintiff concerning the counterclaim defendant asserted. Pursuant to R.C. 1925.12, "[i]f the plaintiff does not appear at the time set for trial, the court may dismiss the claim for want of prosecution, or enter a finding on the merits for the defendant, or make such other disposition as may be proper."

{¶17} Defendant's failure to appear for trial, combined with plaintiff's attendance, allowed the trial court to dismiss defendant's counterclaim under R.C. 1925.12. As was true concerning defendant's contentions about the judgment entered for plaintiff on plaintiff's complaint, the trial court's using the term "default judgment" in its final judgment entry regarding defendant's counterclaim did not convert the proceedings to a "default judgment" pursuant to Civ.R. 55(A). See *United Midwest Sav.* at ¶7. The trial court thus did not err in dismissing defendant's counterclaim. Defendant's sixth and seventh assignments of error are overruled.

#### **V. Disposition**

{¶18} Having overruled defendant's seven assignments of error, we affirm the judgment of the Franklin County Municipal Court.

*Judgment affirmed.*

BROWN and KLATT, JJ., concur.

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