[Cite as *Chase Bank USA, N.A. v. Courey*, 2010-Ohio-246.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92798

CHASE BANK USA, N.A.

PLAINTIFF-APPELLEE

vs.

DAVID J. COUREY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-674733

BEFORE: Jones, J., Dyke, P.J., and Celebrezze, J.

RELEASED: January 28, 2010

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, David Courey ("Courey"), appeals the trial court's granting of summary judgment in favor of plaintiff-appellee, Chase Bank, USA, N.A. ("Chase"). Finding no merit to the appeal, we affirm.

{¶ 2} In 2008, Chase filed suit against Courey for the amount due on his Visa credit card, which was $5,545.30 plus interest. Courey, acting pro se, filed a motion titled "first pre-answer motions, motion to strike, motion for judicial notice, motion to dismiss, [and] motion for a more definite statement." The trial court struck the motion because Courey had failed to sign the pleading, in accordance with Civ.R. 11. Chase moved for default judgment, and the trial court set a hearing on the motion.

{¶ 3} Courey then filed a motion titled "motion for leave of court to extend time limit to amend pre-answer pleading," which the trial court denied. The default hearing was held in January 2009, and the trial court granted Chase's motion for default judgment.

{¶ 4} It is from this judgment that Courey now appeals, raising five assignments of error for our review:

"I. Court erred in striking appellant's original pre-answer motions filing.

"II. Court erred when it denied motion to extend time to amend pleading to correct signature omission.

"III. Court erred when it denied or struck all motions in appellant's amended first pre-answer motions.

"IV. Court erred in conducting default hearing.

"V. Court erred in granting the motion for [default] judgment."

{¶ 5} These assignments of error will be combined for review.

{¶ 6} In the first, second, and third assignments of error, Courey challenges the court's handling of his various pre-hearing motions. First, Courey argues that the trial court erred in striking his "pre-answer" motion filing. Courey claims that the trial court should have allowed him to amend his motion to include his signature instead of outright striking his motion.

{¶ 7} Civ.R. 11 provides, in pertinent part:

{¶ 8} "Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name * * * A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. * * * The signature of an attorney or pro se party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served."

{¶ 9} A decision by a trial court to impose sanctions under Civ.R. 11 is reviewed for abuse of discretion. *State ex rel. Fant v. Sykes* (1987), 29 Ohio

St.3d 65, 505 N.E.2d 966; *Werden v. City of Milford* (1998), 91 Ohio Misc.2d 215, 220, 698 N.E.2d 526. An abuse of discretion signifies an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 10} Civ.R. 12(A) requires a defendant to serve his answer within 28 days after service of the summons and complaint upon him. However, after the time period has expired, a defendant may request an extension of time to answer the complaint late.

{¶ 11} For the following reasons, we do not find that the trial court abused its discretion in this case. Chase filed its complaint against Courey on October 29, 2008. Courey did not file his "pre-answer" motion until December 4, 2008, which was the 28th day. See Civ.R. 12(A)(1).

{¶ 12} On December 11, 2008, Chase moved for default judgment. The trial court struck Courey's "pre-answer" motion on December 15 because he had failed to sign it. Courey then waited an additional two weeks, until December 31, to file a motion for leave to extend the time limit to amend his "pre-answer" pleading and tried to refile the pleadings, well past the time limit to file an answer or responsive pleading.

{¶ 13} Civ.R. 6(B)(2) provides that the court may "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 * * *." A determination under Civ.R. 6(B)(2) rests within the sound discretion of the trial court and will not be disturbed

on appeal absent a showing of an abuse of discretion. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1995), 72 Ohio St.3d 464, 465, 650 N.E.2d 1343. The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances. *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325.

{¶ 14} We find that even though Courey filed a motion for leave, he did not show that his untimely motion should be allowed based on excusable neglect.

{¶ 15} We also find that Courey failed to respond to the motion for default judgment. Loc.R. 12(C) of the Court of Common Pleas of Cuyahoga County, General Division, provides seven days to oppose a motion, except for oppositions to motions for summary judgment. A review of the record shows that Courey never filed a motion in response to Chase's motion for default judgment; he merely attempted to refile his "pre-answer" motions.

{¶ 16} Moreover, we must take into consideration the trial court's journal entry granting default judgment, which indicates that Courey informed the court at the default hearing that he would not file an answer at that time and did not request leave to file an answer at a future date. Although Courey now argues that a default hearing was never held, it is well settled that appellate review is confined to the record developed in the trial court. See App.R. 9. This court is limited in its review on appeal to the record provided by the appellant. Id. see Civ.R. 12(A)(1)(b). Because it is the appellant's duty to establish error on appeal, it

follows that it is Courey's duty to ensure that the record, or necessary portions, are filed with the court in which he seeks review. App.R. 9(B); *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19, 520 N.E.2d 564. If Courey had wanted to dispute what occurred at the lower court, he could have filed a statement of the evidence or proceedings pursuant to App.R. 9(C). If Courey had filed a statement of the evidence pursuant to App.R. 9(C), and any difference arose as to whether the record truly disclosed what occurred in the trial court, the difference would be submitted to and settled by the court and the record made to conform to the truth. App.R. 9(E).

{¶ 17} Therefore, we find no error in the trial court's decision to strike Courey's initial motion or to deny his subsequent motion for leave.

{¶ 18} The first, second, and third assignments of error are overruled.

{¶ 19} In the fourth assignment of error, Courey argues that the trial court erred in holding a hearing on Chase's motion for default judgment. Basically, Courey claims the trial court held an ex parte default hearing. Courey attached an affidavit to his appellate brief that describes in detail what he alleges occurred on the day of the hearing. As stated above, a reviewing court is prohibited from adding matter to the record before it that was not a part of the trial court's proceedings. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus. This court is precluded from considering material that was not made part of the lower court record. *Darner v. Jacobs Group, Inc.*, Cuyahoga App. No. 89611, 2008-Ohio-959. Thus, we cannot consider Courey's

affidavit as it was neither made part of the lower court record nor conforms to App.R. 9.

{¶ 20} The fourth assignment of error is overruled.

{¶ 21} In the fifth assignment of error, Courey argues that the trial court erred in granting the motion for default judgment.

{¶ 22} "A trial court's decision to grant default judgment is reviewed under an abuse of discretion standard." *Fitworks v. Sciranko*, Cuyahoga App. No. 90593, 2008-Ohio-4861. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable—not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} The Supreme Court has noted that "[d]efault, under * * * Civ.R. 55(A), is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading." *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118, 121.

{¶ 24} Under Civ.R. 8(D), allegations in a complaint to which a responsive pleading is required are admitted when not denied in the responsive pleading. "In other words, if a party fails to deny the specific allegations of a complaint against it, those allegations are considered admitted by the party." *Burdge v. On Guard Sec. Servs., Inc.*, Hamilton App. No. C-050522, 2006-Ohio-2092. Thus, when a defendant fails to properly contest the allegations raised in the complaint, "it is 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."

{¶ 25} In the instant case, Chase's complaint alleged conduct by Courey that required a responsive pleading. Because Courey failed to properly file a responsive pleading denying Chase's allegations, the trial court, under Civ.R. 8, was proper to have construed those allegations as admitted. Moreover, because Courey informed the trial court that he would not be filing an answer or seeking leave to file an answer at a later date, the trial court did not err in granting default judgment.

{¶ 26} Although we are cognizant that the local rules may be somewhat confusing even to a learned attorney, let alone a private citizen proceeding pro se, it is well-settled in Ohio that pro se litigants are presumed to have knowledge of the law and of correct legal procedure and are held to the same standard as all other litigants. *Barry v. Barry*, 169 Ohio App.3d 129, 133, 2006-Ohio-5008, 862 N.E.2d 143. While the trial court certainly could have granted leave for Courey to amend his pleading, we do not find that the trial court in this case abused its discretion in not accepting his motions. It appears from the record that the trial court afforded Courey an opportunity at the default judgment hearing to file his answer or file an answer at a later date, and Courey rejected the court's offer.

{¶ 27} The fifth assignment of error is overruled.

{¶ 28} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

LARRY A. JONES, JUDGE

ANN DYKE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR