[Cite as *State Farm Ins. Co. v. Valentino* , 2003-Ohio-3487.]

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

STATE FARM INSURANCE COMPANY, ET AL.,	)	
PLAINTIFFS-APPELLEES,	)	CASE NO. 02-CA-119
VS.	)	OPINION
JOHN E. VALENTINO D.B.A. J&V ROOFING,	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Youngstown Municipal Court Case No. 01CVE1022
JUDGMENT:	Reversed and remanded
APPEARANCES:	
For Plaintiffs-Appellees:	(no brief filed)
For Defendant-Appellant:	Attorney Donald P. Leone 24 West Boardman Street Youngstown, Ohio 44503

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite

Hon. Mary DeGenaro

Dated: June 27, 2003

DONOFRIO, J.

{¶1} Defendant-appellant, John Valentino d.b.a. J&V Roofing, appeals from a decision of the Youngstown Municipal Court denying his Civ.R. 60(B) motion to vacate a default judgment previously entered against him in favor of plaintiffs-appellees, State Farm Insurance Company ("State Farm") and Louis Csizmadia.

{¶2} Appellees filed a complaint against appellant on March 5, 2001. Appellant states that he was served with the complaint on March 9, 2001. The complaint asserted claims for negligence and breach of contract resulting from work appellant performed at Csizmadia's house.

{¶3} Appellant filed an answer on April 19, 2001. On July 6, 2001, appellees filed a motion to strike appellant's answer as being untimely filed. Appellant alleges he never received appellees' motion. However, the motion filed with the court contains an appropriate certificate of service indicating that it was served upon appellant's counsel by regular mail on July 5, 2001. On August 24, 2001, the trial court granted appellees' motion and struck appellant's answer for being untimely filed. Appellant alleges he never received this judgment entry. No indication exists on the judgment entry that the court sent copies to appellant or appellees.

{¶4} On September 26, 2001, appellees filed a motion for default judgment asserting that appellant had failed to plead or otherwise defend against appellees' complaint. Appellant alleges appellees never served him with a copy of this motion. This motion does not contain a certificate of service. That same day, the trial court entered default judgment against appellant for $4,397 plus costs and interest. Appellant alleges the court never sent him this judgment.

{¶5} On January 30, 2002, appellant filed a motion for relief from judgment. A hearing was held before a magistrate. The magistrate subsequently determined appellant failed to satisfy the Civ.R. 60(B) requirements and denied his motion to

vacate in a February 15, 2002 decision. On April 29, 2002, appellant filed objections to the magistrate's decision and requested findings of fact and conclusions of law. On May 9, 2002, the trial court denied appellant's request for findings of fact and conclusions of law because they were untimely filed and they were not supported by a transcript or affidavit as required by Civ.R. 53(E)(3)(b). The court then adopted the magistrate's decision as that of the court. Next, appellant filed a motion for a new trial, on which the court did not rule.

{¶6} Appellant filed his timely notice of appeal on June 7, 2002.

{¶7} At the outset, we should note that appellees have failed to file a brief in this matter. Therefore, we may accept appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action. App.R. 18(C).

{¶8} Appellant raises one assignment of error, which states:

{¶9} "THE TRIAL COURT ERRORED [sic.] IN NOT GRANTING DEFENDANT APPELLANTS [sic.] MOTION FOR NEW TRIAL PURSUANT TO OHIO CIVIL RULE 60(B) MOTION FOR NEW TRIAL."

{¶10} Appellant alleges in his assignment of error that the court erred in not granting him a new trial. However, he never had a trial. Therefore, the court could not grant him a "new" trial. Apparently, appellant is confusing his motion for a new trial with his motion for relief from judgment. Additionally, in his notice of appeal, appellant states that he is seeking review of the trial court's May 9th judgment, which is the judgment adopting the magistrate's decision.

{¶11} Appellant argues that the court erred in not granting his Civ.R. 60(B) motion. He alleges that at the hearing on his motion for relief from judgment, his attorney testified that he did not receive appellees' motion to strike his answer. Appellant also asserts that the trial court's docket shows no indication of the court sending a copy of its decision striking appellant's answer to appellant or his attorney. Appellant contends he testified that he has a meritorious defense to appellees' claim. He claims that he currently has a case pending against appellees to recover unpaid

money. Finally, appellant asserts the record is clear that appellees did not serve him with a copy of their motion for default judgment nor did the court send him a notice of the default judgment it entered against him. Appellant claims that he testified he filed his motion for relief from judgment as soon as he learned of the default judgment.

{¶12} Appellant cites several times in his brief to a transcript, presumably of the hearing before the magistrate on his Civ.R. 60(B) motion. However, appellant has failed to file a transcript with this court. It is the appellant's duty to transmit the record on appeal, including the transcript necessary for the determination of the appeal. App.R. 10(A). "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. * * * When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. If no transcript is available, then it is appellant's duty to present this court with one of the transcript substitutes as provided for in App.R. 9(C).

{¶13} Since appellant failed to provide the court with a transcript or transcript substitute, our analysis is limited to the materials found in the record.

{¶14} An appellate court will not reverse a trial court's ruling on a Civ.R. 60(B) motion absent a showing of abuse of discretion. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146. The court stated:

{¶16} "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 is

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 a reasonable time, and, where the 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." Id. at paragraph two of the syllabus.

{¶17} Appellant met all three prongs of the GTE test, thus the trial court abused its discretion in denying the motion for relief from judgment.

{¶18} As to the first *GTE* requirement, although appellant states in his motion for relief from judgment that he has a meritorious defense to present, he does not specify what that defense might be. Alleging a meritorious defense in an answer can be sufficient to meet the first *GTE* requirement. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17. In his stricken answer, appellant asserts the defenses of "accord and satisfaction, settlement and failure to state a claim upon which relief can be granted, the Ohio Statute of Frauds, failure of consideration, breach of contract, contributory negligence and comparative negligence." If appellant can prove any of these defenses, he would have a meritorious defense to appellees' claim. Appellant is only required to allege a meritorious defense, he is not required to prove that he will prevail on that defense. *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 20. Furthermore, Civ.R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served. *Kay v. Marc Glassman, Inc*. (1996), 76 Ohio St.3d 18, 20; *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 249. Therefore, appellant met the first *GTE* requirement.

{¶19} As to the second *GTE* requirement, the grounds for relief listed in Civ.R. 60(B) are:

{¶20} "(1) [M]istake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable

that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶21} Appellant did not allege on what grounds he was entitled to relief. However, a review of the record demonstrates he was entitled to relief under the catch-all provision.

{¶22} Civ.R. 55(A) governs the entry of default judgments. It provides, in pertinent part:

{¶23} "* * * 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." Civ.R. 55(A).

{¶24} The plain meaning of the notice provision of Civ.R. 55(A) is that a court cannot enter default judgment against a defendant who has appeared in the action, unless at least seven days' notice is given to such defendant prior to the hearing on the application for default judgment. *Breeding v. Herberger* (1992), 81 Ohio App.3d 419, 422. If the defendant has not made an appearance, he is not entitled to seven days notice before the trial court enters default judgment. *Alliance Group, Inc. v. Rosefield* (1996), 115 Ohio App.3d 380, 389.

{¶25} If a party or his representative has appeared as a matter of record *in any manner*, the court must give the party the notice and hearing required by Civ.R. 55(A) before it can properly grant default judgment. *Hartmann v. Ohio State, Crime Victims Reparations Fund* (June 1, 2000), 10th Dist. Nos. 99AP-1034, 99AP-1041. "An appearance is ordinarily made when a party comes into court by some overt act of that party that submits a presentation to the court." *Alliance Group, Inc.*, 115 Ohio App.3d at 390. Without Civ.R. 55(A)'s requisite notice and hearing, the default judgment is void and shall be vacated upon appeal. *Hartmann*, 10th Dist. Nos. 99AP-1034, 99AP-1041.

{¶26} In the present case, appellant filed an answer, although untimely. Nonetheless, this untimely answer constituted an "appearance" for purposes of Civ.R.

55(A). "An untimely answer filed prior to court action on a motion for default judgment constitutes an appearance in the case sufficient to require notice to defendant of the hearing date on the default judgment." *Suki v. Blume* (1983), 9 Ohio App.3d 289, at paragraph three of the syllabus. Since appellant made an appearance in the case, he was entitled to seven days notice before a hearing on appellees' motion for default judgment. There is no indication on the record that appellant was provided with such notice. Appellees' motion for default judgment does not contain a certificate of service. Furthermore, appellees filed their motion on September 26, 2001. The trial court's default judgment against appellant is time-stamped on both September 26, 2001 and October 15, 2001. It states appellant failed to answer or otherwise defend against appellees' complaint. Whether the trial court entered default judgment on the day appellees filed the motion or waited until October 15th, we cannot escape the fact that the court never held a hearing or gave appellant the seven days notice required by Civ.R. 55(A). Therefore, the court could not enter default judgment against appellant. Thus, appellant met the second *GTE* requirement.

{¶27} While we are cognizant of the fact that appellant filed his objections over two months late, the late filing does not deprive this court from reviewing the trial court's judgment for plain error. An appellate court may review for plain error even where the appellant fails to file objections from a magistrate's decision. See *Champion v. Dunns Tire and Auto, Inc.*, 7th Dist. No. 00 CA 42, 2001-Ohio-3305, citing *Minich v. Burton* (July 21, 2000), 2d Dist. No. 99CA48, citing *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, 229. Notice of a default hearing must be given to a defendant who has made an appearance, and failure to notify the party before entry of a default judgment deprives the court of its authority to enter default judgment and constitutes plain error. *Scales v. George* (June 29, 2000), 10th Dist. No. 99AP-1264; *Amiri v. Thropp* (1992), 80 Ohio App.3d 44. "Without the requisite notice and hearing under Civ.R. 55(A), a default judgment is void and shall be vacated upon appeal." *Hartmann v. Ohio Crime Victims Reparations Fund* (2000), 138 Ohio App.3d 235, 238.

{¶28} As to the third *GTE* requirement, the trial court entered default judgment against appellant on September 26, 2001. Appellant filed his motion for relief from judgment on January 30, 2002, approximately four months later. Appellant does not allege in his motion for relief from judgment why he waited four months to request relief. In his objections to the magistrate's decision, appellant claims he testified that he filed the motion as soon as he learned of the judgment. The record supports appellant's contention that he did not learn of the default judgment immediately. Appellant's motion for default judgment does not contain a certificate of service. Additionally, the court's entry of default judgment makes no indication that it sent a copy of the judgment to appellant. Thus, appellant's motion was timely filed.

{¶29} Hence, the trial court's entry of default judgment is void since it never provided appellant with the requisite seven-day notice of a hearing on appellees' motion for default. Accordingly, appellant's assignment of error has merit.

{¶30} For the reasons stated above, the trial court's decision is hereby reversed and remanded for further proceedings according to law and consistent with this opinion.

Waite, J., concurs.
DeGenaro, J., dissents.

DeGenaro, J., dissenting,

{¶31} In this case, Appellant failed to timely object to the magistrate's decision and failed to provide both the trial court and this court with a transcript of the proceedings before the magistrate. When a party does not timely file objections to a magistrate's decision, the trial court may adopt the magistrate's decision if no error of law or other defect appears on the face of the decision. Furthermore, a party's failure to file a transcript or acceptable alternative when objecting to the magistrate's decision prevents both this court and the trial court from reviewing the magistrate's factual findings and forces us to presume the regularity of the proceedings.

{¶32} The majority's decision ignores the fact that the trial court could only review the magistrate's decision for apparent error and that our standard of review is similarly limited. In addition, when applying the facts in the record, the majority presumes the irregularity of the proceedings before the magistrate. I would conclude that Appellant failed to demonstrate that the proceedings leading to the default judgment against him were improper. Accordingly, I would affirm the trial court's decision.

{¶33} This appeal is from a trial court's adoption of a magistrate's decision. As such, our decision must be guided by Civ.R. 53. Civ.R. 53 provides that a trial court may refer matters to a magistrate for a decision. See. Civ.R. 53(C). After the magistrate enters its decision, a party has fourteen days to file objections to that decision. Civ.R. 53(E)(3)(a). "A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." Civ.R. 53(E)(3)(b). If a party does not file timely objections to the magistrate's decision, the court may adopt the magistrate's decision "unless it determines that there is an error of law or other defect on the face of the magistrate's decision." Civ.R. 53(E)(4)(a).

{¶34} As the majority points out, Appellant's objections to the magistrate's decision were filed two and a half months after the decision was entered. Opinion at ¶5. Because these untimely objections were not filed properly under Civ.R. 53, he has

waived all error except for errors apparent on the face of the magistrate's decision. *Champion v. Dunns Tire and Auto, Inc.* (June 26, 2001), 7th Dist. No. 00 CA 42, at 3; *Group One Realty, Inc. v. Dixie Internatl. Co.* (1998), 125 Ohio App.3d 767, 769.

{¶35} Furthermore, Civ.R. 53(E)(3)(b) provides that "[a]ny objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available." As the majority mentions, Appellant did not file a transcript or acceptable alternative with either the trial court or this court. Opinion at ¶5. Thus, as the majority states, we have "no choice but to presume the validity of the lower court's proceedings." Opinion at ¶12. Thus, the scope of our inquiry is not only limited to reviewing the trial court's decision for apparent error, but we must also presume the validity of the proceedings before the magistrate.

{¶36} As grounds for granting Civ.R. 60(B) relief, the majority cites the requirement of Civ.R. 55(A) that a party which has appeared in an action may not have default judgment granted against it without notice of a motion for default judgment at least seven days prior to the trial court's entry of default judgment. It then concludes, "There is no indication on the record that appellant was provided with such notice." Opinion at ¶26. Presumably, this conclusion is based on the fact that Appellees' motion did not contain a certificate of service. But this conclusion ignores the fact that the magistrate heard the matter. At that hearing, Appellees could have proven that it notified Appellant that it filed the motion for default judgment in any of a variety of manners. Because we must presume the regularity of the trial court proceedings, we must presume that the missing transcript or acceptable alternative contains evidence that Appellant received notice of the motion for default judgment.

{¶37} In addition to concluding that Appellant did not have notice of the motion for default judgment, the majority concludes the trial court violated Civ.R. 55(A) when it entered default judgment the day the motion for default was filed, even though Appellant had appeared in the action. But once again, this is presuming facts in favor of, rather than against, Appellant. Appellees' motion for default judgment was filed on

September 26, 2001. The trial court's judgment is file-stamped twice. The first file-stamp was also on September 26, 2001. But the second file-stamp is on October 15, 2001. The second file-stamp corresponds to the date the trial court wrote on the entry when it signed it. In addition, the trial court's docket reflects that it entered judgment on October 15, 2001. Finally, the judgment entry granting default judgment is in the same typeface and format as the motion for default judgment.

{¶38} It is not a stretch of the imagination to presume that Appellees filed a proposed judgment entry with its motion for default judgment and the proposed entry was accidentally file-stamped when the motion was submitted to the clerk. It is altogether possible that this issue was raised before the magistrate and that it heard evidence and resolved the matter in favor of Appellees by finding that the trial court's entry granting default judgment was filed on October 15, 2001, rather than September 26, 2001. But we cannot know this since Appellant did not provide us with a transcript or acceptable alternative of those proceedings. Thus, we must presume the regularity of the magistrate's decision. If the entry was filed on that later date, then the trial court waited much more than seven days for a response to the motion for default judgment from Appellant.

{¶39} Because we must presume the regularity of the proceedings before the magistrate, I cannot now say that the trial court violated Civ.R. 55(A) when it granted default judgment. Thus, I must conclude that the trial court did not commit apparent error when it concluded that Appellant did not demonstrate grounds for relief as required by Civ.R. 60(B) and *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146.

{¶40} Appellant's disregard for the Civil Rules cannot be ignored in this case. He filed his answer to Appellees' complaint late. He never responded to Appellees' motion for default judgment. He filed his Civ.R. 60(B) motion months after default judgment was granted. He filed his objections to the magistrate's decision late. He did not file a transcript or acceptable alternative of the proceedings before the magistrate with the trial court. These actions severely limit our review of the trial

court's decision and force us to presume the proceedings before the magistrate were correct. Accordingly, I would affirm the trial court's decision denying Appellant's motion.