

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Randall Lewis dba Randy's Auto Sales

Court of Appeals No. S-10-006

Appellee

Trial Court No. CVF 0900237

v.

Louis Coup

DECISION AND JUDGMENT

Appellant

Decided: September 17, 2010

* * * * *

Jon M. Ickes, for appellee.

Louis Coup, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This matter is before the court on appeal of the December 21, 2009 judgment of Bellevue Municipal Court which granted judgment in favor of plaintiff-appellee, Randall Lewis, on his replevin action. The court further held that appellee owed appellant \$410 for work completed. For the reasons that follow, we reverse, in part, and remand.

{¶ 2} On August 24, 2009, appellee, Randall Lewis, doing business as Randy's Auto Sales, commenced the instant action. In his complaint, appellee alleged that appellant agreed to pick up a car hauling trailer he had purchased on the internet; it was located in Pineville, North Carolina. According to the complaint, appellee gave appellant \$2,600 in cash for the \$2,326 trailer; appellant picked up the trailer but refused to deliver it to appellee. Appellee alleged that appellant was holding the trailer based on his belief that appellee had a 30 year-old unpaid debt. Appellee requested either the return of the trailer or payment of \$2,600.

{¶ 3} In his September 16, 2009 answer to appellee's complaint, appellant admitted picking up the trailer but denied the other allegations. Appellant also asserted a counterclaim for the cost and delivery expenses of the trailer and for alleged unpaid construction work he had completed for appellee. Appellant's claims totaled \$11,189.

{¶ 4} On December 19, 2009, 15 minutes prior to trial, appellant filed a motion for default judgment as to his counterclaim. Appellant argued that because appellee never filed an answer to his counterclaim, he was entitled to judgment.

{¶ 5} At the start of the trial, appellee's attorney informed the court that the motion had been filed and orally requested leave to enter a general denial of the counterclaim allegations. The court granted the motion for leave and denied the motion for default judgment. The trial then commenced.

{¶ 6} During trial, the following evidence was presented.¹ Appellee testified that he purchased the trailer at issue on E-Bay for \$2,326. Appellee stated that he made a check out to "cash" for \$2,600, cashed it, and gave the money to appellant to purchase the vehicle. A copy of the check was admitted into evidence.

{¶ 7} Regarding his agreement with appellant, appellee stated that he hired appellant to pick up the trailer for \$400 plus expenses. The additional sum of nearly \$300 was to go to appellant's expenses and appellee was to pay appellant the \$400 sum upon his return.

{¶ 8} Appellee testified that upon appellant's return from North Carolina he refused to give appellee the trailer. Appellee stated that he sent his son to see why appellant was not delivering the trailer. According to his son, appellant stated that he would not deliver the trailer until he received payment for 24 tires he sold to appellee 30 years ago. Appellee then spoke to appellant; he claimed that he was owed \$3,000 for the tires. Appellee denied that he owed appellant either for the tires or for past work; he did agree that he still owed appellant \$410 for payment and overage on expenses with regard to picking up the trailer.

{¶ 9} Appellant testified that he agreed to pick up the trailer in North Carolina with the understanding that he and appellee would settle the debts owed to appellant upon his return. Regarding the trailer pick-up, appellant stated that he and appellee agreed that he would be paid one dollar per mile. Appellant agreed that appellee gave him \$2,600

¹The transcript and tape recording abruptly cut off late in appellant's direct examination due to a technical error.

and that he was to use the overage for expenses. Appellant believed that he was still owed \$889 for the job.

{¶ 10} Regarding the other unpaid jobs that appellant raised in his counterclaim, appellant presented invoices, created some time after the jobs were completed, for four additional jobs from 2003-2008 that he claimed were owed. Appellant described the jobs and stated that he had asked appellee for payment about "a dozen" times.

{¶ 11} On December 21, 2009, the court granted judgment in favor of appellee, denied appellant's counterclaim, and ordered that appellee pay appellant \$410. This appeal followed.

{¶ 12} Appellant, pro se, raises two "issues" for review; we will clarify them for ease of discussion as follows:

{¶ 13} 1. The trial court erred when it denied appellant's motion for default judgment.

{¶ 14} 2. The trial court's judgment was against the weight of the evidence.

{¶ 15} In appellant's first assignment of error, he argues that the trial court erred by permitting appellee to orally submit his late answer to appellant's counterclaim on the day of trial. Civ.R. 55(A) provides the procedure for obtaining a default judgment and provides, in part:

{¶ 16} "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; 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."

{¶ 17} Civ.R. 6(B)(2) permits the court, within its discretion, to accept a late filing "upon motion made after the expiration of the specified period" and to "permit the act to be done where the failure to act was the result of excusable neglect * * *." Ohio courts have consistently held that a trial court abuses its discretion when it grants leave to file an answer out of rule absent a finding of excusable neglect. See *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009-Ohio-5087, ¶ 8, citing *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, and *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14-15. However, the excusable neglect standard is lenient and a court may grant an untimely answer "where sufficient evidence of excusable neglect appears in the record." *Id.* at ¶ 14.

{¶ 18} In the present case, we must conclude that the record does not support a finding of excusable neglect. First, the parties were both represented by counsel during all stages of the proceedings. Next, appellant's answer and counterclaim was properly served; in fact, during the trial appellee acknowledged its receipt. Finally, just prior to the start of trial appellee's counsel informed the court of appellant's motion for default judgment; the following discussion ensued:

{¶ 19} "MR. ICKES: Your Honor, first of all, to address the question, Mr. Smith had filed a motion for default (inaudible) on the Counterclaim. We'd ask the Court for leave to enter a general denial of the Counterclaim allegations.

{¶ 20} "COURT: Okay. Do you have an opposition to that?"

{¶ 21} "MR. SMITH: Your Honor, the motion for default does come (inaudible) fact that under Rule 55(A), if no answer is completed or answer to the Counterclaim as of September the 21st 2009, when it was served by certified mail, according to the Court records, on the plaintiff, then the allegations contained in the Counterclaim would be admitted, and we're talking about the allegations only, not the damages, Your Honor, so I (inaudible) be admitted.

{¶ 22} "COURT: Okay. I'll grant you leave. Go ahead.

{¶ 23} "MR. SMITH: That was a denial?"

{¶ 24} "COURT: Uh huh.

{¶ 25} "MR. SMITH: Okay."

{¶ 26} Based on the foregoing, we find that the trial court abused its discretion by allowing appellee to orally submit an untimely answer without first finding excusable neglect. Upon remand, the court may review a properly submitted motion for leave to file on the ground of excusable neglect. See *Hillman*, supra, at ¶ 16. Appellant's first assignment of error is well-taken.

{¶ 27} Assuming that, but in no way implying, the court should enter a finding of excusable neglect upon remand, for purposes of judicial economy we will address

appellant's second assignment of error. Appellant contends that the trial court's judgment was against the weight of the evidence and that the trial court's judgment unjustly enriched appellee.

{¶ 28} It is well settled in Ohio that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Matters relating to the credibility of a witness at trial and/or the weight accorded to the evidence offered at trial are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A reviewing court gives these determinations of fact great deference, as the trier of fact is best able to evaluate the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 29} At the trial to the court below, it was contested as to whether appellee owed appellant for construction jobs he had completed on appellee's behalf. Appellee denied owing appellant for the jobs. Further, the terms of the trailer pick-up job were disputed. Appellee argued that the parties had agreed to a specific sum while appellant asserted that the job was to be paid by mileage. The court was able to observe the parties and assess their credibility. Obviously, the court found appellee's testimony to be more credible and granted judgment in his favor. We cannot say that this was in error. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 30} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Bellevue Municipal Court is reversed, in part. Upon remand, the court may permit appellee to submit a motion for leave to file his answer instanter, with an attached answer. If the court finds that appellee's motion demonstrates excusable neglect, under Civ.R. 6, then the December 21, 2009 judgment remains valid. If, however, the court fails to find excusable neglect, the December 21, 2009 judgment is vacated as to the counterclaim and the matter shall proceed according to the civil rules. Pursuant to App.R. 24, costs of this appeal are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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