[Cite as *Calhoun, Kademenos & Childress Co., L.P.A. v. Shepherd*, 2009-Ohio-3523.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CALHOUN, KADEMENOS, & CHILDRESS CO., L.P.A. Plaintiff-Appellee -vs- RANDY SHEPHERD Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 08CA334 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Mansfield Municipal Court, Case No. 2006CVH03913
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	July 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ANDREW MEDWID 6 West 3rd Street, Suite 200 Mansfield, Ohio 44902	RANDY SHEPHERD, PRO SE 3558 Alvin Road Shelby, Ohio 44875

Hoffman, J.

{¶1} Defendant-appellant Randy Shepherd appeals the November 26, 2008 Judgment Entry entered by the Mansfield Municipal Court, which granted directed verdict in favor of plaintiff-appellee Calhoun, Kademenos & Childress, Co. LPA ("the Firm") on one of his counterclaims, and granted judgment in the Firm's favor on the remaining two counterclaims.

STATEMENT OF THE CASE AND FACTS

{¶2} On November 1, 2006, the Firm filed a Complaint, seeking payment for legal services rendered on Appellant's behalf. Appellant filed an Answer on November 30, 2006. On the same day, Appellant filed a Counterclaim. On January 8, 2007, the Firm filed a Reply to Counterclaim. The certificate of service attached thereto indicated a copy was sent to Appellant by regular U.S. Mail on January 5, 2007. Appellant filed a motion to dismiss the Reply, which the Firm opposed, claiming the Reply was "at most, four days late". January 17, 2007 Memorandum in Opposition.

{¶3} Appellant filed a motion to amend his counterclaim, seeking damages in excess of the municipal court's jurisdiction. The Firm opposed Appellant's motion to amend. The matter came on for status conference before a magistrate on January 29, 2007. The parties were unable to reach a settlement and the magistrate set the matter for trial. On February 12, 2007, Appellant filed a motion for default judgment. The magistrate issued a report on April 5, 2007. Therein, the magistrate stated he was addressing Appellant's motion for default judgment, the Firm's motion to strike and for

leave to respond to the counterclaim.[1] The magistrate noted Civ.R. 12 sets forth a 28 day response time for a counterclaim; therefore, the Firm was required to answer Appellant's counterclaim on or before January 2, 2007. Although, the Firm filed its reply to Appellant's counterclaim on January 8, 2007, the magistrate determined, because the matter had not yet been assigned for any hearings on the merits, neither party's position had changed and neither party had been damaged by the late filing. The magistrate concluded Appellant was not entitled to default judgment because the Firm had filed a reply. The magistrate also denied Appellant's motion to amend his counterclaim.

{¶4} Appellant objected to the Magistrate's Report. On May 3, 2007, the trial court ordered the matter be transferred to the Richland County Court of Common Pleas, finding the allegations contained in the counterclaim could exceed the monetary jurisdiction of the court. The trial court subsequently stayed the transfer and ordered the matter set for hearing before the magistrate on all open motions. Via Magistrate's Report filed September 17, 2007, the magistrate again denied Appellant's motions for default judgment and to amend his counterclaim. The magistrate determined there was no reason for the trial court to transfer the case to the Richland County Court of Common Pleas. Appellant again objected to the Magistrate's Report. The matter proceeded to trial on August 20, 2008. Via Judgment Entry filed November 26, 2008, the trial court approved and adopted the Magistrate's April 5, 2007, and September 17, 2007 reports as order of the court. The trial court granted directed verdict in favor of the

[1] The record before this Court does not include a filing by the Firm captioned Motion to Strike Defendant's Motion for Default Judgment and for Leave to Respond to Defendant's Counterclaim, nor is there a docket notation indicating the filing of such a pleading.

Firm on one of the claims in Appellant's counterclaim, and rendered judgment in the Firm's favor on the remaining two claims. The trial court also granted judgment in favor of Appellant on the Firm's claim.

{¶5} It is from this judgment entry Appellant appeals, raising the following assignments of error:

{¶6} "I. APPELLEE CANNOT APPEAR TO FILE AN ANSWER TO COUNTER CLAIM 39 DAYS AFTER THE COUNTER CLAIM IS FILED WITH PROOF OF SERVICE. CIV.R. 12(A)(2).

{¶7} "II. IS A RUBBER STAMP AVAILABLE TO ANYONE A LEGAL SUBSTITUTE FOR EFFECTING [SIC] A JUDGMENT ENTRY AND FOR JOURNALIZATION BY THE CLERK OF OFFICIAL COURT RECORDS? (CIV.R. 58)

{¶8} "III. APPELLANT IS ENTITLED TO A SUMMARY JUDGMENT, PER CIVIL RULE 56, FROM THE COURT AS MOVED TO DO SO ON JAN. 12, 2007. TO THIS DATE JAN. 9, 2009 NO JE HAS BEEN JOURNALIZED ON SAID MOTION.

{¶9} "IV. APPELLANT HAS THE RIGHT TO AMEND HIS COUNTERCLAIM ONCE, AS A MATTER OF LAW, WHEN NO ANSWER HAS BEEN FILED. (CIV.R. 15(A))

{¶10} "V. APPELLANT IS ENTITLED TO A DEFAULT JUDGMENT, PER CIVIL RULE 55, FROM THE COURT AS MOVED TO DO SO ON FEB. 12, 2007. TO THIS DATE JAN. 12, 2009 NO JUDGMENT ENTRY HAS BEEN JOURNALIZED/EFFECTED ON SAID MOTION.

{¶11} "VI. APPELLANT IS DUE A JUDGMENT ENTRY ON HIS OBJECTIONS TO MAGISTRATES DECISION, DULY AND TIMELY BROUGHT, ON APRIL 14, 2007.

TO THIS DATE JAN. 12, 2009 NO JUDGMENT ENTRY HAS BEEN DOCKETED ON SAID OBJECTIONS. CIV.R. 53(D)(4)(E)

{¶12} "VII. APPELLANT IS DUE A JUDGMENT ENTRY ON HIS OBJECTIONS TO MAGISTRATES DECISION, DULY AND TIMELY BROUGHT ON OCT 01, 2007, TO THIS DATE JAN 12, 2009, NO JUDGMENT ENTRY HAS BEEN DOCKETED ON SAID OBJECTIONS. (CIV.R. 53(D)(4)(E).

{¶13} "VIII. APPELLANT IS DUE A JUDGMENT ENTRY ON HIS MOTION FOR CONTEMPT (CIV.R. 56(G), DULY AND TIMELY BROUGHT, ON JAN. 22, 2008. TO THIS DATE JAN. 12, 2009, NO JUDGMENT ENTRY HAS BEEN DOCKETED ON SAID MOTION.

{¶14} "IX. APPELLANT IS DUE PROTECTION FROM A PARTY IN DEFAULT FILING ANY MOTIONS IN ANY COURT THAT ARE FRIVOLOUS, MALICIOUS AND FOR THE PURPOSE OF DELAY OF RIGHTFUL AND PROMPT ADJUDICATION."

I

{¶15} We find Appellant's first assignment of error to be largely dispositive of this appeal. In his first assignment of error, Appellant maintains the Firm could not appear to file its answer after the expiration date for doing so. Because all subsequent proceedings in the trial court were substantially affected by the trial court's decision on this issue, we find all but one of Appellant's other assignments of error are premature given our disposition of this assignment of error.

{¶16} Civ.R. 12(A)(1) provides, "(t)he defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him." Additionally,

Civ.R. 6(B) authorizes the extension of the answer date beyond the twenty-eight day deadline specified in Civ.R. 12(A), providing, in relevant part:

{¶17} "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *."

{¶18} Thus, a trial court has discretion to grant an extension of time for cause shown, if a party requests the extension before the filing deadline passes. However, once the applicable filing deadline passes, the trial court only has the discretion to grant an extension upon motion and demonstration of excusable neglect.

{¶19} In the instant action, Appellant filed his Counterclaim on November 30, 2006. As noted by the magistrate, the Firm was required to file its answer or request an extension on or before January 2, 2007. The Firm neither filed an answer nor requested an extension of time before that deadline, but rather filed its Reply to Counterclaim on January 8, 2007. The reply was not accompanied by a motion for leave to file out of time, as it should have been. Civ.R. 6(B)(2). Although Civ.R. 6(B) grants broad discretion to the trial court, its discretion is not unlimited. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752. Some showing of excusable neglect is a necessary prelude to the filing of an untimely answer. Id. See, also, *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14-15, 684 N.E.2d 292. We have found nothing in

the record before this Court to demonstrate the Firm's failure to timely answer Appellant's counterclaim was the result of excusable neglect. Accordingly, it was improper for the trial court to consider the Firm's reply.

{¶20} We now turn to the trial court's denial of Appellant's motion for default.

{¶21} In *Miller v. Lint,* supra, the Ohio Supreme Court held a defendant was subject to default judgment pursuant to Civ.R. 55(A) when the defendant failed to file his answer within twenty-eight days after service of the summons and complaint and subsequently filed a late answer not "upon motion" and without a demonstration that "the failure to act was the result of excusable neglect," as required by Civ.R. 6(B)(2). Id. at 214. Accord, *McDonald v. Berry* (1992), 84 Ohio App.3d 6, 9-10, 616 N.E.2d 248; *Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Ent., Inc.* (1982), 6 Ohio App.3d 43, 43-44, 452 N.E.2d 521

{¶22} Civil Rule 55 governs default judgments, and provides, in relevant part: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties." Civ.R. 55(A).

{¶23} Pursuant to the holding in *Miller,* supra, we conclude the trial court abused its discretion by considering the Firm's Reply and thereby summarily denying Appellant's motion for a default judgment.

{¶24} Accordingly, we sustain Appellant's first assignment of error. Upon remand, we direct the trial court to proceed to determine Appellant's Motion for Default Judgment in accordance with Civ.R. 55, this opinion and the law.

IV

{¶25} In his fourth assignment of error, Appellant asserts he had the right to amend his counterclaim once, as the matter of law, because no answer had been filed. We agree.

{¶26} Civ.R. 15(A) provides:

{¶27} "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

{¶28} In light of our disposition of Appellant's first assignment of error, we hold Appellant had a right to amend his counterclaim as a matter of law. Accordingly, we sustain this assignment of error.

{¶29} Because the amended counterclaim was filed before Appellant's Motion for Default Judgment, upon remand, we direct the trial court to consider any possible impact the amended counterclaim may have upon Appellant's Motion for Default Judgment.

II, III, VI, VII, VIII, and IX

{¶30} In light of our disposition of Appellant's first and fourth assignments of error, we find any discussion of Appellant's remaining assignments of error to be premature and unnecessary.

{¶31} The judgment of the Mansfield Municipal Court is reversed and the matter remanded for further proceedings consistent with this Opinion and the law.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CALHOUN, KADEMENOS, & CHILDRESS CO., L.P.A.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RANDY SHEPHERD	:	
Defendant-Appellant	:	Case No. 08CA334

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Mansfield Municipal Court is reversed and the matter remanded to that court for further proceedings consistent with our opinion and the law. Costs assessed to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE