

[Cite as *Harding v. Lewis*, 2010-Ohio-4109.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93557

SANDRA G. HARDING

PLAINTIFF-APPELLEE

VS.

JOSEPH W. LEWIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cleveland Municipal Court
Case No. 2006 CVF 022183

BEFORE: Stewart, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: September 2, 2010
FOR APPELLANT

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ATTORNEY FOR APPELLEE

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Joseph Lewis, appeals from the judgment of the Cleveland Municipal Court granting plaintiff-appellee, Sandra Harding, judgment against him on a debt in the amount of \$8,834, plus costs, and

interest. Appellant's original appeal was dismissed by this court for lack of a final appealable order after a finding that the judgment entry did not dispose of appellant's counterclaims. See *Harding v. Lewis*, 8th Dist. No. 91155, 2009-Ohio-613. On remand, the trial court dismissed appellant's counterclaims and ruled on appellant's three outstanding motions. The court denied appellant's motion to dismiss for lack of subject matter jurisdiction, motion to compel plaintiff to comply with the terms of the promissory note, and motion for summary judgment. This appeal followed.

{¶ 2} Appellant raises three procedural errors for review arguing that the trial court erred by denying his jury demand, by proceeding to trial without his retained counsel, and by summarily denying his motions and counterclaims. Following review of the record and for the reasons stated below, we affirm.

{¶ 3} Appellant, a law student at the time, and Harding, a lawyer, entered into a romantic relationship. Appellant needed money to complete his education and to take the New York state bar exam. He wanted to apply for a loan, but did not have the income to qualify for a loan on his own. Harding agreed to co-sign for the loan. Sometime later, the relationship ended and appellant stopped making payments on the loan. Harding was held responsible for the balance and settled the debt with the lender. She was unsuccessful in her efforts to obtain reimbursement from appellant.

{¶ 4} On August 14, 2006, Harding filed a complaint against appellant. Harding asserted that she was the guarantor of an educational loan to the appellant, and that appellant defaulted on the note with \$13,428 due to the lender. She further asserted that she had settled with the lender for \$8,834, and sought judgment against appellant for the amount of the settlement. In her second cause of action, Harding asserted that appellant committed a theft by failing to repay her, thereby violating R.C. 2307.61. She demanded treble damages under the statute, up to a limit of \$15,000, costs, and attorney's fees.

{¶ 5} Appellant filed his answer pro se, stating with respect to each allegation of the complaint that he "denies wrongdoing; and states plaintiff consented to all agreements and terms within promissory not [sic] /contract." He also counterclaimed for "Breach of contract," "Liable [sic]," and "Slander," and demanded judgment in the amount of \$30,000. Appellant's counterclaims were based upon the following allegation: "On or about May 15th 2000 Plaintiff and Defendant (Sandra Harding and Joseph Lewis respectfully [sic]) executed a legally binding contract (Copy attached, see exhibit A.), for which Plaintiff is now in breach."

{¶ 6} Harding's answer denied the counterclaims, asserted that the counterclaims failed to state a claim, and demanded that the counterclaims be dismissed.

{¶ 7} On April 20, 2007, appellant filed a motion to dismiss in which he argued, among other things, that the court lacked subject matter jurisdiction because Harding's claims exceeded the court's \$15,000 jurisdictional limit. However, before the court ruled on the motion, the parties appeared to settle their differences and, on May 1, 2007, the court entered an agreed upon judgment entry, granting judgment to Harding on her first cause of action, setting monthly payments, and dismissing her second cause of action as well as the counterclaims. On May 30, 2007, appellant filed a pro se motion to vacate this entry.

{¶ 8} On July 9, 2007, the court held a hearing on the motion. Appellant appeared with newly retained counsel who informed the court that he had no personal knowledge of the agreed settlement or the modifications to that agreement, and suggested that appellant should argue the motion himself. Appellant informed the court that he did not believe the entry accurately reflected the agreement of the parties. He stated that he agreed to pay Harding in monthly installments, but that he did not agree to the granting of a "judgment" against him. The court granted appellant's motion and scheduled the matter for trial on July 31, 2007. At appellant's counsel request, the court changed the trial date to July 30, 2007. This date was subsequently noted on the docket. A July 16, 2007 entry shows a trial date of

July 30, 2007 at 9:00 a.m. On July 23, 2007, appellant, through counsel, filed a jury demand.

{¶ 9} On July 30, 2007, the court called the case for trial. Harding and her counsel were present. Appellant was present without counsel. He told the court that he had spoken to his counsel and that he was in the building. The court waited until 9:30 a.m. and then, over appellant's objection, commenced trial. The court offered appellant the opportunity to present argument in support of his late filed jury demand, but he declined. The court proceeded with a bench trial.

{¶ 10} Opening statements were waived and Harding was called as the first witness. Appellant's counsel arrived just after Harding finished her direct testimony. He apologized to the court and stated he was "in court upstairs." Because he had missed Harding's testimony, counsel suggested that appellant handle Harding's cross-examination and he would provide assistance. The record reflects that while appellant conducted the questioning, his counsel also participated — asking the court to instruct the witness to answer and arguing when he felt the witness was being evasive.

{¶ 11} Harding then rested her case. Prior to presenting appellant's case, appellant's counsel objected to the court proceeding with trial without him and to the court's denial of his jury demand. He argued that 35 minutes was not an unreasonable delay of trial and that the court should have waited

for him. He said he spoke to his client and informed him he was parked and had to run to another court in the building to check in for an 8:30 a.m. hearing. He also argued that he filed the jury demand one week prior to the trial believing that his client's best opportunity for a fair trial would be with a jury. He suggested that appellant felt the court was biased against him.

{¶ 12} Following the trial, on February 15, 2008, the court entered an opinion and judgment entry in which it determined that appellant had waived his right to a jury trial by failing to demand a jury within 14 days of the service of the last pleading, as required by Civ.R. 38. The court further found that appellant was liable to Harding for the liability on the promissory note in the amount of \$8,834.

{¶ 13} On May 11, 2009, the trial court held a hearing to consider the issues raised by this court's remand. Appellant appeared pro se. Harding, through counsel, asked the court to dismiss the counterclaims and enter final judgment in her favor. She argued that appellant was given a full and fair opportunity to present his case at trial and failed to present any evidence or argument in support of his counterclaims. Appellant did not rebut Harding's argument on the issue of the counterclaims, instead he confined his arguments to his claim that the trial court lacked subject matter jurisdiction. He argued that appellant's complaint sought treble damages in excess of \$25,000, outside of the municipal court's jurisdiction.

{¶ 14} By judgment entry dated June 1, 2009, the court dismissed appellant's counterclaims, denied his outstanding motions, and stated there is no just cause for delay. Accordingly, the court's judgment for Harding on the debt is now final and subject to appeal.

{¶ 15} In his first assignment of error, appellant asserts that the court denied him the right to a jury trial. He acknowledges that the trial court may not have committed an error of law, but argues that the court exhibited an attitude that was unreasonable, arbitrary, and unconscionable.

{¶ 16} The right to a jury trial is inviolate. Section 5, Article I, Ohio Constitution. Although the right to a jury is inviolate, it may be waived. *Cincinnati v. The Bossert Machine Co.* (1968), 16 Ohio St.2d 76, 79, 243 N.E.2d 105.

{¶ 17} Civ.R. 38 (B) states: "Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and *not later than fourteen days after the service of the last pleading* directed to such issue." (Emphasis added.) According to Civ.R. 7(A), the only filings that qualify as a "pleading" are: a complaint and an answer; a reply to a counterclaim; an answer to a cross-claim; a third-party complaint; a third-party answer; and, a reply to an answer or a third-party answer if the court so orders.

{¶ 18} Civ.R. 38(D) provides that, “[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury.” See, also, *Ferguson v. Johnson* (1984), 15 Ohio App.3d 143, 145, 473 N.E.2d 56 (“The failure of a party to timely serve his demand for a jury trial as required by the Civil Rules constitutes a waiver by him of a trial by jury.”).

{¶ 19} The record reflects that the last pleading directed to the issue of appellant’s counterclaim is Harding’s reply to the counterclaim filed on October 18, 2006.¹ According to the rule, to be timely filed appellant’s jury demand had to have been filed no later than November 1, 2006. Appellant’s demand was filed on July 23, 2007.

{¶ 20} We find appellant’s argument that the jury demand was not filed until a week before trial because he only received “official notice” of the trial date on or about July 19, 2007, to be disingenuous. The record reflects that appellant was present at the July 9, 2007 hearing when, at his counsel’s request, the trial court set the trial date for July 30, 2007. Therefore, while the trial date was not placed on the docket until July 16, 2007, appellant and his counsel had actual notice of the trial date on July 9, 2007, but waited until July 23, 2007 to file the jury demand.

¹Harding’s reply was miscaptioned as an “answer” to the counterclaim.

{¶ 21} We also find no merit to appellant's argument that the trial court should have granted him a jury trial because he paid the \$250 deposit to secure a jury for the trial date in question. Local Rule 6.11 of the Cleveland Municipal Court requires such a deposit at the time the jury demand is made. However, the rule also states: "The jury demand must be filed in compliance with the time frames set forth in Rule 38(B) of the Ohio Rules of Civil Procedure. * * * Failure to comply with the provisions of this section shall constitute a waiver of jury trial." The docket reflects that after finding appellant's jury demand untimely, the court returned appellant's deposit.

{¶ 22} There is a provision under the civil rules for a jury trial to be had where a jury demand was not made. Civ.R. 39(B) states: "Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, *the court in its discretion upon motion* may order a trial by a jury of any or all issues." (Emphasis added.) In this case, the defendant's demand cannot be considered a motion under Civ.R. 39(B). Civ.R. 7 states that a motion, "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Additionally, Loc.R. 7.03 of the Cleveland Municipal Court provides that all written motions shall include a brief in support of the motion with a concise statement of pertinent facts, a description of the relief or order sought, and arguments establishing legal grounds for the motion along with case citations, statutes, and other authorities relied on. Appellant filed

a one page document consisting of a single sentence demanding “a trial by jury on all triable issues pursuant to Civ. R. 38(b) [sic].”

{¶ 23} Even if we were to accept appellant’s July 23, 2007 filing as a Civ.R. 39(B) motion, there is nothing in the record to explain the nine-month delay in demanding a jury trial, or to demonstrate how appellant would be prejudiced from the denial of a jury trial. Accordingly, the trial court did not abuse its discretion by denying appellant’s request. See *Frashuer v. Travelers Indemn. Co.* (1974), 49 Ohio App.2d 1, 358 N.E.2d 886. Appellant’s first assignment of error is overruled.

{¶ 24} In his second assignment of error, appellant asserts that the trial court denied him the right to counsel. He argues that his counsel was present in the building when, over his objection, the court commenced trial. Appellant relies upon *Siegwald v. Curry* (1974), 40 Ohio App.2d 313, 314, 319 N.E.2d 381, in which the court stated:

{¶ 25} “There is an inherent right to counsel as to all matters, be it civil or criminal. * * * In civil matters, however, there is no error with respect to a denial of counsel, unless it appears that the party expressly requested the right to confer with counsel and was unjustifiably denied the exercise of that right. The right is not absolute, but may be controlled as to time and circumstances. However, there exists a right to counsel in civil matters. Another distinction is that in criminal matters a denial of counsel is usually

per se prejudicial. In civil matters, however, a denial of the right to counsel must be shown to have been prejudicial.”

{¶ 26} Loc.R. 6.29 of the Cleveland Municipal Court provides that any judge presiding at a civil trial shall have the authority, “to order the plaintiff to proceed with the case and to decide and determine all matters ex parte upon failure of the defendant or defendant’s counsel to appear in person at any pretrial conference or trial[.]”

{¶ 27} The trial was set for July 30, 2007 at 9:00 a.m. This date was set at appellant’s counsel’s request. Counsel did not notify the court of any conflict or that he was running late. The trial court waited 30 minutes past the time set for trial before commencing. Accordingly, the trial court was within its authority to proceed with the trial.

{¶ 28} Appellant has also failed to demonstrate prejudice from the court’s decision. The only prejudice appellant asserts is that he did not have counsel present to argue the issue of the jury demand before the start of trial. However, appellant’s counsel was permitted to place his arguments upon the record and, as we previously determined, there was no error in the court’s denial of appellant’s jury demand. Appellant’s second assignment of error is overruled.

{¶ 29} For his third assignment of error, appellant claims the trial court erred by dismissing his counterclaims and denying his motion to dismiss the action for lack of subject matter jurisdiction pursuant to R.C. 1901.17.

{¶ 30} Appellant claims that the court erroneously denied his motion to dismiss for lack of subject matter jurisdiction. He argues that the court was without jurisdiction to proceed when both parties filed claims in excess of the court's jurisdictional limit.

{¶ 31} R.C. 1901.17 governs the monetary jurisdiction of the municipal court and provides in pertinent part:

{¶ 32} "A municipal court shall have original jurisdiction only in those cases in which the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed fifteen thousand dollars * * *."

{¶ 33} Contrary to appellant's claim, Harding's complaint did not seek damages in the amount of \$26,502. The record reflects that the complaint was corrected by hand, prior to filing, to reflect damages in the amount of \$15,000. Because the complaint plainly sought damages of not more than the jurisdictional maximum, the municipal court had jurisdiction over the complaint.

{¶ 34} Neither did the court automatically lose jurisdiction upon appellant filing a \$30,000 counterclaim. When a counterclaim is asserted

exceeding the monetary jurisdiction of the municipal court, the correct procedure is not dismissal for lack of subject matter jurisdiction, but rather, to certify the case to the court of common pleas. Civ.R. 13(J); R.C. 1901.22.

{¶ 35} Certification is not automatic, however. “Cases interpreting this provision have uniformly held that the municipal court is authorized to examine whether the counterclaim states a claim exceeding its jurisdiction and is not required to certify cases to the common pleas court based *solely* upon the amount of the monetary demand in a counterclaim.” *Lewallen v. Mentor Lagoons, Inc.* (1993), 85 Ohio App.3d 91, 95, 619 N.E.2d 98 (emphasis in original). Merely making a demand for judgment in excess of the municipal court’s jurisdiction is insufficient. *Hersch v. Debreczeni* (1973), 33 Ohio App.2d 235, 237-239, 294 N.E.2d 918; *Gravill v. Parkhurst* (1985), 27 Ohio App.3d 100, 499 N.E.2d 913. Before certifying the case to the court of common pleas, the municipal court must first determine if the counterclaim satisfies the formalities of the civil rules and states a claim demonstrating that the party is entitled to relief. *Adams Robinson Ent. v. Envirologix Corp.* (1996), 111 Ohio App.3d 426, 431, 676 N.E.2d 560.

{¶ 36} In the instant case, appellant’s counterclaim fails the test for certification. To state a claim for relief, Civ.R. 8(A) requires: 1) “a short and plain statement of the claim showing that the party is entitled to relief,” and 2) “a demand for judgment.” Appellant fails to make a statement of the claim

required by this rule. His counterclaim merely states the name of three causes of action — breach of contract, libel, and slander — and states that Harding is “now in breach.” Upon this he asks the court to dismiss plaintiff’s claims and demands judgment for \$30,000. As written, appellant’s counterclaim is an unsubstantiated demand for judgment in excess of the jurisdictional amount and is insufficient to divest the municipal court of jurisdiction. *Lewallen*, supra. Accordingly, there is no error in the trial court’s denial of appellant’s motion to dismiss.

{¶ 37} We also find no error in the court’s dismissal of appellant’s counterclaims. Appellant argues that he had a right to be heard on his counterclaims. However, appellant’s counterclaims fail to properly state a claim for relief. Additionally, the record reveals that at no time did appellant present any evidence or argument whatsoever in support of a claim for damages. Accordingly, the trial court did not err when it dismissed appellant’s counterclaims. The third assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR