[Cite as *Chibinda v. Depositors Ins.*, 2011-Ohio-2597.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

PETER CHIBINDA,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-09-254
	:	O P I N I O N
- vs -		5/31/2011
	:	
DEPOSITORS INSURANCE,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY AREA III COURT
Case No. CVF0801616

Peter Chibinda, 38 Village Ct., Monroe, Ohio 45050, plaintiff-appellant, pro se

Subashi & Wildermuth, Nicholas E. Subashi, Andrew E. Rudloff, Halli Brownfield Watson, The Greene Town Center, 50 Chestnut Street, Suite 230, Dayton, Ohio 45440, for defendant-appellee

BRESSLER, J.

{¶1} Plaintiff-appellant, Peter Chibinda, appeals from a decision of the Butler County Area III Court granting summary judgment in favor of defendant-appellee, Depositors Insurance Company, on Chibinda's claim for coverage under his homeowner's insurance policy with Depositors. We reverse the trial court's decision because the trial court erred by failing to rule on Depositors' Civ.R. 60(B) motion to set aside the default judgment that had been entered against it earlier in the proceedings and by granting summary judgment to

Depositors without requiring Depositors to serve its motion for summary judgment on Chibinda at least 14 days prior to the hearing scheduled on the motion, as required by Civ.R. 56(C).

{¶2} Chibinda and his wife Dora Chibinda had a homeowner's insurance policy with Depositors, an affiliate of Nationwide Insurance Company. In 2007, the Chibindas sought coverage under their homeowner's policy for water damage to their residence. A claims representative for Depositors, Jeffrey Boehm, inspected the damage and denied coverage on the basis of a policy exclusion that prohibited coverage for loss caused by constant or repeated seepage or leakage of water over a period of weeks, months or years from a plumbing system within the insured's residence. Boehm informed the Chibindas of his decision to deny coverage in a letter with the heading, "**Nationwide®** *On Your Side*."

{¶3} In February 2008, the Chibindas filed a pro se complaint against "Nationwide Insurance" in the Butler County Area III Court, alleging that the water damage to their residence "was caused by a sudden pipe bust [sic] just below the kitchen counter bottom board" and that Nationwide Insurance breached the terms of the parties' homeowner's policy and acted in bad faith by wrongfully denying them coverage. Depositors, representing itself as Nationwide Insurance, filed an answer to the Chibindas' complaint, denying "any and all averments and allegations" contained therein and alleging in one of its defenses "that 'Nationwide Insurance' is not a proper party to this action."

{¶4} "Nationwide Insurance" moved for summary judgment on the grounds that (1) the Chibindas' homeowner's policy had been issued by Depositors, not "Nationwide Insurance," and therefore the Chibindas had filed their complaint against the wrong party, and (2) the Chibindas' homeowner's policy expressly excluded coverage for the water damage. After the Chibindas filed a memorandum in opposition, the magistrate issued an "Entry Granting Summary Judgement [sic] In Favor Of The Defendant," which stated in

pertinent part:

{¶5} "The Plaintiffs failed to respond to the motion [for summary judgment] with proper evidence or affidavits. Technically, the interview by the Defendant's agent (Boehm) could be used, but even in reviewing that, there is no evidence to contradict the Defendant's evidence. The Plaintiff [sic] moved to compel the depositions [sic] of Boehm but did not request additional time to respond to the defendant's motion. With just a little proper response, the Plaintiff [sic] could have overcome the motion.

{¶6} "More importantly, the issue of the proper Defendant was not addressed and the Defendant must prevail simply on that issue."

{¶7} On September 29, 2008, the trial court, noting that no objections to the magistrate's decision had been filed, ordered the magistrate's decision to stand as the decision of the trial court.

{¶8} On October 1, 2008, Chibinda, but not his wife, filed another complaint in the trial court that was similar to the one he and his wife had brought against "Nationwide Insurance," except that it named "Depositors Insurance" as the defendant in the action. When Depositors failed to file an answer or otherwise defend in the action, Chibinda moved for default judgment, but the trial court denied it. In early 2009, Chibinda requested a hearing on his motion for default judgment. On February 27, 2009, the trial court held a hearing on Chibinda's motion, and afterwards granted default judgment against Depositors and in favor of Chibinda in the amount of $15,000 plus costs and interest.

{¶9} Upon learning that default judgment had been entered against it, Depositors, on March 27, 2009, filed a Civ.R. 60(B) motion to set the default judgment aside. A hearing was scheduled on Depositors' motion for May 22, 2009. In April 2009, Chibinda filed a response to Depositors' motion, and Depositors filed a reply memorandum in support of its motion. On May 18, 2009, Chibinda filed a response to Depositors' memorandum in support and a

request for a continuance of the May 22, 2009 hearing to allow him to hire counsel. On May 20, 2009, notice was sent to the parties informing them that the hearing on Depositors' Civ.R. 60(B) motion was being rescheduled for June 12, 2009, not because of Chibinda's request for a continuance, but because the trial judge was unavailable. On May 29, 2009, Depositors filed a motion to strike Chibinda's response to Depositors' reply memorandum.

{¶10} No further filings were made in the case until nearly one year later, when the parties were sent notice that a status or "report hearing" on the case had been scheduled for July 14, 2010. On that date, the magistrate held a status hearing on the matter and afterwards issued an entry that stated, "[Depositors] to brief 'res judicata' issue by [August 16, 2010,]" "[Chibinda] may respond[,]" and "Court to review [the issues in dispute on August 25, 2010]."

{¶11} On August 16, 2010, Depositors filed an answer and counterclaim for declaratory judgment on Chibinda's complaint, and separately filed a motion for summary judgment on Chibinda's complaint. Chibinda did not respond to Depositors' motion for summary judgment. On August 25, 2010, the magistrate issued a decision recommending that Depositors' motion for summary judgment be granted, that Depositors' counterclaim be dismissed as moot, and that Chibinda's complaint be dismissed with prejudice. On August 26, 2010, the trial court adopted the magistrate's recommendations in their entirety and made them the order of the court.

{¶12} Chibinda now appeals, assigning the following as error:

{¶13} Assignment of Error No. 1:

{¶14} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE [sic] MOTION FOR SUMMARY JUDGMENT AS A MATTER OF LAW BASED UPON THE DOCTRINES OF *RES JUDICATA AND COLLATERAL ESTOPPEL*."

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY GRANTING APPELLEE SUMMARY JUDGMENT BASED UPON THE REPORT AND RECOMMENDATIONS OF THE MAGISTRATE AND NOT CONCLUSION OF FACTS AND LAW."

{¶17} Assignment of Error No. 3:

{¶18} "THE TRIAL COURT ABUSED ITS DISCRETION BY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL AND STATE RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW."

{¶19} Assignment of Error No. 4:

{¶20} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING DEFENDANT-APPELLEE [sic] MOTION FOR SUMMARY JUDGMENT WITHOUT VACATING DEFAULT JUDGMENT TO THE BENEFIT OF APPELLANT."

{¶21} Assignment of Error No. 5:

{¶22} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING APPELLEE TO RELITIGATE A CASE THAT HAS BEEN DISPOSED OF DESPITE RES JUDICATA DOCTRINE."

{¶23} We shall address Chibinda's assignments of error in an order and manner that facilitates our analysis of the issues raised therein.

{¶24} In his fourth and fifth assignments of error, Chibinda argues the trial court erred by granting summary judgment to Depositors without ruling on Depositors' motion to set aside the default judgment that had been entered against it. We agree.

{¶25} The law generally does not favor default judgments, since cases should be decided on their merits whenever possible. *Wilson v. Lee*, 172 Ohio App. 3d 791, 2007-Ohio-4542, ¶15. Civ.R. 55(B) provides that "[i]f a judgment by default has been entered, the

court may set it aside in accordance with [Civ.R.] 60(B)." "To prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion." *Bradley v. Holivay*, 183 Ohio App. 3d 596, 598-99, 2009-Ohio-3895, ¶4, citing *GTE Automatic Elec., Inc. v. ARC Indus., Inc*. (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. "The above three requirements are independent and in the conjunctive[,]" and "[u]nless each of the three is satisfied, relief must be denied." *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1993), 67 Ohio St. 3d 134, 136.

{¶26} Nevertheless, Civ.R. 60(B) is a remedial rule, and therefore is to be liberally construed, *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 248, and an even greater standard of liberality must be applied to default judgments. *GTE Automatic Elec., Inc.*, paragraph three of the syllabus. Where the movant has a meritorious defense and has sought relief in a timely manner, any doubt about whether to grant relief under Civ.R. 60(B) should be resolved in favor of setting aside the default judgment so that the case may be decided on its merits. Id.

{¶27} A trial court has discretion in deciding whether to grant or deny a Civ.R. 60(B) motion, and the trial court's decision will not be reversed unless the trial court has abused its discretion, i.e., acted arbitrarily, unconscionably or unreasonably. See *Bradley*, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶28} The trial court failed to rule on Depositors' Civ.R. 60(B) motion to set aside the default judgment that was entered against it. Depositors acknowledges this, but represented during oral arguments before this court that the trial court *orally* granted Depositors' Civ.R. 60(B) motion at a hearing held in June 2009. However, it is axiomatic that a trial court speaks only through its journal entries, see, e.g., *Kaine v. Marion Prison Warden*, 88 Ohio

St.3d 454, 455, 2000-Ohio-381, and therefore, the representations of Depositors' counsel regarding what the trial court allegedly said at a hearing are insufficient to show that the trial court granted Depositors' Civ.R. 60(B) motion. Moreover, there is no indication *in the record* that the scheduled June 22, 2009 hearing on Depositors' Civ.R. 60(B) motion was ever held, let alone, that the trial court granted Depositors' Civ.R. 60(B) motion.

{¶29} Depositors argues the trial court "effectively" set aside the default judgment when the magistrate permitted it to move for summary judgment on the issue of res judicata. In support of this argument, Depositors cites, *State Farm Mut. Ins. Co. v. Young*, Summit App. No. 22944, 2006-Ohio-3812, ¶11, in which the Ninth District Court of Appeals found that the trial court's order granting the appellee leave to intervene in the action "effectively granted" the appellee's motion to vacate the default judgment that had been entered in the appellant's favor. However, this case is distinguishable from *Young* because in that case, the appellee and the appellant *agreed* that the trial court's order allowing the appellee to intervene effectively granted appellee's motion to vacate the default judgment, whereas in this case, Chibinda is *challenging* the trial court's failure to rule on Depositors' motion to set aside the default judgment rendered against Depositors and in his favor.

{¶30} Therefore, Chibinda's fourth and fifth assignments of error are sustained to the extent indicated.

{¶31} In his second and third assignments of error, Chibinda argues the trial court erred by (1) adopting the magistrate's "secret" report and recommendations, and (2) by granting summary judgment to Depositors without complying with the requirements of Civ.R. 56(C), thereby depriving him of an opportunity to defend against Depositors' motion for summary judgment. In response, Depositors acknowledges that the magistrate's report and recommendations apparently were not served on the parties as required under Civ.R. 53(D)(3)(a)(iii). However, Depositors points out that the trial court's entry adopting the

magistrate's report and recommendations was properly served on Chibinda, and asserts that the trial court's entry gave Chibinda "ample opportunity" to obtain a copy of the magistrate's report and recommendations and to file timely objections thereto. As a result, Depositors contends that Chibinda was not prejudiced by the fact that the magistrate's report and recommendations may not have been served on the parties. Depositors also argues the record shows that Chibinda had adequate time to respond to Depositors' motion for summary judgment, and since he failed to do so, has waived any objections he may have had to the magistrate's report and recommendations, which the trial court adopted as the order of the court. We find Depositors' arguments unpersuasive.

{¶32} Civ.R. 56(C) provides that a motion for summary judgment "shall be served at least 14 days before the time fixed for hearing." Therefore, a hearing on a motion for summary judgment must be held not fewer than 14 days *after* service of the motion on the adverse, nonmoving party, in order to provide that party with an opportunity to file affidavits or otherwise defend against the motion for summary judgment. See *Lloyd v. William Fannin Builders, Inc.*, (1973), 40 Ohio App. 2d 507, 511.

{¶33} Civ.R. 53(D)(3)(a)(iii) states:

{¶34} "*Form; filing, and service of magistrate's decision*. A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision *shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion*, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b)." (Emphasis added.)

{¶35} Attached to the magistrate's August 25, 2010 report and recommendations was

the following notice:

NOTICE OF RECEIPT OF ENTRY

_____ A copy of the Report and Recommendations in the above-captioned matter was mailed to the Plaintiff this _____ day of _____, 2010.

_____ A copy of the Report and Recommendations in the above-captioned matter was mailed to the Defendant this _____ day of _____, 2010.

{¶36} "Notice is hereby given that unless objections, in writing, stating the reason therefore are filed with the Court, and a copy sent to opposing party (or to the attorney for said party, if applicable) within fourteen (14) days of the filing of the report, an order will be made as recommended above. Any objection to a finding of fact shall be supported by a transcript of all of the evidence submitted to the Magistrate relevant to that fact or, if a transcript is unavailable, an affidavit of that evidence specifying the errors made by the Magistrate."

{¶37} The spaces in the above notice were left blank, and it does not appear from the record that the magistrate's report and recommendation of August 25, 2010 was ever served on the parties, let alone, within three days after the magistrate's report and recommendations were filed with the court. Moreover, the magistrate's report and recommendations do not contain the "indicate conspicuously" language contained in Civ.R. 53(D)(3)(a)(iii), which would have informed Chibinda that he would not be allowed to assign as error on appeal the court's adoption of any factual finding or legal conclusion unless he made a timely and specific objection to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b). Contrary to what Depositors asserts, it is apparent from the record and the circumstances of this case that Chibinda was prejudiced by the magistrate's failure to comply with the requirements of Civ.R. 53(D)(3)(a)(iii). Consequently, Chibinda's failure to file objections to

the magistrate's report and recommendations does not preclude us from addressing the arguments Chibinda has raised on appeal. See, e.g., *D.A.N. Joint Venture III, L.P. v. Armstrong*, Lake App. No. 2006-L-089, 2007-Ohio-898, ¶22, 23, and *Ulrich v. Mercedes-Benz USA, L.L.C.*, Summit App. No. 23550, 2007-Ohio-5034, ¶15..

{¶38} The record and circumstances of this case refute Depositors' assertion that Chibinda had adequate time and a reasonable opportunity to defend against Depositors' motion for summary judgment. The magistrate's July 14, 2010 entry states, "[Depositors] to brief 'res judicata' issue by [August 16, 2010,]" "[Chibinda] may respond[,]" and "Court to review [the issues in dispute on August 25, 2010]." Depositors has represented to this court that the magistrate directed it to move for summary judgment by August 16, 2010. Chibinda denies this in his brief and contends that he expected Depositors to make arguments in favor of its motion to set aside the default judgment that had been entered against it. Significantly, there is nothing in the magistrate's July 14, 2010 entry that mentions "summary judgment," and the entry reasonably could be interpreted as merely a request for Depositors to brief the res judicata issue for purposes of determining whether to grant or deny Depositors' motion to set aside the default judgment entered against it.

{¶39} However, even if we accept as true Depositors' representation that the magistrate directed it to move for summary judgment by August 16, 2010, Depositors' motion for summary judgment had to be served on Chibinda, the adverse, nonmoving party, at least 14 days before the date fixed for hearing on the motion for summary judgment. However, the hearing on Depositors' summary judgment motion was scheduled for August 25, 2010, and therefore Chibinda was not given at least 14 days to serve and file opposing affidavits in response to Depositors' motion. Consequently, the trial court erred by granting summary judgment in favor of Depositors and against Chibinda under these circumstances, since Chibinda was deprived of an adequate opportunity to file affidavits or otherwise defend

against Depositors' motion for summary judgment. See *Lloyd*, 40 Ohio App. 2d at 511.

{¶40} In light of the foregoing, Chibinda's second and third assignments of error are sustained to the extent indicated.

{¶41} In his first assignment of error, Chibinda argues the trial court erred in granting summary judgment to Depositors on the basis of res judicata or collateral estoppel. However, the trial court prematurely ruled on this issue without ruling on Depositors' Civ.R. 60(B) motion to set aside default judgment and without requiring Depositors to serve its motion for summary judgment on Chibinda at least 14 days prior to the scheduled hearing date on the motion for summary judgment, as required under Civ.R. 56(C). Therefore, we decline to rule on Chinbinda's first assignment of error, since any ruling we would make on the issues raised therein would be purely advisory and thus improper. See *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶84.

{¶42} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.

[Cite as *Chibinda v. Depositors Ins.*, 2011-Ohio-2597.]