[Cite as *Untch v. N. Valley Contrs.* , 2009-Ohio-3271.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
WILLIAM UNTCH, JR.	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-00237
NORTHERN VALLEY	:	
CONTRACTORS, ET AL	:	
	:	O P I N I O N
Defendant-Appellee		

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2008-CV-02775
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JOHN VARIOLA 306 Market Avenue North, Ste. 1024 Canton, OH 44702	PAUL E. MEYER 1911 N. Cleveland-Massillon Road Box 401 Bath, OH 44210-0401
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Gwin, P.J.

{¶1} In this case, the trial court granted default judgment without a hearing on July 8, 2008, in favor of appellee, William G. Untch, Jr., and against appellant, Walker Trucking Company, LLC, and awarded damages for Ten Thousand Ninety Dollars ($10,090.00), together with interest and court costs. Appellant did not appeal that decision. The trial court denied appellant's Civ.R. 60(B) motion for relief from the judgment. Appellant did not appeal that decision. Instead, appellant filed a supplemental motion for relief from judgment and a motion for revision of interlocutory order. The trial court denied both of appellant's motions. Appellant appeals the trial court's October 6, 2008, denial of its supplemental motion for relief from judgment and its motion for revision of interlocutory order.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee, William G. Untch, Jr., filed his complaint in the Canton Municipal Court on March 28, 2008 for damages, against defendant Northern Valley Contractors, Inc. ("Northern Valley"), and appellant Walker Trucking Company, LLC ("Walker Trucking").[1] Northern Valley filed an answer and counter-claim in excess of the monetary jurisdiction of the Canton Municipal Court, causing the matter to be transferred to the Stark County Court of Common Pleas.

{¶3} The Common Pleas Court issued an assignment notice on June 26, 2008 and filed with the Court on June 27, 2008. This notice set a trial date of August 11, 2008 at 8:30 a.m. and a pretrial date for July 8, 2008 at 8:30 a.m. That assignment notice states, "failure to appear at any pretrial conference or hearing may result in an adverse

[1] A Statement of the Facts underlying appellee's original complaint is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in appellant's assignment of error shall be contained therein.

judgment being rendered against the party not appearing or in default judgment being rendered wherever appropriate."

{¶4} At the pretrial on July 8, 2008, counsel for Untch and Northern Valley appeared, but appellant and its counsel failed to appear. Having failed to appear, the court granted a default judgment in favor of Untch against Walker Trucking in the sum of Ten Thousand Ninety Dollars ($10,090.00), together with interest and court costs.

{¶5} On July 28, 2008, appellant filed a motion for relief from judgment pursuant to Civ. R. 60(B)(1) based upon excusable neglect. The motion contained an affidavit from appellant's counsel that explained the circumstances surrounding his absence from the July 8, 2008 pretrial hearing. On August 13, 2008, the trial court denied said motion on the basis that appellant had not "include[ed] the necessary requirement of showing a meritorious defense."

{¶6} On September 12, 2008 appellant filed two motions in the trial court. The first motion requested a revision of the court's "interlocutory order" granting default judgment because it did not contain an express determination that "there is no just reason for delay" in entering final judgment as required by Civ.R. 54(B). The second motion filed by appellant on September 12, 2008 was a "supplement" to the motion for relief from judgment pursuant to Civ.R. 60(B) previously filed by appellant. On October 6, 2008, the trial court overruled each motion.

{¶7} It is from the trial court's October 6, 2008 Judgment Entry denying appellant's supplemental motion for relief from judgment and appellant's motion for revision of interlocutory order that appellant has appealed, raising the following assignment of error:

{¶8} "I. THE COURT BELOW ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR DEFAULT JUDGMENT WITHOUT NOTICE OR HEARING WHERE COUNSEL HAD ENTERED AN APPEARANCE AND FILED AN ANSWER."

I.

{¶9} In its sole assignment of error, appellant attempts to argue that the trial court erred in granting appellee's motion for default judgment. For the reasons that follow, we find we are without jurisdiction to answer that question.

{¶10} We agree with appellant that, once a party has answered or appeared a default judgment is improper.[2] See, *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hospital Assoc.* (1986), 28 Ohio St.3d 118, 502 N.E.2d 599. Where a defendant does not appear for trial, but a default judgment is not appropriate for other reasons, the proper action for the trial court is to proceed *ex parte* and permit the other party to present its case. *Carr v. Green* (1992), 78 Ohio App.3d 487, 605 N.E.2d 431; *Dupal v. Daedlow* (1989), 61 Ohio App.3d 46, 572 N.E.2d 147.

{¶11} In a somewhat analogous situation, we have held that *dismissals* for procedural irregularities are not highly favored and *dismissal* for nonappearance at a pre-trial conference should be used sparingly and only in extreme situations. *Willis v. RCA Corp.* (1983), 12 Ohio App. 3d 1, 465 N.E.2d 924. In *Maddox v. Ward,* Cuyahoga County App. No. 87090, 2006-Ohio-4099, the court held that failure to appear at a pre-

[2] Generally, in the interest of justice, the disposition of cases on their merits is favored in the law, and militates against dismissal with prejudice. *U.S. Bank National Association v. Pellegrini, et al*, Delaware County, App. No. 2005-CAE-03015, 2005-Ohio-5174, citing *Jones v. Hartranft*, 78 Ohio St. 3d 368, 1997-Ohio-203. 678 N.E.2d 530; See also, *Wachovia Securities, Inc. v. Gangale* Tuscarawas App. No. 2003-AP-08-0065, 2004-Ohio-2169, citing *Maritime Manufacturers, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 436 N.E.2d 1034.

trial, due to errors in scheduling, constituted excusable neglect for the purposes of relief from a judgment since counsel did not deliberately ignore a judicial directive. Id. See, also, *George F.A., Inc. v. T.K. Harris Commercial* (March 31, 2008), Stark App. No. 2007CA00233.

{¶12} Factors that have been considered in support of a dismissal for failure to prosecute include a drawn out history of litigation, failure to respond to interrogatories until threatened with dismissal and other evidence that a plaintiff is deliberately proceeding in a dilatory fashion or has done so in a previously filed and voluntarily dismissed action. *U.S. Bank National Association v. Pellegrini, et. al.*, Delaware County, App. No. 2005-CAE-03015, 2005-Ohio-5174, citing *Jones v. Hartranft,* 78 Ohio St.3d 368, 1997-Ohio-203, 678 N.E.2d 530.

{¶13} The United States Supreme Court has held that the harsh remedy of dismissal should only be used when a failure to comply has been due to willfulness or bad faith. *Societe Internationale v. Rogers* (1958), 357 U.S. 197, 212, 78 S.Ct. 1087, 1096. “There are constitutional limitations upon the power of courts, even in aid of their own valued processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.” Id. 357 U.S. at 210, 785 S.Ct. 1087.

{¶14} However, we find in the case sub judice we are not reviewing a timely direct appeal of a default entry that had been entered without the seven-day notice to the defendant who had appeared in the action as required by Civ. R. 55.

{¶15} An appeal as of right may be taken by the filing of a timely notice of appeal with the clerk of the trial court in which the judgment was entered. App.R. 3(A). App.R. 4(A) states:

{¶16} "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶17} In the case sub judice, the record established the trial court's July 8, 2008 entry granting default judgment in favor of appellee, and the trial court's August 13, 2008 judgment entry denying appellant's Civ. R. 60(B) motion for relief from default judgment were final appealable orders from which no appeals were taken.

{¶18} The time for filing a notice of appeal from a judgment is not tolled by either the filing of a Civ.R. 60(B) motion for relief from judgment or a motion to reconsider. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245, 416 N.E.2d 605, 607. (Citations omitted). Moreover, a motion for relief from judgment is not a substitute for a direct appeal from the judgment challenged. Id. However, it is well settled that a judgment denying a motion for relief from judgment filed pursuant to Civ.R. 60(B) is itself a final appealable order. Id.

{¶19} "The Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court," and, accordingly, "all judgments or final orders from said motion are a nullity." *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, paragraph one of the syllabus. If we were to hold differently, judgments would never be final because a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a motion for reconsideration or a motion to vacate judgment. *State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St.3d 191, 193, 529 N.E.2d 1268. Thus, the filing of a motion for

reconsideration after a final appealable order does not suspend the time for filing a notice of appeal. *Consolidated Rail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App.3d 333, 338, 588 N.E.2d 263.

{¶20} It is apparent that if appellant wished to challenge the trial court's order granting the default judgment against appellant, or the trial court's denial of its Civ.R. 60(B) motion for relief from judgment, it should have appealed the judgment within 30 days of the entry of the order, rather than filing a supplemental motion for relief from judgment or a motion for revision of interlocutory order. These motions, in substance, were requests for the trial court to reconsider the granting of default judgment against appellant; they cannot extend the time for filing a notice of appeal from the previously entered final appealable orders.

{¶21} In the case at bar, appellant failed to file a timely notice of appeal from either the July 8, 2008 entry granting a default judgment or the August 13, 2008 entry overruling his Civ. R. 60(B) motion for relief from judgment.

{¶22} Appellant's assignment of error and arguments in support thereof are based upon the alleged error of the trial court in granting a default judgment. Accordingly, we reach the unavoidable conclusion that, by way of this appeal, appellant is attempting to use a supplemental motion for relief from judgment or a motion for revision of interlocutory order as a substitute to re-address the granting of a default judgment in favor of appellee. This it cannot do. Appellant's remedy was an appeal of the judgment (or possibly an appeal from the denial of the motion for relief). See *Van DeRyt v. Van DeRyt* (1966), 6 Ohio St.2d 31, 36 (where the only issue is a mistake by

the trial court in an otherwise effective judgment, the "reasons for the court's inherent power to vacate vanish").

{¶23} The trial court did not err in overruling appellant's supplemental motion for relief from judgment or appellant's motion for revision of interlocutory order, as these motions were simply attempts to extend the time to file an appeal from the trial court's entry of default judgment.

{¶24} Appellant's sole assignment of error is overruled. Appellant did not file a timely appeal to the granting of a default judgment in the case.

{¶25} Accordingly, the judgment of the Stark County Court of Common Pleas is hereby affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY

WSG:clw 0619

[Cite as *Untch v. N. Valley Contrs.* , 2009-Ohio-3271.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WILLIAM UNTCH, JR.	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
NORTHERN VALLEY CONTRACTORS, ET AL	:	
Defendant-Appellee	:	CASE NO. 2008-CA-00237

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. PATRICIA A. DELANEY