

[Cite as *Petsch v. Hampton Inn*, 2011-Ohio-838.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95039

MARIE PETSCH, ET AL.

PLAINTIFFS-APPELLEES

vs.

HAMPTON INN, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-620769

BEFORE: Jones, J., Sweeney, P.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 24, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Blue Cross & Blue Shield of Michigan (“Blue Cross”), appeals the trial court’s February 10, 2009 judgment denying its first motion to dismiss (for failure to state a claim upon which relief can be granted). It also appeals the trial court’s March 30, 2010 judgment wherein the court (1) denied Blue Cross’s second motion to dismiss (for lack of subject matter jurisdiction); (2) granted the motion of plaintiffs-appellees, Marie and Frederick Petsch, for reconsideration; (3) granted the Petschs’ motion for default judgment; (4) denied Blue Cross’s motion for leave to file an answer instanter; and (5) struck Blue Cross’s answer and cross-claim filed on March 6, 2009. We affirm in part and reverse and remand in part.

I. Procedural History

{¶ 2} The procedural history of this case spans nearly three years and is as follows. The Petschs filed this personal injury action on April 5, 2007, against various alleged tortfeasors. Relevant to this appeal, the complaint alleged that Marie Petsch was insured

under a plan administered by Blue Cross and asked the court to “construe the policy of insurance and determine the prospective rights of the Plaintiffs and Defendant [Blue Cross].”

Blue Cross was served on April 16, 2007.

{¶ 3} Over one year later, on May 2, 2008, Blue Cross filed (1) a motion to intervene, 2) an intervening complaint instanter, and (3) a motion to dismiss. On May 9, 2008, before the trial court ruled on Blue Cross’s motion to intervene, it filed an intervening complaint.¹

{¶ 4} Five months later, on October 7, 2008, the Petschs filed a motion for default judgment. On February 10, 2009, the trial court denied Blue Cross’s motion to dismiss and motion to file an intervening complaint.

{¶ 5} On February 26, 2009, the Petschs filed a “memorandum in support of default judgment and declaratory judgment that defendant has no right of subrogation and/or reimbursement.” On February 27, 2009, Blue Cross filed a “motion for leave to file their answer and crossclaims instanter,” seeking until March 6, 2009 to file same. The Petschs opposed the motion.

{¶ 6} On March 6, 2009, Blue Cross filed three pleadings: (1) another motion to dismiss, this one for alleged lack of subject matter jurisdiction; (2) a brief in opposition to the Petschs’ motion for default judgment; and (3) an answer and cross-claim.

{¶ 7} On March 11, 2009, the trial court granted Blue Cross’s motion for leave to file

¹The Petschs opposed Blue Cross’s motions to intervene and dismiss on May 23, 2008.

an answer and cross-claims and denied the Petschs' motion for default judgment. On March 18, 2009, the Petschs filed a motion for reconsideration.

{¶ 8} On March 30, 2010, the trial court issued a judgment, wherein it (1) denied Blue Cross's motion to dismiss for lack of subject matter jurisdiction; (2) granted the Petschs' motion for reconsideration; (3) granted the Petschs' motion for default judgment; (4) denied Blue Cross's motion for leave to file an answer instant; and (5) struck Blue Cross's answer and cross-claim filed on March 6, 2009.

{¶ 9} Blue Cross presents the following four assignments of error for our review:

{¶ 10} "I. The trial court erred in granting Rule 55(A) Default Judgment where Defendant/Appellant [Blue Cross] had 'otherwise defended' the case.

{¶ 11} "II. The trial court committed error by not dismissing [the] complaint where no allegations were made that Plaintiff/Appellee Petsch exhausted her administrative remedies under ERISA.

{¶ 12} "III. [The] Trial Court committed reversible error as it lacked subject matter jurisdiction to hear any suit for declaratory relief under ERISA.

{¶ 13} "IV. [The] Trial Court committed reversible error by denying the motion to dismiss for failure to state a valid cause of action as Appellee/Plaintiff Petsch did not assert any recognized cause of action against Appellant/Defendant BCBS."

II. Analysis

A. Default Judgment

{¶ 14} In its first assignment of error, Blue Cross challenges the trial court’s grant of default judgment in favor of the Petschs.

{¶ 15} Civ.R. 55, governing default judgment, provides in relevant part as follows: “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.”

{¶ 16} A trial court’s decision to grant or deny a motion for default judgment is reviewed for an abuse of discretion. *Goodyear v. Waco Holdings, Inc.*, Cuyahoga App. No. 91432, 2009-Ohio-619, ¶ 19, citing *Jones v. Dillard*, Cuyahoga App. No. 87733, 2006-Ohio-6417. The term “abuse of discretion” implies that the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 17} Blue Cross did not take action in this case until May 2008, which was over a year from when the case was filed and service was perfected on it. The three filings made by Blue Cross in May 2008 — a motion to intervene, an intervening complaint instanter, and a

motion to dismiss — were done so without leave of court.² But at the time the filings were made, the Petschs had not filed their default judgment motion, and did not do so until five months later, in October 2008. Further, despite the untimeliness of Blue Cross’s motions, the court considered them, denying the motions in February 2009.

{¶ 18} After the trial court denied Blue Cross’s motion to dismiss, Blue Cross sought an extension of time to file its answer, the court granted the extension, and Blue Cross filed its answer. Accordingly, the court denied the Petschs’ motion for default judgment. The Petschs filed a motion for reconsideration.

{¶ 19} In their motion for reconsideration, the Petschs argued that Blue Cross untimely filed its motion to dismiss, without leave of court, and without demonstrating excusable neglect as required by Civ.R. 60(B)(2). We find this argument unpersuasive, however, in light of the fact that (1) the Petschs did not file their motion for default judgment until over a year after the action had been filed and service was had on Blue Cross, and five months after Blue Cross filed its motion to dismiss; (2) the Petschs never filed a motion to strike Blue Cross’s late filings; and (3) the trial court did not take any action on the Petschs’ default motion until five months after it had been filed, when it *denied* the motion, evidencing that it deemed that Blue Cross had appeared in the action. In *Suki v. Blume* (1983), 9 Ohio App.3d 289, 459 N.E.2d 1311, this court held that an untimely answer filed prior to court action on a motion for default

²Civ.R. 6(B)(2) allows for an extension of time to file a late pleading within the trial court’s discretion “upon motion made after the expiration of the specified period * * * where the failure to

judgment constitutes an appearance in the case.

{¶ 20} In its March 20, 2010 judgment entry, in granting the Petschs’ motion for default judgment, the trial court found that “Blue Cross is not entitled to any form of subrogation from Plaintiff.” We make no determination on the substance of that finding. Such a finding, if supported by the evidence, would be appropriate under a summary judgment exercise. But we are not reviewing a motion for summary judgment.

{¶ 21} Accordingly, on this record, the trial court abused its discretion by granting the Petschs’ motion for default judgment. Implicit in this holding is a finding that the Petschs waived the ability to challenge the untimeliness of Blue Cross’s filings and the trial court acquiesced in that waiver. Thus, Blue Cross’s answer and cross-claim shall be reinstated upon remand.

{¶ 22} The first assignment of error is sustained.

B. Exhaustion of Administrative Remedies

{¶ 23} For its second assignment of error, Blue Cross contends that the Petschs’ complaint should have been dismissed because they failed to exhaust their administrative remedies under the federal Employee Retirement Income Security Act of 1974 (“ERISA”). We disagree.

{¶ 24} The failure to exhaust administrative remedies is an affirmative defense that may

act was the result of excusable neglect.”

be waived if not timely raised and maintained. *Jones v. Chagrin Falls* (1997), 77 Ohio St.3d 456, 462, 674 N.E.2d 1388. Generally, because they require reference to materials outside the complaint, affirmative defenses cannot be raised by means of a Civ.R. 12(B)(6) motion to dismiss. *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109, 579 N.E.2d 702; *Johnson v. Wilkinson* (1992), 84 Ohio App.3d 509, 516, 617 N.E.2d 707. Rather, affirmative defenses are properly raised by motions for summary judgment. *Morris* at id.

{¶ 25} Blue Cross raised the failure to exhaust administrative remedies in its second motion to dismiss, not in a motion for summary judgment. In support of its motion, Blue Cross simply made the blanket statement that the Petschs failed to exhaust administrative remedies. The blanket statement was not sufficient to entitle Blue Cross to dismissal, especially in light of the fact that claims of failure to exhaust administrative remedies are generally not resolved by a motion to dismiss.

{¶ 26} Accordingly, the second assignment of error is overruled.

C. Lack of Subject Matter Jurisdiction

{¶ 27} In its third assignment of error, Blue Cross contends that the trial court erred by not dismissing the Petschs' complaint against it for lack of subject matter jurisdiction. Specifically, Blue Cross contends that state courts do not have jurisdiction over ERISA claims.

{¶ 28} In *Qualchoice, Inc. v. Nationwide Ins. Co.*, Cuyahoga App. No. 91964, 2009-Ohio-1696, this court stated that "Ohio courts have concluded that subrogation claims by ERISA benefit plans are governed by state law and are not preempted. In fact, Ohio appellate

courts are on record that subrogation claims by ERISA administrators or insurers are governed by state law.” *Id.* at ¶29.³

{¶ 29} In light of the above, the trial court did not err by denying Blue Cross’s motion to dismiss for lack of subject matter jurisdiction and the third assignment of error is overruled.

D. Failure to State a Claim Upon which Relief can be Granted

{¶ 30} For its fourth assigned error, Blue Cross challenges the denial of its first motion to dismiss, which was based on failure to state a claim upon which relief can be granted.

{¶ 31} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. It is well settled that “when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

{¶ 32} While the factual allegations of the complaint are taken as true, “[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand

³Citing the following cases: *Immediate Pharmaceutical Servs., Inc. v. Superior Metal Prods., Inc. Emp. Benefit Trust*, 134 Ohio App.3d 748, 1999-Ohio-871, 732 N.E.2d 417; *Halley v. Ohio Co.* (1995), 107 Ohio App.3d 518, 669 N.E.2d 70; *Leasher v. Leggett & Platt, Inc.* (1994), 96 Ohio App.3d 367, 645 N.E.2d 91; *Beasecker v. State Auto Ins. Co.* (Feb. 2, 2001), Darke App. No. 1530; *Bradburn v. Merman* (Oct. 25, 1999), Clermont App. No. CA99-02-011; *Tri-Cty. Bldg. Trade Fund v. First Benefits Agency, Inc.* (Nov. 4, 1998), Summit App. No. 18729.

a motion to dismiss.” *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 324, 544 N.E.2d 639. Thus, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

{¶ 33} In its May 2, 2008 motion to dismiss, Blue Cross stated the following: “Plaintiff named [Blue Cross] as a party to set up its subrogation claim or be barred. Has Plaintiff stated a cause of action for affirmative relief against [Blue Cross]? Clearly, the answer is no warranting dismissal of the action[] against this defendant.”

{¶ 34} As it related to Blue Cross, the Petschs’ complaint alleged the following:

{¶ 35} “26. At all times pertinent to this action * * * Marie Petsch was insured under a plan of hospitalization and medical insurance coverage that provided for payment of fees and bills which occurred due to injury or sickness, and a policy issued through her husband’s employer [Blue Cross];

{¶ 36} “27. At all times pertinent to this action, it is believed that this plan of insurance calls for assertion of a right to subrogation;

{¶ 37} “28. Upon information and belief, the subrogation claim of this Defendant is equitable in nature [and] will not attach until there has been a determination of liability making [Blue Cross] a necessary party pursuant to Rule 19 of [the] Ohio Rules of Civil Procedure;

{¶ 38} “WHEREFORE, Plaintiff, Marie Petsch, requests that this Court construe the

policy of insurance and determine the prospective rights of both the Plaintiffs and Defendant [Blue Cross] * * *.”

{¶ 39} Thus, the Petschs’ complaint as it related to Blue Cross was for declaratory judgment. A complaint for declaratory judgment may be dismissed for failure to state a claim upon which relief can be granted only if (1) no real controversy or justiciable issue exists between the parties, or (2) the declaratory judgment will not terminate the uncertainty or controversy. *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721, 679 N.E.2d 1191; see, also, *Fioresi v. State Farm Mut. Auto. Ins. Co.* (1985), 26 Ohio App.3d 203, 203-204, 499 N.E.2d 5.

{¶ 40} Blue Cross’s motion did not demonstrate, or even allege, either of the two grounds upon which a declaratory judgment action may be dismissed for failure to state a claim upon which relief can be granted.⁴ Accordingly, the trial court properly denied Blue Cross’s motion to dismiss for failure to state a claim upon which relief can be granted and the fourth assignment of error is overruled.

III. Conclusion

{¶ 41} The judgments are affirmed in part and reversed and remanded in part. The judgment denying Blue Cross’s motions to dismiss are affirmed. The judgment granting the motion for default judgment, denying Blue Cross’s motion for leave to file an answer, and

⁴In fact, Blue Cross sought to intervene as a plaintiff to “protect and preserve its subrogated interest” in the action.

striking Blue Cross's answer and cross-claim are reversed. On remand, Blue Cross's answer and cross-claim shall be reinstated, and the case shall proceed consistent with this opinion.

It is ordered that appellants and appellees split 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 Cuyahoga County Court of Common Pleas 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

**JAMES J. SWEENEY, P.J., and
KENNETH A. ROCCO, J., CONCUR**