

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

EMERY CONN, JR. ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiffs-Appellees	:	Hon. Sheila G. Farmer, J.
	:	
-VS-	:	
	:	Case No. 2010-CA-51
I.G. CONCRETE, INC., ET AL	:	
	:	
Defendant	:	<u>OPINION</u>

and

MAXUM INDEMNITY COMPANY
Defendant-Appellant

CHARACTER OF PROCEEDING: Civil appeal from the Richland County Court
of Common Pleas, Case No. 2008-CV-1668

JUDGMENT: Reversed, Vacated and Remanded

DATE OF JUDGMENT ENTRY: November 10, 2010

APPEARANCES:

For Plaintiffs-Appellees

BYRON D. CORLEY
3 North Main Street
714 Richland Bank Building
Mansfield, OH 44902

For Defendant-Appellant

ROBERT D. WARNER
MICHELLE J. SHEEHAN
REMINGER CO., L.P.A.
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101 Prospect Avenue, West
Cleveland, OH 44115-1093

Gwin, P.J.

{¶1} Defendant-appellant Maxum Indemnity Co. appeals a judgment of the Court of Common Pleas of Richland County, Ohio, which overruled its motion for relief from the default judgment the court had granted in favor of plaintiffs-appellees Emery Conn, Jr. and Alma P. Conn. Appellant assigns a single error to the trial court:

{¶2} “I. THE TRIAL COURT FAILED TO GRANT MAXUM INDEMNITY CO. RELIEF FROM A VOID JUDGMENT.”

{¶3} The record indicates appellees brought suit against I.G. Concrete, alleging defendant I.G. Concrete had breached a contract to repair appellee’s home. I.G. Concrete is not a party to this appeal.

{¶4} The parties were unsuccessful in mediation and appellees filed an amended complaint against I.G. Concrete, adding Maxum, I.G. Concrete’s insurer. Appellees alleged Maxum provides insurance which would cover the within action and satisfy any judgment in favor of appellees. Appellees did not allege any direct claim against Maxum.

{¶5} Appellees served the amended complaint on Maxum by certified mail at 6455 East John’s Crossing, Suite 325, Duluth, Georgia 30097. Maxum’s affidavit in support of its motion for relief states that nearly a month prior to service, it had relocated its headquarters to 3655 Northpointe Parkway, Suite 500, Alpharetta, Georgia 30005. Maxum argues appellees failed to properly serve it.

{¶6} Two months later, defendant I.G. Concrete filed for bankruptcy and filed a suggestion of stay in the court of common pleas. Nevertheless, a few days later, the trial court granted appellees’ motion for default judgment and awarded them judgment in

the amount of \$30,000. The court then inactivated the case because of I.G. Concrete's bankruptcy.

{¶17} Maxum filed a motion for relief from judgment four months later and specifically requested a hearing on the issue of service. The court did not conduct an oral hearing, but entered a judgment stating Maxum was not entitled to relief from judgment or to have the judgment vacated. The court overruled the motion, but found it did not have sufficient information to rule on the coverage issue. The court found if during further proceedings appellees' damages do not fall within the coverage of Maxum's insurance policy, then the court will make "an appropriate ruling". The court directed Maxum to file either a motion for declaratory judgment or for summary judgment on the issue of coverage.

{¶18} The trial court found it could not make a ruling on the issue of coverage, and for this reason, we find it erred in not sustaining the motion for relief from judgment and not vacating the default judgment. A finding on the coverage issue is a crucial condition precedent to the entering of a judgment against Maxum.

{¶19} The assignment of error is sustained.

{¶10} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the default judgment is vacated. The matter is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By: Gwin, P.J, and

Farmer, J., concur;

Hoffman, J., concurs

separately

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

WSG:clw 1101

Hoffman, J., concurring

{¶11} I concur in the majority's decision finding the trial court erred in not sustaining Appellant's motion for relief from judgment. I concur a finding of coverage is a condition precedent to entering judgment against Appellant. Of greater concern is the entry of judgment against an insurer before a determination of liability has been made against its insured.

HON. WILLIAM B. HOFFMAN

EMERY CONN, JR., ET AL	:	
	:	
Plaintiffs-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
I.G. CONCRETE, INC., ET AL	:	
	:	
	:	
Defendant	:	CASE NO. 2010-CA-51
and	:	
	:	
MAXUM INDEMNITY COMPANY	:	
	:	
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the default judgment is vacated. The matter is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

HON. SHEILA G. FARMER