[Cite as *Woodworking Shop, L.L.C. v. Shay*, 2010-Ohio-4568.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

WOODWORKING SHOP, LLC,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-12-298
	:	O P I N I O N
- vs -	:	9/27/2010
CHRIS SHAY,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM MIDDLETOWN MUNICIPAL COURT
Case No. 08CVF04602

Sams, Fischer, Packard, Schuessler, Joshua T. Morrow, Dwight A. Packard II, 209 Reading Road, Mason, Ohio 45050, for plaintiff-appellee

Scaccia & Associates, LLC, John J. Scaccia, Krystle N. Marko, 536 W. Central Avenue, Springboro, Ohio 45066, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Chris Shay, appeals the Middletown Municipal Court's decision granting a default judgment to plaintiff-appellee, Woodworking Shop, LLC, and denying Shay's motion to dismiss. We affirm the municipal court's decision.

{¶2} Woodworking filed its initial complaint against Shay based on Shay's failure to pay monies due under a cabinetry contract. Shay filed an initial answer asserting numerous defenses. With the municipal court's permission, Woodworking filed an amended complaint on May 14, 2009. On June 9, 2009, Shay moved to dismiss

the amended complaint for failure to state a claim on which relief can be granted.

{¶3} On June 24, 2009, Woodworking moved to strike Shay's motion to dismiss as untimely filed. Woodworking also moved for a default judgment because Shay had failed to file a responsive pleading within 14 days after service of the amended complaint. On June 25, 2009, Shay moved for leave to file an answer out of time. In his memorandum in support, Shay argued excusable neglect based on a misreading of the Rules of Civil Procedure. Shay believed he had 28 days pursuant to Civ.R. 12 to respond to the amended complaint, rather than the 14 days proscribed by Civ.R. 15.

{¶4} On October 5, 2009, the magistrate issued a decision denying Shay's motion to dismiss because (1) it was not a responsive pleading under Civ.R. 15, and (2) allegations made in the motion regarding the nonexistence of a contract were not well taken. The magistrate also denied Shay's motion for leave to file an answer out of time because the motion was not made until June 25, 2009, which was "well beyond the time set out by the Rules of Civil Procedure." In addition, the magistrate noted "[w]hile it is clear that courts do not favor default judgments, nevertheless where both parties are represented by counsel, it is their duty to see that all time requirements are met." Finding an implied contract existed between the parties based on the pleadings and exhibits filed, the magistrate granted Woodworking a default judgment against Shay. On October 12, 2009, the municipal court reviewed the magistrate's decision and found Woodworking's default judgment motion well taken.[1] Shay filed an appeal raising two assignments of error.

{¶5} Assignment of Error No 1:

{¶6} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S

1. Although the municipal court's order made no mention of Shay's motion for leave to file out of time or his motion to dismiss, we may presume by entering a final judgment that the municipal court overruled

MOTION FOR DEFAULT JUDGMENT."

{¶7} Assignment of Error No 2:

{¶8} "THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO FILE OUT OF TIME DEFENDANT'S MOTION TO DISMISS, INSTANTER."

{¶9} In his first assignment of error, Shay maintains the municipal court improperly granted Woodworking's default judgment motion because (1) default judgments are disfavored, (2) Shay appeared in the action by evidencing an intent to defend or "otherwise defend" the suit, and (3) the municipal court failed to comply with the requirements of Civ.R. 55 which require he be "served with written notice of the application for judgment at least seven days prior to the hearing on such application." In his second assignment of error, Shay argues the municipal court (1) failed to consider his claim of excusable neglect in denying his motion for leave to file out time, and (2) failed to allow him to file an answer within 14 days of the denial of his motion to dismiss pursuant to the tolling provision in Civ.R. 12(A)(2).

{¶10} Because it has bearing on our decision, we must address the fact that Shay failed to file objections to the magistrate's decision. Civ.R. 53(D)(3)(b)(iv) states that "a party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." The failure to follow the terms of Civ.R. 53 precludes a party from later raising the issue on appeal. *Burns v. May* (1999), 133 Ohio App.3d 351, 358.

{¶11} Nevertheless, a party may assert a claim of plain error where no objections

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those motions. See *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, ¶13, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329.

to the magistrate's decision were filed. Civ.R. 53(D)(3)(b)(iv). "In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, citing *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209; *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 124; *Cleveland Elec. Illum. Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 275.

{¶12} Upon careful review of this case, we do not find that Shay has demonstrated that this is an extremely rare case where exceptional circumstances exist which require application of the plain error doctrine. This is especially true where Shay not only failed to raise objections to the magistrate's decision, but also neglected to file a Civ.R. 60(B) motion for relief from judgment. Because we decline to find plain error exists in this case, Shay's assignments of error are overruled.

{¶13} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.