

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

REBECCA SNYDER, et al.	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiffs-Appellees	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ANTHONY SWICK	:	Case No. 2010CA00066
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of
Common Pleas, Case No. 2008CV03929

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY: October 18, 2010

APPEARANCES:

For Plaintiffs-Appellees

MARIO GAITANOS
437 Market Avenue North
Canton, OH 44702

For Defendant - Appellee
Administrator of BWC
KEVIN G. DAVIS
12 East Exchange St., 8th Fl
Akron, OH 44308

For Defendant-Appellant

TERRENCE J. KENNEALLY
Old Forge Center
20595 Lorain Road, Terrace Level 1
Fairview Park, OH 44126

Delaney, J.

{¶1} Defendant-Appellant Anthony Swick appeals the March 4, 2010 judgment entry of the Stark County Court of Common Pleas granting judgment and damages in favor of Plaintiffs-Appellees, Rebecca Snyder and Kyle Snyder.

STATEMENT OF THE CASE

{¶2} For the purposes of the within appeal we examine only the procedural history of this case. In order to establish the procedural history of this case and the relevant dates for this appeal, this Court has thoroughly reviewed the trial court case file and we utilize the time-stamped dates of the filings at issue in rendering our decision.

{¶3} On September 12, 2008, Appellees filed a Complaint with the Stark County Court of Common Pleas alleging that Appellant was responsible for Appellee Rebecca Snyder's permanent injuries, medical bills, and loss of consortium following a severe automobile collision that occurred on September 15, 2006.

{¶4} On September 15, 2008, the Stark County Clerk of Courts issued a service of Summons of the Complaint on Appellant via certified mail, return receipt requested. The Summons was returned "unclaimed" and the Stark County Clerk of Courts time-stamped the unserved Complaint on October 8, 2008.

{¶5} On October 9, 2008, Appellees filed "Instructions for Service." The "Instructions for Service" requested the Stark County Clerk of Courts serve Appellant by ordinary mail.

{¶6} On October 15, 2008, the Stark County Clerk of Courts filed a Certificate of Mailing. The Certificate of Mailing is time-stamped by the Stark County Clerk of Courts as "mailed on October 15, 2008." The Certificate of Mailing reflects that the

Complaint was served on Appellant at his home address. The Stark County Clerk of Courts' docket entry on October 15, 2008 states, "CERTIFICATE OF MAILING FOR SERVICE ISSUED 10-09-2008 – ANTHONY SWICK."

{¶7} Appellees filed their Motion for Default Judgment on November 7, 2008.

{¶8} The trial court granted Appellees' Motion for Default Judgment on November 10, 2008. The matter was set for a damages hearing on December 1, 2008.

{¶9} Appellant filed a Motion to Vacate Default Judgment on November 21, 2008. In his Motion to Vacate, Appellant argued that Appellees filed their Motion for Default Judgment and the trial court granted the motion before Appellant's time to answer or otherwise plead had expired on November 12, 2008. Appellant relied upon Civ.R. 4.6(D) in support of his argument. Appellees filed a response stating that the Stark County Clerk of Courts' docket showed that the Summons and Complaint was served on Appellant by ordinary mail on October 9, 2008, as evidenced by the Certificate of Mailing. As such, Appellant's answer date was November 6, 2008.

{¶10} The trial court overruled Appellant's Motion to Vacate on December 5, 2008. The damages hearing was rescheduled to January 9, 2009 and then continued to January 30, 2009.

{¶11} Appellant filed an appeal of the trial court's decision with this Court on January 2, 2009. In *Snyder v. Swick*, Stark App. No. 2009CA00001, 2009-Ohio-5142, this Court dismissed Appellant's appeal. We held that an order granting default judgment was not a final, appealable order.

{¶12} The matter went back the trial court and a damages hearing was held on February 26, 2010.

{¶13} On March 4, 2010, the trial court awarded damages to Appellees in the amount of \$143,775.12.

{¶14} It is from this decision Appellant now appeals.

{¶15} Appellant raises one Assignment of Error:

{¶16} "THE TRIAL COURT ERRED IN GRANTING A DEFAULT JUDGMENT IN FAVOR OF APPELLEES, REBECCA SNYDER, ET AL., AND DENYING APPELLANT ANTHONY SWICK'S MOTION TO VACATE DEFAULT JUDGMENT BECAUSE THE DEFAULT JUDGMENT WAS GRANTED BEFORE THE DUE DATE FOR APPELLANT'S ANSWER TO THE COMPLAINT."

{¶17} Appellant argues that the trial court abused its discretion when it denied Appellant's Motion to Vacate Default Judgment. We agree.

{¶18} In Appellant's Motion to Vacate, Appellant made arguments under Civ.R. 4.6(D), 55(B), and 60(B) to support his motion to vacate the default judgment. A motion for relief from judgment under Civ.R. 60(B) lies within the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶19} Similarly, we review a trial court's decision concerning a default judgment under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. Civ.R. 55(B) states the court may set aside a default judgment in accordance with Civ.R. 60(B).

{¶20} Civ.R. 60(B) states in pertinent part,

{¶21} On motion and upon such terms as are just, the court may relieve a party *
* * from a final judgment, order or proceedings for the following reasons: (1) mistake,
inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by
due diligence could not have been discovered in time to move for a new trial under Rule
59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic),
misrepresentation or other misconduct of an adverse party; (4) the judgment has been
satisfied, released or discharged, or a prior judgment upon which it is based has been
reversed or otherwise vacated, or it is no longer equitable that the judgment should
have prospective application; or (5) any other reason justifying relief from the judgment.
The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not
more than one year after the judgment, order, or proceeding was entered to taken. * *
*.”

{¶22} A party seeking relief from judgment pursuant to Civ.R. 60(B) must show:
“(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief
under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be
timely filed.” *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d
146, 351 N.E.2d 113, paragraph two of the syllabus.

{¶23} The trial court granted default judgment pursuant to Civ.R. 55(A). This
rule provides, in pertinent part:

{¶24} “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 therefore; but no
judgment by default shall be entered against a minor or an incompetent person unless

represented in the action by a guardian or other such representative who has appeared therein. 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. * * *

{¶25} Civ.R. 55(A) provides that default judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action. *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14, 684 N.E.2d 292, citing Civ.R. 55(A). However, it is a basic tenet of Ohio jurisprudence that if there is any doubt, it should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits. See *GTE*, supra.

{¶26} We find the within matter is resolved by application of Civ.R. 4.6(D). It states:

{¶27} “If a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. *If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing.* The clerk

shall endorse this answer date upon the summons which is sent by ordinary mail. *Service shall be deemed complete when the fact of mailing is entered of record,* provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk shall forthwith notify the attorney, or serving party, by mail.” (Emphasis added).

{¶28} Civ.R. 12 provides:

{¶29} “(A) When answer presented

{¶30} “(1) *Generally.* The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.”

{¶31} As stated in Civ.R. 4.6(D), the Instructions for Service and Certificate of Mailing are separate and apart. The Instructions for Service is a written request provided by the serving party to ask the Clerk of Courts to serve the defendant by ordinary mail. The Instructions for Service inform the Clerk of Courts of the address to which the Summons and Complaint are to be mailed. The Certificate of Mailing, on the other hand, is completed and filed by the Clerk of Courts. The date of the Certificate of Mailing serves as the evidence of the date of the mailing of the Summons and Complaint. The “fact of mailing” is the Clerk of Courts’ Certificate of Mailing. *Holt Co. v. Perry*, Lawrence App. Nos. 01CA9, 01CA14, 2003-Ohio-7347, ¶33. Service by ordinary mail is complete when the Certificate of Service is entered into the record; the answer date is 28 days after that date of mailing.

{¶32} In the present case, service to Appellant by certified mail failed. Appellees then sought service by ordinary mail pursuant to Civ.R. 4.6(D). The trial court case file shows that Appellees filed the Instructions for Service on October 9, 2008. The Stark County Clerk of Courts followed Appellees' Instructions for Service and filed the Certificate of Mailing on October 15, 2008. The Certificate of Mailing evidences that the Summons and Complaint was mailed by the Clerk of Courts on October 15, 2008 and service was complete on that date.¹ Because service by ordinary mail was complete on October 15, 2008, Appellant was required to answer by November 12, 2008 under Civ.R. 12.

{¶33} Appellees filed their Motion for Default Judgment on November 7, 2008. The trial court granted Appellees' Motion for Default Judgment on November 10, 2008.

{¶34} We find that based on the above dates, Appellees filed their Motion for Default Judgment before the expiration of Appellant's time to answer or otherwise respond to Appellees' complaint. We therefore determine, pursuant to Civ.R. 4.6(D), the trial court abused its discretion in granting default judgment in favor of Appellees. The trial court impermissibly shortened Appellant's time to answer or otherwise respond to the Complaint. Accord, *Romano v. Cabin Homes*, Stark App. No. 2006CA00361, 2007-Ohio-2465 (trial court improperly granted default judgment because motion for default filed seven days prior to the answer date).

¹ In support of Appellant's argument that the Summons and Complaint were served by ordinary mail on October 15, 2008 and not on October 9, 2008, Appellant attached to his Appellant's Brief the affidavit of the Stark County Clerk of Courts Civil Division Supervisor. She states the October 15, 2008 entry on the docket stating that service was issued on October 9, 2008 is erroneous. Appellant did not provide this affidavit to the trial court with his Motion to Vacate Default Judgment. Appellant did not file a Motion to Supplement the Record with this Court. We therefore strike the affidavit. We also find it unnecessary due to the facts in the record.

{¶35} As stated above, if there is any doubt, it should be resolved in favor of the motion to set aside the judgment so that the case can be decided on its merits. In this case, Appellant was not given the opportunity to respond to the Complaint pursuant to Civ.R. 4.6(D) and Civ.R. 12. We find that because Appellant was not permitted to respond, this case should proceed on the merits under the Rules of Civil Procedure.

{¶36} Appellant's sole Assignment of Error is sustained.

{¶37} The judgment of the Stark County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion and judgment.

By Delaney, J.

Hoffman, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

