[Cite as *Dan Eynon Ents. v. Mid-America Diesel,* 2015-Ohio-1089.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DAN EYNON ENTERPRISES,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-06-140
	:	O P I N I O N
- vs -		3/23/2015
	:	
MID-AMERICA DIESEL,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2013-12-3456

Salyers Law Office LLC, Megan E. Salyers, 4725 Cornell Road, Cincinnati, Ohio 45241, for plaintiff-appellee

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PIPER, P.J.

{¶ 1} Defendant-appellant, Mid-America Diesel, appeals a decision of the Butler County Court of Common Pleas denying its request to compel arbitration in a suit filed by plaintiff-appellee, Dan Eynon Enterprises.

{¶ 2} Mid-America, a corporation with its principal place of business in Michigan, services and rebuilds diesel engines. Eynon leases transportation services to customers,

and is an Ohio company. Eynon contacted Mid-America in an effort to purchase a rebuilt engine for one of its semi-trucks after learning about Mid-America on its website. The two parties reached an oral agreement wherein Mid-America agreed to sell Eynon the rebuilt engine and deliver it to Ohio. Once the terms were agreed upon, Mid-America emailed an invoice to Eynon and Eynon paid accordingly.

{¶ 3} Soon after the rebuilt engine was installed in Eynon's truck, the engine stopped working properly. The Eynon employee driving the truck at the time the engine stopped working was stranded out-of-state with a customer's load. Eynon incurred repair expenses, lost profits for the load, as well as expenses to house the employee while repairs were made.

{¶ 4} Eynon filed suit on December 18, 2013, claiming breach of contract, misrepresentation, and breach of implied warranties. Mid-America did not answer the complaint or defend in any manner. On February 3, 2014, Eynon filed a motion for default judgment. On February 11, 2014, Mid-America's president, Carl Spencer, filed a document he captioned "Answer to Complaint" in the trial court. Spencer moved the court to order arbitration in Michigan, and stated that arbitration was a term included on the invoice Mid-America sent Eynon after their oral negotiations were completed.

{¶ 5} On February 24, 2014, Eynon moved the court to strike Mid-America's answer, arguing that the answer was filed out of time because it was filed past the 28 days in which Mid-America was required to answer the complaint. Eynon also filed a response to Mid-America's demand for arbitration, arguing that the invoice was not a contract between the parties that required arbitration and that Eynon had in no way agreed to arbitration as a term of the oral agreement between the parties.

{¶ 6} The trial court set a hearing on Eynon's motions for May 9, 2014. Mid-America obtained counsel approximately one and one-half weeks before the hearing date, and on May 5, 2014, counsel entered his appearance with the court. Two days before the hearing

was to occur, Mid-America filed a motion to compel arbitration. At the same time, Mid-America also filed responses to Eynon's motion to strike the pro se "answer" filed by Mid-America's president and Eynon's motion for default judgment. However, Mid-America never filed a motion for leave to file an answer out of time.

{¶ 7} The trial court held the hearing as scheduled, and counsel for both parties argued the default judgment issue. Mid-America asserted that it did not file an answer or request leave to file a late answer because of its concern that doing so would have waived its right to compel arbitration. The trial court, however, found that Mid-America had failed to answer within the 28 days provided by the civil rules, and that Carl Spencer's "answer" demanding arbitration filed in February, 2014 was not permitted because corporations cannot represent themselves pro se. The trial court also found that Mid-America, even once it had obtained counsel, never filed a motion for leave to file a late answer. As such, the trial court granted Eynon's motions to strike and for default judgment, and denied Mid-America's motion to compel arbitration. Mid-America now appeals the trial court's order, raising one assignment of error.

{¶ 8} THE TRIAL COURT ERRED BY FAILING TO GRANT MID-AMERICA'S MOTION TO COMPEL ARBITRATION.

{¶ 9} Mid-America argues in its sole assignment of error that the trial court erred in denying its motion to compel arbitration.

{¶ 10} According to Civ.R. 12(A)(1), "the defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him * * *." When a defendant fails to answer according to Civ.R. 12(A), the plaintiff may move for default judgment. Civ.R. 55. Default judgment may be awarded when a "defendant fails to make an appearance by filing an answer or otherwise defending an action." *Davis v. Immediate Med. Serv., Inc.*, 80 Ohio St.3d 10, 14 (1997). This court reviews a trial court's decision to grant or

deny a default judgment motion for an abuse of discretion. *Nix v. Robertson*, 12th Dist. Butler No. CA2012-08-157, 2013-Ohio-777, ¶ 9. 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. *Id*.

{¶ 11} The record indicates that Eynon filed its complaint on December 18, 2013 and that Mid-America did not file an answer or defend in any manner. Eynon then moved for default judgment according to Civ.R. 55 based upon Mid-America's failure to answer or defend. Mid-America's first filing was only made after Eynon moved the court for default judgment, and well past the 28-day timeframe provided by Civ.R. 12(A)(1). Even then, the filing was improper because Carl Spencer filed the request for arbitration on behalf of Mid-America despite the inability of a corporation to proceed pro se. *See Union Savings Assn. v. Home Owners Aid, Inc.*, 23 Ohio St.2d 60 (1970) (finding that an agent of a corporation who is not an attorney may not represent the corporation as a pro se advocate in court).

{¶ 12} In response to Mid-America filing the pro se "answer," Eynon filed a motion to strike the answer, as well as a motion in opposition to the demand for arbitration made by Spencer. The trial court, on March 19, 2014, set the matter for a hearing, and on April 23, 2014 continued to the hearing until May 9, 2014. Despite having approximately two months' notice of the hearing, Mid-America did not offer to defend or ask the court to permit a late answer. Mid-America did not procure counsel until less than two weeks before the May 9th hearing, and Mid-America's counsel did not enter his appearance until four days before the hearing. Even upon entering an appearance of counsel, Mid-America never filed an answer or a motion for leave to file a response out of time.

{¶ 13} During the hearing, Mid-America did not dispute that it had failed to file an answer to Eynon's complaint or to defend. Mid-America argued that it would not answer Eynon's complaint out of fear of waiving its arbitration right. However, a party does not waive

its right to enforce a valid arbitration clause merely by filing an answer. Instead, waiver occurs only when the record demonstrates that based on the totality of the circumstances, the defending party knew of an existing right to arbitration and acted inconsistently with that right to arbitrate. *Dixon v. Residential Fin. Corp*., 12th Dist. Madison No. CA2009-11-024, 2010-Ohio-4409, ¶ 11.

{¶ 14} This court, and others, reviews several factors before deciding whether a party has waived its right to arbitration, including,

> (1) any delay in the requesting party's demand to arbitrate via a motion to stay judicial proceedings and an order compelling arbitration; (2) the extent of the requesting party's participation in the litigation prior to its filing a motion to stay the judicial proceedings, including a determination of the status of discovery, dispositive motions, and the trial date; (3) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of the proceedings; and (4) whether the nonrequesting party has been prejudiced by the requesting party's inconsistent acts.

Id. at ¶ 12.

{¶ 15} Moreover, and according to R.C. 2711.02(B), a court is required to stay proceedings once a party moves the court to stay the action and the court determines that there is a valid and binding arbitration agreement. As such, Mid-America could have answered and defended the suit by invoking R.C. 2711.02(B). Moreover, the statute states that the court is not required to stay the proceedings if the applicant for the stay is in "default in proceeding with arbitration." As such, and even if a valid arbitration clause binds the parties, the proponent of arbitration must take timely action to assert its right to arbitrate.[1]

{¶ 16} Even if Mid-America feared waiver, it could have defended without filing an

1. The trial court did not reach the merits of whether the parties were bound by a valid arbitration clause. The trial court's decision was not on the merits of whether or not the invoice created a binding arbitration term added by operation of law to the parties' oral contract. This court need not address the merits of the arbitration issue for that reason.

answer.[2] According to Civ.R. 12(B), a party may file a motion to dismiss for several reasons, including lack of jurisdiction over the subject matter or failure to state a claim upon which relief can be granted. A party that wishes to defend its right to arbitration rather than litigation in the courts can defend the complaint by asking the court to dismiss the case based upon a valid arbitration clause, and may use the methods subscribed in Civ.R. 12(B) to do so. The record is clear that Mid-America did not move the court to dismiss Eynon's complaint because of arbitration, and that it did not defend Eynon's action in any way.

{¶ 17} During the hearing, the trial court noted that Mid-America, even upon retaining counsel, had not asked the court for leave to file an answer out of time, as it could have done according to Civ.R. 6(B)(2), which permits a party to move for an untimely filing "where the failure to act was the result of excusable neglect." The court noted that in addition to not even asking for leave to file a late answer, Mid-America had not taken any steps to show excusable neglect for failing to answer or defend. Instead, the court stated that Mid-America essentially "[sat] on [its] rights" and "only when backs are up against the wall is the Defendant prepared to do what the law expects [it] to do in terms of being timely."

{¶ 18} Although Mid-America had several options to defend without waiving the arbitration issue, it chose not to answer or defend the complaint and did not take any valid steps to cure its failure to respond to Eynon's complaint pursuant to Civ.R. 12(A)(1). As such, the trial court granted Eynon's motion for default judgment, and as a result of the default, denied Mid-America's motion to compel arbitration as being not timely asserted.

{¶ 19} Given that Mid-America was required to answer or defend the complaint within 28 days and did not do so, the trial court was within its discretion in granting default judgment. Based upon the default judgment and entering judgment in favor of Eynon, the

2. It is not uncommon for a defendant filing an answer to list arbitration as a defense in it answer. *See e.g. Church v. Fleishour Homes, Inc*., 172 Ohio App.3d 205, 2007-Ohio-1806 (5th Dist.).

trial court did not err in denying Mid-America's motion to compel arbitration. As such, Mid-America's single assignment of error is overruled.

{¶ 20} Judgment affirmed.

RINGLAND and M. POWELL, J., concur.