[Cite as *Matthews v. Rader*, 2005-Ohio-3271.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

CAROLE S. MATTHEWS,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-L-092**
- vs -	:	
KENNETH M. RADER, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 02 CV 002058.

Judgment: Affirmed.

Stephen M. Bales, 2020 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115 (For Plaintiff-Appellee).

William C. Gargiulo, A.M. Pena Building, #500, 27801 Euclid Avenue, Euclid, OH 44132 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Kenneth M. Rader appeals from the judgment of the Lake County Common Pleas court, which granted Carole S. Matthews's motion for default judgment. We affirm.

{¶2} On November 15, 2002, Matthews filed an action against Rader (Matthews's nephew) and Roberta E. Paul[1] (Matthews's sister and Rader's mother). In this action, Matthews sought to invalidate an amendment to her mother's trust, allegedly made because of Rader's undue influence. Rader received service of the summons and complaint on November 21, 2002.

{¶3} On January 2, 2003, Rader filed a stipulation for leave to plead for an additional thirty days. On January 30, 2003, Rader filed a pro se "Stipulation for Leave to Plead and Journal Entry" purportedly giving himself an additional thirty days to respond to the complaint. Neither Matthews nor her counsel agreed to this "stipulation," and it was not served on Matthews or her counsel. The trial court treated the "stipulation" as a motion for leave to plead and on February 7, 2003, entered an order stating, "Defendants shall have until February 21, 2003, to file answers or otherwise respond to plaintiff's complaint. No further extensions will be granted." Rader failed to file an answer or respond to the complaint.

{¶4} On March 14, 2003, Matthews moved for default judgment. The motion was served on Rader and his former counsel. On May 6, 2003, Mathews filed an affidavit in support of her motion for default judgment.

{¶5} On May 14, 2003, at 9:11 a.m., Rader, through counsel, filed an answer to the complaint. On the same day, at 2:33 p.m., the trial court put on an order stating in relevant part:

{¶6} "On May 14, 2003 – nearly three months after the final deadline established by the court – Defendant Kenneth M. Rader filed an answer without seeking

1. Paul did not appear in the action and is not a party to this appeal.

or obtaining leave of court to do so. The court finds that Defendant Kenneth M. Rader's attempt to file an answer without leave of court is a nullity, and that the defendants have not timely filed an answer or otherwise defended against the complaint."

{¶7} The trial court then granted Matthews's motion for default judgment.

{¶8} Rader filed a timely appeal from the trial court's judgment raising three assignments of error:

{¶9} "[1.] The trial court committed prejudicial error by denying a pro se defendant-appellant, who made two appearances in the action, a hearing upon the plaintiff-appellee's motion for default judgment and affidavit in support and thereby prevented the case from being decided on its merits and violated defendant-appellant's due process rights.

{¶10} "[2.] The trial court committed prejudicial error by granting a default judgment without a hearing and without requiring the plaintiff-appellee to provide the 7-day written notice mandated by Civil R. 55(A) to the pro se defendant-appellant who made two appearances in the action, and in failing to require plaintiff-appellee to give notice to the pro se defendant-appellant of any hearing on default and thereby prevented the case from being decided on its merits and violated the defendant-appellant's due process rights.

{¶11} "The trial court committed prejudicial error by issuing a judgment entry of default which also ordered a nullity of the defendant-appellant's responsive answer filed by his counsel, and thereby prevented the case from being decided on its merits violating the defendant-appellant's due process rights."

{¶12} We first consider Rader's third assignment of error. In this assignment of error, Rader argues the trial court erred in finding his answer to be a nullity. We disagree.

{¶13} Civ.R. 12(A)(1) requires a defendant to serve his answer within 28 days after he has been served with the summons and complaint. Rader was served with the summons and complaint on November 22, 2002; thus, he had until December 20, 2002 to move or plead. On January 2, 2003, Rader filed a stipulation for leave to plead for an additional thirty days. In response to Rader's pro se "stipulation" filed January 30, 2003, the trial court granted Rader an extension to February 21, 2003 to file an answer. The order also stated no further continuances would be granted. Rader failed to file an answer or otherwise defend.

{¶14} Matthews moved for default judgment on March 14, 2003. Two months later, at 9:11 a.m., May 14, 2003, Rader filed an answer. The trial court put on an order at 2:33 p.m. the same day holding Rader's answer to be a nullity and granting Matthews's motion for default judgment.

{¶15} Civ.R. 6(B) grants trial courts discretion to extend the time within which an act must be performed. This rule provides:

{¶16} "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 (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (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; ***." (Emphasis added.)

{¶17} Civ.R. 6(B)(2) is clearly applicable in this case because the time for Rader to file an answer had long since expired. Thus, the trial court could have granted Rader an extension of time to file his answer if Rader had moved for such an extension and demonstrated that his failure to file an answer within the time allowed was the result of excusable neglect. Rader failed to move for an extension of time and made no effort to demonstrate excusable neglect.

{¶18} In *Miller v. Lint*, the Ohio Supreme Court held:

{¶19} "While this court is in general agreement with the universal practice of allowing trial courts broad discretion in settling procedural matters, such discretion, as evidenced by Civ.R. 6(B), is not unlimited, and under the circumstances *** some showing of 'excusable neglect' was a necessary prelude to the filing of the answer. Furthermore, 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.

{¶20} "However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment."[2]

2. (1980), 62 Ohio St.2d 209, 214-215.

{¶21} The Ohio Supreme Court's holding in *Miller* is dispositive of the instant case. Rader failed to comply with the requirements of the Civil Rules and failed to demonstrate excusable neglect. Rader's answer was never properly filed; therefore, as the trial court concluded, it was a nullity.[3]

{¶22} Appellant's third assignment of error is without merit.

{¶23} In his first assignment of error, Rader argues the trial court erred by denying him a hearing on Matthews's motion for default judgment. We find no error.

{¶24} Civ.R. 55(A) provides in relevant part:

{¶25} "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. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court

3. Accord, *Farmers & Merchants State & Savings Bank v. Raymond G. Barr Enterprises, Inc.* (1982), 6 Ohio App.3d 43, 43-44 ("Nowhere by motion, memorandum, or argument does appellant advance a reason for failing to file an answer that would constitute 'excusable neglect.' Indeed, the record is to the contrary to the existence of such.") *T.S. Expediting Services, Inc. v. Mexican Industries, Inc.*, 6th Dist. No. WD-01-060, 2002-Ohio-2268; *Thrower v. Olowo*, 8th Dist. No. 81873, 2003-Ohio-2049, ¶17 ("In the case at hand, the record reflects that appellee William Olowo submitted his answer some 90 days after the expiration of the answer date and without leave of the court. Further, the lower court has yet to formally grant appellee William Olowo leave to file his answer. Second, before the lower court can grant leave to file the answer, appellee William Olowo must offer a showing of 'excusable neglect' as a prelude to filing the answer, in accordance with *Miller*. Failure to make such a showing and a subsequent grant of leave to file his answer by the lower court would undoubtedly be construed as an abuse of discretion pursuant to *Miller*.")

may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties."

{¶26} Under Civ.R. 55(A), the trial court is not required to hold a hearing on a motion for default judgment, but may do so in its discretion.[4] In the instant case, no hearing was necessary because Matthews sought only declaratory judgment. Further, Rader never requested a hearing on the motion for default judgment. Thus, we conclude the trial court did not abuse its discretion when it ruled on Matthews' motion for default judgment without first conducting a hearing.

{¶27} Appellant's first assignment of error is without merit.

{¶28} In his second assignment of error, Rader argues the trial court erred in granting default judgment without requiring Matthews to provide seven days notice as required by Civ.R. 55(A) and without requiring Matthews to provide him notice of the hearing on the motion.

{¶29} Civ.R. 55(A) requires the moving party to provide notice of the motion to any party who has appeared in the action, at least seven days prior to the hearing on the motion. Rader contends Matthews failed to comply with this requirement. We disagree.

{¶30} Matthews filed her motion for default judgment on March 14, 2003. It is undisputed that Rader had appeared in the action, and thus was entitled to notice of the motion for default judgment. The record demonstrates Matthews served the motion on Rader and his former counsel. (Interestingly, Rader never explicitly argues that he was

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4. *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134, 136.

not served with the motion.) The trial court did not grant the motion for default judgment until May 14, 2003. Thus, Rader received 61 days notice of the motion for default judgment. Matthews clearly complied with the notice requirements of Civ.R. 55(A).

{¶31} Appellant's second assignment of error is without merit.

{¶32} For the foregoing reasons the judgment of the Lake County Court of Common Pleas is affirmed.

JUDITH A. CHRISTLEY, J., Ret., Eleventh Appellate District, sitting by assignment, concurs,

WILLIAM M. O'NEILL, J., dissents with Dissenting Opinion.

WILLIAM M. O'NEILL, J., dissenting.

{¶33} I must respectfully dissent. I believe the trial court erred by entering default judgment against Rader, without holding a hearing or ensuring that Rader had notice pursuant to Civ.R. 55(A), after Rader had filed an answer.

{¶34} Civ.R. 55(A) provides, in part:

{¶35} "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."

{¶36} Civ.R. 7(B)(2) provides:

{¶37} "To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

{¶38} Civ.R. 7 applies to motions for default judgment.[5] Local rules dictate whether a party is entitled to an oral or non-oral hearing.[6] Finally, courts have held that the trial court has discretion as to whether to conduct a formal hearing on a Civ.R. 55(A) motion for default judgment.[7] "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable."[8]

{¶39} Rader filed two motions for extensions of time in this matter. Therefore, he made an appearance for purposes of Civ.R. 55(A) and was entitled to notice.

{¶40} The Local Rules of the Lake County Court of Common Pleas provide:

{¶41} "All motions, including motions for summary judgment, may be considered upon the Motion papers alone twenty (20) days after the filing of same and without oral argument. Oral argument may be permitted upon application and proper showing."[9]

{¶42} In addition to the local rules, in this matter, the trial court issued a pretrial order. Therein, the court ruled that "[m]otions for default judgment are set for non-oral hearing[.]"

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5. *Columbus v. Kahrl* (Mar. 12, 1996), 10th Dist. No. 95APG09-1204, 1996 Ohio App. LEXIS 965, at *6.
6. Id. at *4, citing Baldwin's Ohio Civil Practice, Section T21.19(B).
7. *The Scarefactory, Inc. v. D & B Imports, LTD.* (Jan. 3, 2002), 10th Dist. No. 01AP-607, 2002 Ohio App. LEXIS 5, at *15, citing *Buckeye Supply Co. v. Northeast Drilling Co.* (1985), 24 Ohio App.3d 134.
8. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
9. Loc.R. III(D)(6) of the Court of Common Pleas of Lake County, General Division.

{¶43} Civ.R. 55(A) does "not require the requisite notice for a 'non-oral hearing' as required for an oral hearing. 'It is acceptable practice *** for trial courts to dispose of motions without formal hearing, so long as due process rights are afforded.'"[10]

{¶44} In this matter, pursuant to Loc.R. III(D)(6), the matter was set to be decided twenty days after Matthews' motion for default judgment was filed. In *The Scarefactory, Inc. v. D & B Imports, LTD.*, a similar local rule provided motions would be submitted to the trial court twenty-eight days after the motion was filed. The Tenth District held that such a rule can be sufficient notice of a non-oral hearing date for Civ.R. 55(A) purposes.[11] I disagree with this holding and believe the Tenth District correctly applied the law in a prior case, where the court held:

{¶45} "The wisdom of scheduling an oral or non-oral hearing is graphically demonstrated in the instant case. *Had a specific date been scheduled* when the motion for default judgment was filed, counsel-of-record would have been compelled to attend or would have been urged in the direction of obtaining substitute counsel for the hearing."[12]

{¶46} Similarly, the Fifth District has held that a trial court errs when it rules on a motion for default judgment without a hearing, because the adverse party is not given the requisite seven-day notice.[13]

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10. *The Scarefactory, Inc. v. D & B Imports, LTD.*, at *15, quoting *Buckeye Supply Co. v. Northeast Drilling Co.*, 24 Ohio App.3d at 136.
11. *The Scarefactory, Inc. v. D & B Imports, LTD.*, at *15.
12. (Emphasis added.) *Industrial Comm. v. Rister* (Feb. 25, 1992), 10th Dist. No. 91 AP-1158, 1992 Ohio App. LEXIS 868, at *4.
13. *Rennicker v. Jackson*, 5th Dist. No. 2003AP090076, 2004-Ohio-3051, at ¶13.

{¶47} Civ.R. 55(A) requires the opposing party be "served with written notice." A provision in a local rule, setting a period in which a motion may be considered, is not "service by written notice." Also, it is important to note that Loc.R. III(D)(6) pertains to motions in general. It is not a substitute for the provisions of Civ.R. 55(A).

{¶48} Due process requires "'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[14] For due process purposes, the additional burden of providing written notice is minimal, when compared to the potential harm of having a default judgment entered against a party.

{¶49} In the case sub judice, there was no notice of a specific date for the hearing sent to Rader. Such notice would have provided him with a "drop-dead" date in which to respond to Matthews' motion.

{¶50} I acknowledge that Loc.R. III(D)(6) provides that motions "may be" considered, through non-oral hearings, twenty days after they are filed. However, the record reveals that a "non-oral" hearing was not held twenty days after Matthews' motion for default judgment was filed. Matthews' motion was filed on March 14, 2003. According to Loc.R. III(D)(6), the non-oral hearing should have occurred twenty days later, on April 3, 2003. However, the trial court did not rule on the motion until May 14, 2003, coincidently, only hours after Rader filed his answer to the complaint. Did the "non-oral" hearing occur during these few hours between Rader filing his answer and

14. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 124-125, quoting *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314.

the trial court's judgment? The fact that the trial court failed to adhere to the parameters of Loc.R. III(D)(6) prevents that same rule from being used against Rader.

{¶51} Civ.R. 55(A) expressly provides that written notice is to be served on the opposing party. In this case, Rader did not receive any notice. As such, his due process rights were violated.

{¶52} Moreover, I believe the trial court erred by granting Matthews' motion for default judgment. This court has held that "[g]enerally, the law disfavors default judgments."[15] In addition, "[t]he general policy in Ohio is to decide cases on their merits whenever possible."[16]

{¶53} "A trial court cannot enter a default judgment against a party who has filed an answer."[17] In addition, "'[a] default judgment is proper when, *and only when*, a defendant has not contested the plaintiff's allegations by pleading or "otherwise defending" such that no issues are present in the case.'"[18]

{¶54} In this matter, Rader filed an answer. However, the trial court deemed the answer a "nullity" and proceeded to enter default judgment against appellant. The trial court noted that Rader's answer was filed late and that he did not obtain leave of court to file the answer. However, the Eighth Appellate District has held "[w]here a party pleads before default is entered, though out of time and without leave, if the answer is

15. *Baines v. Harwood* (1993), 87 Ohio App.3d 345, 347, citing *Suki v. Blume* (1983), 9 Ohio App.3d 289.
16. Id., citing *Natl. Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15.
17. *Providian Natl. Bank v. Stone* (Sept. 28, 2001), 11th Dist. No. 2000-P-0117, 2001 Ohio App. LEXIS 4412, at *2, citing *Fallsway Equip. Co. v. Kirtland Auto Sales, Inc.* (June 30, 1999), 11th Dist. No. 98-G-2169, 1999 WL 476130, at *2.
18. (Emphasis added.) *Pandi v. Marc Glassman, Inc.* (May 11, 1995), 8th Dist. No. 68076, 1995 Ohio App. LEXIS 1966, at *4-5, quoting *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105.

good in form and substance, a default should not be entered as long as the answer stands as part of the record."[19]

{¶55} At 9:11 a.m. on May 14, 2003, Rader filed his answer. At that point, Matthews' complaint was no longer uncontested. Thus, the trial court abused its discretion by entering a default judgment.

{¶56} When the errors that occurred in this matter are examined together, the resulting prejudice is multiplied. Rader was not given notice of the hearing on Matthews' motion for default judgment. In fact, the question of whether a "non-oral" hearing was even held is subject to debate. Finally, Rader filed his answer, albeit late, to Matthews' complaint. Thereafter, the trial court immediately deemed the answer a nullity and granted Matthews' motion for default judgment.

{¶57} The trial court was permitted to impose other sanctions for Rader's disregard of the court-imposed deadlines. However, since Rader was not provided notice of the hearing and he filed an answer and contested the complaint, the ultimate sanction of default judgment was an abuse of discretion.

19. *Suki v. Blume*, 9 Ohio App.3d at 290