[Cite as *MCS Acquisition Corp. v. Gilpin*, 2012-Ohio-3018.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MCS ACQUISITION CORP. d.b.a. MOBILE CONTAINER SERVICE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-G-3037**
- vs -	:	
SHEREE GILPIN, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 10M000871.

Judgment: Reversed and remanded.

A. Pearce Leary, 401 South Street, Bldg. 4-A, Chardon, OH 44024 (For Plaintiff-Appellee).

Jonathan W. Winer, 5276 Rome Rock Creek Road, Rome, OH 44085-9616 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Sheree Gilpin, Sheree Gilpin d.b.a. Meadall Welding ("Meadall Welding"), and David Gilpin, appeal the judgment of the trial court denying their motion to vacate default judgment pursuant to Civ.R. 60(B).

{¶2} Appellee, MCS Acquisition Corp., d.b.a. Mobile Container Service, filed a Creditors Bill action against appellants on July 23, 2010, alleging that it had obtained a

judgment against David Gilpin and Bruce Gilpin,[1] that they had "equitable and other interests" in assets in the possession of Meadall Welding, and that they refused to disclose or apply those interests toward satisfaction of the judgment. Appellee filed an amended complaint for a Creditors Bill against the same appellants on August 5, 2010. It was assigned case No. 10M871.

{¶3} Summons on the Creditors Bill were sent by certified mail to Sheree Gilpin ("Sheree"), Meadall Welding, and Bruce Gilpin ("Bruce") at 245 B Homestead Avenue, Andover, Ohio, 44403 and to David Gilpin ("David") at 240 Homestead Avenue, Andover, Ohio, 44403. All summons sent by certified mail were returned as unclaimed.

{¶4} On October 1, 2010, the summons were sent to appellants by regular mail to the aforementioned addresses. The clerk's office received notice from the United States Parcel Service that the summons sent to Bruce was undeliverable due to "no mail receptacle – unable to forward." There is no evidence the summons sent by regular mail to Sheree and David were returned.

{¶5} The clerk's office received a letter, dated October 8, 2010, from an individual named Tracy Dean. In her letter, Ms. Dean referenced case No. 10M871 and stated that she was writing on behalf of her parents, Sheree and Bruce, and her brother, David. Ms. Dean also provided the above stated addresses, to wit: 240 Homestead Avenue and 245 B Homestead Avenue.

{¶6} Thereafter, appellee sought personal service on appellants. On December 22, 2010, a return of service was filed stating that personal service of

1. Sheree and Bruce Gilpin are husband and wife; David Gilpin is their son. Bruce Gilpin is not a party to this appeal.

summons was made on Sheree and Meadall Welding. A return of service was also filed with a notation that residence service was made on David and Bruce.

{¶7} Again, Ms. Dean sent a letter, dated January 12, 2011, to the clerk's office referencing the above case number. Included in her letter were copies of pages three through five of the amended complaint. Ms. Dean once again referenced the aforementioned addresses of appellants.

{¶8} Appellee, on February 10, 2011, moved the trial court to strike appellants' "answer" asserting that Ms. Dean was not an attorney. Appellee's certificate of service indicates that said motion was sent to appellants at the aforementioned addresses.

{¶9} The trial court sent a letter to appellants on February 22, 2011, indicating that the court had received a response to the complaint. This letter was sent to the 245 B Homestead Avenue address. The trial court stated that "[it] cannot be determined if you have sent a copy of your response to the attorney who represents the Plaintiff in this case." The trial court advised appellants of the Ohio Rules of Civil Procedure and "strongly urged [appellants] to seek representation from an attorney to be sure that your side of the case will be presented and your rights protected."

{¶10} On March 1, 2011, the trial court sustained appellee's motion to strike the "answer"; however, the court's order and notice that this had been done was apparently only sent to appellee's attorney, not to Ms. Dean or appellants.

{¶11} The trial court entered default judgment against appellants on March 25, 2011. In that entry, the trial court stated that appellants "failed to answer or otherwise plead, although duly served with a copy of the first amended complaint * * * according to law."

{¶12} Appellants filed a motion to vacate default judgment, which was denied.

{¶13} A notice of appeal was filed, and as their sole assignment of error, appellants maintain the following:

{¶14} "The trial court erred in denying Defendants' Motion to Set Aside the Default Judgment, pursuant to Civil Rule 60(B)."

{¶15} In their motion to set aside default judgment, appellants state they were served on or about December 22, 2010, by residential service. Appellants maintain they attempted to file an answer on or about January 20, 2011, with the assistance of Ms. Dean. Appellants averred they believed that an answer had been properly filed and served on their behalf by Ms. Dean. Appellants also averred they never received the order of the trial court striking their answer, notice of the default hearing, or notices of any kind.

{¶16} Civ.R. 55(B) states that if a trial court enters a default judgment, "the court may set it aside in accordance with Rule 60(B)." Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

> **{¶17}** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been

> satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

{¶18} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

> **{¶19}** To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶20} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). Thus, an appellate court's standard of review is whether the trial court abused its discretion. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶21} In its judgment entry overruling appellants' motion, the trial court considered only the second prong of the *GTE* test—whether appellants were entitled to relief under one of the prongs of Civ.R. 60(B)(1) through (5). Appellants argue that they have demonstrated they are entitled to relief because they entered an "appearance" through the letter sent to the court by Ms. Dean. They further assert that the trial court acknowledged this as an appearance when it sent the letter of February 22, 2011, and when it entered the order striking the answer.

{¶22} After a hearing was held, the trial court concluded the following:

> **{¶23}** Defendants have failed to demonstrate that their failure to file an answer to Plaintiff's Amended Complaint was the result of mistake, inadvertence, or excusable neglect. The Court cannot accept the explanation that Defendants believe it was sufficient for their daughter and sister, who is not an attorney, to send a letter to the Court and that the letter would serve as an answer. Defendants are not justified in never checking with the Court or accessing the docket to determine what is happening with their case. As noted above, no explanation was offered as to how Traci Dean could send a letter to the Court on October 13, 2010, which discussed the complaint that Defendants claim had never been served.

{¶24} However, the position taken by appellants in their Civ.R. 60(B) application was that the default judgment should not have been entered due to the fact they thought they *had* filed an answer, and they received no notification that appellee requested the answer be stricken, no notice that the court entered an order striking the answer, and

most significantly, no notification that the court granted the application for default judgment.

{¶25} Default judgments are addressed by Rule 55 of the Ohio Rules of Civil Procedure. It is clear that if a party has entered an appearance in a case, that party is entitled to notice of the application for default at least seven days prior to any hearing on said application. If this notice is not given, Ohio courts have held that, "[w]ithout the requisite notice and hearing under Civ.R. 55(A), a default judgment is void and shall be vacated upon appeal." *Hartmann v. Crime Victims Reparations Fund*, 138 Ohio App.3d 235, 238 (10th Dist.). However this court and other Ohio courts have held that a default judgment rendered without the requisite notice is voidable. *See Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2010-A-0024, 2011-Ohio-2450 and *Deutsche Bank Natl. Trust Co. v. Lagowski*, 7th Dist. No. 10 BE 28, 2012-Ohio-1684. This case does not present a question regarding lack of personal jurisdiction over appellants; it is a question of an infirmity related to procedural due process. Whether a procedural due process event has occurred in this case depends on whether appellants had entered an appearance in a form that would require the Civ.R. 55(A) notification. We hold that they did enter an appearance in the case for purposes of Civ.R. 55(A).

{¶26} While there is some disagreement among appellate districts as to what is sufficient to establish the entry of an appearance, the response filed by Ms. Dean contains more than what is necessary to be considered an "appearance" for Civ.R. 55 purposes. In *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 91 (1984), the Ohio Supreme Court held that courts must follow the general policy of relaxing or abandoning restrictive rules "which prevent hearing of cases on their merits." *Id*. at 91. In that case,

in a telephone conference with the employee's attorney, the employer communicated its intent to defend the suit. *Id*. at 90. The Court determined that the employer made an appearance sufficient to trigger the notice requirement in Civ.R. 55(A). *Id*.

{¶27} Here, the analysis of the trial court that concluded appellants were not justified in relying on the letter from Ms. Dean, who is not an attorney, or for never checking the court docket does not address the requirement that appellants be notified of the pending request for default judgment. Without that notice, the default judgment rendered was voidable.

{¶28} In accord with the direction of the Ohio Supreme Court in *ACMA Internatl. Corp.*, *supra*, the default judgment must be vacated and set aside, because, although the record establishes the entry of an appearance in this case by appellants, they were not sent the notice required by Civ.R. 55(A). As noted by the Ohio Supreme Court, in keeping with the spirit of the rule, the notice requirement is effectively a device intended to protect those parties who have otherwise indicated to the moving party a clear purpose and intent to defend the suit. *ACMA Internatl. Corp*., 10 Ohio St.3d at 91.

{¶29} Appellee acknowledges in its brief that the motion for default judgment was never served on appellants. However, appellee asserts that the issue of failure to serve appellants with notice of the default judgment was not raised by appellants at the trial court level, and even if they had, the trial court had stricken Ms. Dean's letter. Therefore, appellee contends, appellants had not made an "appearance" as required by the rule. In their Civ.R. 60(B) motion, appellants allege that even though they responded to the complaint by virtue of Ms. Dean's letter, they received no notice of any of the proceedings, except the summons and complaint. In addition, they never

received notice that the court had stricken and did not accept Ms. Dean's letter. That distinguishes this case from *Aurora Loan Services, LLC, supra*. The argument raised at the trial court level—that they should have received notice of the striking of this letter *and* of the default proceedings—preserved the issue for appeal. In addition, the fact that Ms. Dean's letter was ultimately stricken does not equate to a failure of appellants to appear.

{¶30} With regard to the meritorious defense issue raised by appellants, we note this case involves a Creditors Bill—directed at assets in the possession or control of Sheree—which appellee asserts should be applied to the judgment rendered against David and Bruce. Neither the complaint nor the default judgment rendered specifies or delineates which assets will be subject to attachment in satisfaction of the judgment. The default judgment states that "[p]roperty and assets owned by, in the possession of, or under the control of defendants Sheree Gilpin, and/or Sheree Gilpin dba Meddal (sic) Welding, may be sold, liquidated, or otherwise converted into cash and the proceeds thereof shall become the property of plaintiff * * *." This judgment appears to suggest that *all* of Sheree's assets are subject to attachment, not just the assets in her possession, custody, or control that are subject to an equitable interest in the judgment debtors. This exceeds the scope of what was requested in the Creditors Bill.

{¶31} Thus, a trial court abuses its discretion when it fails to send the requisite notice pursuant to Civ.R. 55(A) when a party has entered an appearance. What constitutes an appearance depends on the facts of an individual case. However, when a party indicates, in some form, that it has a clear purpose or intention to defend the suit, then such action militates towards sending notice. *See Mateyko v. Crain*, 11th

Dist. No. 2011-T-0036, 2012-Ohio-1133 (although Crain, acting pro se, failed to file a timely answer, he followed the trial court's advice and contacted appellee's counsel; thus, Crain entered an appearance and was entitled to notice under Civ.R 55(A)). Any doubtful or marginal calls regarding whether an appearance has been entered for purposes of Civ.R. 55(A) should be made in favor of sending notice. Fairness dictates no less.

{¶32} The judgment of the Geauga County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.

concur.