[Cite as *Ohio Bell Tel. Co. v. C-5 Constr., Inc.*, 2010-Ohio-4762.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

OHIO BELL TELEPHONE CO. :

Plaintiff-Appellee : C.A. CASE NO. 23792

v. : T.C. NO. 2008CVF03552

C-5 CONSTRUCTION, INC. : (Civil appeal from Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 1st day of October, 2010.

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FROELICH, J.

{¶ 1} C-5 Construction, Inc., appeals from a judgment of the Dayton Municipal Court, which granted judgment to Ohio Bell Telephone Company on its claims against C-5 Construction after the trial court deemed Ohio Bell's request for admissions and interrogatories to be admitted by C-5 Construction. For the following reasons, the trial

court's judgment will be reversed, and the matter will be remanded for further proceedings.

I

{¶ 2} On May 6, 2008, Ohio Bell filed suit against Steve Rauch, Inc., claiming that Rauch cut Ohio Bell's underground telephone cable during three separate excavation projects. Eleven months later, Ohio Bell moved for leave to amend its complaint in order to add C-5 Construction as a party-defendant for its claims regarding one of the excavation projects. The trial court granted the motion for leave on April 14, 2009. Ohio Bell filed its amended complaint the same day. Two days later, Rauch filed its answer to the amended complaint.

{¶ 3} Initially, Ohio Bell's service upon C-5 Construction by certified mail was returned with a sticker indicating that the address was "vacant." In May 2009, service upon C-5 was again attempted by certified mail, but to a different address. The envelope was returned as "unclaimed." On June 15, 2009, Ohio Bell requested service by ordinary mail. Service was completed on June 16, 2009. The summons indicated that an answer was required by July 13, 2009.

{¶ 4} On July 15, 2009, Rauch moved to continue the trial date, noting that C-5 Construction had not yet appeared in the action and that Rauch would file a cross-claim against C-5 Construction once it had made an appearance. Ohio Bell did not object to the motion. Rauch's motion was granted, and the court re-scheduled the trial for November 20, 2009. Without waiting for C-5 Construction to make an appearance, Rauch filed a cross-claim against C-5 Construction on July 24, 2009.

{¶ 5} On August 11, 2009, C-5 Construction requested permission to file an answer

out-of-time and for additional time to respond to Ohio Bell's first request for admissions, first request for production, and first set of interrogatories. C-5 Construction did not request an extension until a particular date, nor did it indicate the length of time it needed to prepare its answer and discovery responses.

{¶ 6} On August 18, 2009, the trial court granted C-5 Construction's motion. The court did not, however, set new deadlines for C-5 Construction to file its answer or to respond to Ohio Bell's discovery requests.

{¶ 7} On October 5, 2009, C-5 Construction filed its answers to Ohio Bell's amended complaint and Rauch's cross-claim.

{¶ 8} On approximately November 15, 2009,[1] Ohio Bell moved for a continuance of the November 20, 2009, trial date. Ohio Bell explained that "the amended pleadings were closed approximately one month ago and Plaintiff's counsel is waiting on discovery responses from Defendant C-5 Construction." Ohio Bell indicated that counsel for C-5 Construction joined in the motion, and Rauch's counsel did not oppose it.

{¶ 9} On November 16, 2009, Ohio Bell moved to compel discovery and to deem matters admitted as to C-5 Construction. (This motion apparently had been faxed to the court on November 14, a Saturday, but it was filed stamped on November 16.) In its motion, Ohio Bell indicated that it served discovery requests on C-5 Construction on May 14, 2009, and that, as of November 14, 2009, C-5 Construction had not yet responded to Ohio Bell's discovery requests.

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[1]The file stamp on the motion indicates that it was filed at 9:56 p.m. on November 15, 2009, a Sunday. It is unlikely that the file stamp is accurate.

{¶ 10} At the same time that the motion to compel and to deem matters admitted was filed, a supplement to the motion to compel was also filed.[2] Ohio Bell's supplement indicated that its motion to compel had erroneously stated that no discovery response had been received. Ohio Bell informed the court that C-5 Construction had faxed discovery responses to Ohio Bell at 4:20 p.m. on Friday, November 13, 2009.

{¶ 11} On the same day that the motion to compel and to deem matters admitted and the supplement were filed, the trial court granted the motion and entered judgment against C-5 Construction. The court's decision and judgment entry stated, in its entirety:

{¶ 12} "This matter came before the Court on Plaintiff's Motion to Compel Discovery and to Deem Matters Admitted as to Defendant C-5 Construction, Inc.

{¶ 13} "Defendant C-5 Construction was served with Plaintiff's First Set of Discovery, Requests for Admissions, Interrogatories and Requests for Production on May 15, 2009. Defendant's response was due by June 16, 2009. However, Defendant failed to provide Discovery until November 13, 2009.

{¶ 14} "THEREFORE, the Court DEEMS Plaintiff's Requests for Admissions and Interrogatories to be ADMITTED.

{¶ 15} "THEREFORE, the Court grants Plaintiff's Motion to Compel and the matters referenced are DEEMED ADMITTED.

{¶ 16} "Plaintiff is GRANTED JUDGMENT based on the Pleadings, including the Admissions and Interrogatories deemed admitted."

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[2]The file stamps on both the motion to compel and the supplement to that motion were 4:56 a.m. on November 16, 2009. Again, the file stamps appear to be inaccurate.

{¶ 17} C-5 Construction moved for reconsideration of the trial court's entry deeming the admissions and interrogatories admitted. The court granted Ohio Bell twenty days to respond to the motion. Before Ohio Bell responded to C-5 Construction's motion, Rauch dismissed its cross-claims against C-5 Construction, without prejudice, and Ohio Bell dismissed its claims against Rauch, with prejudice. As a result of these dismissals, no claims remained pending.

{¶ 18} On December 16, 2009, C-5 Construction appealed from the trial court's November 16, 2009, judgment. C-5 Construction raises three assignments of error.

II

{¶ 19} C-5 Construction's first assignment of error states:

{¶ 20} "THE TRIAL COURT ERRED IN SUA SPONTE ISSUING A JUDGMENT ON THE PLEADINGS."

{¶ 21} In its first assignment of error, C-5 Construction claims that the trial court erred in, sua sponte, granting judgment on the pleadings in favor of Ohio Bell on its claims against C-5 Construction. C-5 Construction argues that Ohio Bell did not move for judgment on the pleadings, pursuant to Civ.R. 12(C), and the trial court should not have considered matters outside of the pleadings.

{¶ 22} In its responsive brief, Ohio Bell acknowledges that it did not move for judgment on the pleadings, pursuant to Civ.R. 12(C). It argues, however, that the trial court did not grant judgment on the pleadings. Ohio Bell states: "Once all relevant matters to the allegations of the complaint were conclusively established, nothing was left to be done, save to render judgment in favor of the plaintiff." Ohio Bell contends that it is "apparent" that

the trial court's judgment was a sanction for C-5 Construction's "outrageous disregard for the rules of discovery."

{¶ 23} It is not clear which Rule of Civil Procedure, if any, the trial court relied upon in entering judgment against C-5 Construction. By stating that it entered judgment "based on the Pleadings, including the Admissions and Interrogatories," the trial court implied that it was entering judgment under either Civ.R. 12(C) or Civ.R. 56, and not as a sanction for failing to respond in a timely manner to Ohio Bell's discovery requests.

{¶ 24} Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." When considering a defendant's Civ.R. 12(C) motion for judgment on the pleadings, the court may consider only the allegations in the complaint and any written instrument attached thereto. Dismissal is appropriate under Civ.R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Dearth v. Stanley,* Montgomery App. No. 22180, 2008-Ohio-487, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459. Thus, a motion for judgment on the pleadings may be granted only if the moving party is entitled to judgment as a matter of law.

{¶ 25} Assuming that the trial court relied upon Civ.R. 12(C), the trial court acted in the absence of any motion for judgment on the pleadings. Even if the court had been presented with such a motion, the trial court acted before C-5 Construction had an opportunity to respond. See Civ.R. 6(D); Loc.R. 3.10(D)(2) of

the Dayton Municipal Court (providing 14 days to respond to motions). A trial court errs in granting a motion prior to the expiration of the time allowed by Rules of Civil Procedure or the court's local rules for the non-moving party to respond. See, e.g., *Hillabrand v. Drypers Corp.*, 87 Ohio St.3d 517, 2000-Ohio-468.

{¶ 26} Moreover, even if Ohio Bell had moved for judgment on the pleadings and C-5 Construction had responded, the trial court should not have considered C-5 Construction's admissions, which are matters outside of the pleadings. Upon review of C-5 Construction's pleading, C-5 Construction's answer constituted a general denial; Ohio Bell was not entitled to judgment, as a matter of law, based solely on the pleadings. Accordingly, judgment on the pleadings under Civ.R. 12(C) was not proper.

{¶ 27} We also conclude that the trial court did not properly grant summary judgment against C-5 Construction.

{¶ 28} Summary judgment is governed by Civ.R. 56. "Civ.R. 56 authorizes motions for summary judgment, supported by affidavits, filed by a party to an action, with notice of the motion and its grounds for relief served on the adverse party, who may serve and file opposing affidavits." *Vanderhorst v. 6105 N. Dixie Drive, L.L.C.*, Montgomery App. No. 23491, 2009-Ohio-6687, ¶11. Under that Rule, summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 29} "A summary judgment ordered by the court, sua sponte, denies the

party against whose claim or defense summary judgment is ordered the notice to which the party is entitled by Civ.R. 56. Therefore, summary judgment granted to a nonmoving party is appropriate only where all relevant evidence is before the court, no genuine issue as to any material facts exists, and the nonmoving party is entitled to judgment as a matter of law." *Vanderhorst* at ¶11, citing *State ex rel. Moyer v. Montgomery Cty. Bd. of Commrs.* (1995), 102 Ohio App.3d 257, 267. "A court which is considering granting summary judgment to a nonmoving party must make sure *** that the party whom it is considering entering summary judgment against has had a fair opportunity to present both evidence and arguments against the grant of summary judgment to the nonmoving party." *Moyer*, 102 Ohio App.3d at 267.

{¶ 30} In the present case, the trial court entered judgment, even though none of the parties had filed a motion for summary judgment. This factual circumstance does not arise often. When it has arisen, Ohio courts have reversed the granting of summary judgment to a non-moving party when the court has entered judgment, sua sponte, in the absence of any pending summary judgment motion. See *HomEq Servicing Corp. v. Schwamberger*, Scioto App. No. 07 CA 3146, 2008-Ohio-2478; *Gibbs v. Ohio Adult Parole Auth.,* Ross App. No. 01 CA 2622, 2002-Ohio-2311; *LaSalle Bank Natl. Assn. v. Murray*, 179 Ohio App.3d 432, 2008-Ohio-6097. When no party has moved for summary judgment, the party against whom judgment is summarily entered by the court lacks notice that the court might dispose of the case on summary judgment and, consequently, that party has no opportunity to marshal evidence on its behalf. Id.

{¶ 31} Here, neither Ohio Bell nor C-5 Construction filed motions for summary judgment. The only motions pending before the trial court were Ohio Bell's motion for a continuance, Ohio Bell's motion to compel and to deem matters admitted, and its supplemental motion to compel and to deem matters admitted. Although the trial court's granting of Ohio Bell's motion to deem matters admitted may have had a detrimental effect on C-5 Construction's defense, C-5 Construction was not placed on notice that the court might immediately enter judgment against it, and C-5 Construction was not afforded any opportunity to gather additional evidence on its behalf. Accordingly, the trial court's sua sponte entry of judgment against C-5 Construction failed to comply with Civ.R. 56 and due process.

{¶ 32} Finally, even if judgment had been entered as a discovery sanction, as Ohio Bell suggests, the trial court committed prejudicial error. A trial court is permitted to dismiss a case or enter a judgment by default against a party who fails to comply with a court order, including discovery orders. Civ.R. 37(B); Civ.R. 41(B)(1). However, the Supreme Court of Ohio has held that a trial court may dismiss a case with prejudice only '"when counsel has been informed that dismissal is a possibility and *has had a reasonable opportunity to defend against dismissal*."' (Emphasis in original.) *Hillabrand*, 87 Ohio St.3d at 518, quoting *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, syllabus. "A 'reasonable opportunity to defend against dismissal' under *Quonset* contemplates that a trial court allow the party opposing dismissal the opportunity to respond at least within the time frame allowed by the procedural rules of the court." Id. at 519-520. See, also, *Bank One, N.A. v. Wesley*, Montgomery App. No. 20259, 2004-Ohio-6051, ¶11-12

(holding that trial court erred in entering default judgment as a discovery sanction without providing defendant the time allowed by the local rules to respond to a motion for sanctions).

{¶ 33} Accordingly, even if judgment had been entered against C-5 Construction as a discovery sanction, the trial court was required to give C-5 Construction notice that a default judgment might result from the company's failure to timely respond to discovery requests and to provide C-5 Construction an opportunity to argue why judgment should not be entered against it. The trial court failed to provide such notice and an opportunity to respond.

{¶ 34} The first assignment of error is sustained.

III

{¶ 35} "THE TRIAL COURT ABUSED ITS DISCRETION IN DEEMING THE REQUESTS FOR ADMISSIONS AND THE INTERROGATORIES ADMITTED IN LIGHT OF THEIR [SIC] ENTRY GRANTING THE APPELLANTS AN EXTENSION TO RESPOND TO THE APPELLEE'S DISCOVERY REQUESTS."

{¶ 36} In its second assignment of error, C-5 Construction claims that the trial court abused its discretion in deeming the request for admissions to be admitted.

{¶ 37} Civ.R. 36 governs requests for admissions. It provides:

{¶ 38} "A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request ***. The request may, without leave of court, be served upon the plaintiff after commencement of the

action and upon any other party with or after service of the summons and complaint upon that party. ***

{¶ 39} "(1) *** The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. ***" Civ.R. 36(A).

{¶ 40} "When a party fails to timely respond to requests for admissions, the admissions become facts of record that the court must recognize." *Martin v. Martin*, 179 Ohio App.3d 805, 2008-Ohio-6336, ¶13, citing *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. Any matter admitted under Civ.R. 36 "is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Civ.R. 36(B).

{¶ 41} We have made clear that Civ.R. 36 is self-enforcing. *Martin* at ¶14. "[T]he trial court has no discretion whether to deem the matters admitted. If the requests are not answered, they are admitted and conclusively established, and the trial court must recognize them as so." Id.

{¶ 42} As an initial matter, Ohio Bell stated in its motion to compel and to deem request for admissions admitted that it had served its discovery requests upon C-5 Construction on May 14, 2009. Although Ohio Bell had attempted to serve the summons and complaint upon C-5 Construction prior to that date, service of the summons and complaint by certified mail failed twice, and service was not

accomplished by ordinary mail until June 16, 2009. Nothing in the record suggests that Ohio Bell served C-5 Construction with its discovery requests at the same time or after C-5 Construction was properly served with the summons and complaint.

{¶ 43} Nevertheless, on August 11, 2009, C-5 Construction moved for an extension of time to respond to Ohio Bell's discovery requests. The trial court granted the motion, but no deadline was set for C-5 Construction to respond to Ohio Bell's discovery requests.

{¶ 44} Civ.R. 36 requires that unanswered requests for admissions be deemed admitted and conclusively established. However, in order for Civ.R. 36 to self-execute, the party served with the request for admissions must be on notice of the date upon which responses are due. In this case, the request for admissions (purportedly served on May 14) designated "twenty-eight (28) days from the date of service hereof for Defendant's response;" however, the record does not reflect that C-5 was served with the discovery requests at the same time or after service of the complaint and summons. In addition, on August 18, the court explicitly extended this time, but did not indicate how much time it would allow for C-5 Construction to answer the request for admissions when it granted C-5 Construction's motion for an extension to respond. In the absence of an established date when the answers to the requests for admissions were due, the trial court abused its discretion in deeming Ohio Bell's requests for admissions to be admitted.[3] See *McGreevy v.*

[3] We also note that C-5 Construction responded to the request for admissions on November 13, prior to the trial court's granting of the motion to compel.

Bassler, Franklin App. No. 07AP-283, 2008-Ohio-328, citing *Richardson v. Fairbanks Ltd., L.L.C.* (Oct. 28, 1997), Franklin App. No. 97APE03-384 (stating that "where requests for admissions are served without designating a period within which responses are due, the responses may be served any time prior to trial.").

{¶ 45} The second assignment of error is sustained.

IV

{¶ 46} "THE TRIAL COURT ERRED IN NOT ALLOWING THE APPELLANT TO AMEND OR WITHDRAW THE ADMISSIONS."

{¶ 47} In its third assignment of error, C-5 Construction claims that the trial court should have granted its motion for reconsideration, which should have been viewed as a motion to amend or withdraw the admissions. In light of our dispositions of the first and second assignments of error, the third assignment of error is overruled as moot.

V

{¶ 48} The trial court's judgment will be reversed, and the matter will be remanded for further proceedings.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

William H. Hunt
Michael C. Thompson
Hon. John S. Pickrel