

[Cite as *Citibank v. Hura*, 2015-Ohio-742.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CITIBANK, N.A.

PLAINTIFF

V.

THOMAS D. HURA,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLEE,

V.

THOMAS P. GILMARTIN, JR.,

THIRD-PARTY
DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas of Mahoning County, Ohio
Case No. 13 MA 173

JUDGMENT:

Reversed and Remanded

APPEARANCES:

For Plaintiff-Appellee

Attorney Stuart A. Strasfeld
100 East Federal St., Suite 600
Youngstown, Ohio 44503-1893

For Defendant-Appellant

Attorney Thomas P. Gilmartin, Jr.
534 S. Schenley Avenue
Youngstown, Ohio 44509

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 11, 2015

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DONOFRIO, J.

{¶1} Third-party defendant-appellant, Thomas Gilmartin, Jr., appeals from a Mahoning County Common Pleas Court judgment entered against him in the amount of \$50,863.61, following a default judgment.

{¶2} On September 8, 2011, plaintiff Citibank N.A. filed a complaint against defendant/third-party plaintiff-appellee, Tom Hura. The complaint alleged that Hura owed a balance of \$50,863.61 due on a credit card debt.

{¶3} In response, Hura filed an answer and third-party complaint naming Gilmartin as the defendant. Hura alleged that Gilmartin secured credit through Citibank for XZOOM Enterprise, Inc. by using Hura's social security number without Hura's consent. Hura further asserted that Gilmartin used the credit card to pay for his personal expenses thereby committing fraud. Thus, Hura claimed that he was entitled to recover from Gilmartin any amount that Citibank was entitled to recover from him.

{¶4} Gilmartin, acting pro se, filed an answer denying the claim against him.

{¶5} The court held a final pretrial conference on February 15, 2013. Gilmartin failed to appear or notify the court of his absence.

{¶6} On February 21, 2013, Hura filed a motion for default judgment on his third-party complaint. Hura asserted that Gilmartin failed to appear for the final pretrial and was not excused by the court. Therefore, he requested judgment on his complaint.

{¶7} On February 25, 2013, the trial court granted Hura's motion and entered a default judgment against Gilmartin. It also set the matter for a hearing on damages.

{¶8} All parties appeared at the damages hearing before a magistrate. After listening to the testimony and considering the exhibits, the magistrate entered judgment against Gilmartin in the amount of \$50,863.61, plus interest, costs, and attorney fees. The trial court adopted the magistrate's decision and entered judgment accordingly.

{¶9} Gilmartin filed a timely notice of appeal on November 12, 2013.

{¶10} Gilmartin, still acting pro se, raises a single assignment of error, which states:

THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THIRD-PARTY DEFENDANT GILMARTIN WHERE THE THIRD-PARTY COMPLAINT WAS IMPROPER, AND WHEN NO JUDGMENT WAS ENTERED AGAINST THE THIRD-PARTY PLAINTIFF HURA [IN] FAVOR OF THE PLAINTIFF CITIBANK.

{¶11} Gilmartin argues that because there is no judgment against Hura in favor of Citibank, the court could not enter judgment against him as a third-party defendant. He also argues that Hura's third-party complaint was an independent cause of action that Hura had against him but was not a proper third-party complaint pursuant to Civ.R. 14(A). Gilmartin asserts that Hura's claim did not arise out of Citibank's claim.

{¶12} First, we must address the jurisdictional issue raised by Hura. Hura argues that this court does not have jurisdiction over this appeal because Gilmartin did not appeal from the judgment entry granting default judgment.

{¶13} The entry granting default judgment was not a final, appealable order. The trial court granted default judgment in favor of Hura and against Gilmartin on February 25, 2013. In its judgment entry granting default judgment, the court set the matter for a hearing on damages.

{¶14} A judgment entering default judgment but holding the issue of damages in abeyance for a later hearing is not a final, appealable order. *McCants v. Tolliver*, 9th Dist. No. 27253, 2014-Ohio-3478, ¶7; *Glass v. Glass*, 11th Dist. No. 2004-L-214, 2005-Ohio-1688, ¶2. Therefore, the judgment entry that simply granted default judgment in favor of Hura and set the matter for a damages hearing was not a final, appealable order. As such, had Gilmartin appealed from that judgment, as Hura suggests he was required to do, we would have dismissed the appeal for lack of a final, appealable order. Therefore, Hura's jurisdictional argument does not have

merit.

{¶15} Next, we must consider Gilmartin's argument.

{¶16} In this case, the magistrate entered default judgment on Hura's motion. The magistrate did so even though Gilmartin filed an answer in the case and approved a report of mediation. The magistrate entered default judgment simply because Gilmartin did not appear for the final pretrial.

{¶17} Civ.R. 55(A) provides that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, the party entitled to default judgment shall apply in writing or orally to the trial court. The Rule further provides that if the party against whom default judgment is sought has appeared in the action, he or she shall be served with written notice of the application for judgment at least seven days prior to the hearing on the application.

{¶18} But "when a case is at issue because a defendant has filed an answer, there can be no default judgment." *Office of Disciplinary Counsel v. Jackson*, 81 Ohio St. 3d 308, 311, 1998-Ohio-474, 691 N.E.2d 262. See also, *Skinner v. Leyland*, 167 Ohio App.3d 226, 2006-Ohio-3186, 854 N.E.2d 573, ¶14 (6th Dist.) (default judgment cannot be entered when party has filed a responsive pleading); *In re Crabtree*, 1st Dist. No. C-010290, 2002-Ohio-1135 ("court cannot enter a default judgment against a party who has filed an answer"). A default judgment is a judgment entered by the court against a defendant who failed to timely plead in response to an affirmative pleading. *Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St. 3d 118, 121, 502 N.E.2d 599 (1986).

{¶19} Because Gilmartin filed an answer in this case, the default judgment against him was improper.

{¶20} Moreover, when the trial court entered its judgment against Gilmartin, Citibank's claim against Hura was still pending. In fact, it appears the claim is still pending. A search of the docket revealed that there has never been a judgment on Citibank's claim against Hura. Yet the docket also reflects that this case is closed.

{¶21} A third-party complaint requires that the liability of the third-party

defendant is dependent on the outcome of the main claim. *Renacci v. Martell*, 91 Ohio App. 3d 217, 220, 632 N.E.2d 536 (9th Dist.1993), citing *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (C.A.5, 1967). In this case, there has never been a judgment on the main claim. Therefore, there can be no judgment on Hura's third-party claim against Gilmartin.

{¶22} Accordingly, Gilmartin's sole assignment of error has merit.

{¶23} For the reasons stated above, the trial court's judgment is hereby reversed and the matter is remanded to the trial court for further proceedings pursuant to law and consistent with this opinion.

Waite, J., concurs.

DeGenaro, J., concurs.