[Cite as *Discover Bank v. Schiefer*, 2010-Ohio-2980.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Discover Bank c/o DFS Services LLC,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1178
v.	:	(C.P.C. No. 09CVH06-9142)
Kathie E. Schiefer,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2010

Weltman, Weinberg & Reis Co., L.P.A., Rosemary Taft Milby, and *Matthew G. Burg*, for appellee.

Kathie E. Schiefer, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Kathie E. Schiefer, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court denied appellant's motion for summary judgment and granted the motion for default judgment filed by Discover Bank ("Discover"), plaintiff-appellee.

{¶2} On June 18, 2009, Discover filed a complaint, naming appellant as defendant and seeking to collect on $15,675.32 in credit card debt allegedly owed by

appellant. On July 20, 2009, appellant, acting pro se, filed a document entitled "Motion to Dismiss with Prejudice," to which was attached several documents including a "Sworn Notice and Claim" and "Sworn Notice Addendum and Restitution Contract." The trial court denied the motion to dismiss on August 25, 2009. Appellant filed several pleadings thereafter, the precise nature of which are immaterial and/or difficult to discern.

{¶3} On November 2, 2009, Discover filed a motion for default judgment asserting that, although appellant had filed several documents in the case, she had failed to file an answer. On November 4, 2009, appellant filed a motion for summary judgment. In her motion, appellant indicated that she had initiated an arbitration action in Arizona against Discover using an alleged "arbitration board," R.G. Services, L.L.C., which is registered in New Mexico, and Discover failed to respond. Appellant attached the alleged arbitration award, in which the arbiter awarded appellant $20,050,000.

{¶4} On December 8, 2009, the trial court issued a decision and entry in which it denied appellant's motion for summary judgment and granted Discover's motion for default judgment. In denying appellant's motion for summary judgment, the trial court called appellant's alleged arbitration award a "complete and total sham" with no binding effect on Discover whatsoever, adding that "Defendant must really think that this Court is stupid." In granting Discover's motion for default judgment, the trial court found that, while appellant had filed numerous documents in the matter, she never filed an answer. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The court granted a default judgment to Plaintiff on the erroneous belief that Defendant did not file a response to Plaintiff's complaint and without Plaintiff providing the burden

> of proof to support the complaint. Defendant filed a verified answer and response with the Clerk of Courts of Franklin County Court of Common Pleas on July 20, 2009 at 11:02 a.m. as a Sworn Notice.
>
> [II.] The court denied Defendant the right to contract by disregarding the only valid evidence and legal contract entered into this case. By disregarding the contract, the court violated Defendant's due process rights.
>
> [III.] The court acted without authority or jurisdiction over the contract. The court has the authority to hear the case but not the authority to give an opinion on or rewrite a valid and legal contract in force between two parties.
>
> [IV.] The court denied Defendant's right to an administrative process without a tribunal. The court disregarded the alternative process chosen by Defendant and agreed upon by Plaintiff in our contract. The court failed to uphold the decision and enforce the award issued by the impartial arbitration board by denying Defendant's Motion for Summary Judgment.
>
> [V.] The judge did not faithfully adhere to his oath of office in his decisions by overlooking the frivolous conduct of Plaintiff. The court allowed the case to continue even though evidence was submitted confirming Defendant is the victim and granted Plaintiff a default judgment; thereby denying Defendant her due process. The judge exhibited a pattern of behavior in a manner that prevented and hindered Defendant from receiving a fair and impartial administration of justice.

{¶5} In her first assignment of error, appellant argues that the trial court erred when it granted Discover's motion for default judgment. An appellate court reviews a trial court's decision to grant or deny a motion for default judgment under an abuse of discretion standard. *Domadia v. Briggs*, 11th Dist. No. 2008-G-2847, 2009-Ohio-6510, ¶19; *Natl. City Bank v. Shuman*, 9th Dist. No. 21484, 2003-Ohio-6116, ¶6. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶6} Civ.R. 55(A) provides, in pertinent part, as follows:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore[.]

{¶7} The Supreme Court of Ohio has noted that "[d]efault, under * * * Civ.R. 55(A), is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading." *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 121. Thus, to avoid default, a party against whom a claim is sought must either "plead" or "otherwise defend." *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105.

{¶8} Under the civil rules, only three types of "pleadings" are allowed: complaints, answers, and replies. Civ.R. 7(A); see also *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 549, 1992-Ohio-73. Furthermore, although the phrase "otherwise defend" is not defined by Civ.R. 55, "otherwise defend" has been defined by the courts as referring to " 'attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits.' " (Emphasis omitted.) *Reese* at 106, quoting *Bass v. Hoagland* (1949), 172 F.2d 205, 210. "[A]ttacks on the service, or motions to dismiss, or for better particulars" involve challenges to the jurisdiction of the trial court. *Fleming v. Plummer*, 10th Dist. No. 01AP-739, 2002-Ohio-624, citing *Miles v. Horizon Homes, Inc.* (Oct. 17, 1991), 8th Dist. No. 61379, citing *Reese*.

{¶9} Although it is clear that appellant did not file any pleading purporting to be an "answer," appellant maintains that her July 20, 2009 pleading entitled "Motion to Dismiss with Prejudice" constituted an answer. More specifically, appellant seems to be asserting that the exhibits entitled "Sworn Notice and Claim" and "Sworn Notice Addendum and Restitution Contract," which were attached to the motion to dismiss, constituted an answer. However, we find none of these documents constituted an answer. Initially, with regard to the motion to dismiss itself, the motion consists of only a few sentences and a list of attached exhibits. What little text the motion does include asserts that dismissal was warranted because Discover committed fraud against appellant and admitted to such fraud when it failed to appear and participate in the arbitration proceedings, resulting in an arbitration determination in her favor by default. In no way do these allegations directly or indirectly respond to the allegations in Discover's complaint, and they do not involve challenges to the jurisdiction of the trial court under the "otherwise defend" provisions in Civ.R. 55. Therefore, we find the motion to dismiss itself did not constitute a timely answer to Discover's complaint.

{¶10} With regard to the "Sworn Notice and Claim" and "Sworn Notice Addendum and Restitution Contract," which were attached to the motion to dismiss, both of these documents contained statements that generally disputed the credit card debt at issue. However, we find these documents also could not have constituted an answer. We first note that these documents were not filed as independent pleadings in the case, but were attached as exhibits to the original pleading, which, as explained above, was a motion to dismiss based upon fraud and Discover's failure to participate in arbitration. Furthermore, neither document appears to have been created for purposes of answering Discover's

complaint in the present action. Neither document contains a case caption or style indicating it was meant to be filed in this case, and neither document makes any reference to the trial court's case number assigned to the present case. There was also nothing else contained within the documents that indicated they were intended to be the answer to Discover's complaint. Rather, the circumstances suggest that these documents were prepared in an attempt to ensnare Discover in some sort of new or modified contract by default.

{¶11} In addition, Civ.R. 5(A) requires service of an answer, and Civ.R. 5(D) provides that papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed, and the proof of service must state the date and manner of service. A trial court may not consider an answer that does not contain a certificate of service that complies with Civ.R. 5(A), and default judgment is proper. *Erie Ins. Co. v. Bell*, 4th Dist. No. 01CA12, 2002-Ohio-6139. Here, the motion to dismiss, as a whole, contains no certificate of service, and the record contains no evidence that the motion to dismiss was ever served upon Discover. Although there is a certified mail receipt issued by the United States Postal Service on July 13, 2009, attached to the motion to dismiss, there is no indication what was delivered to Discover on that date via certified mail. The "Sworn Notice and Claim" does appear to have a certificate of service, but it was prepared in February 2009, and, as explained above, was not prepared in response to the complaint in this case. With respect to the "Sworn Notice Addendum and Restitution Contract," the record does contain a document entitled a "Notary Certificate of Dishonor," executed by a notary public, in which the notary maintains that the notice was served upon Discover. However, this document was attached to another of appellant's

pleadings and filed on September 29, 2009, over two months after the "Sworn Notice Addendum and Restitution Contract." Further, the "Notary Certificate of Dishonor" contains no indication that the "Sworn Notice Addendum and Restitution Contract" was served upon Discover for purposes of the present proceeding. Again, it appears that any service of this notice was for purposes unrelated to the present case.

{¶12} Importantly, the "Sworn Notice" documents failed to comply with the Ohio civil rules in numerous respects. The "Sworn Notice" documents individually contained no caption as required by Civ.R. 10(A), and did not set out separate averments in numbered paragraphs as required by Civ.R. 10(B). The "Sworn Notice" documents also failed to comport with the general rules of pleading contained in Civ.R. 8, as well as the methods of pleading defenses and objections set forth in Civ.R. 12. See *Schneller v. Patten* (June 11, 1987), 8th Dist. No. 52369 (refusing to treat pro se litigant's personal letters as an "answer" in light of failure to comport with Civ.R. 5, 8, 10, and 12). Pro se litigants are bound by the same rules and procedures as litigants with counsel. *Meyers v. First Natl. Bank* (1981), 3 Ohio App.3d 209, 210. Therefore, we find neither the "Sworn Notice and Claim" nor "Sworn Notice Addendum and Restitution Contract" constituted an answer to Discover's complaint. For these reasons, the trial court did not err when it determined that appellant had failed to file an answer challenging the allegations alleged in Discover's complaint. Accordingly, appellant's first assignment of error is overruled.

{¶13} We will address appellant's second, third, and fourth assignments of error together, as they are related. Although somewhat unclear, all three of these assignments of error appear to contest the trial court's failure to recognize the arbitration decision appellant obtained, as well as "the contract" between the parties. Appellant maintains

that Discover agreed to all claims against it, accepted "the contract," and accepted any restitution ordered by its failure to respond in the arbitration proceedings.

{¶14} We disagree with appellant's contentions. Appellant indicates that she initiated an arbitration action in September 2009 in Arizona against Discover using an alleged "arbitration board" registered in New Mexico, and Discover failed to appear in or respond to the action. In her motion for summary judgment, appellant attached the alleged arbitration award, in which the alleged arbiter awarded appellant $20,050,000 against Discover. The precise basis upon which the alleged arbitration board made its generous damages award is elusive, but it may have been based upon the premise that appellant mailed several "notices" to Discover that purported to modify the terms of the contract between the parties or create new contracts between the parties, and Discover never responded to any of these "notices." In the trial court's December 8, 2009 judgment, the trial court called appellant's alleged arbitration award a "complete and total sham" with no binding effect on Discover whatsoever, and added that "Defendant must really think that this Court is stupid."

{¶15} We concur with the trial court's findings. Both the "notices" mailed to Discover, as well as the arbitration process initiated by appellant, were fraudulent attempts to evade the legal consequences of her credit card debt. With regard to the arbitration process, page 13 of the Cardmember Agreement provides that arbitration must be conducted by either the American Arbitration Association or the National Arbitration Forum, and specifically indicates that no other arbitration forum will be permitted. Thus, appellant's invocation of R.G. Services, L.L.C., to arbitrate the dispute was impermissible. Insofar as appellant may be arguing that the parties formed a new contract, altered the

terms of their current agreement or created an "addendum" to their agreement by way of her mailing to Discover the "Sworn Notice" documents or any of the other documents in the record, and that Discover agreed to such changes or terms of a new contract by failing to respond, is without merit. Essential elements of a valid contract include an offer, an acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16. Here, there is no evidence that Discover accepted the terms of any new contract or manifested any mutual assent. Discover's failure to respond to any of appellant's myriad mailings did not create any new contracts between the parties or entitle appellant to "restitution" for damages she claims were due to Discover's fraud. Furthermore, although the Cardmember Agreement between the parties indicates that Discover may alter the terms of the contract at any time, the agreement contains no provision that permits card members to alter the agreement. For these reasons, appellant's various filings did not constitute a new or modified contract between appellant and Discover, and appellant's use of the alleged arbitration service was impermissible. Therefore, appellant's second, third, and fourth assignments of error are overruled.

{¶16} Appellant argues in her fifth assignment of error that the trial judge exhibited bias against her and was not fair and impartial. However, the Chief Justice of the Supreme Court has exclusive jurisdiction to determine a claim that a common pleas court judge is biased or prejudiced, and common pleas litigants must bring any challenge to the trial judge's objectivity by way of the procedure set forth in R.C. 2701.03. *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11. A court of appeals is without authority to void the judgment of a trial court because of bias or prejudice of the judge. *Beer v. Griffith*

(1978), 54 Ohio St.2d 440, 441-42. Therefore, appellant's fifth assignment of error is overruled.

{¶17} Accordingly, appellant's five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.

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