

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

ROBERT HENDRICKS, :
 :
 Plaintiff-Appellant, : CASE NO. CA2011-10-188
 :
 : OPINION
 : 5/21/2012
 - vs - :
 :
 EVERTZ TECHNOLOGY SERVICE USA, :
 INC., et al., :
 :
 Defendants-Appellees. :
 :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-12-4962

Jeffrey M. Silverstein, Jason P. Matthews, 627 South Edwin C. Moses Blvd., Suite 2C,
Dayton, Ohio 45408, for plaintiff-appellant

Kathleen J. Goldman, One Oxford Centre, 20th Floor, 301 Grant Street, Pittsburgh, PA
15219, for defendant-appellee, Evertz Technology Service USA, Inc.

David A. Wise, 2601 S. Verity Parkway, Bldg. 15, Middletown, Ohio 45044, defendant, pro se

HENDRICKSON, P.J.

{¶ 1} Plaintiff-appellant, Robert Hendricks, appeals a decision of the Butler County
Court of Common Pleas awarding costs to defendant-appellee, Evertz Technology Service

USA, Inc. For the reasons that follow, we reverse the decision of the trial court.¹

{¶ 2} On December 6, 2010, appellant filed a complaint for breach of contract against appellee. The trial court scheduled a mandatory status report hearing on the matter for August 4, 2011, notice of which was placed on the court's online docket. During the hearing, counsel for appellee appeared pro hac vice from Pittsburgh, Pennsylvania, but counsel for appellant failed to appear. As a result, the trial court dismissed appellant's complaint for failure to prosecute. The entry of dismissal stated:

This matter was scheduled for a Status Report Conference hearing on Thursday, August 4, 2011. No one appeared for this Status Report Hearing. * * * In accordance with the Notice of Report filed on July 15, 2011, this case is hereby dismissed, without prejudice, for failure to prosecute.

{¶ 3} Following dismissal, appellee filed a motion for costs incurred as a result of counsel's appearance at the hearing, including travel expenses and attorney fees. In response, appellant filed a motion to reactivate the case, arguing that he was unaware of the hearing because the clerk sent the notice to an incorrect address. After a second status report hearing, the trial court granted appellee's motion and ordered appellant to pay \$1,139.23 in costs.

{¶ 4} Appellant timely appeals, raising one assignment of error for review:

{¶ 5} THE TRIAL COURT ERRED IN FINDING THAT APPELLEE WAS ENTITLED TO COSTS[.]

{¶ 6} In his sole assignment of error, appellant argues the trial court abused its discretion in awarding costs to appellee.

{¶ 7} The assessment of costs is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *Taylor v. McCullough-Hyde*

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this case from the accelerated calendar.

Mem. Hosp., 116 Ohio App.3d 595, 600 (12th Dist.1996). An abuse of discretion implies that a court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 8} We find the trial court's decision constitutes an abuse of discretion, where the facts as stated in the court's written entry of dismissal would have precluded the award of costs to appellee. In its entry, the court indicated that "[n]o one" appeared for the status report hearing on August 4, 2011. (Emphasis added.) This is in direct conflict with appellee's representations in her motion for costs.

{¶ 9} It is well-settled that a trial court only speaks through its journal entries. See, e.g., *Dudley v. Dudley*, 12th Dist. No. CA2010-05-114, 2012-Ohio-225, ¶ 19. As a result, the court, going forward, was bound by its determination that neither party appeared for the status report hearing. Under such circumstances, there would be no basis to award the aforementioned costs. We therefore conclude the trial court abused its discretion in awarding costs to appellee.

{¶ 10} We also note that appellant's reply brief raises an interesting argument regarding the application of Loc.R. 4.13, which requires the trial court to schedule a report hearing "no later than 180 days after the filing of the complaint." Loc.R. 4.13(A). Here, the report hearing was scheduled on July 8, 2011, 214 days after appellant filed his complaint on December 6, 2010. Unfortunately, appellant never raised this issue below, and it is well settled that a party cannot use a reply brief to raise new issues or arguments on appeal. See, e.g., *In re Z.C.*, 12th Dist. Nos. CA2005-06-065, CA2005-06-066, CA2005-06-081, CA2005-06-082, 2006-Ohio-1787, ¶ 20.

{¶ 11} Appellant's single assignment of error is sustained.

{¶ 12} Judgment reversed and cause remanded.

RINGLAND and PIPER, JJ., concur.