

[Cite as *Pennington Paving, Inc. v. Bloedel*, 2009-Ohio-2425.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

PENNINGTON PAVING, INC.	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009CA2
vs.	:	T.C. CASE NO. 08CVI1791
JILL BLOEDEL	:	(Civil Appeal from Municipal Court)
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 22nd day of May, 2009.

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Pennington Paving, Inc., 3209 Springfield-Xenia Road,
Springfield, OH 45506
Plaintiff-Appellant, Pro Se

Stephen A. Bogenschutz, 58 Hardacre Drive, Xenia, OH 45385
Attorney for Defendant-Appellee

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GRADY, J.:

{¶1} This is an appeal from a default judgment for the defendant on its counterclaim in a small claims proceeding.

{¶2} On October 20, 2008, Plaintiff Pennington Paving, Inc., through George and Diana Pennington, filed a complaint in the small claims division of Xenia Municipal Court against Jill Bloedel, c/o Cedarville Crossings, a condominium

association. The complaint alleged that \$2,500 was due and owing by Cedarville Crossings to Pennington Paving. The complaint was served on October 23, 2007. An attached notice signed by the clerk of the small claims division advised the Defendant that a trial would be held on November 18, 2008, and that "[i]f you do not appear at the trial, judgment may be entered against you by default." (Dkt. 1 and 2).

{¶3} On November 6, 2008, Cedarville Crossings, through Jill Bloedel, as its Secretary/Treasurer, filed a counterclaim against Pennington Paving for \$3,000. A certificate of service reflects that the counterclaim was served by mail on Pennington Paving on the same date. (Dkt. 8).

{¶4} The court notified the parties that trial of the complaint and counterclaim was scheduled for December 23, 2008. (Dkt. 9). On that date, Pennington Paving failed to appear. Bloedel appeared and, through Cedarville Crossings' attorney, orally moved for a default judgment on its counterclaim against Pennington Paving. (T. 3). The court granted a default judgment because of Pennington Pavings's failure to appear. (T. 7). After hearing evidence that Cedarville Crossings offered (T. 3-6), the court dismissed Pennington Paving's complaint and granted a judgment for \$3,000 in favor of Cedarville Crossings on its counterclaim.

(Dkt. 10).

{¶5} On January 20, 2009, the court received a letter (Dkt. 11) from Diana Pennington. The letter denied that Pennington Paving had done anything to harm Cedarville Crossings and further stated: "on the 23rd of December 2008 [,] we had just decided to forget this whole matter and sustain the losses that we had already suffered [,] not understanding that (sic) their was a counterclaim against us . . . and we would like to be heard in court to explain and for our side to be heard." The letter bears a notation by the trial court dated January 21, 2009, stating: "Denied - service and notice were proper. (Defendant) was here by counsel & witnesses."

{¶6} Pennington Paving filed a timely notice of appeal. George and Diana Pennington filed a pro se brief on behalf of Pennington Paving. A brief was filed on behalf of Cedarville Crossings by its counsel.

{¶7} Pennington Paving does not assign any particular error in its pro se brief, which is largely concerned with its transaction with Cedarville Crossings leading to this litigation. Concerning their failure to appear at trial on December 23, 2007, the Penningtons state that they had decided not to press their claim, and believed that the counterclaim against them, when they received it, "was just a notice to be

in court," adding: "If we had known that it was a counterclaim [,] then we would have appeared in court on December 23d 2008."

{¶8} We are unable to determine the merits of the Penningtons' contentions concerning their agreement with Cedarville Crossings because there was no trial of that issue, the court having granted a default judgment. Therefore, we confine our review to the default judgment the court granted.

{¶9} R.C. 1925.05(A) sets out the text of a notice that must be served on the defendant in a small claims action. The notice includes the following warning:

{¶10} "If you do not appear at the trial, judgment may be entered against you by default, and your earnings may be subjected to garnishment or your property may be attached to satisfy the judgment. If your defense is supported by witnesses, account books, receipts, or other documents, you must produce them at the trial. Subpoenas for witnesses, if requested by a party, will be issued by the clerk."

{¶11} The complaint that Pennington Paving caused to be served on Cedarville Crossings was accompanied by a notice signed by the clerk of the small claims court that contains the warnings prescribed by R.C. 1925.05(A). (Dkt. 1, 2, and 6) The counterclaim Cedarville Crossings served on Pennington

Paving (Dkt 7) failed to contain the required notice. That probably occurred because the counterclaim was served directly on Pennington Paving pursuant to Civ.R. 5(A), and therefore the clerk had no opportunity to include the prescribed warning.

{¶12} R.C. 1925.16 provides that the Rules of Civil Procedure apply in small claims actions, "[e]xcept as inconsistent procedures are provided in this chapter." As a consequence, "[s]mall claims procedure under R.C. Chapter 1925 does not have the same procedure for joining the issues prior to trial as do the Rules of Civil Procedure." *Sheaff v. Conese*, Butler App. No. CA-2001-10-242, 2002-Ohio-5607, at ¶36.

{¶13} Civ.R. 55(A) authorizes the court to grant a judgment to "the party entitled to judgment by default" when the adverse party "has failed to plead or otherwise defend as provided by (the Rules of Civil Procedure)." However, because small claims procedure does not contemplate the filing of an answer or other responsive pleading, *Robert Neroni Co. v. Bendersky* (April 18, 1988), Cuyahoga App. No. 53885, an adverse party's failure to so plead is not a "default" for purposes of Civ.R. 55(A). *Sheaff; Miller v. McStay*, Summit App. No. 23369, 2007-Ohio-369. Default judgment remains

available nevertheless if the adverse party fails to "otherwise defend" by not appearing at the hearing scheduled on the claims for relief in the action.

{¶14} Pennington Paving did not appear at the December 23, 2007 hearing. However, the counterclaim that Cedarville Crossings served on Pennington Paving failed to contain the express warning prescribed by R.C. 1925.05(A) regarding the prospect of a default judgment in that event. Civ.R. 55(A) authorizes the trial court to grant a default judgment to "the party entitled to judgment by default." Cedarville Crossings' failure to satisfy the requirements of R.C. 1925.05(A) barred its right to a judgment by default by reason of Pennington Paving's non-appearance. Therefore, the trial court erred when it granted Cedarville Crossings' oral motion for default judgment.

{¶15} The default judgment for Cedarville Crossings will be reversed and vacated, and the case will be remanded to the trial court for further proceedings consistent with this opinion.

FROELICH, J. And WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Pennington Paving, Inc.
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Hon. Michael K. Murry
Acting Judge David Mesaros