

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHERYL L. KEBLER, INDIVIDUALLY AND
AS ADMINISTRATOR OF THE ESTATE
OF JAMIE L. KEBLER,

Plaintiff-Appellee

-vs-

PRUDENTIAL PROPERTY & CASUALTY
INSURANCE CO., ET. AL.,

Defendants-Appellees

and

AMERICAN INTERNATIONAL
SPECIALTY LINES INSURANCE
COMPANY,

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John F. Boggins, J.

Case No. CT2002-0036

OPINION

CHARACTER OF PROCEEDING:

Appeal from Muskingum County Common
Pleas Court, Case No. CC2000-0316

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

April 18, 2003

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Boggins, J.

{¶1} This is an appeal from a judgment entry of October 23, 2002 which amended an entry of September 26, 2002 which denied the motion of American International Specialty Lines Insurance Company's (AISL) motions to vacate a default judgment and leave to file its answer instanter.

{¶2} The Assignments of Error raised by this appeal are:

I.

{¶3} "THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR DEFAULT JUDGMENT."

II.

{¶4} "THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT, AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY'S MOTION TO VACATE DEFAULT JUDGMENT."

III.

{¶5} "THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT, AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY'S MOTION FOR LEAVE TO FILE ANSWER INSTANTER."

I.

{¶6} We shall address each of the Assignments of Error simultaneously as they are interrelated as to the ultimate issue.

{¶7} This case involved a declaratory judgment filed by appellee, Cheryl L. Kebler, individually as an Administratrix of the Estate of Jamie L. Kebler, whose death resulted from an auto accident on July 19, 1997.

{¶8} The action was initially filed on April 4, 2000 against Prudential Property and Casualty Insurance Company and sought a determination under the Ohio Supreme Court's ruling in the *Scott-Pontzer* case and its progeny.

{¶9} On February 5, 2002 an amended complaint, again seeking declaratory judgment as to coverage was filed. Several additional insurance companies were joined, due to various policies, including appellant.

{¶10} The address listed for the appellant on the complaint and summons was:

{¶11} "Harborside Financial Center

{¶12} "401 Plaza 3

{¶13} "Jersey City, New Jersey 07311"

{¶14} Service was returned as undeliverable at such address and unable to forward.

{¶15} Subsequently, appellee Kebler reissued service to appellant at:

{¶16} "Harborside Financial Center

{¶17} "70 Pine St.

{¶18} "New York, New York 10270"

{¶19} While service was signed for at such address, "Harborside Financial Center" still remained as part of the address and, it was forwarded to its New Jersey location, which was not the address of appellant. Ultimately, such amended complaint and summons reached the representative of appellant in New York, but after answer day, if service was considered effected when signed for at the Pine Street address.

{¶20} The affidavits in support of appellants motion to vacate default judgment indicated that voice mail contact indicating representation was made to appellee's

counsel on April 12, 2002 and verbal contact on April 16, 2002 but that later on April 16, 2002 appellee' Kebler's counsel filed a motion for default judgment without informing the trial court of representation notification.

{¶21} The transcript of the hearing does not indicate that a discrepancy exists as to these facts.

{¶22} As to service of process, the question has been raised as to whether such has taken place. The statement of facts in this appeal states that it reached the desk of the appropriate representative of appellant after the answer date had run. We do not have the date when receipt by such representative was effected. Also, we do not know the address of the representative referenced.

{¶23} It is clear that appellee Kebler was aware that the Harborside Financial Center was in New Jersey and that service could not be made at such location. Such appellee continued, however, to include such incorrect location on the reissuance of its service and, thereby, contributed to the delay in service.

{¶24} Another issue raised by appellant is that service was not attempted at the address for service listed in its policy. First, the policy states that service *may* be made at such address and second, the rules as to service in Civ. R. 4 take precedence over such policy designation.

{¶25} The next aspect to consider is the effect of lack of the seven day notification period contained in Civ. R. 55(A).

{¶26} Such Rule provides:

{¶27} "(A) Entry of judgment

{¶28} “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; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. 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.

{¶29} “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 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.

{¶30} “(B) Setting aside default judgment

{¶31} “If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B).

{¶32} “(C) Plaintiffs, counterclaimants, cross-claimants

{¶33} “The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(C).

{¶34} “(D) Judgment against this state

{¶35} “No judgment by default shall be entered against this state, a political subdivision, or officer in his representative capacity or agency of either unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”

{¶36} Clearly, appellee Kebler’s counsel had notice of representation prior to filing of the motion. *Miamisburg Motel v. Huntington National Bank* (1993), 88 Ohio App.3d 117, *Baines v. Harwood* (1993), 87 Ohio App.3d 345. While professional courtesy, which seems to be often absent, may not have required appellant’s counsel to be notified that a default motion was forthcoming, the trial court was entitled to such information.

{¶37} Therefore, as to Civ. R. 55(A), the motion for and resulting default judgment was premature, rendering the latter invalid.

{¶38} The next two aspects to consider are first, the basis of the judgment in default under the pleadings granted by the trial court and, in addition, whether the granting of such judgment was an abuse of discretion.

{¶39} As to the former, appellee Kebler, in her amended complaint has asked the court to declare coverage to the extent of the various policy limits and for monetary damages.

{¶40} As the determination of coverage under a policy is a matter of law, *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241,.there is a serious question, which we do not necessarily need to address, as to whether a responsive pleading is necessary in a declaratory judgment action. Since the court must determine as a matter of law that, under a respective policy, coverage exists, the mere fact that a party asserts coverage would not create such as this is not a factual but a legal

determination.

{¶41} Here, the trial court, by its default entry recites the failure to timely respond as the sole basis for the judgment and does not make or address the legal issues of coverage, as a matter of law under the policy, and to that extent the default judgment is erroneous.

{¶42} Appellant claims the trial court in denying its motion to vacate default judgment pursuant to Civ. R. 60(B) was erroneous because a valid defense to the default judgment and excusable neglect were established.

{¶43} A motion for relief from judgment under Civ R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Appellant based its Civ. R. 60(B) motion on "mistake, inadvertence, surprise, or excusable neglect." Civ. R. 60(B)(1). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶44} "To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within reasonable time, and, where grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken."

{¶45} On its face, this Court, having experienced the various twists and turns to *Scott Pontzer* cases, finds appellant may have “a meritorious defense or claim to present if relief is granted.” See, *Cox v. State Farm Fire and Casualty Co.*, Licking App. No. 2001CA00117, 2002-Ohio-3076, *Dalton, et al. v. The Travelers Insurance Company*, Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407 and 2001CA00409, 2002-Ohio-7369. We find the first prong of *GTE Automatic*, supra, to be satisfied.

{¶46} In *Colley v. Bazell* (1980), 64 Ohio St.2d 243, we are cautioned by the Supreme Court of Ohio that excusable neglect depends on the facts and circumstances of each case.

{¶47} In *Colley*, supra, at 248, the Supreme Court of Ohio set the tone for trial courts in dealing with Civ. R. 60(B) motions as follows:

{¶48} “In our view, the concept of ‘excusable neglect’ must be construed in keeping with the proposition that Civ. R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ. R. 60(B) constitutes an attempt to ‘strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.’ 11 Wright & Miller, Federal Practice & Procedures 140, Section 2851, quoted in *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12.”

{¶49} A denial of a Civ. R. 60(B) motion serves justice when there has been an intentional disregard for the legal process and a lack of good faith by the neglectful party. Neither has occurred in this case. Appellant acted in a timely fashion to address the complaint, but the notice was misdirected due in part to the fault of appellee Kebler and a timely filing was forestalled.

{¶50} Under the facts of this case, we fail to find an intentional act or a showing of bad faith even though a specific procedure for processing summons was found not to have been established. Further, although we need not get into the particulars of the declaratory judgment action, there can hardly be any showing of prejudice to appellee. There is also no showing of prejudice to the trial court. This case involves multiple parties with numerous policies all in dispute under the theory of *Scott-Pontzer*. The trial court will have to review the coverage's amid the complications thereto.

{¶51} Upon review, we find the trial court erred in denying appellant's motion to vacate default judgment pursuant to Civ. R. 60(B).

{¶52} We therefore sustain each of the Assignments of Error, reverse the judgment of the trial court in denying appellant's motion and remand this cause for further proceedings in accordance herewith.

By: Boggins, J. and

Farmer, J, concur.

Hoffman, P.J. concurs in judgment only.

Hoffman, P.J., concurring in part and dissenting in part

{¶53} I concur in the majority's disposition of appellant's appeal only because the delay in timely responding to appellee's complaint was partly due to confusion in the way appellee addressed the envelope containing the complaint.

{¶54} I disagree with the remainder of the conclusions reach by the majority and specifically disagree with the majority's reference to the *Scott-Pontzer* decision as "infamous."

JUDGE WILLIAM B. HOFFMAN