[Cite as *JPMorgan Chase Bank, Natl. Assn. v. Swan*, 2014-Ohio-999.]

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

JPMorgan Chase Bank,
National Association

Appellee

v.

Jennifer L. Swan aka Jennifer L. Jackson
and Thomas M. Zeigler, et al.

Appellants

Court of Appeals No. L-13-1064

Trial Court No. CI0201202980

DECISION AND JUDGMENT

Decided: March 7, 2014

* * * * *

Anne Marie Sferra and Nelson M. Reid, for appellee.

Jennifer L. Swan and Thomas Zeigler, pro se.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Jennifer Swan and Thomas Zeigler, appeal the judgment of the Lucas County Court of Common Pleas, granting default judgment in favor of appellee,

JPMorgan Chase Bank, N.A. For the following reasons, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} Appellee filed its complaint on April 27, 2012. In its complaint, appellee sought foreclosure of appellants' residence located at 4208 Roundtree Drive in Toledo, Ohio. Appellee's complaint alleged that appellants defaulted on the terms of the note and mortgage. Consequently, appellee's complaint prayed for a monetary judgment against appellants in the amount of $81,791.11, along with foreclosure of the property.

{¶ 3} One month later, appellants filed a request for an extension of time to file an answer. The trial court granted the request on May 31, 2012, and ordered appellants to file their answer by June 26, 2012. On the eve of that deadline, appellants sought another extension of time to file an answer. Once again, the trial court granted appellants' request, ordering appellants to file an answer by July 25, 2012. On July 23, 2012, appellants again asked the trial court for an extension of time. The trial court granted the third request, giving appellants until August 23, 2012, to file an answer. On August 24, 2012, appellants made a fourth request for an extension of time. Despite the fact that appellants' request was filed after the expiration of the extended deadline, the trial court granted the request and ordered appellants to file their answer by September 24, 2012.

{¶ 4} On September 24, 2012, appellants filed their fifth request for an extension of time to file the answer. This time, however, appellee objected to appellants' request, arguing that appellants were merely delaying the proceedings by persistently requesting

additional time to file an answer. Appellants' request was eventually denied on December 10, 2012.

{¶ 5} On December 20, 2012, appellants filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6). Appellants also argued that the trial court lacked subject matter jurisdiction and that dismissal was appropriate under Civ.R. 12(B)(1). On December 31, 2012, appellee filed a motion for default judgment, arguing default judgment was proper due to appellants' failure to file an answer. Appellants did not file a memorandum in opposition to the motion for default judgment.

{¶ 6} Approximately three months later, the trial court issued its judgment entry denying appellants' motion to dismiss. In its entry, the court stated:

> 5. It is well settled that Lucas County has jurisdiction over foreclosures of property within the county. The property is encumbered by a mortgage and the assignment took place prior to the commencement of the Complaint.
>
> 6. The Plaintiff has stated a cause of action by reference to the Note and Mortgage and non-payment of the monthly payments. It is clear that consideration was passed to the Defendants due to the loan of money in the original amount of $91,563.00 in exchange for a promise to pay pursuant to the note.

7. It is further clear that the Defendants' Motion to Dismiss was not timely filed in that the Defendants should have answered by September 24, 2012 but did not file the Motion to Dismiss until December 20, 2012 and the Defendants failed to request leave to file the Motion to Dismiss untimely.

{¶ 7} After providing the foregoing reasons for denying appellants' motion to dismiss, the court granted appellee's motion for default judgment. The court explained that appellants were in "technical default" due to their failure to file an answer.

{¶ 8} Two weeks after the court granted default judgment, appellants filed a motion for relief from judgment under Civ.R. 60(B)(1). While it was pending, appellants filed their timely notice of appeal.

B. Assignments of Error

{¶ 9} On appeal, appellants assign the following errors for our review:

Assignment of Error 1: At ¶ 3 Jud. Ord. "Since the filing of the Complaint, the defendants have filed five (5) extensions of time. The first four (4) were granted by the fifth extension on September 24, 2012 was denied. This Motion to Dismiss was filed about three (3) months after the time to respond had terminated." This statement is in error and is omitting the facts. The first four were granted and the fifth extension was denied on December 10, 2012. The entry fails to mention that appellants filed for the "fifth extension" on the same date of September 24, 2012 before the clerk

of court closed for the day, in compliance with [Civ.R. 12(B)(1) and (6)] and Civ.R. 6. The ruling on said extension was not ruled upon until December 10, 2012 as the record clearly shows.

Assignment of Error 2: At ¶ 5 Jud. Ord. "It is well settled that Lucas County has jurisdiction over foreclosures of property within the county. The property is encumbered by a mortgage and the assignment took place prior to the commencement of the Complaint." This judgment is in error, a jurisdictional question can always be raised at any time and is never either lached or time-barred. The burden of establishing jurisdiction when challenged rests on the party asserting jurisdiction, not the court. Appellee has not provided satisfactory evidence of damages, proper assignments, or delivery of the note and mortgage; valid recording of the mortgage; default; and establishing an amount due thereby depriving trial court of subject matter jurisdiction. Due process requires that the defendant be given adequate notice of the suit, appellants were not given notice of any proceedings between the dates of September 24, 2012 until on or about December 15, 2012. Upon notice of the decision of the trial court appellants responded with [a] motion to dismiss filed December 20, 2012 in a timely manner. Soon thereafter appellee filed motion for default without prior 7 day notice to appellants further depriving appellants of due process rights.

Assignment of Error 3: At ¶ 7 Jud. Ord. "It is further clear that defendants' Motion to Dismiss was not timely filed in that the defendants should have answered by September 24, 2012 but did not file the Motion to Dismiss until December 20, 2012 and the defendants failed to request leave to file the Motion to Dismiss untimely." This statement is in error. Appellants have no authority to force the trial [c]ourt or [j]udge to rule on any motion within any amount of time except as permitted by the rules. Appellants received no notice from [the] court until the order filed December 10, 2012 denying extension received by appellants on or about December 15, 2012. [A]ppellants filed a Motion to Dismiss [on] December 20, 2012 in a timely manner pursuant to [Civ.R. 12(B)(1) and (6)] and Civ.R. 6. [A]ppellants are in compliance with these rules of civil procedure.

II. Analysis

{¶ 10} In their first assignment of error, appellants argue that the trial court erred in concluding that their motion to dismiss was untimely filed. In response, appellee argues that the trial court's denial of appellants' motion to dismiss was not predicated merely on the assertion that the motion was untimely filed—the court also denied the motion on its merits. Thus, appellee argues that the trial court's denial of appellants' motion to dismiss was proper.

{¶ 11} We review a trial court's decision to deny a Civ.R. 12(B)(6) motion de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. In doing so, we must presume the truth of the factual allegations in the complaint and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Before a Civ.R. 12(B)(6) motion can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. For these reasons, motions to dismiss for failure to state a claim are rarely successful. *Tri-State Computer Exchange v. Burt*, 1st Dist. Hamilton No. C020345, 2003-Ohio-3197, ¶ 12.

{¶ 12} As to the trial court's conclusion that the motion to dismiss was untimely filed, we note at the outset that "a party may raise the defense of failure to state a claim upon which relief can be granted *at any time up to and including trial*." (Emphasis added.) *Resolution Trust Corp. v. Levitt*, 8th Dist. Cuyahoga No. 61018, 1992 WL 181714, *2 (July 30, 1992), citing *Miller v. Cudahy Co.*, 656 F.Supp. 950 (D.Kan.1987); *Steele v. Stephan*, 633 F.Supp. 950 (D.Kan.1986); *Gonzales v. Union Carbide Corp.*, 580 F.Supp. 249 (N.D.Ind.1983). Thus, appellants' motion, which was filed prior to appellee's motion for default judgment, was not untimely filed. However, this conclusion does not end our analysis. We must further evaluate whether appellants' motion was properly denied on the merits.

{¶ 13} In their motion to dismiss, appellants argued that the complaint was deficient insofar as it failed to allege that appellee provided any services or products to appellants. Further, appellants argued that the complaint was unsupported by any evidence of consideration. We disagree.

{¶ 14} In its complaint, appellee alleged that appellants defaulted on the terms of the note. Additionally, appellee set forth the amount due from appellants and attached copies of the note and mortgage to the complaint. Finally, the note clearly establishes the requisite consideration by stating that $91,563.00 was loaned to appellants in exchange for their promise to repay the principal with interest. Thus, we conclude that the trial court properly denied the motion to dismiss under Civ.R. 12(B)(6).

{¶ 15} Moreover, we find that appellants' assertion that the trial court lacked subject matter jurisdiction is without merit. By statute, the trial court, being a court of common pleas, has original jurisdiction in all civil cases in which the amount in controversy exceeds $500. R.C. 2305.01 and 1907.03(A). Thus, the trial court clearly had subject matter jurisdiction, since the amount in controversy in this action was well above the statutory threshold.

{¶ 16} Accordingly, appellants' first assignment of error is not well-taken.

{¶ 17} In their second assignment of error, appellants argue that the trial court erroneously concluded that "[i]t is well settled that Lucas County has jurisdiction over foreclosures of property within the county. The property is encumbered by a mortgage and the assignment took place prior to the commencement of the Complaint." In

addition, appellants argue that the trial court deprived them of due process by granting appellee's motion for default judgment without the requisite seven-day notice under Civ.R. 55(A).

{¶ 18} Having already concluded that the trial court possessed subject matter jurisdiction over the action within our analysis of appellants' first assignment of error, we turn to appellants' argument concerning the trial court's grant of default judgment.

{¶ 19} A trial court's decision to grant or deny a motion for default judgment will not be reversed absent an abuse of discretion. *Tikaradze v. Kenwood Garden Apts.*, 6th Dist. Lucas No. L-11-1217, 2012-Ohio-3735, ¶ 6, citing *Huffer v. Cicero*, 107 Ohio App.3d 65, 74, 667 N.E.2d 1031 (4th Dist.1995). Default judgment is governed by Civ.R. 55, which provides, in relevant part:

> (A) Entry of judgment
>
> 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 therefor * * *. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.

{¶ 20} Here, appellants argue that they were not provided with the requisite notice under Civ.R. 55(A). However, the record reveals that appellee mailed copies of the

motion to appellants at their respective addresses on December 27, 2012. Under Civ.R. 5(B)(2)(c), a motion may be served on a party by "mailing it to the person's last known address by United States mail, in which event service is complete upon mailing." Absent evidence submitted by appellants establishing that they did not receive the copies, we must presume that they were properly served. *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. Franklin No. 09AP-510, 2009-Ohio-6852, ¶ 22 ("Where a party follows the Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence."). Appellants failed to produce any such rebuttal evidence. Consequently, we will presume that appellants were properly served. Since service occurred more than two months before the trial court issued its decision granting appellee's motion for default judgment, we conclude that appellants were provided adequate notice under Civ.R. 55(A).[1]

{¶ 21} Although we find that appellants were provided adequate notice under Civ.R. 55(A), we agree with appellants' assertion that the trial court abused its discretion in granting appellee's motion for default judgment. As we indicated above, default judgment is only proper under Civ.R. 55(A) where the nonmoving party has "failed to plead or otherwise defend." When, as here, a defendant files a motion to dismiss under

[1] We note that the trial court did not hold a hearing prior to granting default judgment in this case. Under Civ.R. 55(A), a hearing is not necessary where damages are based on a readily ascertainable amount. *K. Ronald Bailey & Assoc. Co., L.P.A. v. Soltesz*, 6th Dist. Erie No. E-05-077, 2006-Ohio-2489, ¶ 16. Since the complaint clearly establishes the amount of damages in this case, the trial court was not required to hold a hearing to determine the appropriate amount of damages.

Civ.R. 12(B)(6) in response to a complaint, he "otherwise defend[s]" and makes an appearance in the action. *Copeland v. Summit Cty. Probate Court*, 9th Dist. Summit No. 24648, 2009-Ohio-4860, ¶ 7. *See also Equable Ascent Fin., L.L.C. v. Christian*, 196 Ohio App.3d 34, 2011-Ohio-3791, 962 N.E.2d 322, ¶ 7 (10th Dist.) (finding that the trial court erred in granting default judgment where the defendant filed a motion to dismiss prior to plaintiff's motion for default judgment). Because appellants' motion to dismiss was pending before the trial court on the date that appellee filed its motion for default judgment, we conclude that appellants "otherwise defend[ed]". Thus, the trial court abused its discretion in granting appellee's motion for default judgment.

{¶ 22} Accordingly, appellants' second assignment of error is well-taken. Having concluded that the trial court abused its discretion by granting appellee's motion for default judgment, appellants' third assignment of error is moot.

{¶ 23} Conclusion

{¶ 24} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE