[Cite as *Schmidt v. Brower*, 2010-Ohio-4431.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

ERWIN M. SCHMIDT,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0014**
- vs -	:	
WILLIAM M. BROWER, III,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court, Western District, Case No. 09 CVI 798.

Judgment: Affirmed.

Erwin M. Schmidt, pro se, 1142 Tote Road, Rock Creek, OH 44084 (Appellee).

William M. Brower, *III*, pro se, 4890 Footville-Richmond Road, P.O. Box 328, Rock Creek, OH 44084 (Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William M. Brower III, appeals the money judgment of the Ashtabula County Court, Western District, in favor of appellee, Erwin M. Schmidt, and against Brower on Schmidt's small claims complaint. At issue is whether Brower waived his defense of corporate shield. For the reasons that follow, we affirm.

{¶2} Based on the exhibits attached to Schmidt's complaint, he is doing business as a sole proprietor under the name Scenic River Cabinetry. As such, he designs and builds cabinets for new and existing homes. On or about July 12, 2007,

Brower, a custom home and carpentry contractor, retained Schmidt to build custom cabinets for a project Brower was working on.

{¶3} After delivering the cabinets and submitting a bill for them, Brower failed to pay Schmidt's bill and he filed his small claims complaint. Schmidt alleged he was owed $2,302.50 for labor and $491.07 for materials, for a total of $2,793.57.

{¶4} Service of summons and notice of the trial date was effected on Brower by certified mail on December 16, 2009. The court scheduled the case for mediation on January 14, 2010, at 3:00 p.m. Notice of the mediation was mailed to the parties. Both parties attended the mediation, but it did not result in an agreement to resolve the case.

{¶5} The matter came on for small claims trial on February 1, 2010; however, Brower failed to appear. The court in its judgment entry, dated February 1, 2010, found that Brower had been served with summons, and entered judgment in favor of Schmidt and against Brower in the amount prayed for in the complaint, i.e., $2,793.57 plus interest and court costs. Although the judgment stated it was based on the evidence presented, Brower failed to submit a trial transcript on appeal.

{¶6} On February 3, 2010, Brower sent a letter to the clerk of courts, "objecting" to the trial court's February 1, 2010 judgment. He said that the work was performed by Schmidt for First American Contractors, Inc., of which Brower is the president, and that the corporation, rather than he himself, should have been named as the defendant. He said he was sued in his own name, and therefore asked the court to "dismiss" its judgment.

{¶7} On February 9, 2010, the trial court entered judgment concerning Brower's request, reciting that he had failed to appear on February 1, 2010 for the small claims

trial, and did not attempt in any way to raise the defense he mentioned in his letter. As a result, the court found that Brower had waived such defense, and denied his request to dismiss the court's final judgment.

{¶8} Brower appeals the trial court's money judgment, asserting the following for his sole assignment of error:

{¶9} "The trial court erred to the prejudice of the Defendant-Appellant in awarding judgment for money to the Plaintiff-Appellee."

{¶10} As a preliminary matter, we note that Brower does not challenge the trial court's February 9, 2010 judgment denying his request to dismiss the judgment or its finding therein that he waived the corporate shield defense. Instead, he contests the money judgment itself. Brower argues he was incorrectly named as the defendant since it was his company rather than he himself who retained Schmidt to build the cabinets. However, it is undisputed that, by not attending the small claims trial and defending on the merits of Schmidt's complaint, Brower failed to raise this defense in the trial court. It is therefore waived on appeal. In *Hommel v. Micco* (1991), 76 Ohio App.3d 690, this court held:

{¶11} "Under Ohio law, it is well established that a corporate officer will generally not be held individually liable on contracts which he enters into on behalf of the corporation. *Centennial Ins. Co. of New York v. Vic Tanny Internatl. of Toledo, Inc.* (1975), 46 Ohio App.2d 137. ***

{¶12} "*** [T]his court has held that '*** the corporate officer has a responsibility to clearly identify the capacity in which he is dealing in a specific transaction ***.' *Universal Energy Serv., Inc. v. Camilly* (May 3, 1991), [11th Dist.] No. 90-A-1533, [1991

Ohio App. LEXIS 2003, *7]. The failure to comply with this rule will expose the corporate officer to individual liability on the resulting contract. Id.

{¶13} "In this case, each [defendant] testified as to the existence of his respective corporation ***. *** However, neither [defendant] testified that he told [plaintiff] that he was representing the corporation ***. In fact, [defendant] Buescher specifically stated on cross-examination that he 'doubted' that he told [plaintiff] that he was acting as a corporate officer.

{¶14} "***

{¶15} "*** [S]ince [plaintiff] had alleged in his complaint that [defendants] were individually liable on the debt, *it was incumbent upon them to show that the corporate shield was established in this instance. In the opinion of this court,* [*defendants*] *failed to carry the burden of proof on this defense*." (Emphasis added.) *Hommel*, supra, at 697-698.

{¶16} This court thus held that when a party's complaint alleges a corporate officer's individual liability, the burden of proving the existence of a corporate shield lies with the corporate officer. Id. at 698.

{¶17} Further, it is well settled that "[a] party waives the right to raise as error on appeal an issue that was apparent at the time of trial if the party did not bring it to the attention of the trial court." *Page v. Chrysler Corp.* (1996), 116 Ohio App.3d 125, 128, citing *Varisco v. Varisco* (1993), 91 Ohio App.3d 542, 545. This court has held that a party's failure to raise an issue at the trial court level acts as a waiver of the issue on appeal. *Sekora v. General Motors Corp.* (1989), 61 Ohio App.3d 105, 112-113. See, also, *State ex rel. Zollner v. Indus. Comm*., 66 Ohio St.3d 276, 278, 1993-Ohio-49.

{¶18} Because no answer is required of a defendant in a small claims case, *Miller v. McStay*, 9th Dist. No. 23369, 2007-Ohio-369, at ¶8, if Brower wanted to defend on the ground that he was not liable because he is a corporate officer, it was incumbent on him to attend the trial, id., and present evidence that his company is a corporation; that it is registered with the state of Ohio and therefore in good standing; and that in retaining Schmidt to build the custom cabinets, he told Schmidt he was acting as a corporate officer representing the corporation. Because Brower did not, the defense suggested by his letter is waived on appeal.

{¶19} However, even if Brower had not waived his right to assert this defense, the argument would still lack merit because he failed to present the transcript of the trial in support of his argument on appeal. In the trial court's judgment, the court stated it ruled in favor of Schmidt based on "the evidence presented." Evidence was therefore presented by Schmidt during the trial. In determining the existence of error, an appellate court is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without any evidence in support of Brower's assignment of error, there is nothing for us to consider. On appeal it is the appellant's responsibility to support his argument by evidence in the record that supports his or her assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Without a transcript we are bound to presume the regularity of the proceedings below. *State v. Yankora* (Mar. 16, 2001), 11th Dist. No. 2000-A-0033, 2001 Ohio App. LEXIS 1230, *6.

{¶20} Finally, because Brower failed to appear at trial and defend against the allegations of the complaint, the trial court would also have had the authority to enter judgment against him by default. The Supreme Court of Ohio in *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hospital* (1986), 28 Ohio St.3d 118, held: "'[a] default by a defendant *** arises *** 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. at 121, quoting *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105. A default judgment is "based upon admission and *** therefore obviates the need for proof." *Ohio Valley Hospital*, supra, at 122.

{¶21} Further, under R.C. 1925.05(A), small claims courts are permitted to enter default judgment where a defendant fails to appear at trial. "R.C. 1925.05(A) *** suggests the failure to appear at [trial] constitutes an admission of liability, much as the failure to file an answer in the general division of the municipal court constitutes an admission of liability." *Miller*, supra. Moreover, in a small claims case it is not necessary for a plaintiff to file an application for default judgment prior to the trial court's entry of such judgment. Id. at ¶13-14. Accord *Sheaff v. Conese*, 12th Dist. No. CA-2001-10-242, 2002-Ohio-5607.

{¶22} Here, the record reflects that Brower received notice by certified mail on December 16, 2009 that trial was scheduled for February 1, 2010, at 3:00 p.m. and that default judgment could be entered against him if he failed to attend the trial. This notice included the language required under R.C. 1925.05(A) for notifying a person that judgment may be entered against him for default.

{¶23} We therefore hold that the trial court did not err in entering judgment against Brower.

{¶24} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Ashtabula County Court, Western District, is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶25} I respectfully dissent.

{¶26} "An action must be brought against a proper defendant. To determine a proper party the substantive right being asserted under applicable law must be addressed. See *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24, ***; *State ex rel. Dallman v. Ct. of Common Pleas, Franklin County* (1973), 35 Ohio St.2d 176, ***; see, also Civ.R. 17." *Kirby v. Cole*, 163 Ohio App.3d 297, 2005-Ohio-4753, at ¶10. "A corporation is a legal entity separate and apart from the natural persons who compose it. *Dirksing v. Blue Chip Architectural Products, Inc.* (1994), 100 Ohio App.3d 213, 226, ***." Id. at ¶12. (Parallel citations omitted.)

{¶27} In the instant matter, Brower, president of First American Contractors, Inc., was sued in his individual capacity. He argues, and I agree, however, that he is not the proper party and that the corporation should have been named as the defendant. It was

First American Contractors, Inc., rather than Brower himself, who retained Schmidt to build the cabinets at issue. Thus, this writer believes that the trial court erred in rendering judgment against Brower individually where First American Contractors, Inc. was the proper defendant.

{¶28} I dissent.