

DATE OF JUDGMENT ENTRY: June 8, 2004

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Defendant Delon Jackson appeals a default judgment of the Court of Common Pleas of Tuscarawas County, Ohio, entered in favor of plaintiff Brian Rennicker on his complaint for personal injuries. Appellant assigns three errors to the trial court:

{¶2} “THE TRIAL COURT ERRED BY GRANTING THE PLAINTIFF/APPELLEE A DEFAULT JUDGMENT.

{¶3} “THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT/APPELLANT’S REQUEST TO FILE A LATE ANSWER.

{¶4} “THE TRIAL COURT’S DAMAGE AWARD WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶5} The record indicates appellee filed his complaint on November 26, 2001, and service was perfected on November 30, 2001. On February 4, 2002, the trial court

entered a pre-trial scheduling order, setting a discovery cut-off date of May 30, 2002, and a jury trial scheduled for August 13, 2002. On April 2, 2002, appellee filed a motion for default judgment. On May 7, 2002, counsel for appellant filed a notice of appearance and a motion for leave to file an answer. On August 28, 2002, the trial court entered a default judgment against appellant without a hearing.

{¶6} On July 31, 2003, the trial court held a hearing on the issue of damages. On September 2, 2003, the court awarded appellee \$2,116.28 in compensatory damages and \$25,000.00 in punitive damages.

I

{¶7} In his first assignment of error, appellant argues the trial court erred in entering default judgment in favor of appellee because appellant had never been served with the required seven-day notice.

{¶8} Civ. R. 55 (A) provides in part: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the Rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore. ***If the party against whom judgment by default is sought has

appeared in the action, he ***shall be served with the notice of the application for judgment at least seven days prior to the hearing on such application.”

{¶9} Compliance with the seven-day notice requirement of Civ. R. 55 (A) is mandatory, see *Midwest Flooring and Lining, Inc. v. Express Painting Corporation*, Stark Appellate No. 2001-CA-00353, 2002-Ohio-2564, citing *AMCA International Corporation v. Carlton* (1984), 10 Ohio St. 3d 88.

{¶10} In *Hyway Logistic Services, Inc. v. Ashcraft*, Hancock Appellate No. 5-99-40, 2000-Ohio-1620, the Third District Court of Appeals reviewed a number of cases which construed the notice provisions of the Civ. R. 55. The court found courts generally construe the term “appeared” liberally, as in *Suki v. Blum* (1983), 9 Ohio App. 3d 289, 459 N.E. 2d 1311, where the defendant filed an untimely answer without leave of court. The court of appeals found this constituted an appearance. Likewise, in *Gagliardi v. Flowers* (1984), 13 Ohio App. 3d 238, 468 N.E. 2d 933, and *Hardware & Supply Company vs. Edward Davidson, M.D., Inc.* (1985), 23 Ohio App. 3d 145, 492 N.E. 2d 168, courts have found filing a motion to file an answer instanter or a motion for extension of time to plead constitutes an appearance.

{¶11} As the court of appeals in *Hyway Logistic Services, Inc.* noted the overriding, and dispositive concern in all cases must be whether the communication

between parties or counsel, via telephone calls or otherwise, demonstrated a clear intent to defend the suit.

{¶12} In the case at bar, counsel for appellant filed a notice of appearance and a motion for leave to file an answer prior to the entry of default judgment.

{¶13} We find because appellant appeared in this action, the trial court erred in ruling on the motion for default without a hearing. Instead, appellant was entitled to seven days notice prior to the hearing on the motion.

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

II

{¶15} In his second assignment of error appellant argues the trial court abused its discretion in overruling the appellant's request to file a late answer.

{¶16} Appellant points out he caused no delay in the action because he filed his notice of appearance and motion for leave to plead before the cut-off date for the exchange of discovery. Appellant urges the Supreme Court has often held the courts should decide their cases on their merits, see *DeHart v. Aetna Life Ins. Co.* (1983), 69 Ohio St. 2d 189.

{¶17} Our standard of reviewing a trial court's judgment entered on a motion for leave to plead is the abuse of discretion standard. The Supreme Court has repeatedly defined the term abuse of discretion as implying the court's attitude is unreasonable,

arbitrary, or unconscionable, see *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E. 2d 1140.

{¶18} In his motion for leave to plead and file his answer instanter, appellant cited as reasons for the delay excusable neglect and recently obtained counsel. The motion also alleges the answer is attached to the motion and incorporated within. However, this court was unable to find any proposed answer in the record.

{¶19} The trial court found appellant had not demonstrated any evidence of excusable neglect, and this court is unable to find the trial court was wrong.

{¶20} We find the trial court did not abuse its discretion in overruling the motion for leave to plead.

{¶21} The second assignment of error is overruled.

III

{¶22} In his third assignment of error, appellant urges the trial court's damage award is against the manifest weight of the evidence. Because in I, supra, we find the default judgment must be set aside, the question of weight of the evidence on the damage award is premature.

{¶23} The third assignment of error is overruled as premature.

{¶24} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J., and

Edwards, J., concur

Hoffman, J., concurs in part;

dissents in part

JUDGES

Hoffman, J., concurring in part and dissenting in part

{¶25} I concur in the majority's analysis and disposition of appellant's second assignment of error. However, I respectfully dissent from the majority's disposition of appellant's first assignment of error.

{¶26} I agree appellant's notice of appearance and motion for leave to file an answer constitute an appearance for purposes of Civ. R. 55(A). However, because appellant appeared after appellee filed his motion for default, I find the seven day notice provision contained in Civ. R. 55(A) does not apply. I agree with appellee, in order for the seven day notice provision to be triggered, the appearance by the defendant must have been before the application for default judgment, not after. As noted by appellee, the phrase in the rule "is sought" is in the present tense, while the phrase "has appeared" is in the past tense, meaning it [the appearance] must have already occurred before the seven day notice is required. In the case sub judice, the appearance was not made for more than 30 days after default judgment was sought.¹ Accordingly, although appellant may have made an appearance, such appearance was too late to allow appellant to avail itself of the seven day notice provision in Civ. R. 55(A).

{¶27} I would affirm the trial court's grant of default judgment.

¹ Appellant's reliance on this Court's opinion in *Muskingum v. Melvin* (1990), Ohio App.3d 811, is misplaced. *Melvin* is significantly factually distinguishable from the instant case. In *Melvin*, the defendant's appearance occurred before the application for default judgment. The *Melvin* Court reached the correct decision and my decision herein is consistent with that opinion.

JUDGE WILLIAM B. HOFFMAN

