[Cite as *Bohem, Kurtz & Lowry v. Evans Landscaping, Inc.*, 2015-Ohio-2692.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BOEHM, KURTZ & LOWRY,	:	APPEAL NO. C-140597 TRIAL NO. 13CV-17090
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
EVANS LANDSCAPING, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 2, 2015

Boehm, Kurtz & Lowry and *John P. Lowry*, and *Montgomery, Rennie & Jonson* and *George D. Jonson*, for Plaintiff-Appellee,

Anthony J. Muto, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant Evans Landscaping, Inc., appeals the decision of the Hamilton County Municipal Court overruling its Civ.R. 60(B) motion for relief from judgment. We find merit in Evans's arguments, although not precisely for the reasons it states. Consequently, we reverse the trial court's entry of default judgment against Evans.

{¶2} The record shows that plaintiff-appellee Boehm, Kurtz & Lowry ("BKL") is a law firm that had represented Evans in some of its business dealings. BKL filed a complaint against Evans, seeking to recover $2,920 in unpaid legal fees, pre- and post-judgment interest, and costs. Evans filed a timely answer, and the trial court scheduled a case-management conference.

{¶3} When Evans failed to appear at the case-management conference, the trial court sua sponte entered judgment in favor of BKL. The handwritten entry, entitled, "Entry of Default Judgment," stated that "upon failure to appear for the scheduled September 25, 2013, Case Management Conference, Judgment is granted to Plaintiff on its claims in the amount of $2,920, together with prejudgment interest, statutory postjudgment interest, and costs of this action."

{¶4} On July 18, 2014, the day before a scheduled judgment-debtor exam, Evans filed a Civ.R. 60(B) motion for relief from judgment, in which it alleged that its failure to appear at the case-management conference was the result of excusable neglect. The trial court overruled that motion. This appeal followed.

{¶5} In its sole assignment of error, Evans contends that the trial court erred in overruling its motion for relief from judgment because it had met all of the requirements of Civ.R. 60(B). It also contends that the trial court improperly entered a

default judgment because the court had failed to give it seven days written notice of a hearing as required by Civ.R. 55(A). We agree that the trial court improperly entered default judgment against Evans, although not for the reasons it states.

{¶6} The judgment is void for another reason. Civ.R. 55(A) provides that a default judgment may be entered against a party who has "failed to plead or otherwise defend" as provided by the Civil Rules. A default arises only when a party has failed to contest the allegations raised in the complaint. Consequently, a court cannot enter a default judgment against a party who has filed an answer. *Office of Disciplinary Counsel v. Jackson*, 81 Ohio St.3d 308, 311, 691 N.E.2d 262 (1998); *In re Crabtree*, 1st Dist. Hamilton No. C-010290, 2002 Ohio App. LEXIS 1156, *5 (Mar. 15, 2002). In that situation, the moving party is required to present a prima facie case before the court can enter default judgment. *Jackson* at 311.

> The proper action for a court to take when a defending party who has pleaded fails to appear for trial is to require the party seeking relief to proceed *ex parte* in the opponent's absence. Such a procedure, which requires the plaintiff to prove the essential elements of his or her claim, is diametrically opposed to the concept of default, which is based upon an admission and which, therefore, obviates the need for proof. Any judgment based upon an *ex parte* trial is a judgment after trial pursuant to Civ.R. 58 and not a default judgment under Civ.R. 55.

(Citations omitted.) *Crabtree* at *6-7, citing *Ohio Valley Radiology Assoc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 122, 502 N.E.2d 599 (1986), and *Providian Natl. Bank v. Stone*, 11th Dist. Portage No. 2000-P-0117, 2001 Ohio App. LEXIS 4412, *2-4 (Sept. 28, 2001).

{¶7} Because Evans filed an answer in this case, the trial court did not have the authority to enter a default judgment under Civ.R. 55. The trial court entered judgment in BKL's favor sua sponte without requiring the presentation of any evidence. The record is devoid of any evidence presented by BKL justifying the entry of judgment in its favor.

{¶8} BKL correctly argues that a court has inherent power to control its docket. *See Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998); *State ex rel. Givaudan Flavors Corp. v. Nadel*, 1st Dist. Hamilton No. C-070673, 2007-Ohio-5971, ¶ 10. An entry of a default judgment, however, without a hearing is a draconian action taking away a party's right to a trial, and is not favored under the law. *Heard v. Dubose*, 1st Dist. Hamilton No. C-060265, 2007-Ohio-551, ¶ 20. This does not mean that default judgments, under the correct circumstances, will not be enforced. *See Lyons v. Kindell*, 1st Dist. Hamilton No. C-140160, 2015-Ohio-1709, ¶ 25-27 and 57-65 (Fischer, J., concurring separately); *Burdge v. On Guard Sec. Serv., Inc.*, 1st Dist. Hamilton No. C-050522, 2006-Ohio-2092, ¶ 6-8; *Cale Prod., Inc. v. Orrville Bronze & Aluminum Co.*, 8 Ohio App.3d 375, 378, 457 N.E.2d 854 (9th Dist.1982).

{¶9} Because the trial court was without authority to enter a Civ.R. 55 default judgment at that point in the proceedings, it is void. *See Plant Equip., Inc.*, 155 Ohio App.3d 46, 2003-Ohio-5395, 798 N.E.2d 1202, at ¶ 16. A void judgment is a nullity. It may be collaterally attacked at any time, and the party attacking the judgment need not meet the requirements of Civ.R. 60(B). *See id.* Therefore, we have no choice but to reverse the trial court's judgment granting the default judgment and to remand the cause for further proceedings consistent with this opinion. This disposition renders

moot Evans's primary argument that the trial court erred in overruling its Civ.R. 60(B) motion, and we, therefore, decline to address it. *See* App.R. 12(A)(1)(c).

Judgment reversed and cause remanded.

HENDON, P.J., and **STAUTBERG, J.,** concur.

Please note:

The court has recorded its own entry this date.