

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

American Communications of Ohio, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-352 (C.P.C. No. 10CVH-12-18744)
Khaled Hussein,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
Merchant Data, LLC,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 29, 2011

Elliot Klayman, for appellee.

Law Offices of Marcell Rose Anthony, LLC, and Marcell Rose Anthony, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Khaled Hussein, dba United Food Land, appeals from a judgment of the Franklin County Court of Common Pleas that granted the Civ.R. 55(A) motion for default judgment of plaintiff-appellee, American Communications of Ohio, Inc.,

and entered judgment without the court's conducting a damages hearing. Because (1) the trial court wrongly granted a default judgment without notice against defendant who appeared in the action and (2) the trial court should have conducted a hearing on the damages plaintiff sought in its complaint, we reverse.

I. Facts and Procedural History

{¶2} On December 27, 2010, plaintiff filed a complaint against defendant and Merchant Data, LLC. The complaint alleges that on or about November 14, 2009, plaintiff entered into a written "ATM Space Lease Agreement" with defendant. (Complaint, ¶5.) Pursuant to the agreement, the complaint asserts, defendant agreed to lease to plaintiff certain space in defendant's business premises for a total of 120 months, granting plaintiff the exclusive right to install an automated teller machine ("ATM") that defendant's customers would be able to use. The complaint alleges that, according to the agreement, plaintiff was to pay defendant \$0.75 per ATM transaction but could retain the remainder of revenue generated from each transaction.

{¶3} The first count of the complaint states plaintiff installed one ATM at defendant's premises, but defendant breached the contract when, without plaintiff's authorization, he caused the ATM to be inactivated. The complaint asserts that, as a result of defendant's breach of contract, plaintiff "has suffered and continues to suffer damages, including lost profits, past, present and future." (Complaint, ¶15.) The second count of the complaint alleges Merchant Data interfered with the contract between plaintiff and defendant when it entered into an agreement with defendant to install one of its ATMs at defendant's business premises. According to the complaint, Merchant Data "continues to intentionally interfere with Plaintiff's contractual relationship" with defendant,

causing plaintiff to suffer damages. (Complaint, ¶20.) Plaintiff sought \$63,341.38 against defendant, plus reasonable attorney fees, court costs, interest, and other appropriate relief, as well as unspecified damages against Merchant Data.

{¶4} On January 12, 2011, the United States Postal Service filed delivery information for certified mail number 7190 0903 0010 0394 6587, indicating the item was delivered on January 6, 2011 at 2:27 p.m. to the specified address where a signature, although virtually illegible, was obtained. The certified mail number matches the number on the original summons from the trial court addressed to defendant in this case. For reasons not entirely clear from the record, plaintiff on January 31, 2011 requested ordinary service on defendant and Merchant Data.

{¶5} Without providing notice to defendant, plaintiff filed a motion for default judgment against defendant on February 23, 2011. The trial court granted plaintiff's default judgment motion on March 9, 2011 in the amount of \$63,341.38, plus interest and court costs. The court added that "[t]here is no just cause for delay in enforcement of this judgment. Civ.R. 54(B)." (Decision & Entry, 1.) Defendant filed a notice of appeal on April 8, 2011 and a motion for Civ.R. 60(B) relief on April 13, 2011. The Civ.R. 60(B) motion remains pending in the trial court.

II. Assignments of Error

I. THE TRIAL COURT ERRED IN GRANTING DEFAULT JUDGMENT AGAINST APPELLANT ON APPELLEE'S MOTION FOR DEFAULT JUDGMENT WHEN THE MOTION FOR DEFAULT JUDGMENT FAILED TO INCLUDE A CERTIFICATE OF SERVICE, AND NEITHER APPELLANT NOR HIS ATTORNEY WHO WAS IN SETTLEMENT NEGOTIATIONS WITH APPELLEE'S ATTORNEY RECEIVED A COPY OF THE MOTION FOR DEFAULT JUDGMENT.

II. THE TRIAL COURT ERRED IN GRANTING DEFAULT JUDGMENT FOR DAMAGES WHEN THERE WAS NO CREDIBLE EVIDENCE IN THE RECORD AS TO DAMAGES AND INDEED, THE COURT SHOULD HAVE SET THE CASE FOR A DAMAGES HEARING WITH NOTICE TO ALL PARTIES, WHICH THE TRIAL COURT FAILED TO DO.

III. THE TRIAL COURT DENIED APPELLANT DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

III. Notice and Hearing under Civ.R. 55

{¶6} Defendant's three assignments of error raise two issues: (1) whether plaintiff was required to give defendant notice under Civ.R. 55(A) of its motion for default judgment, and (2) whether the trial court was required to conduct a hearing to determine the amount of damages sought in plaintiff's complaint.

A. Notice of Default Judgment

{¶7} Defendant initially contends he was not served with summons until he received service by ordinary mail, making plaintiff's default judgment motion premature. Based on the state of the record as of the time defendant filed his notice of appeal, plaintiff appears to have served defendant by certified mail on January 6, 2011. Plaintiff's default judgment motion was not filed until February 23, 2011, more than 28 days after service on defendant.

{¶8} Defendant next asserts he was entitled to notice of plaintiff's motion for default judgment pursuant to Civ.R. 55. "Civ.R. 55(A) requires that a ' * * * party against whom judgment by default is sought [who] has appeared in the action * * * be served with written notice of the application for judgment at least seven days prior to the hearing on

such application.' " *Dick Masheter Ford, Inc. v. Kienzle* (Mar. 9, 1993), 10th Dist. No. 92AP-1228. See also Loc.R. 55, Franklin County Court of Common Pleas, General Division (stating that "[i]f the party against whom judgment by default is sought has appeared in the action, written notice of the hearing on the motion along with the date and time fixed by the Assignment Commissioner with the concurrence of the Trial Judge shall be served upon that party").

{¶9} By its plain language, the rule prohibits a default judgment against a party who has "appeared" in the action, unless written notice of the application for default judgment first is served at least seven days prior to the hearing on the application. *Columbus Mgt. Co. v. Nichols* (Aug. 4, 1992), 10th Dist. No. 92AP-191; *Dick Masheter Ford* (noting the notice requirement is waived under circumstances in which a party "has failed to plead or otherwise defend"). Because defendant filed no pleading or other motion in the trial court, plaintiff asserts no notice is required under Civ.R. 55(A) concerning its application for default judgment.

{¶10} "As the term is commonly understood, an appearance generally implies some sort of presentation or submission to the court in which the action is pending. However, the term is not necessarily limited to formal appearances and submissions." *Columbus Mgt. Co.* Rather, "[i]t may be reasonably construed to reach informal contacts or correspondence between the parties or the court which serve the same purpose." *Id.* As *Columbus Mgt. Co.* pointed out, "[t]his court has liberally construed the term 'appearance' for the purpose of applying the notice provisions of Civ.R. 55(A). * * * Likewise, the federal courts have broadly construed the analogous federal rule to include informal contacts between the parties which indicate a clear purpose to defend the suit."

Id., citing *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe* (C.A.D.C.1970), 432 F.2d 689, 691. Such a construction of the rule is consistent with "the general policy of the courts of this state to decide cases on their merits whenever possible." Id., citing *Natl. Mut. Ins. Co. v. Papenhagen* (1987), 30 Ohio St.3d 14, 15; *AMCA Internatl. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 91 (recognizing the notice requirement of Civ.R. 55 is intended to protect parties who failed to formally appear but who otherwise have indicated a clear intent to defend the suit, as is consistent with the policy underlying the civil rules to hear cases on their merits).

{¶11} Given that policy, *Columbus Mgt. Co.* held that "[w]here a party becomes aware by means of informal contacts, correspondence or negotiations that the opposing party intends to actively defend the suit, this constitutes an appearance which requires seven days advance notice to that party before a default judgment may be taken." See also *Plant Equip., Inc. v. Nationwide Control Serv., Inc.*, 155 Ohio App.3d 46, 2003-Ohio-5395, ¶8 (citations omitted) (concluding that "[a] telephone call from the alleged defaulting party to the other party expressing the intent to defend the suit is sufficient to constitute an appearance"); *Miami Sys. Corp. v. Dry Cleaning Computer Sys., Inc.* (1993), 90 Ohio App.3d 181, 185 (determining counsel's settlement negotiations with plaintiff's attorney was an appearance under Civ.R. 55(A)); *Miamisburg Motel v. Huntington Natl. Bank* (1993), 88 Ohio App.3d 117, 126 (concluding notice of a motion for default judgment is required under Civ.R. 55 "when [the] party clearly expresses to the opposing party an intention and purpose to defend the suit, regardless of whether a formal filing is made"); *Justice v. Sears, Roebuck & Co.* (Sept. 4, 1984), 2d Dist. No. 8658 (concluding an exchange of letters in which defendant evidenced an intent to contest a claim was

sufficient to invoke Civ.R. 55(A)'s notice requirement); *Baines v. Harwood* (1993), 87 Ohio App.3d 345 (deciding that telephone conversations with opposing counsel constituted an "appearance" for purposes of Civ.R. 55 and triggered the seven-day notice required under Civ.R. 55(A)).

{¶12} Here, when plaintiff filed its motion for default judgment, plaintiff advised the court that "[d]efendant, through an attorney, requested by email an extension of 7-10 days to file, while Defendant explored other representation." Moreover, in oral argument before this court, counsel for plaintiff acknowledged not only the conversation referenced in plaintiff's motion for default judgment but also settlement negotiations that apparently preceded the motion for default judgment. Although the contact regarding the pleading time extension was before the trial court at the time the default motion was granted, the trial court apparently was unaware of the settlement negotiations.

{¶13} Given the broad interpretation granted the term "appearance" in Civ.R. 55(A), defendant appeared in this action through the contact his attorney made to plaintiff's counsel, triggering the Civ.R. 55(A) requirement that plaintiff provide defendant notice of its motion for default judgment. *Allstate Ins. Co. v. Hunt*, 2d Dist. No. 20991, 2006-Ohio-238, ¶13, quoting *Miamisburg Motel* (stating that "a party, or his counsel, who is aware of a communication by the opposing party in which that party has expressed a clear purpose to defend the suit has a duty to inform the trial court of this fact when seeking a default judgment against that party, and has an obligation under Civ.R. 55(A) to inform that party that application for a default judgment has been made"). Although plaintiff informed the court of the contact, plaintiff failed to send the necessary notice to defendant. Defendant's first issue is well-taken.

B. Hearing on Damages

{¶14} Defendant further contends the trial court improperly granted judgment to plaintiff without first conducting a hearing on damages.

{¶15} Civ.R. 55 provides that "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages * * *, the court may conduct such hearings or order such references as it deems necessary and proper." Civ.R. 55(A) thus "clearly indicates that a court **may** conduct a hearing when it deems that it is necessary. A hearing is permissive, not mandatory." *Nationwide Mut. Fire Ins. Co. v. Barrett*, 7th Dist. No. 08 MA 130, 2008-Ohio-6588, ¶26. (Emphasis sic.)

{¶16} Thus, "when the complaint and the motion for default judgment clearly set forth the amount of damages" and reveal the amount to be ascertainable, "the trial court does not abuse its discretion in relying on the amount asserted" in the complaint. *Id.* If, by contrast, "the determination of damages necessarily requires consideration of information outside a written instrument, the trial court abuses its discretion in failing to hold an evidentiary hearing to determine the exact amount of damages." *L.S. Industries v. Coe*, 9th Dist. No. Civ.A 22603, 2005-Ohio-6736, ¶20, appeal not allowed, 109 Ohio St.3d 1457, 2006-Ohio-2226. Given the discretionary nature of the authority to hold a hearing on damages, we review the trial court's decision to award damages without a hearing under the abuse of discretion standard of review. *Id.* at ¶21.

{¶17} Here, the trial court abused its discretion in granting a default judgment without a damages hearing. Plaintiff attached to the complaint an incomplete copy of the

contract between plaintiff and defendant. Although the complaint suggests a fee of \$0.75 per transaction, that number only is handwritten at the top of the document attached to the complaint. Moreover, plaintiff's complaint sought lost profits of an unliquidated amount. Cf. *L.S. Industries* (noting "[p]roof of damages is not required before a default judgment may be granted in an action founded upon a liquidated damage claim based upon an account"). Given the language of the complaint, coupled with the absence of the complete contract or any basis to calculate from the complaint what may be plaintiff's lost profits as a result of the alleged breach, the trial court should have held a hearing to determine damages. Defendant's second issue is well-taken.

IV. Disposition

{¶18} Having sustained defendant's first and second assignments of error, rendering moot his third assignment of error, we reverse the judgment of the trial court and remand for further proceedings consistent with this decision. Plaintiff's motion seeking damages for defendant's appeal is rendered moot.

*Motion for damages moot;
judgment reversed and
cause remanded.*

BROWN and TYACK, JJ., concur.
