

JIN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John Fanelli,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-552
Tobias Elsass et al.,	:	(C.P.C. No. 12CV003526)
Defendants-Appellants.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on January 31, 2013

Mark S. Miller, for appellee.

Tobias Elsass, pro se.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Tobias Elsass is appealing from the default judgment granted against him following the trial court's order striking his answer to the complaint. Elsass assigns a single error for our consideration:

THE COURT ERRORED [sic] IN GRANTING PLAINTIFF'S
MOTION TO STRIKE DEFENDANT ELSASS [sic] ANSWER
TO THE COMPLAINT.

{¶ 2} John Fanelli filed a complaint in which he claimed Tobias Elsass and a corporation for which Elsass is or was the statutory agent were obligated on a promissory note to John and Gina Fanelli in the sum of \$100,000. Service of the complaint was

obtained by certified mail on March 23, and March 26, 2012, but was logged in the court docket as completed on March 27, 2012.

{¶ 3} Elsass sent an answer on his own behalf by regular mail to plaintiff's counsel on April 30, 2012 and filed a copy of the answer on that same date.

{¶ 4} On May 1, 2012, counsel for the Fanellis filed a motion for default judgment. Two days later, he filed a motion to strike Elsass's answer because it was not timely filed.

{¶ 5} Elsass has claimed in his appellate brief that he e-filed a memorandum in response to the motion to strike. However, the court's docket does not reflect that the clerk's office ever received such a document.

{¶ 6} On June 1, 2012, the trial judge assigned to the case granted the motion to strike and indicated that Elsass had neither filed a response to the motion to strike nor had requested leave of court to file an answer out of rule.

{¶ 7} The trial judge did not schedule a hearing on the motion for default judgment after striking the answer filed by Elsass. Instead, the trial judge entered judgment in the same entry which struck the answer. The trial court's granting of default judgment was not in compliance with Civ.R. 55(A) and our interpretation of that rule. Elsass had entered an appearance so the trial court needed to schedule a hearing on the motion for default judgment and provide Elsass notice of the hearing at least seven days prior to the hearing.

{¶ 8} Loc.R. 21 of the Franklin County Court of Common Pleas indicates via Loc.R. 21.01 that all motions are deemed submitted to the trial judge on the 28th day after the motion is filed. Oral hearings on motions, including motions for default judgment, are not permitted except on leave of the trial judge upon written request by a party.

{¶ 9} The motion for default judgment filed in this case was filed after an answer had been filed and served. The motion claimed, inaccurately, that no answer had been filed.

{¶ 10} Civ.R. 55(A) clearly contemplates that a party who has entered an appearance in a lawsuit should have a period of seven days to prepare for and contest a motion for default judgment. By striking the answer filed by Elsass and granting judgment in the same document, the trial judge effectively took away that which Civ.R.

55(A) contemplates, including the opportunity to request that Elsass be allowed to file a new answer out of rule before judgment was granted.

{¶ 11} We cannot say the trial court was completely wrong to refuse to allow the answer filed a few days late to be considered without a motion for leave to file the answer late or *instanter* being filed. However, the procedure used of striking the answer and granting default judgment in the same entry is inconsistent with Civ.R. 55(A). We, therefore, have no choice but to sustain the sole assignment of error.

{¶ 12} As a result, we vacate the default judgment entered by the trial court and remand the case to the Franklin County Court of Common Pleas for a hearing on the motion for default judgment and such other proceedings as the trial court deems appropriate.

*Judgment vacated; case remanded
for further proceedings.*

BRYANT and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).
