[Cite as *Haley v. DCO Internatl., Inc.*, 2010-Ohio-1343.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STEPHEN T. HALEY	C.A. No. 24820
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DCO INTERNATIONAL, INC., et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2008-11-7880

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

MOORE, Presiding Judge.

{¶1} Appellant, Stephen T. Haley, appeals from the judgment of the Summit County Court of Common Pleas. We affirm.

I.

{¶2} DCO International, Inc. ("DCO") and Brightfish Recycled Plastics, Inc. ("Brightfish") are corporations that import and export plastics material. As a result of two different transactions involving the sale of ground plastic material totaling 83,860 pounds, DCO allegedly became indebted to Brightfish in the amount of $36,898.40. Jeff Green is an agent of DCO and Claudine M. Osipow is President of DCO. DCO allegedly requested that Brightfish offset money it owed to DCO for a separate delivery of material DCO made to one of Brightfish's clients. Brightfish refused and threatened litigation. Brightfish eventually assigned all of its interest in any claims against DCO, Green and Osipow to Haley. Haley is the father-in-law to Michael Fullbright, an officer, director and shareholder of Brightfish.

{¶3} Haley brought the instant action as the real party in interest, acting pro se. On November 21, 2008, Haley achieved service on Green. On November 24, 2008, he achieved service on Osipow. Using Osipow's service date for time calculation purposes, the answer date was December 22, 2008. However, counsel for Green and Osipow filed a certification of leave to plead for 21 days. As a result, the answer date became January 12, 2009. Green and Osipow never filed an answer. Instead, on January 14, 2009, counsel acting on behalf of DCO, Green and Osipow filed a motion for summary judgment alleging that they were entitled to judgment as a matter of law because Haley was acting as a collection agency and failed to comply with R.C. 1319.12. Haley opposed the motion and also filed a motion for default judgment on February 12, 2009.

{¶4} The trial court granted summary judgment in favor of appellees, DCO International, Inc., Claudine M. Osipow and Jeff Green.

{¶5} Haley timely filed a notice of appeal, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF [HALEY] BY ALLOWING [DCO, GREEN AND OSIPOW] TO FILE [THEIR] MOTION FOR SUMMARY JUDGMENT OUTSIDE THE TIME FRAME PROVIDED BY CIV.R [SIC] 12(A)(1) WITHOUT FILING AN ANSWER OR WITHOUT [] FILING A MOTION REQUESTING LEAVE OF THE COURT TO FILE THE ANSWER OR RESPONSIVE PLEADING DEMONSTRATING EXCUSABLE NEGLECT FOR THE LATE FILING PURSUANT TO OHIO CIV.R. 6(B)(2)[.]"

{¶6} In his first assignment of error, Haley contends that the trial court erred in allowing DCO, Green and Osipow to file their motion for summary judgment beyond the answer date without first requesting leave of court or demonstrating excusable neglect. We disagree.

{¶7} Haley predicates this assignment of error on the belief that an answer must be filed prior to a motion for summary judgment and that any other responsive pleading must be filed within the answer period or a party must demonstrate excusable neglect if the pleading is filed outside the answer period. He is mistaken. "A party against whom a claim *** [is brought] may, *at any time*, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim[.]" (Emphasis added.) Civ.R. 56(B). Under the plain language of Civ.R. 56(B), an answer need not precede a defendant's motion for summary judgment. *Anderson v. Morning View Care Center New Philadelphia, Inc.* (Jan. 8, 1993), 5th Dist. No. 92AP060043, at *3; 2 Baldwin's Oh. Prac. Civ. Prac. (2009) Section 56:7; see also, *Internatl. EPDM Rubber Roofing Systems, Inc. v. GRE Ins. Group* (May 4, 2001), 6th Dist. No. L-00-1293 at *5. Civ.R. 55(A) permits a party to move for default judgment if the party against whom a judgment is sought has failed to plead or otherwise defend. Civil Rules 55 and 56 operate in concert with one another and do not limit each other. While a party that chooses to ignore an answer date in favor of later filing a motion for summary judgment does so at his peril, nothing in the rules requires the filing of an answer as a condition precedent to filing a motion for summary judgment. In this case, the motion for default judgment was filed after DCO had filed its motion for summary judgment. Civil Rule 56 (A) limits the filing of a motion for summary judgment to "any time after the *expiration of the time permitted* under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party." (Emphasis added.) It does not say *after the party has filed* a responsive pleading. The other limitation in the rule is that leave of court is required if the action has been set for pretrial or trial. Accordingly, the trial court did not err in allowing DCO, Green

and Osipow to file their motion for summary judgment outside of the answer period and without demonstrating excusable neglect pursuant to Civ.R. 6(B).

{¶8} Haley's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRORED [SIC] AS A MATTER OF LAW BY GRANTING [DCO, GREEN AND OSIPOW'S] MOTION FOR SUMMARY JUDGMENT DETERMINING THAT [HALEY] WAS ACTIING [SIC] AS A 'COLLECTION AGENCY' AND THAT [HALEY] HAD NOT COMPLIED WITH THE STATUTORY REQUIREMENTS FOUND IN R.C. §1319.12 WHEN THE FACTS REVEAL THAT [HALEY] HAD PURCHASED THE DEBT FROM HIS SON-IN-LAW CAUSING THE TRIAL COURT'S INTERPRETATION TO BE CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND CIV.R. 17(A)."

{¶9} In Haley's second assignment of error he contends that the trial court erred in granting summary judgment to DCO, Green and Osipow on the basis that Haley was acting as a collection agency and failed to comply with R.C. 1319.12. We disagree.

{¶10} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶11} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶12} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the

absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶13} DCO, Green and Osipow moved for summary judgment on the basis that Haley was acting as a debt collector and failed to comply with R.C. 1319.12. The only issue for our determination is whether the trial court erred as a matter of law in determining that Haley acted as a collection agency and thus became subject to R.C. 1319.12. There is no dispute that he failed to comply with the requirements of the statute. Haley acted pro se in his dealings with DCO, Brightfish and the officers and agents at all relevant times, and at all stages of this litigation. He does not dispute that he is not an attorney licensed to practice in the State of Ohio as required by R.C. 1319.12(E). The trial court granted summary judgment on this basis.

{¶14} R.C. 1319.12(A)(1) provides that "[a]s used in this section, 'collection agency' means any person who, for compensation, contingent or otherwise, or for other valuable consideration, offers services to collect an alleged debt asserted to be owed to another." Haley directs this Court to *Calvary, Investments, LLC v. Vonderheide* (Nov. 9, 2001), 1st Dist. No. C-010359 for the proposition that he is not subject to this statutory definition because he purchased the debt of Brightfish. The *Calvary* court held that "[t]he plain language of the statute is that a purchaser of a debt does not fall under the R.C. 1319.12(A)(1) definition, because it is pursuing collection on its own behalf." Id. at *2. However, assuming without deciding that *Calvary*

represents a correct interpretation of the statute, we cannot conclude that Haley was a purchaser of the debt at issue in this case.

{¶15} Exhibit A attached to Haley's complaint is a copy of the document that purports to transfer the right to sue on the debt allegedly owed to Brightfish. That document is entitled "*Assignment* of All Claims Against DCO International, Inc., Jeff Green and Claudine M. Osipow." (Emphasis added.) That document further refers to Brightfish as the assignors [*sic*] and Haley as the assignee. The signature lines at the end of the Assignment contain the signatures of Fullbright on behalf of Brightfish and Haley. Fullbright signed the document for Brightfish as "assignor" and Haley signed the document as assignee. In the body of the document, the parties referred to the transaction as an assignment. The language that raises some ambiguity is found in one line of the Assignment stating that the assignment "shall be payment for certain consideration made by [Haley] to [Brightfish]." This language could be interpreted as suggesting that the assignment was a means of compensating Haley for services provided to Brightfish. More specifically, the document states "for consideration *made* by [Haley]" rather than for consideration *paid* by Haley. (Emphasis added.) Additionally, in the next paragraph the document grants Haley the right to sue in his own name. Had the parties intended the transaction to constitute a purchase rather than an assignment, no such language would be necessary to allow Haley to sue in his own name. R.C. 1319.12(B) provides that a collection agency with a place of business in Ohio may take an assignment of another person's debt "in its own name for the purpose of billing, collecting or filing suit in its own name as the real party in interest." DCO, Green and Osipow attached the assignment document to their motion for summary judgment, thus directing the court to its contents and satisfying their *Dresher* burden. *Dresher*, 75 Ohio St.3d 292-93.

{¶16} In opposition to the summary judgment motion, Haley attached two affidavits. The affidavit of Michael Fullbright, an "Officer, Director and Shareholder" of Brightfish states that Fullbright, on behalf of Brightfish, "assigned one hundred (100%) percent of all claims" against DCO, Green and Osipow. Haley also attached an affidavit of his own, in which he stated "I purchased the debt owed to Brightfish." Haley's statement appears designed to create a question of fact as to whether he purchased Brightfish's claim rather than merely received an assignment. This affidavit is in stark contrast to the words of assignment permeating the transfer document and Haley's own language in his complaint. In his complaint, Haley's first paragraph and first numbered paragraph each begin "Plaintiff Stephen T. Haley ("Haley"), by *assignment*," with explanatory language then following each introduction. (Emphasis added, punctuation omitted.) The complaint also states that "demand has been made upon the DCO Defendants to liquidate the balance due and owing to Haley by *assignment*[.]" (Emphasis added.) Although Haley states in one sentence that he purchased the claim, even his prayer for relief asserts that "Plaintiff (by *Assignment*) demands judgment against Defendants[.]"

{¶17} In his affidavit, Haley makes no effort to explain the use of the word "purchased" in contrast to the language in the complaint alleging assignment. Further, his use of a term such as "purchase" suggests a legal conclusion rather than a factual allegation. In *Cleveland v. Policy Mgt. Sys. Corp.* (1999), 526 U.S. 795, the United States Supreme Court encountered a similar contradiction. In that case, Ms. Cleveland brought suit under the Americans with Disabilities Act and the defendant moved for summary judgment. The defendant pointed to a prior application by Cleveland for social security disability benefits in which she alleged that she was totally disabled. Id. at 799. If Cleveland was totally disabled, she could not prevail on her ADA claim, which required her to prove that she could perform the essential functions of her job. The

Supreme Court noted that the apparent inconsistencies in the prior application and the current claim required "a sufficient explanation" in order to save the claim from summary dismissal. Id. at 806.

{¶18} While we recognize that signing a complaint in accordance with Civ.R. 11 does not constitute sworn testimony, like Cleveland swearing that she was totally disabled in order to apply for social security benefits, Id. at 807, the act does carry significance. As provided in Civ.R. 11,

> "[t]he 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."

{¶19} We believe that this case is analogous to *Cleveland* in that Haley was required to provide a sufficient explanation for the contradiction between his use of the word "assignment" in his complaint signed pursuant to Civ.R. 11 and the use of the word "purchase" in his own sworn affidavit. See *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶29 (holding that affidavits contradicting deposition testimony must sufficiently explain the contradiction before a genuine issue of material fact is created). Summary judgment in favor of DCO, Green and Osipow is appropriate because Haley failed to submit evidence sufficient to create a genuine question of material fact as to whether he was acting as a purchaser of debt and, therefore, not subject to R.C. 1319.12. *Henkle*, 75 Ohio App.3d at 735.

{¶20} Haley's second assignment of error is overruled.

III.

{¶21} Haley's first and second assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

BELFANCE, J.
CONCURS

CARR, J.
DISSENTS, SAYING:

{¶22} I respectfully dissent. I would reverse and remand this matter by sustaining the first assignment of error. I would, therefore, not reach the second assignment of error.

{¶23} Civ.R. 7(A) defines pleadings as complaints, answers (to complaints, cross-claims, and third-party complaints), and replies to counterclaims. Civ.R. 12(B) requires that all defenses to claims be asserted in a responsive pleading of the type allowed in Civ.R. 7(A), except for seven enumerated defenses which may be made in either the responsive pleading or

by motion prior to pleading. Civ.R. 55(A) allows the complaining party to move for default judgment if the party against whom a judgment for affirmative relief is sought "has failed to plead or otherwise defend as provided by the rules[.]"

{¶24} DCO, Green, and Osipow failed to file a responsive pleading as provided by the civil rules. Their motion for summary judgment in lieu of an answer or motion to dismiss pursuant to Civ.R. 12(B)(6) did not constitute a proper responsive pleading. Consequently, Haley's motion for default judgment was properly before the trial court and should have been ruled on prior to summary judgment being entertained. Accordingly, I would sustain the first assignment of error.

APPEARANCES:

STEPHEN T. HALEY, pro se Appellant.

GREGORY R. GLICK, Attorney at Law, for Appellees.