[Cite as *Environmental Bldrs., Inc. v. Blankenbaker*, 2002-Ohio-7155.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ENVIRONMENTAL BUILDERS, INC., et al.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2001-P-0064**
- vs -	:	
DENNIS BLANKENBAKER, et al.,	:	
Defendants-Appellants,	:	
WILDERNESS LOG HOMES, et al.,	:	
Defendants-Appellees.		

Civil Appeal from Portage County Common Pleas Court, Case No. 98 CV 0477

Judgment: Affirmed.

Robert Malone, 14493 Windsor Castle Lane, Strongsville, OH 44136, (For Plaintiff-Appellee).

Douglas M. Kehres, Kehres & Farah, 638 West Main Street, Ravenna, OH 44255 (For Defendants-Appellants).

Walter H. Krohngold, Keller & Curtin Co., L.P.A., 330 The Hanna Building, 1422 Euclid Avenue, Cleveland, OH 44115-1994 (For Appellee, Wilderness Log Homes).

Rosemary T. Milby, Weltman, Weinberg & Reis Co., L.P.A., Lakeside Place, #200, 323 Lakeside Avenue, West, Cleveland, OH 44113 (For Appellee, Park View Federal Savings Bank).

DONALD R. FORD, J.

{¶1} Appellants, Dennis and Carol Blankenbaker, appeal from the April 30, 2001 judgment entry of the Portage County Court of Common Pleas Court.

{¶2} Environmental Builders, Inc. ("Environmental Builders") and Environmental Restoration & Builders, Inc. filed a complaint for breach of contract in the Portage County Court of Common Pleas Court on June 9, 1998, naming appellants as defendants. The complaint alleged that appellants had refused to pay invoices in the amount of $36,581.55 for work that Environmental Builders had performed in connection with the construction of a log home for appellants.

{¶3} On July 2, 1998, appellants filed an "Answer and Counterclaim Adding Additional Parties on Counterlaim." The counterclaim named Wilderness Log Homes ("Wilderness"), Collier Foundation Systems, Inc. ("Collier"), and Park View Federal Savings Bank ("Park View") as defendants.[1] Wilderness had provided the materials for the construction of the log home; Collier had built the foundation; and, Park View had provided the initial construction financing for the home. In their counterclaim, appellants alleged that: Environmental Builders did not construct the home in a workmanlike and professional manner and that the home was uninhabitable; Environmental Builders was the agent of Wilderness; Wilderness had violated the Ohio Consumers Sales Practice Act; Collier was negligent in the design and/or construction of the foundation; Park View was responsible for conducting inspections before the release of funds from the construction loan; and, Park View was negligent in performing said inspections.

{¶4} Park View filed a reply to the counterclaim on July 27, 1998; Environmental Builders filed a reply to the counterclaim on July 29, 1998; and, Collier filed a reply to the counterclaim on September 8, 1998. (Wilderness did not file a reply

to the counterclaim until October 6, 2000, less than two weeks prior to trial. In a motion filed on October 13, 2000, appellants moved to strike Wilderness's reply.)

{¶5} Park View filed a motion for summary judgment on December 6, 1999. The trial court denied the motion in a March 3, 2000 judgment entry.

{¶6} A jury trial was held commencing October 17, 2000. Park View and Wilderness both moved for directed verdicts, and the trial court granted both motions. The jury found in favor of Collier on appellants' negligence claim with respect to the foundation. The jury returned a verdict in favor of appellants on their counterclaim against Environmental Builders for breach of contract and awarded appellants a judgment of one million dollars. The jury also awarded appellants $250,000 on their claim that Environmental Builders violated the Ohio Consumer Sales Practice Act.

{¶7} In an October 31, 2000 judgment entry, the trial court found that pursuant to R.C. 1345.09(B), appellants were entitled to three times actual damages for Environmental Builders' violation of the Ohio Consumer Sales Practice Act; therefore, the trial court awarded $750,000 on that claim.

{¶8} In its April 30, 2001 judgment entry, the trial court awarded appellants $26,612.50 in attorney fees to be paid by Environmental Builders.

{¶9} Appellants have filed a timely appeal and make the following three assignments of error:

{¶10} "[1.] The [t]rial [c]ourt erred in overruling [appellant's] [m]otion to strike the untimely [a]nswer of [appellee], Wilderness Log Homes.

{¶11} "[2.] The [t]rial [c]ourt erred in granting [appellee Wilderness's] [m]otion for a directed verdict.

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1. Upon agreement of the parties and pursuant to a motion filed by Collier on September 16, 2002, the

{¶12} "[3.] The [t]rial [c]ourt erred in granting [appellee], Park View Federal Savings and Loan's [m]otion for a directed verdict."

{¶13} In their first assignment of error, appellants argue that the trial court erred in overruling appellants' motion to strike Wilderness's answer. Appellants filed their counterclaim, naming Wilderness as a defendant on July 2, 1998. As a result of an alleged clerical error, Wilderness did not file its answer until more than two years later, on October 6, 2000. At no time during that two-year period did appellants seek a default judgment against Wilderness.

{¶14} At the trial, which commenced on October 17, 2000, Wilderness's attorney stated on the record that the insurance adjuster who received the complaint placed it in the wrong file shortly before he retired, and that the file was then placed in storage. Wilderness's counsel was not aware of the complaint until counsel for one of the other parties in the case contacted him and inquired as to whether Wilderness intended to file an answer. After listening to this statement, the trial court granted Wilderness leave to file its answer in spite of Wilderness's failure to file a motion requesting such leave. Appellants' counsel raised no objection to the trial court's decision.

{¶15} Civ.R. 6(B), which governs the granting of an extension of time to file a pleading subsequent to the original complaint, states: "When *** an act is required *** 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 ***." The standard for excusable neglect is less stringent under Civ.R. 6(B)(2) than that applied under Civ.R. 60(B). *State ex rel. Lidenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72

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appeal against Collier was dismissed in a judgment entry from this court dated September 27, 2002.

Ohio St.3d 464, 466, citing *Jenkins v. Clark* (Nov. 10, 1983), 2d Dist. No. 8137, 1983 WL 2540, at 3. Although not mandatory, a party moving for an extension of time premised on excusable neglect should file evidential materials in supports of its motion. See *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20. In *Kay*, the Supreme Court of Ohio found excusable when the secretary of the appellants' counsel inadvertently placed the appellants' answer in a file drawer instead of mailing them to the court for filing. Id.

{¶16} The circumstances surrounding Wilderness's failure to timely file an answer, as related by its attorney at trial, place its actions within the parameters of excusable neglect in the context of Civ.R. 6(B). Further, appellants were not prejudiced by the trial court's decision. They had ample opportunity to seek a default judgment against Wilderness, but failed to do so. Appellants also chose not to request a continuance in order to prepare for trial after Wilderness filed its late reply. In view of Wilderness's showing of excusable neglect and appellants' failure to demonstrate that they were prejudiced by the trial court's decision, we conclude that the trial court did not abuse its discretion in granting Wilderness an extension of time to reply to appellants' counterclaim. Consequently, appellants' first assignment of error is without merit.

{¶17} In their second assignment of error, appellants contend that the trial court erred in granting Wilderness's motion for a directed verdict. Appellants' claim against Wilderness was premised on the assumption that Environmental Builders was an agent of Wilderness.

{¶18} To establish a principal/agent relationship under the theory of apparent agency, the evidence must show that (1) the principal held the agent out to the public as possessing sufficient authority to act on the principal's behalf, and (2) the person

dealing with the agent had a good faith reason to believe and did believe that the agent possessed the necessary authority. *Master Consd. Corp. v. BancOhio Natl. Bank* (1991), 61 Ohio St.3d 570, 576. "Such agency can be created where a principal's failure to exercise ordinary care allows third parties to act or rely on apparent agency." *Bank One, Akron, N.A. v. Smart-Tomlinson Corp.* (1988), 56 Ohio App.3d 60, 61.

{¶19} Here, Dennis Blankenbaker testified that Wilderness informed him that it had a "dealer/builder" in Strongsville, Geoffrey Badger ("Badger"), the president and owner of Enivornmental Builders. He met Badger at his office in Strongsville, which contained a number of items with the Wilderness logo, where Badger assisted him with the design of his home. He further testified that Badger told him that he was Wilderness's representative in the area, but that Wilderness and Environmental Builders were separate companies.

{¶20} Badger testified that he had an independent dealer contract with Wilderness that he signed in February 1995. This contract required Badger to preface all uses of the Wilderness trademark with the words "Authorized Direct Dealer". Badger also stated that Wilderness had made it clear that its name was not to be used in association with any construction business operated by Badger. He explained to appellants his two separate roles, and it was his impression that they understood that while he sold Wilderness homes, he was not a Wilderness agent with respect to the construction of such homes.

{¶21} Michael Erdmann ("Erdmann"), the president of Wilderness, testified that Wilderness sells log home packages throughout the United States and that it has no interest in being responsible for the construction of the homes because of various soil conditions and building codes throughout the country. He stated that Wilderness has

independent dealers throughout the country, and the company maintains a clear distinction between dealers and builders.

{¶22} Wilderness's Exhibit W-4 is a September 13, 1996 letter from the then president of Wilderness, Jeff Radtke ("Radtke"). In that letter, Radtke congratulated Dennis Blankenbaker on his purchase of a Wilderness home. The fifth paragraph of the letter provides: "To assist our customer, [Wilderness has] compiled a contractor and lender list in your state obtained from a survey of satisfied customers. This list should not be regarded as a recommendation or endorsement of the individuals listed. Before deciding on a builder or lender, we recommend that you do your own investigation and use your own best judgment." Dennis Blankenbaker testified that he did not doubt that he had received this letter at some point in time; however, by the time he had received this letter, he had already decided to have Environmental Builders construct the home.

{¶23} Further, the agreement executed by appellant and Wilderness provided as follows: "No sales agent, dealer or other person is authorized to act on behalf of [Wilderness] for the erection of any Wilderness Log Homes package. Customers may be provided with a list of builders in their area who have built homes for Wilderness customers in the past. [Wilderness] makes no recommendation about these or other builder's [sic] performance, and furthermore, strongly urges customers to contact several builders, whether on the list or not, and make an independent, informed decision about which builder to use. Any representation to the contrary is void."

{¶24} The foregoing paragraph clearly states that dealers of Wilderness products are not authorized to act on behalf of Wilderness in connection with the construction of a Wilderness home kit. This paragraph of the purchase agreement was separately initialed by appellant, Dennis Blankenbaker. He testified that he discussed

that provision with Badger, but that he was, nevertheless, convinced that Wilderness and Environmental Builders were a single company.

{¶25} Appellants make much of the fact that Environmental Builders placed a Wilderness logo on its contracts; however, there is no suggestion that Wilderness had granted Environmental Builders the right to use its logo in that manner. In *Sponagle v. USAir Group, Inc.* (1992), 81 Ohio App.3d 789, 798, the Second Appellate District held that although Jetstream International Airlines was required by its agreement with Piedmont Aviation, Inc. to place a Piedmont logo on its planes, this did not support a claim that Piedmont held itself out as having a right of control over the hiring and training of pilots by Jetstream. In the case at hand, not only did Wilderness not require Environmental Builders to place the Wilderness logo on its contracts, the evidence indicates that Environmental Builders' use of the Wilderness logo was unauthorized.

{¶26} Having considered the testimony on the issue of Environmental Builders being an agent of Wilderness, we conclude that appellants offered no evidence that Wilderness held Environmental Builders out to the public as its agent with respect to the construction of Wilderness homes. Appellants chose to believe that Environmental Builders was an agent of Wilderness, in spite of Badger's oral statements and Wilderness's written statements to the contrary. Because appellants are unable to identify any evidence that would suggest that Wilderness held out Environmental Builders as possessing authority to act on behalf of Wilderness in the construction of appellants' home, the trial court properly granted Wilderness's motion for a directed verdict, and appellants' second assignment of error is without merit.

{¶27} In their third assignment of error, appellants aver that the trial court erred in granting Park View's motion for a directed verdict. Appellants alleged in their

complaint that Park View either failed to conduct inspections of the construction project before disbursing funds, or was negligent in conducting said inspections.[2]

{¶28} At trial, appellant, Dennis Blankenbaker, was asked on cross-examination: "Now you were aware of, were you not, that [Park View] was in fact doing inspections of the property?" Appellant replied: "Yes." Appellants introduced no evidence at trial contradicting this admission that Park View carried out its inspection duties. Nor did appellants proffer any evidence suggesting that Park View behaved in a negligent fashion in performing those inspections.

{¶29} In the absence of any evidence that Park View either failed to conduct inspections or performed its inspections in a negligent manner, the trial court properly granted Park View's motion for a directed verdict. Therefore, appellants' third assignment of error lacks merit.

{¶30} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is affirmed.

Judgment affirmed.

ROBERT A. NADER and DIANE V. GRENDELL, JJ., concur.

2. Because the Park View loan was a construction loan for a term of one year, appellants ultimately refinanced the loan with Ravenna Savings while the home was still in the process of being built.