

[Cite as *Orr v. Hays*, 2002-Ohio-7441.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DENNIS P. ORR,	)	
	)	CASE NO. 02 CA 27
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
LEVON HAYS,	)	
JACQUELYNE HAYS,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from County Court, Area #5, Mahoning County, Ohio, Case No. 01 CVG 187.
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JUDGMENT:	Affirmed.
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APPEARANCES:	
For Plaintiff-Appellee:	Attorney Matthew C. Giannini 1040 South Commons Place Suite 200 Youngstown, OH 44514

For Defendants-Appellants:	Levon Hays, Pro-se Jacquelyne Hays, Pro-se 123 College Lane Poland, OH 44514
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JUDGES:
Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 17, 2002

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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Defendants-Appellants, Levon and Jacquelyne Hays, filed a pro se appeal from the decision of County Court, Area #5, Mahoning County, Ohio, granting judgment in favor of Plaintiff-Appellee, Dennis Orr. We are asked to reverse the trial court's decision because the Hays had evidence they would like this court to look at in order for us to overturn the trial court's decision. Although we note the trial court improperly captioned its decision a default judgment, we must affirm its decision as the Hays have failed to provide this court with a transcript. This court is a court of record and may not consider evidence not in the record. Further, a review of the record does not show any obvious errors by the trial court. Thus, we must affirm the trial court's decision.

{¶2} Orr filed a complaint in forcible entry and detainer against the Hays which contained two causes of action, one for eviction and the other for restitution. In that complaint, Orr sought to evict the Hays from a house they rented from Orr because, among other things, they had failed to pay their rent. The Hays were served with that complaint and appeared at a hearing relating to the eviction. However the trial court continued the second cause of action. Orr then moved the court for a hearing on the restitution cause of action. That motion was granted. The matter was set for a hearing, and the Hays were notified of that hearing. The trial court's judgment entry, although captioned as a default judgment, provided in pertinent part: "The Defendant failed to appear although duly notified according to Ohio law. The Plaintiff presented evidence. The Court grants judgment for the Plaintiff, against the Defendant * * *."

{¶3} Before addressing the arguments in the Hays' brief, we must first address the issues raised in Orr's responsive brief and motion to dismiss this appeal. Orr asks this court to dismiss the Hays' appeal for two reasons: their failure to properly file and serve a timely notice of appeal and their failure to provide this court with a proper record of the proceedings in the trial court. However, the record demonstrates Orr's arguments are groundless and we will not dismiss this appeal.

{¶4} If a party does not file a notice of appeal in accordance with the Appellate

Rules, then an appellate court does not have jurisdiction to hear that appeal. App.R. 3(A); *State v. Bassham* (2002), 94 Ohio St.3d 269, 272, 762 N.E.2d 963. Orr apparently believes the Hays' brief to this court is the filing the Hays intended to act as their notice of appeal and, thus, argues it fails to comply with the Appellate Rules. However, the record before this court contains a notice of appeal. That notice of appeal was timely as it was filed on January 25, 2002, within thirty days of the day the judgment entry was filed, December 28, 2001. See App.R. 4(A).

{¶15} In addition, the notice filed in this case contains most of the information required in App.R. 3(D). It contains the parties' names, designates the judgment appealed from, and names the court to which the appeal is taken. The only thing missing from the notice of appeal is a proper designation of the appellant and appellee. We will not dismiss this pro se appeal on this basis. It is obvious from the notice of appeal that the pro se parties filing the notice, the Hays, are the appellants and that the only other party to the case, Orr, is the appellee.

{¶16} Orr also asks this court dismiss this appeal because the Hays' notice of appeal was not timely served. App.R. 3(E) requires the clerk serve notice of the filing of a notice of appeal upon each party other than the appellant. However, a clerk's failure to do so "shall not affect the validity of the appeal." App.R. 3(E). Orr claims he did not receive notice of the appeal until he received a copy of the Hays' brief. However, the instructions and certification of service asked the clerk to serve a copy of the notice of appeal upon Orr's counsel. Thus, Orr's claim that he did not receive notice of the appeal is not reflected in the record. In addition, the clerk's alleged mistake does not affect the validity of the appeal. Thus, we will not dismiss the appeal on this basis.

{¶17} Finally, Orr argues the Hays have failed to provide this court with a record of the trial court's proceedings in accordance with the Appellate Rules and, thus, this case should be dismissed. However, the record was prepared and filed on February 5, 2002, eleven days after the Hays filed their notice of appeal. Thus, Orr's final argument is meritless and we will not dismiss this appeal.

{¶18} When disposing of this case, the trial court captioned its judgment entry as

a default judgment. A trial court's decision to grant default judgment is governed by Civ.R. 55. Default is a clearly defined concept and default judgment may only be entered when the defendant has failed to timely plead or otherwise defend in response to an affirmative pleading. *State ex rel. Thomas v. Ghee* (1998), 81 Ohio St.3d 191, 193, 690 N.E.2d 6; *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 121, 28 OBR 216, 502 N.E.2d 599. Once the defendant has begun to contest the allegations raised in the complaint, it is improper to render a default judgment against that defendant. *Ohio Valley* at 121.

{¶9} Furthermore, if a defendant has made an appearance in the case, then a trial court may not grant default judgment unless the defendant has been served with written notice of the motion for default judgment at least seven days before the hearing on that motion. *Ohio Valley* at 120; Civ.R. 55(A). For the purposes of default judgment, a defendant appears in a case even when the defendant's filings are subsequent to a plaintiff's motion for default. *Hartmann v. Ohio Crime Victims Reparations Fund* (2000), 138 Ohio App.3d 235, 238, 741 N.E.2d 149. "Without the requisite notice and hearing under Civ.R. 55(A), a default judgment is void and shall be vacated upon appeal." *Id.*

{¶10} In this case, the Hays appeared at the first hearing related to the eviction. It appears from the trial court's judgment entry that they contested the eviction. Therefore, it would be improper for the trial court to render default judgment for Orr. Even if the Hays did not contest the eviction at the first hearing, that would qualify as an appearance in the case. Further, the record demonstrates Orr never filed a motion for default judgment nor were the Hays served with notice of a default hearing. For these reasons, the trial court could not have granted default judgment.

{¶11} Merely because it would be improper to grant default judgment does not mean we must reverse the trial court's decision. The label or title a trial court puts on a judgment entry does not define the nature of the judgment entry. *St. Vincent Charity Hosp. v. Mintz* (1987), 33 Ohio St.3d 121, 123, 515 N.E.2d 917. Appellate courts look to the content of a document in order to determine its nature. See *Id.*; *Millies v. Millies* (1976), 47 Ohio St.2d 43, 1 O.O.3d 26, 350 N.E.2d 675; *In re Simmons* (Mar. 8, 2001),

7th Dist. No. 99 BA 53; see also *Hrina v. Segall* (June 6, 2001), 7th Dist. No. 00 CA 87 (Where trial court labels judgment as default but took proof on the merits of the claim, then judgment should properly be characterized as a judgment on the merits).

{¶12} Here, the trial court's judgment entry states the Hays failed to appear and Orr presented evidence. When a defending party fails to show for trial, the proper action for a court to take is to require the party seeking relief to proceed ex parte in the opponent's absence. *Ohio Valley* at 122-123. An ex parte trial is different than default because it is a true trial and a judgment based upon an ex parte trial is a judgment after trial pursuant to Civ.R. 58 rather than a default judgment under Civ.R. 55. *Id.* "Because Civ.R. 55 is by its terms inapplicable to ex parte proceedings, the notice requirement of Civ.R. 55(A) was not applicable to the proceedings below in this case." *Id.* at 122.

{¶13} We cannot review whether the trial court properly granted judgment after the ex parte trial because the Hays have failed to provide us with a transcript of those proceedings. The Hays, as the parties asserting an error in the trial court, bear the burden of demonstrating error by reference to matters made part of the record in the court of appeals and it is their duty to provide us with an adequate transcript. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 15 O.O.3d 218, 400 N.E.2d 384; App.R. 9(B). The procedure for filing an adequate transcript or a suitable alternative are found in App.R. 9. In the absence of an adequate transcript, we must presume the regularity of the trial court proceedings and the presence of sufficient evidence to support the trial court's decision. *Id.*

{¶14} Additionally, in their brief the Hays present their side of the dispute and ask us to consider additional evidence not found in the record. It is a fundamental principle of appellate review that an appellate court is limited to considering the evidence found within the record transmitted to it on appeal. App.R. 9(A); *State v. Callihan* (1992), 80 Ohio App.3d 184, 197, 608 N.E.2d 1136. We are simply not allowed to add matter to the record before it that was not a part of the trial court's proceedings and then decide the appeal on the basis of the new evidence. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500. Thus, we cannot consider any of the information contained

in the Hays' brief that does not appear in the record transmitted from the trial court. Furthermore, the record before us does not show the trial court made any obvious error.

{¶15} We realize the Hays are proceeding before this court pro se, but pro se litigants are bound by the same rules and procedures as litigants who retain counsel. *State ex rel. Montgomery v. Maginn* (2002), 147 Ohio App.3d 420, 426, 770 N.E.2d 1099.

This court does make some allowances for pro se litigants, such as in the form and content of their briefs. *Mahone v. Moore* (Dec. 31, 2001), 7th Dist. No. 854. This is demonstrated by the fact we have not dismissed their appeal without dealing with its merits. However, we do not have the authority or power to consider things that are not in the record before us. The argument the Hays presented to this court should have been made to the trial court, which apparently the Hays chose not to do. They received notice of the trial and did not appear.

{¶16} For the foregoing reasons, the decision of the trial court is affirmed.

Judgment affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs. See concurring opinion.

WAITE, J., concurring:

{¶17} While I agree with the result the majority reaches in this case, I believe some further explanation of the laws which govern this matter is necessary given the irregularities apparent on the record. Since the validity of default judgments depend on the fulfillment of certain conditions precedent, some discussion of those requirements and their potential implications to this case is warranted.

{¶18} Default judgments are governed by Civ.R. 55. That rule limits the entry of a default to cases where the party against whom a judgment is sought has failed to appear, plead or otherwise defend against the allegations in the complaint. *Fontanella v. Ambrosio*, 11th Dist. No. 2001-T-0033, 2002-Ohio-3144; citing, *Ohio Valley Radiology Assoc. v. Ohio Valley Hospital* (1986), 28 Ohio St.3d 118, 121, 502 N.E. 2d 599. In general, such a failure is treated as an admission of the basis of the complaint. See, Civ.R. 8(D); *X-Technology v. MJ Technologies*, 8th Dist. No. 80126, 2002-Ohio-2259. Accordingly, default judgments are typically reserved for uncontested cases. *Id.*

{¶19} Rule 55(A) further provides that:

{¶20} “* * * 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 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.” (Emphasis added.)

{¶21} Civ.R. 55(A) does not define the phrase: “otherwise defend.” Other courts interpreting that term have concluded that it, “refers to attacks on the service, or motions to dismiss, or for better particulars.” *Miles v. Horizon Homes* (Oct. 17, 1991), 8th Dist. No. 61379; quoting, *Williams v. Cleveland* (Dec. 14, 1989), 8th Dist. No. 56408. Under the circumstances, any conduct by the defendant subsequent to the filing of plaintiff’s complaint; whether it involves the failure to provide discovery, appear, or comply with court orders, cannot form the basis of a default judgment when we consider the term “otherwise defend” as contemplated by Civ.R. 55(A). *Id.*

{¶22} Based on these limitations, then, a default judgment would be invalid in this case unless the record demonstrated that Appellants failed to appear, answer the complaint or otherwise defend against it and the record reflected that Appellants were properly notified of a hearing on Appellee’s application for default.

{¶23} As the majority accurately points out, however, it is difficult to ascertain what transpired in the trial court because the record Appellants have submitted is so inadequate.

{¶24} The record does establish, that on July 10, 2001, Appellee instituted a cause of action alleging that Appellants agreed to rent certain property and thereafter failed to pay rent on the property. Appellee sought: (1) to evict Appellants from the

premises and, (2) to recover back rent he claimed Appellants owed on the property. Appellants received personal service of the complaint and a summons on July 28, 2001. On August 3, 2001, the parties appeared in court. No transcript was submitted to this Court memorializing the nature of the testimony taken or what otherwise transpired during the August 3, 2001 proceeding. The docket sheet, however, reflects the following entry:

{¶25} “CASE CALLED ON FIRST CAUSE OF ACTION. PLTFF APPEARED IN COURT. SWORN TESTIMONY TAKEN. DEFENDANT APPEARED. WRIT OF RESTITUION IN 10 DAYS. CONTINUED SECOND CAUSE OF ACTION: SDH.”

{¶26} Based on the entry quoted above, we can conclude that Appellants appeared as that term is contemplated by Civ.R. 55(A). The court’s notes further indicate that while Appellants may not have filed a written answer to the complaint, a contested hearing of some kind took place on August 3, 2001. Therefore, it is reasonable to presume that Appellants, at least orally, took that opportunity to, “answer or otherwise defend,” as contemplated by Civ.R. 55(A).

{¶27} Documents in the record indicate that at the conclusion of the hearing, the trial court granted Appellee’s request to evict Appellants from the property and deferred the issue of damages to a later date. On November 5, 2001, Appellee filed a motion requesting a hearing on the second count of his complaint as to damages. The record also includes an order from the municipal court setting the matter for a “Second Cause Hearing” on December 28, 2001. (Notice of Hearing, Nov. 9, 2001). Appellants did not appear in court on the date set and the trial court entered a default judgment against them in the amount of \$2,410 plus costs. (Judgment Entry, Dec. 28, 2001). We must

note that our review raises questions as to whether Appellants were properly notified of either the motion asking the court to set the matter for a hearing or the order doing so. The addresses to which those pleadings were apparently sent are inconsistent. Because, however, Appellants have not challenged the judgment on notice grounds at any point, this Court may not properly review the matter.

{¶28} Since Appellants have submitted no transcripts documenting what occurred in the trial court, we have no choice other than to presume that Appellants appeared in court and defended against the allegations in Appellee's complaint. *Korusechak v. Smotrilla*, 7th Dist. No. 99 CA 320, 2001-Ohio-3326 at P2; quoting, *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. See, also, *Allison v. Daniels*, 7th Dist. No. 01 CA 86, 2002-Ohio-5027, at P67.

{¶29} In light of the limitations on default judgments in Civ.R. 55(A), this case could not have been properly resolved by way of a default judgment for two reasons. First, because Appellants did appear, Appellee could only secure a default judgment if he notified them of his intent to seek default at least seven days prior to doing so. Second, the rule explicitly prohibits a default judgment where the party defending against a cause of action answers or undertakes to defend against the complaint.

{¶30} Having reached this conclusion, I am nevertheless of the opinion that the trial court should be affirmed. The entry memorializing the trial court's judgment in Appellee's favor, while called a "default" judgment, reflects that the trial court issued the order after taking sworn testimony, presumably from Appellee, who was present. This Court has found that when a trial court takes proof in the absence of the defendant and

decides to enter judgment on the merits in favor of the plaintiff, the judgment is not a default; rather it is a judgment on the merits in favor of the plaintiff. *Hrina v. Segall* (June 6, 2001), 7th Dist. No. 00 C.A. 87, 2001-Ohio-3281. Accordingly, given the record, this court must find that the December 28, 2001, proceeding was a hearing on the merits of Appellee's damage claim and that Appellee apparently presented prima facie evidence to support this claim. See *Disciplinary Counsel v. Jackson* (1998), 81 Ohio St.3d 308, 311, 691 N.E.2d 262. Any judgment rendered from this hearing was properly issued on the merits.

{¶31} It is Appellants' burden to submit to the court of review a record of the facts and findings providing the basis for their appeal. *Wray v. Parsson* (1995), 101 Ohio App.3d 514, 518, 655 N.E.2d 1365; App.R. 9. Such a record necessarily includes a complete transcript of the relevant proceedings below. In the absence of such transcripts, this court must assume the correctness of the proceedings in the lower court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St. 2d 197, 199, 400 N.E.2d 384. Notwithstanding the allegations Appellants have leveled in their brief, lacking anything in the record to substantiate their claims or otherwise impugn such a presumption, I agree that this court must affirm the judgment entered by the trial court.