IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ROBERT BONIFACIO,	:	APPEAL NO. C-210207 TRIAL NO. A-2003172
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
RAYMOND STORAGE CONCEPTS, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: January 14, 2022

Whittaker Law, LLC, and *Justin Wittaker*, for Plaintiff-Appellant,

Dinsmore & Shohl, LLP, *Michael W. Hawkins*, *Lindsey N. Boyd* and *Jonathan Kelly*, for Defendant-Appellee.

ZAYAS, Presiding Judge.

{¶1} Plaintiff-appellant Robert Bonifacio brings this appeal to challenge the trial court's dismissal of his claims against defendant-appellee Raymond Storage Concepts, Inc., ("Raymond"). In his first assignment of error, Bonifacio argues that the trial court erred in granting Raymond's motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). In his second assignment of error, Bonifacio argues that the trial court abused its discretion by overruling his motion for a default judgment. For the following reasons, we sustain the first assignment of error and overrule the second assignment of error. Accordingly, we reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion and the law.

Factual Allegations in the Complaint

{¶2} Robert Bonifacio is a "seasoned sales account manager." Raymond "provides materials handling, engineering, and automation equipment and services to businesses in Ohio, Kentucky, Indiana, and West Virginia."

{¶3} In July of 2019, Raymond offered Bonifacio the position of "Sales Account Manager" pursuant to a written offer letter, which Bonifacio accepted in writing. The "pertinent terms" of the agreement include: (1) Raymond would pay Bonifacio a base salary of $50,000 per year, on a bi-weekly basis; (2) Raymond would pay Bonifacio a "guaranteed commission" of $5,000 per month through December 2020, "payable one month in arrears on the 15th of the month"; (3) Raymond would pay Bonifacio an automobile allowance of $750 per month; and (4) Bonifacio's employment was conditioned only upon a pre-employment drug screen, criminal background check, alcohol breath test, motor vehicle check, disclosure of

any enforceable restrictions imposed on him by a previous employer, and compliance with any noncompetition agreement imposed on him by a previous employer.

{¶4} On August 3, 2020, Raymond terminated Bonifacio's employment "without justification." Bonifacio alleged, "Despite the clear terms of the Agreement, [Raymond] has refused to compensate [Bonifacio] the liquidated sum of $44,384.62 owed to him through the end of December 2020."

Procedural History

{¶5} Bonifacio filed a complaint against Raymond on September 9, 2020. The complaint alleged causes of action for claim on account, breach of contract, and unjust enrichment. The employment offer letter from Raymond to Bonifacio was attached and incorporated into the complaint. On September 15, 2020, the complaint and summons were sent to Raymond via certified mail. The certified mail receipt was returned on September 21, 2020, showing that the summons and complaint were delivered on September 17, 2020.

{¶6} Raymond filed a motion to dismiss the complaint for failure to state a claim pursuant to Civ.R. 12(B)(6) on October 19, 2020. Raymond argued that the terms of the offer letter attached to the complaint were superseded by a subsequent written agreement that took the place of "any and all previous written and oral agreements." The motion stated that the subsequent agreement was attached, but the agreement was not actually filed with the trial court until October 27, 2020.

{¶7} On October 20, 2020, Bonifacio filed a "Consolidated Motion for Entry of Default Judgment, and to Strike Defendant's Motion to Dismiss as Untimely." Bonifacio argued that Raymond failed to file a responsive pleading within the time allotted by Civ.R. 12 and that, consequently, he is entitled to a default judgment under Civ.R. 55. The following day, Raymond filed a response to Bonifacio's motion,

claiming Raymond did not actually receive the complaint until September 22, 2020. Additionally, Raymond argued that Bonifacio was not entitled to a default judgment because it had appeared in the case on several occasions.

{¶8} The trial court granted Raymond's motion to dismiss on March 11, 2021. In a footnote to its entry, the trial court specified that the motion for a default judgment had been denied at a prior hearing in front of a previous judge, although there was no such entry in the record.[1] Regarding the motion to dismiss, the trial court found that the offer letter was superseded by the terms of the "fully integrated Compensation Plan he executed on July 18, 2019." Accordingly, the trial court granted the motion to dismiss.

{¶9} Bonifacio timely filed a notice of appeal on March 29, 2021. He now raises two assignments of error for our review.

Law and Analysis

First Assignment of Error

{¶10} In his first assignment of error, Bonifacio argues that the trial court erred by granting Raymond's motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). We review a motion to dismiss for failure to state a claim de novo. *Zalvin v. Ayers*, 2020-Ohio-4021, 157 N.E.3d 256, ¶ 13 (1st Dist.). When deciding a 12(B)(6) motion to dismiss, courts "cannot rely on evidence or allegations outside the complaint." *Jefferson v. Bunting*, 140 Ohio St.3d 62, 2014-Ohio 3074, 14 N.E.3d 1036, ¶ 11, citing *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). Civ.R. 12(B) provides:

[1] The case was reassigned on February 11, 2021.

> When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials pertinent to such a motion by Rule 56.

{¶11} The document attached to Raymond's motion to dismiss was an agreement between Bonifacio and Raymond entitled "Combo Sale Representative Agreement & Compensation Plan 2019" ("the agreement"). It is clear from the trial court's entry that it considered this agreement when ruling on Raymond's motion to dismiss. Raymond argues that the trial court was permitted to consider the agreement without converting the motion to dismiss into a motion for summary judgment because the court was permitted to consider materials that were referenced or incorporated in the complaint. In support of his contention, he cites to this court's decision in *Coors v. Fifth Third Bank*, 1st Dist. Hamilton No. C-050927, 2006-Ohio-4505, ¶ 11. In *Coors*, this court stated:

> The staff notes to Civ.R. 12(B) suggest that, when ruling on Civ.R. 12(B)(6) motions, trial courts should exclude matters outside the pleadings, thereby requiring a party to move formally for summary judgment under Civ.R. 56 in order to present matters extraneous to the pleadings. Accordingly, when resolving a Civ.R. 12(B)(6) dismissal motion, a court should not rely on evidence outside the complaint. But

> the court may consider materials that are referred to or incorporated in the complaint.

(Citations omitted.) *Id.* at ¶ 11.

{¶12} In this case, the agreement was not referenced in the complaint or incorporated in the complaint. Under the compensation section of the employment offer letter, which was attached to the complaint, it states, "You are eligible for commissions under the RSCI *commission* plan." (Emphasis added.) This appears to be the basis of Raymond's claim that the agreement was incorporated into the complaint. However, the agreement in question was "combo sales representative agreement and compensation plan." This agreement appears to be much broader and more encompassing than just a "commission plan." Additionally, Raymond points to no authority for its proposition that a document may be considered when ruling on a motion to dismiss when it is solely referenced in another document which is attached to the complaint.

{¶13} Therefore, we hold that the compensation agreement was not referenced in or incorporated into the complaint, and thus the trial court was obligated to convert the motion into a motion for summary judgment before considering the agreement. *See Chahda v. Youseff*, 8th Dist. Cuyahoga No. 82505, 2004-Ohio-635, ¶ 12 ("The 'shall' language in the text of Civ.R. 12(B) is mandatory.").

{¶14} "If the court converts the motion to dismiss into a motion for summary judgment, the court must give the parties notice and a reasonable opportunity to present all of the available evidence that Civ.R. 56(C) permits." *JNS Ents., Inc. v. Sturgell*, 4th Dist. Ross No. 05CA2814, 2005-Ohio-3200, ¶ 8, citing Civ.R. 12(B). "Failure to notify the parties that the court is converting a Civ.R. 12(B)(6) motion to dismiss into one for summary judgment is, itself, reversible error." *State ex rel.*

Boggs v. Springfield Local School Dist. Bd. of Edn., 72 Ohio St.3d 94, 96, 647 N.E.2d 788 (1995).

{¶15} Here, the trial court was obligated to convert the motion to dismiss into a motion for summary judgment before considering the agreement, and there is no indication that the trial court notified the parties that it was converting the motion to dismiss into one for summary judgment. Therefore, the trial court committed reversible error when ruling on the motion, and we must reverse its decision. Accordingly, this assignment of error is sustained.

Second Assignment of Error

{¶16} In his second assignment of error, Bonifacio argues that the trial court abused its discretion by overruling his motion for a default judgment and to strike the motion to dismiss as untimely. We review a trial court's decision determining whether to grant a default judgment or permit a late filing by the defending party for an abuse of discretion. *Watts v. Fledderman*, 1st Dist. Hamilton No. C-170255, 2018-Ohio-2732, ¶ 36, citing *Huffer v. Cicero*, 107 Ohio App.3d 65, 73, 667 N.E.2d 1031 (4th Dist.1995).

{¶17} Civ.R. 55 provides, "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 * * *." "Under the plain language of Civ.R. 55, a default judgment is appropriate only where a party has failed to plead or otherwise defend." *Watts* at ¶ 37. "Ohio appellate courts have held that 'the words "otherwise defend" refer to attacks on the services, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits.' " *Bank*

of Am., N.A. v. Smith, 1st Dist. Hamilton No. C-170654, 2018-Ohio-3638, ¶ 19, quoting *Reese v. Proppe*, 3 Ohio App.3d 103, 106, 443 N.E.2d 992 (8th Dist.1981).

{¶18} "[P]ursuant to Civ.R. 6(B)(2), a trial court may, within its discretion, permit a tardy filing." *White v. Belcher*, 8th Dist. Cuyahoga No. 84214, 2004-Ohio-5873, ¶ 8, citing *Lindenschmidt v. Bd. of Commrs. of Butler Cty.*, 72 Ohio St.3d 464, 465, 650 N.E.2d 1343 (1995). " 'A trial court does not necessarily abuse its discretion when it permits a tardy filing even if a party has not provided an explicit reason for delay unless the other party is prejudiced by the delay.' " *Harvest Credit Mgt. VII, L.L.C. v. Harris*, 8th Dist. Cuyahoga No. 96742, 2012-Ohio-80, ¶ 16, quoting *White*. "In order to have an abuse of that choice, the result must be 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.' " *Id.*, quoting *State v. Jenks*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984). Accordingly, when a responsive pleading is late, but filed before a motion for a default judgment, a trial court is within its discretion in accepting the late filing where there is no showing of prejudice. *Id.* at ¶ 18-19.

{¶19} Here, Raymond filed its motion to dismiss four days out of time, but before Bonifacio's motion for a default judgment. *See* Civ.R. 12(A). Bonifacio has not argued, and the record does not reflect, that he was prejudiced by the trial court's acceptance of the four-day-late filing. There is also nothing in the record to reflect that the trial court's decision was violative of fact or logic or reason. Therefore, the trial court did not abuse its discretion in denying the motion for a default judgment and allowing Raymond to file its motion to dismiss. Accordingly, this assignment of error is overruled.

Conclusion

{¶20} For the foregoing reasons, we sustain the first assignment of error and overrule the second assignment of error. The judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded to the trial court for further proceedings consistent with this opinion and the law.

Judgment affirmed in part, reversed in part, and cause remanded.

WINKLER and **BOCK, JJ.,** concur.

Please note:

The court has recorded its own entry this date.