

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

NATHAN GRAHAM

Plaintiff - Appellant

-VS-

ACCESS CORRECTIONS, ET. AL.,

## Defendants - Appellees

**JUDGES:**

Hon. William B. Hoffman, P.J.  
Hon. Patricia D. Delaney, J.  
Hon. Craig R. Baldwin, J.

Case No. 14CA91

## OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County  
Court of Common Pleas, Civil  
Division, Case No. 2014-CV-274

**JUDGMENT:**

## Reversed and Remanded

DATE OF JUDGMENT:

April 3, 2015

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee Access

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*Baldwin, J.*

{¶1} Plaintiff-appellant Nathan Graham appeals from the August 8, 2014 and October 23, 2014 Orders of the Richland County Court of Common Pleas.

#### STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Nathan Graham is an inmate at Marion Correctional Institution. According to appellant, the Ohio Department of Rehabilitation and Corrections permitted appellee Keefe Commissary Network, LLC d.b.a. Access Corrections (hereinafter “Access”) to sell MP3 players to inmates. Appellant purchased an MP3 player from appellee Access in November of 2010 and began ordering music from its kiosk in the prison once he received his player.

{¶3} In February of 2013, appellee Access informed inmates that the MP3 concession had been awarded to another vendor and that it would, therefore, discontinue its MP3 player program in Ohio prisons. Appellee J-Pay, Inc. took over the operation of the MP3 player program in Ohio and, on about December 3, 2013, delivered a new MP3 media player to appellant without cost. The music that appellant downloaded from appellee Access’s kiosk cannot be downloaded to his new MP3 media player because of incompatible coding.

{¶4} On March 17, 2014, appellant filed a complaint against appellees Access and J-Pay, Inc., asserting causes of action for breach of contract and unjust enrichment and seeking punitive damages. Appellee Access was served with the summons and complaint on March 20, 2014. Appellee J-Pay was served on March 21, 2014.

{¶5} On April 23, 2014, appellee Access filed a motion seeking an extension of time until May 15, 2014 in which to respond to appellant’s complaint. Appellee Access,

in its motion, stated that its response to appellant's complaint had been due on April 17, 2014. Appellee Access also noted that appellant was not represented by counsel and had filed his complaint while he was incarcerated "so any opposing counsel could not be consulted with respect to this motion." The trial court, pursuant to an Order filed on April 28, 2014, granted such motion.

{¶6} On April 30, 2014, appellant filed a Motion for Default Judgment against appellee J-Pay, Inc. and a separate Motion for Default Judgment against appellee Access. On the same date, he filed a Motion to Strike appellee Access's April 23, 2014 motion.

{¶7} Appellee J-Pay, Inc., on May 12, 2014, filed an answer to the complaint. Pursuant to a Judgment Entry filed on May 19, 2014, the trial court overruled appellant's Motion for Default Judgment against appellee Access.

{¶8} Thereafter, on May 23, 2014, appellee Access filed a Motion to Dismiss appellant's complaint pursuant to Civ.R. 12(B)(6).

{¶9} On May 21, 2014, appellant filed a Motion to Strike the answer filed by appellee J-Pay, Inc. Appellant filed a response to the Motion to Dismiss on June 2, 2014.

{¶10} As memorialized in a Judgment Entry filed on June 10, 2014, the trial court overruled appellant's Motion for Default Judgment against appellee J-Pay, Inc. The trial court, however, set an oral hearing on appellant's Motion for Default Judgment against appellee Access, noting that appellee Access had not filed an answer by May 15, 2014. Appellee Access, on July 1, 2014, filed a reply brief in support of its Motion and Dismiss and, on July 7, 2014, filed a memorandum in opposition to appellant's

Motion for Default and an affidavit in support of the same. Appellee Access, in its memorandum, noted that it had served its Motion to Dismiss on May 15, 2014 and had submitted the same to the court for facsimile filing on the same day.

{¶11} Pursuant to an Order filed on August 8, 2014, the trial court granted appellee Access's Motion to Dismiss and dismissed appellant's complaint against such appellee for failure to state a claim pursuant to Civ.R. 12(B)(6).

{¶12} Appellant, on September 5, 2014, filed a Motion to Strike appellee J-Pay's answer to the complaint. On September 8, 2014, appellee J-Pay filed a Motion for Judgment on the Pleadings pursuant to Civ.R. 12(C). Appellee J-Pay filed the same motion again on September 12, 2014 and a response to appellant's Motion to Strike on September 23, 2014.

{¶13} As memorialized in an Order filed on October 23, 2014, the trial court granted appellee J-Pay's Motion for Judgment on the Pleadings and dismissed the complaint against appellee J-Pay.

{¶14} Appellant now raises the following assignments of error on appeal:

{¶15} THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ALLOWED APPELLEES TO FILE AN ANSWER BEYOND RULE DATE WHERE THERE WAS NO SHOWING OF "EXCUSABLE NEGLIGENCE" AND APPELLEES FAILED TO COMPLY WITH PROCEDURES OUTLINED IN RULE (SIC) OF CIVIL PROCEDURE FOR LATE FILING.

{¶16} THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO RULE ON GRAHAM'S CLAIM OF UNJUST ENRICHMENT WHEN IT

CAME TO THE MONEY THAT GRAHAM HAD ON DEPOSIT WITH ACCESS CORRECTIONS AND THAT THEY HAD REFUSED TO RETURN.

I

{¶17} Appellant, in his first assignment of error, argues that the trial court erred in allowing appellees to file a late answer. We agree.

{¶18} Civ.R. 6(B) governs the trial court's discretion to allow a party to file an answer out of time:

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; but it may not extend the time for taking any action under Civ.R. 50(B), Civ.R. 59(B), Civ.R. 59(D), and Civ.R. 60(B), except to the extent and under the conditions stated in them.

{¶19} Civ.R. 12(A)(1) expressly provides, in relevant part, that “(t)he defendant shall serve his answer within twenty-eight days after service of the summons and

complaint upon him.” Therefore, appellee Access in this case was required to file an answer or to request an extension on or before April 17, 2014 and appellee J-Pay on or before April 18, 2014.

{¶20} A trial court's decision on whether a party's neglect was excusable may not be reversed absent an abuse of discretion. *Grilli v. Smith*, 5th Dist. Fairfield No.2012–CA–12, 2012–Ohio–6146, ¶ 43 citing *Marion Prod. Credit Association v. Cochran*, 40 Ohio St.3d 265, 271, 533 N.E.2d 325 (1988). The Supreme Court has frequently defined the term abuse of discretion as showing the court's attitude is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶21} The trial court has discretion to grant leave to file an untimely answer. That discretion is limited, however, by the determination of whether the neglect for failure to file a timely answer was excusable or inexcusable. *Miller v. Lint*, 62 Ohio St.2d 209, 214, 404 N.E.2d 752 (1980). “Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B).” *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 1995-Ohio-49, 650 N.E.2d 1343.

‘Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances.’ *Davis v. Immediate Medical Services, Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292, 1997–Ohio–363. ‘The determination of whether neglect is excusable or inexcusable must take into consideration all the

surrounding facts and circumstances, and courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds.’ *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343, 1995–Ohio–49, citing *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325. *Ihenacho v. Ohio Inst. of Photography & Technology*, 2nd Dist. Montgomery No. 24191, 2011–Ohio–3730, ¶ 19.

{¶22} In the case sub judice, appellee Access was served on March 20, 2014 and, on April 23, 2014, after the deadline for filing an answer had passed, filed a motion requesting an extension of time until May 15, 2014 to respond to appellant’s complaint. Appellee Access, in its motion, stated, in relevant part, as follows:

This is Defendant’s first request for an extension of time to move, answer or otherwise plead in response to Plaintiff’s complaint, no prior extensions having been requested or provided.

According to the Court’s docket, and the complaint, Plaintiff is not represented by counsel at this time and is filing this action pro se while “incarcerated in a State correctional institutional [sic],” and so any opposing counsel could not be consulted with respect to this motion. (Plf.s’ Compl. At ¶3.) However, the minimal amount of additional

time requested by defendant to respond to Plaintiff's complaint comports with the amount provided by the Local Rules and, therefore, would not be prejudicial to Plaintiff, given that this case has just started and a case schedule has not yet been set.

{¶23} The trial court granted such motion as memorialized in an Order filed on April 28, 2014. Because appellee Access, in its motion, made no showing of any excusable neglect for its failure to file a timely answer, we find that the trial court abused its discretion in granting its motion for extension of time to file an answer.

{¶24} With respect to appellee J-Pay, we note that such appellee was served on March 21, 2014 and that, after no answer was filed, appellant filed a Motion for Default Judgment against appellee J-Pay on April 30, 2014. Appellee J-Pay, on May 12, 2014, then filed an answer. There is no indication in the record that appellee J-Pay sought an extension of time to file its answer or filed a motion seeking leave to file a late answer and setting forth excusable neglect. On May 21, 2014, appellant filed a Motion to Strike appellee J-Pay's answer.

{¶25} We find that the trial court erred in allowing appellee J-Pay to file a late answer. The answer was filed out of rule, such appellee had not filed a motion requesting leave to file the same, and no showing of excusable neglect was made. See *Graham v. Higgins*, 3rd Dist. Hancock No. 5-09-39, 2010-Ohio-3674.

{¶26} Accordingly, appellant's first assignment of error is, therefore, sustained.



{¶27} Appellant, in his second assignment of error, argues that the trial court failed to rule on his unjust enrichment claim against appellee Access as set forth in paragraph 18 of his complaint. Appellant, in paragraph 18 of his complaint, alleged that appellee Access refused to return the balance of appellant's unused money that was left in his account with appellee Access.

{¶28} Based on our disposition of appellant's first assignment of error, appellant's second assignment of error is moot.

{¶29} Accordingly, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded for further proceedings.

By: Baldwin, J.

Hoffman, P.J. and

Delaney, J. concur.