

[Cite as *Sovey v. Lending Group of Ohio*, 2005-Ohio-195.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84823

MARK SOVEY, ET AL. :
 : JOURNAL ENTRY
 Plaintiffs-Appellees :
 : AND
 vs. :
 : OPINION
 THE LENDING GROUP OF OHIO :
 :
 Defendant-Appellant :
 :
 :
 DATE OF ANNOUNCEMENT :
 OF DECISION : JANUARY 20, 2005
 :
 CHARACTER OF PROCEEDINGS : Civil appeal from
 : Common Pleas Court
 : Case No. CV-520601
 :
 JUDGMENT : REVERSED AND REMANDED.
 :
 DATE OF JOURNALIZATION :

APPEARANCES:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} The Lending Group of Ohio ("Lending Group") appeals from the trial court's decision granting default judgment in favor of Mark Sovey, et al. regarding a home mortgage. After reviewing the record and applicable law, we reverse the decision of the trial court and remand this matter for further proceedings.

{¶ 2} On January 27, 2004, Sovey filed a complaint against Lending Group alleging that it had violated the Ohio Consumer Sales Practices Act, R.C. 1345.01, when originating one of Sovey's two mortgage loans. Sovey claimed the Lending Group made intentional misrepresentations, engaged in the theft of documents, and practiced "bait and switch" tactics.

{¶ 3} According to the complaint, Sovey contracted with the Lending Group to provide him with a 5.75 percent fixed interest rate for a secondary loan which, in essence, would provide him with a 20 percent down payment for the first loan. Sovey claims he was later informed by Lending Group, the day after closing, that the 5.75 percent rate was not available to him on the second loan and that Lending Group could provide him with another loan at a 7.05 percent fixed interest rate. Sovey alleges Lending Group provided him with a written guarantee that if the second loan at 7.05 percent was closed within 30 days, Lending Group would later refinance it at a fixed rate of 5.75 percent. Sovey closed the loan with Lending Group; however, he claims he was never given a

new loan at the 5.75 percent rate. Lending Group later provided Sovey with a variable rate loan at 6.20 percent interest.

{¶ 4} Lending Group was officially served with Sovey's complaint on February 9, 2004. On April 7, 2004, Sovey amended his complaint to also allege violations of Ohio's Mortgage Brokers Act, R.C. 1322.11. On April 20, 2004, Lending Group requested a 30-day extension to file an answer. On April 29, 2004, the trial court denied Lending Group's motion because it failed to comply with the time constraints pursuant to Civ.R. 5(D).

{¶ 5} On May 5, 2004, Sovey filed a motion for default judgment. On May 7, 2004, Lending Group filed a second motion requesting another 30-day extension in which to file an answer. On May 18, 2004, the trial court denied Lending Group's second motion because it failed to demonstrate excusable neglect, pursuant to Civ.R. 6(B). The trial court set a hearing for June 7, 2004 on Sovey's motion for default judgment.

{¶ 6} On May 19, 2004, without leave from the court, Lending Group filed an answer to Sovey's complaint and a counterclaim alleging fraud and breach of contract. On May 24, Sovey filed a motion to strike Lending Group's answer and counterclaim. Thereafter, on June 2, Lending Group filed a brief in opposition to Sovey's motion for default judgment. On June 14, 2004, after holding a hearing, the trial court granted Sovey's motion for default judgment and awarded him \$37,378.02 in damages.

{¶ 7} Lending Group brings this timely appeal arguing that the trial court erred by granting default judgment to Sovey.

{¶ 8} The Civil Rules are in place to achieve the prompt and efficient dispatch of justice. *DeHart v. Aetna Life Insurance Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644. Fairness and justice are best served when a court disposes of a case on the merits. *Id.* at 193. It is always preferred that cases be decided on their merits rather than on technicalities. *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. Only a flagrant, substantial disregard for the court rules can justify a dismissal on procedural grounds. *DeHart*, 69 Ohio St.2d, 189, 193.

{¶ 9} Civ.R. 5(D) provides that all papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service upon the opposing party. Failure to file within the three-day period can result in the court striking the filing.

{¶ 10} The trial court's decision regarding whether to permit or reject a filing will not be disturbed on appeal absent an abuse of discretion. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464.

{¶ 11} A trial court abuses its discretion when it dismisses a case for a minor, inadvertent violation of a Civil Rule when: (1) the mistake was made in good faith and not as a part of a continuing course of conduct for the purpose of delay; (2) neither

the opposing party nor the court is prejudiced by the error; (3) the dismissal is a sanction that is disproportionate to the nature of the mistake; (4) the client will be unfairly punished for the fault of his counsel; and (5) dismissal frustrates the prevailing policy of deciding cases on the merits. *Dehart*, 69 Ohio St.2d 189, see syllabus.

{¶ 12} In the instant matter, the record indicates that Sovey filed his amended complaint on April 7, 2004. On April 20, 2004, the appellant appeared and, with the consent of Sovey, timely requested a 30-day extension in which to file an answer. On April 29, the trial court denied the appellant's request for an extension of time, stating appellant failed to file a copy of the extension with the court within three days of serving Sovey, in violation of Civ.R. 5(D).

{¶ 13} On May 7, 2004, the appellant filed a second motion requesting a 30-day extension in which to file an answer. On May 18, 2004, the trial court denied the appellant's second motion because it failed to demonstrate excusable neglect, pursuant to Civ.R. 6(B). The trial court held that because the appellant's first motion for an extension of time had been stricken, the appellant's second motion for an extension of time was now deemed untimely, being filed beyond the 14-day answer period provided under Civ.R. 15(A). On May 19, without leave from the court, the appellant filed an answer to Sovey's complaint. Thereafter, on

June 14, 2004, after holding a hearing, the trial court granted default judgment in favor of Sovey and struck the appellant's answer.

{¶ 14} After reviewing the record in this case and the principles enunciated in the Ohio Supreme Court's decision of *DeHart v. Aetna Life Insurance Co.*, we find that the trial court abused its discretion in granting default judgment in favor of Sovey.

{¶ 15} First, the mistake of filing the motion for an extension of time with the trial court one day late, in violation of Civ.R. 5(D), was made in good faith and not as part of a continuing course of conduct for the purpose of delay. Sovey consented to the extension of time, which was timely filed in regard to the amended complaint. Furthermore, the record reflects that the appellant tried three times within 30 days to file an answer; indicating that his course of conduct was not for the purpose of delay.

{¶ 16} Second, the record indicates that neither the opposing party nor the court was prejudiced by the appellant's error. The purpose of Civ.R. 5(D) is to ensure that the opposing party is promptly served with filings. The rule is not intended to be a sanction. The record indicates that Sovey was promptly served with the appellant's extension for time, in accordance with the

purpose of Civ.R. 5(D). The appellant merely filed the extension with the trial court one day past the three-day limit.

{¶ 17} Third, the trial court's decision to repeatedly strike the appellant's motions requesting extensions of time and to eventually grant default judgment in favor of Sovey was disproportionate to the nature of the appellant's mistake.

{¶ 18} As previously stated, Civ.R. 5(D) is not meant to be a sanction. The trial court's decision to strike the appellant's first request for an extension of time, when the request violated Civ.R. 5(D), created a "snowball effect," which eventually led to the grant of default judgment. The trial court struck the appellant's second filing as being untimely, stating it failed to demonstrate excusable neglect. One day later, the appellant filed an answer to Sovey's complaint. Within three weeks, the court granted default judgment in favor of Sovey, striking the appellant's answer.

{¶ 19} Finally, we find that the client in this case will be unfairly punished for the minor fault of his counsel and that the award of default judgment frustrates the prevailing policy of deciding cases on their merits. The record indicates that Sovey was awarded \$37,378.02 in damages as a result of the default judgment.

{¶ 20} Based on the facts of this case, we hold that the trial court abused its discretion in granting default judgment against

the appellant. The appellant's sole assignment of error is therefore sustained.

Judgment reversed.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees costs herein.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

JAMES J. SWEENEY, J., AND

COLLEEN CONWAY COONEY, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will

be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).