

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Graham Knight, :
 :
Plaintiff-Appellee, :
 :
v. : No. 09AP-228
 : (C.P.C. No. 06CVH-5881)
Nutritional Sciences, L.L.C. et al., : (REGULAR CALENDAR)
 :
Defendants-Appellants. :

D E C I S I O N

Rendered on September 29, 2009

Ermel R. Luckett Jr., for appellee.

James L. Dye, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendants-appellants, Nutritional Sciences, L.L.C. ("Nutritional Sciences") and Rodney Zeune¹ (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas granting a default judgment and awarding damages in favor of plaintiff-appellee, Graham Knight ("appellee").

{¶2} The allegations underlying this matter stem from a contest sponsored by appellants. According to the complaint, appellee was notified he was the "Overall Runner Up" entitling him to \$50,000. When appellee went to collect his prize, however, appellants cited financial difficulties and, instead, offered him a \$10,000 prize. As a

¹ Rodney Zeune was the CEO of Nutritional Sciences, which is now defunct.

result, appellee filed a six-count complaint on May 3, 2006. Appellants filed an answer to the complaint on July 31, 2006. After various proceedings, including continuances, status conferences, and counsel's withdrawal, the matter was scheduled for a pretrial conference on July 28, 2008, and a trial on August 25, 2008. Appellants failed to appear at either scheduled event, and the trial court granted a default judgment in appellee's favor. The trial court's August 27, 2008 entry states:

Trial in the above-captioned action was scheduled for August 25, 2008. Plaintiff was present. Although defendant, Rodney Zeune, has appeared previously in this action, he failed to appear for the pre-trial conference and for trial. The Court notes that Zeune was properly notified of the pending dates, as they were set in his presence and pursuant to his agreement. The record further indicates that notices of the dates were sent to Zeune's address of record. Regardless, Zeune failed to appear. As such, the Court hereby enters default judgment against Zeune and Nutritional Sciences, LLC. The matter will be referred to a magistrate for a hearing on damages.

{¶3} On December 1, 2008, a magistrate rendered a decision awarding total damages of \$45,360. On December 15, 2008, appellants, through counsel, filed objections to the magistrate's decision. On February 5, 2009, the trial court overruled said objections and adopted the magistrate's decision, including the findings of fact and conclusions of law contained therein.

{¶4} This appeal followed, and appellants bring the following four assignments of error for our review:

1. THE TRIAL [COURT] ERRED IN ORDERING THE SANCTION OF DEFAULT JUDGMENT WITHOUT FIRST PROVIDING NOTICE OF ITS INTENTION TO DO SO.

2. THE TRIAL COURT ERRED TO THE DETRIMENT OF APPELLANT IN GRANTING DEFAULT JUDGMENT AND AWARDING DAMAGES AS THE CASE WAS RES

JUDICATA BASED ON THE HOLDINGS IN FRANKLIN COUNTY CASE # 05 CV 7702 AND THIS COURT'S DECISION IN 07 AP 989.

3. APPELLEE'S CLAIMS ARE BARRED AS THEY FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

4. APPELLEE'S [SIC] PRESENTED NO EVIDENCE UPON WHICH DAMAGES MIGHT BE AWARDED.

{¶5} In the first assignment of error, appellants contend the trial court erred in granting a default judgment without providing notice as required by Civ.R. 55(A). While we agree it was error for the trial court to have granted a default judgment in this instance, we do so for a different reason.

{¶6} In *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118 ("*Ohio Valley*"), the Supreme Court of Ohio reviewed default judgment requirements. In *Ohio Valley*, the underlying issues asserted in both the original complaint and counterclaim related to a contract dispute between the parties. Prior to trial, the defendants were granted summary judgment on the plaintiffs' claims. On the day of trial, the defendants appeared, but the plaintiffs did not. Therefore, the trial court proceeded with an ex parte trial on the defendants' counterclaims, and judgment on said counterclaims was entered for the defendants. The plaintiffs appealed the judgment. The appellate court reversed finding that the trial court's granting of a default judgment was in error because the plaintiffs had not been served with notice pursuant to Civ.R. 55(A).

{¶7} The Supreme Court of Ohio disagreed with the appellate court and found Civ.R. 55(A) was inapplicable to the trial court proceedings before it. Noting the defined concept of default judgments, the Supreme Court reiterated that a default judgment is a

judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. *Id.* at 121, citing *McCabe v. Tom* (1929), 35 Ohio App. 73. " '[A] default by a defendant * * * arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render a default judgment against the defendant as liability has been admitted or "confessed" by the omission of statements refuting the plaintiff's claims.' " *Id.*, quoting *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105.

{¶8} The Supreme Court reasoned that because a default judgment under Civ.R. 55(A) only applies to those uncontested cases where one party has failed to plead or otherwise defend, the notice requirements of Civ.R. 55(A) were generally held to be inapplicable in those cases where a defending party has pleaded but later fails to appear for a trial or pretrial conference. *Id.* The Supreme Court went on to state that "[t]he proper action for a court to take when a defending party who has pleaded fails to show for trial is to require the party seeking relief to proceed *ex parte* in the opponent's absence." *Id.* at 122. This requirement, that a party whose non-defending opponent fails to appear for trial must prove his case, "reflects the basic nature of the burden of proof requirements in our trial system." *Id.* Because in *Ohio Valley* the trial court did proceed with an *ex parte* trial, the notice requirements of Civ.R. 55 were inapplicable, and the Supreme Court upheld the trial court's judgment.

{¶9} Here, appellants filed an answer to appellee's complaint, thereby effectively contesting appellee's allegations by pleading. However, even though appellee appeared for trial and appellants did not, an *ex parte* trial did not occur. Instead, the trial court

granted a default judgment, with no prior notice of its intent to do so as a sanction² or otherwise, and proceeded to a hearing on damages only. By doing so, the trial court in effect wholly relieved appellee of his burden of providing affirmative proof of the essential elements of his claims. Thus, the trial court's judgment in favor of appellee where the matter was contested and the record is void of any proof of appellants' liability is in error. *Reese*, supra. See also *Carter v. Le*, 10th Dist. No. 05AP-173, 2005-Ohio-6209, ¶18 (noting the proper action for a court to take when a defendant who has filed an answer fails to appear for trial is to require the party seeking relief to proceed ex parte in the defendant's absence).

{¶10} In a similar case before this court, *Kemba Columbus Credit Union, Inc. v. Maddy* (Oct. 11, 1990), 10th Dist. No. 90AP-272, the trial court entered a default judgment in favor of a plaintiff because the defendants failed to appear for trial despite having previously filed an answer. In *Kemba*, this court found that granting a default judgment and proceeding to a hearing on damages only was in error, and that "the trial court in this instance should have proceeded with an ex parte trial on the merits." *Id.*; *Carr v. Green* (1992), 78 Ohio App.3d 487 (granting a default judgment due to the defendant's failure to appear at trial was improper because the defendant filed an answer and therefore a default was improper).

{¶11} Thus, to the extent appellants' first assignment of error argues the trial court erred in rendering a default judgment, we agree and, therefore, sustain appellants' first

² While a default judgment may be an appropriate sanction in some instances, there is still a notice requirement before such can be imposed. *Malaco Constr., Inc. v. Jones* (Aug. 24, 1995), 10th Dist. No. 94APE10-1466 (a default judgment as a sanction for violation of discovery orders requires prior notice); *Gunton Corp. v. Architectural Concepts*, 8th Dist. No. 89725, 2007-Ohio-6805 (proper notice required of intent to grant default judgment as a discovery sanction); *Tingley v. Rose*, 5th Dist. No. 03CA0022, 2004-Ohio-5003; *Baker v. Edmonds*, 2d Dist. No. 2002-CA-47, 2003-Ohio-1030.

assignment of error. Our disposition of appellants' first assignment of error renders the remaining assignments of error moot, and, accordingly, they are overruled as such.

{¶12} For the foregoing reasons, we sustain appellants' first assignment of error, overrule appellant's second, third and fourth assignments of error as moot, reverse the judgment of the Franklin County Court of Common Pleas, and remand the matter to that court for further proceedings in accordance with law and this decision.

Judgment reversed and cause remanded.

BRYANT and BROWN, JJ., concur.
