

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Erie Materials, Inc., et al.

Court of Appeals No. E-11-028

Appellees

Trial Court No. 2009-CV-0896

v.

Vermilion Paving Corp.

DECISION AND JUDGMENT

Appellant

Decided: October 5, 2012

* * * * *

Robert P. Boehk, for appellees.

Loretta A. Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas which granted plaintiffs-appellees, Erie Materials, Inc. and Erie Trucking Inc., a default judgment and awarded damages following a damages hearing. Defendant-appellant, Vermilion Paving Corporation, now challenges that judgment through the following assignment of error:

A trial court errs, and abuses its discretion by sua sponte granting a hearing on damages when plaintiff has insufficient information upon which to grant a damage award.

{¶ 2} The undisputed facts of this case are as follows. On October 22, 2009, appellees filed a complaint in the lower court for suit on account, breach of contract and unjust enrichment. The complaint alleged that appellee Erie Materials, Inc. had provided to appellant aggregate, topsoil and other construction materials and that appellee Erie Trucking, Inc. had provided trucking services, all pursuant to written and oral contracts for which appellant failed and refused to pay. Appellees attached to the complaint current accounts receivables reports for both appellees covering goods and services provided to appellant. The report for goods delivered to appellant from Erie Materials, Inc., plus interest, covered the time period of July 21, 2008 through August 31, 2009, and totaled \$83,477.57. The report for delivery services provided to appellant from Erie Trucking, Inc., plus interest, covered the time period of December 27, 2007 through August 31, 2009, and totaled \$16,134.

{¶ 3} The record reveals that appellant was served with a copy of the summons and complaint on November 5, 2009. Appellant did not file an answer or other responsive pleading and on July 14, 2010, appellees filed a motion for default judgment. On July 29, 2010, the lower court filed an entry granting appellees default judgment. In granting that judgment, the court first stated that service of the complaint had been perfected on appellant on November 5, 2009, by certified mail, return receipt, signed by

Joyce White, that more than 28 days had passed, and that appellant had not answered or otherwise attempted to defend the action. The court then stated:

This Court also notes that because Plaintiff had not moved for Default and a significant time period had lapsed, this Court scheduled a Case Management Conference (“CMC”) on June 1, 2010. With no motion for Default pending at that time, this Court managed to contact Steven Kessler (“Kessler”) [, the principal of Vermilion Paving Corp.,] by telephone for the CMC. While he stated that he knew nothing about the suit being filed, Court personnel [(Magistrate Steven Bechtel)] advised Kessler that technically he was in a Default posture. Kessler advised that he’d contact an attorney and this Court continued the CMC until August 20, 2010. Counsel for Plaintiff agreed with Kessler that he’d wait thirty (30) days, giving Kessler time for counsel to file an Answer before moving for Default.

{¶ 4} Finding that appellant had still not filed an answer or attempted to defend the matter, the court determined that pursuant to Civ.R. 55(B), appellant was in default and therefore granted appellees’ motion. The court, however, then determined that it had insufficient information upon which to grant a damages award. The court noted that while the account had been attached to the complaint, it had not been verified in the form of an affidavit. The court explained that it typically, “at a bare minimum, requires an Affidavit of Account in order to award damages on Default.” The court then ordered that

the case management conference previously scheduled for August 20, 2010, be converted to an evidentiary hearing on damages.

{¶ 5} On August 18, 2010, appellant, who was then represented by counsel Loretta Riddle, filed a motion to dismiss or, in the alternative, to vacate the default judgment. In support of its motion to dismiss, appellant asserted that the complaint was not supported by sufficient proof of an account and was defective. In support of its alternative motion to vacate, appellant argued that appellees' motion for default judgment was defective and untimely. The lower court, thereafter, postponed the damages hearing until appellant's motion could be decided.

{¶ 6} On October 8, 2010, the court filed a judgment entry denying appellant's motion to dismiss and motion to vacate. Regarding the motion to dismiss, the court held that the motion was not within rule and that the issues raised in that motion were required to be raised before a default judgment is granted. The court determined that to properly challenge the sufficiency of a complaint alleging an account, a defendant would have to file a Civ.R. 12 motion to dismiss either before filing an answer or simultaneously with the filing of an answer. As to appellant's motion to vacate, the court held that appellant failed to properly allege or establish by operative facts that it had a meritorious defense to present if the default judgment was vacated. The court further held that appellant failed to set forth factual evidence to show that there were grounds for relief under Civ.R. 60(B)(1) through (5). Having denied the motions to dismiss and to vacate, the court then reset the evidentiary hearing on damages.

{¶ 7} That hearing proceeded on November 23, 2010, before a court appointed magistrate. In its judgment awarding damages, the lower court noted that it had heard sworn testimony from Judith Koehler, an employee of Erie Materials, Inc. who does billing and invoicing on accounts receivables. The court found that Mrs. Koehler was competent to testify and found her testimony credible. Based on that testimony, the court determined that the principal amount appellant owed to Erie Materials, Inc. for limestone and asphalt product was \$70,230.50 and that the principal amount appellant owed to Erie Trucking, Inc. for the purchase and sale of a 1998 Freightliner was \$15,000. On the issue of interest, however, the court determined that although appellees' billing program automatically calculated interest of 1½ percent each month on unpaid balances, because the parties had no written contract that set forth a rate of interest on unpaid balances, appellees were only entitled to the statutory rate. Accordingly, the court awarded appellee Erie Materials, Inc. a total of \$79,560.63, principal and interest, and awarded Erie Trucking, Inc. a total of \$16,069.50, principal and interest.

{¶ 8} Appellant filed objections to the magistrate's decision in which it argued that holding an evidentiary hearing on the issue of damages after granting a default judgment, under the circumstances in this case, was contrary to law. Appellant also challenged the evidence appellees submitted in support of their complaint. On March 3, 2011, the lower court filed a judgment entry overruling appellant's objections and granting judgment in favor of appellees as set forth in the magistrate's decision. It is from that judgment that appellant appeals.

{¶ 9} In its sole assignment of error, appellant contends that the lower court erred in holding a hearing on the issue of damages when there was insufficient evidence upon which to grant appellees a judgment. Specifically, appellant asserts that the documents attached to the complaint do not establish an account or written contract and, so, the court erred in holding a hearing to determine the issue of damages.

{¶ 10} Civ.R. 55(A), regarding default judgments, 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 therefore * * *.

{¶ 11} In *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 121, 502 N.E.2d 599 (1986), the Supreme Court of Ohio explained:

A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. *McCabe v. Tom* (1929), 35 Ohio App. 73. As stated by the court in *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105, “[a] default by a defendant * * * arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render a default judgment against the defendant as liability has been admitted or ‘confessed’ by the omission of statements refuting the plaintiff’s claims. * * *” It is only when the party against whom a claim is sought fails to contest the opposing party’s

allegations by either pleading or “otherwise defend[ing]” that a default arises. This rule * * * is logically consistent with the general rule of pleading contained in Civ.R. 8(D), which reads in part that “[a]verments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading.”

{¶ 12} Accordingly, by failing to file an answer or otherwise defend itself in the proceeding below, appellant admitted to the allegations in the complaint. In granting appellees default judgment, the lower court determined that they had proven all of the elements of their claim on an account, for breach of contract, and for unjust enrichment. As the court noted in its judgment entry denying appellant’s motion to dismiss and motion to vacate, the complaint was not deficient in any way. Rather, as the court stated, it ordered a hearing on the damages issue because it regularly requires verification of the amount owed by affidavit. As no affidavit was attached to the complaint, the court scheduled a hearing. Civ.R. 55(A) states that with regard to default judgments:

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 * * *.

{¶ 13} The decision of whether or not to hold a hearing or require additional evidence on the issue of damages following the granting of a default judgment is a matter

left to the sound discretion of the trial court. *Buckeye Supply Co. v. Northeast Drilling Co.*, 24 Ohio App.3d 134, 136, 493 N.E.2d 964 (9th Dist.1985). Upon a review of the record before us, we fail to see how the lower court abused its discretion in conducting a hearing on the issue of damages. We further find that the accounts attached to the complaint below satisfied the requirements for a suit on account as set forth in *Capital One Bank v. Heidebrink*, 6th Dist. No. OT-08-049, 2009-Ohio-2931, ¶ 29-33. The sole assignment of error is not well-taken.

{¶ 14} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
