

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COLUMBIA GAS OF OHIO, INC.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 0095
BRIAN BACIN, et al.	:	
	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas, Case No. 09-CV-54 H

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: May 28, 2010

APPEARANCES:

For Plaintiff-Appellant:

For Defendant-Appellee:

JAMES R. BERENDSEN
Huntington Center, Suite 2200
41 S. High St.
Columbus, OH 43215

Delaney, J.

{¶1} Plaintiff-Appellant, Columbia Gas of Ohio, Inc. appeals the June 30, 2009 judgment entry of the Richland County Court of Common Pleas.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant filed a complaint against Defendant-Appellee, Brian Bacin on January 12, 2009 with the Richland County Court of Common Pleas. Within this complaint, Appellant sought to enforce its judgment against Bacin in Richland County Court of Common Pleas Case No. 08 CV 1804 for \$109,120.34. Appellant brought claims for unjust enrichment, money damages, and sought injunctive relief. The complaint was served by certified mail to Bacin. Bacin did not file an answer.

{¶3} On March 26, 2009, Appellant filed its First Amended Complaint. In the amended complaint, Appellant named Brian Bacin, individually, and DMP Mfg., Inc. as defendants, seeking money damages of \$109,120.34, plus interests and costs. The amended complaint stated in part, “Defendant, Brian Bacin, the apparent sole shareholder of DMP, at certain times did, inter alia, either comingle his personal resources and/or held himself out to creditors to be operating akin to a sole proprietorship with regard to operations of the business at the property.” Appellant further alleged Defendants fraudulently converted or transferred income or resources received in the operation of the business for Defendants’ own benefit.

{¶4} Brian Bacin and DMP Mfg., Inc. were served with the First Amended Complaint. Neither Defendant filed an answer or responsive pleading.

{¶5} On June 16, 2009, Appellant filed a Motion for Default Judgment with Supporting Affidavit, seeking a judgment, jointly and severally, against Brian Bacin and DMP Mfg., Inc. in the amount of \$109,120.34 and tariff late charges of \$13,080.

{¶6} The trial court issued its judgment entry on June 30, 2009. In its entry, the trial court granted Appellant's motion for default judgment against DMP Mfg., Inc. for \$109,120.34.¹ As to Defendant, Brian Bacin, the trial court stated as follows:

{¶7} "The Court hereby finds that the defendant Brian Bacin, individually, is in no way responsible for the business debts of DMP Mfg., Inc. and plaintiff's complaint in so far as it seeks judgment against Brian Bacin personally is hereby dismissed with prejudice."

{¶8} It is from this judgment Appellant now appeals.

ASSIGNMENT OF ERROR

{¶9} Appellant raises one Assignment of Error:

{¶10} "IT WAS ERROR BY THE TRIAL COURT TO DISMISS THE DEFENDANT, BRIAN BACIN, WITH PREJUDICE."

{¶11} Appellant argues that the trial court erred when it denied its motion for default judgment against Defendant, Brian Bacin and further dismissed Bacin as a defendant, with prejudice. We agree.

¹ The trial court also denied the late charges requested by Appellant, finding the late charges were "onerous and unacceptable during the economic circumstance extant in Richland County, Ohio and such late charges would be unfair to DMP Mfg., Inc. which company has done nothing to bring about such economic circumstances." Appellant does not raise this issue as part of their appeal because the trial court granted Appellant interest on the judgment at the statutory rate.

{¶12} The trial court's dismissal of Bacin as a party to the action when ruling on a motion for default judgment where the defendant has not appeared raises two procedural matters for consideration: (1) the trial court's conversion of the default judgment motion to a Civ.R. 12(B)(6) motion and (2) the application of Civ.R. 8(D) to a default judgment motion.

{¶13} As stated above, neither Defendant has appeared in this action.² After Defendants' failed to appear after being served with the First Amended Complaint, Appellant filed its default judgment motion pursuant to Civ.R. 55(A). Civ.R. 55(A) states in pertinent part:

{¶14} ““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 * * * 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.”

{¶15} We review a trial court's decision concerning a default judgment under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. In order to find an abuse of 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, 219, 450 N.E.2d 1140.

² Nor has either Defendant filed a responsive brief to this appeal.

{¶16} In this case, the trial court sua sponte dismissed Bacin as a defendant, with prejudice. It has been held that a trial court may dismiss a complaint on its own motion pursuant to Civ.R. 12(B)(6) only after the parties are given notice of the court's intention to dismiss and an opportunity to respond. *MBNA America Bank, N.A. v. Canfora*, 9th Dist. No. 23588, 2007-Ohio-4137, ¶7. A sua sponte dismissal without notice to the plaintiff can be prejudicial as it denies the plaintiff any opportunity to respond to the alleged insufficiencies. *Id.* citing *McMullian v. Borean*, 6th Dist. No. OT-05-017, 2006-Ohio-861, ¶16. The exception to the notice provision, however, is if the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint. *State ex rel. Pullins v. Eyster*, 5th Dist. No. 2009-CA-09, 2009-Ohio-2846, ¶8.

{¶17} A review of the record shows there was no notice to the parties that the trial court intended to dismiss Bacin as a party to the action. We therefore must determine whether Appellant's claims against Bacin were frivolous or they obviously could not prevail on the facts alleged.

{¶18} In order for the trial court to grant a motion to dismiss for failure to state a claim under Civ.R. 12(B)(6), it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753, citing *Conley v. Gibson* (1957), 335 U.S. 41, 45-56. When a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981.

{¶19} Interrelated to the trial court's standard for reviewing a Civ.R. 12(B)(6) motion is the application of Civ.R. 8(D) when considering a motion for default judgment. Civ.R. 8(D) provides that "averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." The First District Court of Appeals has summarized that "if a party fails to deny the specific allegations of a complaint against it, those allegations are considered admitted by the party." *Burdge v. On Guard Security Services, Inc.*, 1st Dist. No. C-050522, 2006-Ohio-2092, ¶7. "The effect of an admission of an allegation is that the plaintiff does not have to prove the allegation." *Id.*

{¶20} Appellant's First Amended Complaint sought to pierce the corporate veil with respect to DMP Mfg., Inc. to hold Bacin personally liable for the amount owed to Appellant. Appellant's First Amended Complaint also alleged that Bacin engaged in fraudulent transfers to avoid the debt obligations. We find Appellant's amended complaint alleged conduct by Defendants that required a responsive pleading. Because Defendants did not file a responsive pleading denying the allegations, the trial court, under Civ.R. 8(D), should have construed the allegations as admitted. *Id.* at ¶8. Related to Civ.R. 12(B)(6), the trial court must accept the factual allegations in the amended complaint as true and make every reasonable inference in favor of Appellant.

{¶21} The trial court in its judgment entry made the factual determination that Bacin was in no way responsible for the business debts of DMP Mfg., Inc. Applying the confines of Civ.R. 12(B)(6) and Civ.R. 8(D) to Appellant's motion for default judgment

based upon Defendant's failure to answer Appellant's First Amended Complaint, we find that Appellant stated a claim upon which relief could be granted and the trial court's dismissal of Bacin, with prejudice, was improper.

{¶22} Because Appellant stated a claim upon which relief could be granted, we also find the trial court abused its discretion in denying Appellant's motion for default judgment as to Bacin on the grounds set forth in its judgment entry.

{¶23} Accordingly, Appellant's sole Assignment of Error is sustained.

{¶24} The judgment of the Richland County Court of Common Pleas is reversed and remanded for proceedings consistent with this opinion.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

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IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COLUMBIA GAS OF OHIO, INC.	:	
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Plaintiff-Appellant	:	
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-vs-	:	JUDGMENT ENTRY
	:	
BRIAN BACIN, et al.	:	
	:	
	:	Case No. 2009 CA 0095
Defendants-Appellees	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and remanded. Costs assessed to Appellees.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE