COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JBS EXCAVATING, LLC	:	
Plaintiff	:	**CASE NO. 2016 CVH 01603**
vs.	:	**Judge McBride**
CDK CONSTRUCTION, LLC, ET AL.	:	**DECISION/ENTRY**
Defendants	:	

Finney Law Firm, LLC, Brian C. Shrive and Justin C. Walker, counsel for the plaintiff JBS Excavating, LLC, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245

The Fogelman Law Firm LLC, Adam R. Fogelman, counsel for the defendants CDK Construction, LLC and Chris Knipper, 285 E. Main Street, 2nd Floor, Batavia, Ohio 45103

This cause is before the court for consideration of (1) a motion for leave to file answer *instanter* filed by the defendants Chris Knipper and CDK Construction, LLC on February 10, 2017 and (2) a motion for default judgment filed by the plaintiff JBS Excavating, LLC on January 18, 2017. The court scheduled and held an evidentiary hearing on the motions on March 3, 2017 and May 12, 2017. At the conclusion of the May 12th hearing, the court took the motions under advisement.

Upon consideration of the respective motions, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The present case stems from a dispute regarding payments for a construction project between a general contractor and subcontractor. The plaintiff JBS Excavating, LLC (hereinafter referred to as "JBS") filed a complaint against the defendants CDK Construction, LLC (hereinafter referred to "CDK") and its sole owner, Chris Knipper, on November 14, 2016. The plaintiff is asserting claims of breach of contract and fraud.

JBS attempted to serve the defendants via certified mail on November 16, 2016. On December 13th, the process directed to CDK was returned unclaimed. The process directed to Knipper was returned unclaimed on December 16th. On December 20th, the plaintiff served the defendants via ordinary mail service. The address the plaintiff directed the service of process to was Knipper's home. Knipper is not sure when he received the complaint in the mail, but he opened it on or about January 2, 2017. Knipper explained that he did not open his mail right away due to the holiday season, traveling out-of-town, and finishing two construction jobs.

On January 3rd or 4th, Knipper contacted his lawyer, Dayle Donithan, who normally handled legal issues related to CDK. One or two days later, approximately between January 4th and January 6th, Knipper met with Donithan to discuss this case. On January 6th, Knipper received an email from Donithan informing him that her

workload was too substantial to file an answer, counterclaim, and third party complaint by the deadline.[1] Donithan warned Knipper: "The answer is due no later than the 17th or you risk a default judgment being taken against you."[2]

Shortly thereafter, Donithan referred Knipper to two other potential attorneys, including his present counsel, Adam Fogelman. Knipper states that within one or two days of receiving the referrals, he called both attorneys. The day after he called Fogelman's office, he received a return phone call from Fogelman. The next day he met Fogelman at his office to discuss the case. The day after Knipper and Fogelman met, Fogelman sent Knipper the retainer instructions. Although Knipper wanted to hire Fogelman, he did not have enough money at that time for the retainer.

While the process of hiring Fogelman was unfolding, on January 18, 2017, the plaintiff moved for a default judgment against the defendants. At some point in February, and Knipper cannot recall the exact day, he received a payment and was able to retain Fogelman. The defendants then filed a motion to file an answer *instanter* on February 10th. The defendants also filed two affidavits from Mr. Knipper, one on February 10th and one on March 2nd. The plaintiff filed a motion in opposition to the defendants' motion to answer out of time on February 23rd.

On March 3rd, the court held an evidentiary hearing on the defendants' motion to file out of time. At that hearing, Mr. Knipper testified generally to his discovery that this litigation was pending and how he went about retaining counsel. At multiple points during the hearing, issues arose surrounding Mr. Knipper's attorney-client privilege. The court continued the hearing so that it could resolve the issues of attorney-client

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[1] Pls. Ex. 4.
[2] Pls. Ex. 4.

privilege. On April 4th, the court issued a decision regarding attorney-client privilege. The evidentiary hearing resumed on May 12th, at the end of which the court took the motions under advisement.

LEGAL ANALYSIS

Civ.R. 12(A)(1) provides that a "* * * defendant shall serve his answer within twenty-eight days after service of the summons and complaint * * *."[3] When a defendant fails to do so, under Civ.R. 6(B) a trial court has discretion for "cause shown" to extend the period of time within which the defendant may answer. Civ.R. 6(B) provides:

> "When by these rules or by notice given thereunder or by order of court as an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *."[4]

Accordingly, when a party can show that its failure to timely file an answer was the result of "excusable neglect," the court has the discretion to grant the extension.[5] Of note, "the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B)."[6]

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[3] Civ.R. 12(A)(1).
[4] Civ.R. 6(B).
[5] *State ex rel. Doe v. Register*, 12th Dist. Clermont No. CA2008-08-081, 2009-Ohio-2448, ¶ 12.
[6] *State ex rel. Lindenschmidt v. Butler Cty. Bd. Of Commrs.*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995). *See Eskin v. Zurich*, 12th Dist. Preble No. CA2003-11-022, 2004-Ohio-3668, ¶ 9, citing *State ex rel. Lindenschmidt*, 72 Ohio St.3d at 466 ("Although excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B).").

When analyzing circumstances for excusable neglect, the court must "* * * remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds."[7] Moreover, "[j]udicial discretion must be carefully – and cautiously – exercised before" appellate courts "will uphold an outright dismissal of a case on purely procedural grounds."[8] Thus, as a general matter, "default judgements are disfavored."[9] They are a "harsh remedy" that should "be imposed only when the actions of the defaulting party create a presumption of willfulness or bad faith."[10] Civ.R. 6(B) is purposed to "militate against the harshness of a default judgment."[11]

Accordingly, "Ohio courts have held that '[w]here a party pleads before a default is entered, though out of time and without leave, if the answer is in good form and substance, a default should not be entered as long as the answer stands as part of the record."[12]

Neglect is "conduct that falls substantially below what is reasonable under the circumstances."[13] The Ohio Supreme Court instructs that "the determination of whether

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[7] *Marion Production Credit Ass'n v. Cochran*, 40 Ohio St.3d 265, 271, 533 N.E.2d 325 (1988), quoting *Griffey v. Rajan*, 33 Ohio St.3d 75, 79-81, 514 N.E.2d 1122 (1987)
[8] *Linville v. Kratochvill*, 11th Dist. Geauga No. 2013-G-3161, 2014-Ohio-1153, ¶ 18.
[9] *Hillman v. Edwards*, 10th Dist. Franklin No. 10AP-58, 2010-Ohio-3524, ¶ 6, citing *Suki v. Blume*, 9 Ohio App.3d 289, 290, 459 N.E.2d 13119 (8th Dist. 1983).
[10] *Edwards*, 2010-Ohio-3524 at ¶ 6, citing *Haddad v. English*, 145 Ohio App.3d 598, 603, 763 N.E.2d 1199 (9th Dist. 2001).
[11] *Kratochvill*, 2014-Ohio-1153 at ¶ 18.
[12] *Pitts v. DiLabbio*, 6th Dist. Lucas No. L01201343, 2013-Ohio-3854, quoting *Suki v. Blume*, 9 Ohio App.3d 289, 290, 459 N.E.2d 1311 (8th Dist. 1983). *See Fowler v. Coleman*, 10th Dist. Franklin No. 99AP-319, 1999 WL 1262052, *4 (Dec. 28, 1999), citing *Miami Sys. Corp. v. Dry Cleaning Computer Sys., Inc.*, 90 Ohio App.3d 181, 186, 628 N.E.2d 122 (1st Dist. 1993).
[13] *Davis v. Immediate Medical Services, Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292 (1997), citing *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 473, 605 N.E.2d 37 (1992).

neglect was excusable or inexcusable 'must of necessity take into consideration all the surrounding facts and circumstances.'"[14]

While difficult to define, a defendant's inaction is not excusable neglect when it evidences a "complete disregard for the judicial system."[15] Moreover, neglect is not excusable when "the party could have controlled or guarded against the event which caused the neglect."[16]

In evaluating neglect, courts also take into consideration whether the plaintiff will suffer prejudice as a result of granting the defendant leave to file an answer.[17] For example, in *Linville v. Kratochvill*, 11th Dist. Geauga No. 2013-G-3161, 2014-Ohio-1153, ¶ 22, the Eleventh District Court of Appeals assessed whether the plaintiff would suffer prejudice if the court granted the defendant's request for leave to file an answer out of time. In determining that no prejudice would result, the court highlighted that the plaintiff would "still be able to recover the same damages, as well as any interest that accrues."[18]

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[14] *Marion Production Credit Ass'n*, 40 Ohio St.3d at 271, quoting *Rajan*, 33 Ohio St.3d at 79. *See Davis*, 80 Ohio St.3d at 14, citing *Griffey*, 33 Ohio St.3d at 79 ("In determining whether neglect is excusable or inexcusable, all the surrounding facts and circumstances must be taken into consideration.").

[15] *Zugg v. Wisby*, 12th Dist. Warren No. CA2010-08-079, 2011-Ohio-2468, ¶ 10, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996).

[16] *Zugg*, 2011-Ohio-2468 at ¶ 10, citing *Venst v. Pillsbury*, 124 Ohio App.3d 525, 536, 706 N.E.2d 825 (4th Dist. 1997).

[17] *Kratochvill*, 2014-Ohio-1153 at ¶ 22. *See Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Cent. Ohio*, 10th Dist. Franklin Nos. 09AP-505, 09AP-506, 2009-Ohio-6849, ¶ 20 (in finding "excusable neglect" existed, the court highlighted that the plaintiff had not claimed the defendant's failure to timely answer impeded the plaintiff's representation of its client, and the defendant gained no strategic advantage by extending the deadline to answer).

[18] *Kratochvill*, 2014-Ohio-1153 at ¶ 22. *Cf. Miller v. Lint*, 62 Ohio St.2d 209, 214, 404 N.E.2d 752 (1980) (in granting default judgment for the plaintiffs, the Court noted that the defendant simply filed a late answer after receiving the default motion, and in doing so failed to comply with Civ.R. 6(B)(2), Civ.R. 7(B)(1) (requiring that any motion made outside of a hearing or trial be made in writing), and Civ.R. 6(D) (requiring service of any such written motions)).

Additionally, when evaluating neglect, trial courts consider the "length of delay and its potential impact on proceedings."[19] As an illustration, in *Citizens National Bank of Southwest Ohio v. Harrison*, 2016-Ohio-2746, 64 N.E.2d 316 (2d Dist.), the appellate court examined the length of delay in the proceedings. There, the defendant's motion for leave to answer was filed almost four months after the complaint was served.[20] Weighing in favor of allowing the answer, the appellate court observed that the "case had not proceeded beyond the pleading stage," and the plaintiff would thus "not suffer prejudice" as a result of the late answer.[21]

Furthermore, trial courts note whether the party moving for leave to file out of time has followed the procedural rules in doing so. For instance, in *Compston v. McGlothlin*, 12th Dist. No. CA90-01-016, 1990 WL 129458 (Sept. 10, 1990), the Twelfth District Court of Appeals affirmed the trial court's decision to grant an extension of time to file an answer after the deadline. One of the factors that persuaded the court was that the defendant complied with Civ.R. 7(B)(1) by filing the motion in writing.[22]

Courts have found excusable neglect under Civ.R. 6(B) in a wide variety of situations, including where a defendant did not file an answer because the complaint was received by a temporary employee who did not properly forward it,[23] where a party inadequately recorded the due date because it had fallen on a federal holiday,[24] where

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[19] *Citizens Natl. Bank of SW Ohio v. Harrison*, 2016-Ohio-2746, 64 N.E.2d 316, ¶18 (2d Dist.), citing *First-Union-Lehman Bros. Bank of Am. Commercial Mtge. Trust v. Pillar Real Estate Advisors, Inc.*, 2d Dist. Montgomery No. 2010-CV-9039, 2014-Ohio-1105, ¶ 15.
[20] *Citizens Natl. Bank of SW Ohio*, 2016-Ohio-2746 at ¶ 20.
[21] Id. at ¶ 20.
[22] *Compston v. McGlothlin*, 12th Dist. No. CA90-01-016, 1990 WL 129458, *2 (Sept. 10, 1990).
[23] *Esken v. Zurich American Ins. Co.*, 12th Dist. Preble, No. CA2003–11–022, 2004-Ohio-3668, ¶¶ 10-11.
[24] *State of Ohio Dept. of Dev. v. Matrix Centennial, L.L.C.*, 10th Dist. Franklin No. 14AP-47, 2014-Ohio-3251, ¶¶ 28-29.

an employee made an "honest mistake" by forwarding the complaint to the wrong insurance company,[25] where a complaint was served unnoticed because it was placed in the client's file before the attorney learned it had been served on the client,[26] and where other "clerical errors" have occurred.[27]

Several cases have found excusable neglect where a defendant has not answered because he or she has recently retained counsel. The Twelfth District Court of Appeals made such a finding in *Compston v. McGlothlin*, discussed above. In addition to favorably observing that the defendant had adhered to Civ.R. 7 when filing for a motion for leave to file out of time, the court found that the defendant's reason for filing late constituted excusable neglect. The court opined: "* * * McGlothlin stated he needed extra time because he had just retained counsel. Such a circumstance clearly rises to the level of excusable neglect justifying an extension of time under Civ.R. 6(B)."[28]

Recently, the Sixth District Court of Appeals in *Bank of New York Mellon v. Belville*, 6th Dist. Lucas No. L-16-1312, 2017-Ohio-7772, found that a trial court erred in granting a default judgment against the defendants when those defendants had not filed an answer because they recently retained counsel. In *Belville* the complaint was served on each defendant on September 9, 2016 and September 19, 2016. Their answers were due on October 7, 2016 and October 17, 2016, respectively.[29] The plaintiff moved for default judgment on November 4, 2016, and on November 15th, the defendants

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[25] *Scott v. McCluskey*, 9th Dist. Summit No. 25838, 2012-Ohio-2484, ¶ 9.
[26] *Edwards*, 2010-Ohio-3524 at ¶¶ 5, 13.
[27] *Merritt v. Cottee*, 12th Dist. Clermont No. CA89-07-061, 1990 WL 44221, *2 (Apr. 16, 1990).
[28] *McGlothlin*, 1990 WL 129458 at *2.
[29] *Belville*, 2017-Ohio-7772 at ¶ 3.

moved for leave to file answer *instanter*.[30] The trial court granted the motion for default without taking action on the motion for leave to file out of time.[31] On appeal, the appellate court found that the trial court erred in granting default judgment because the defendants had presented an excusable neglect argument in positing that their tardiness was due to the recent retainer of counsel.[32]

Likewise, in *Sericola v. Johnson*, 11th Dist. Trumbull No. 2015-T-0091, 2016-Ohio-1164, the Eleventh District Court of Appeals found excusable neglect where there was a short delay in filing an answer due to the fact that the defendant had just retained counsel. The defendant had been served with the complaint on May 12, 2014, and thus his answer was due on June 9, 2014.[33] The defendant did not file an answer, and on June 12, 2014 he requested to file an answer out of time because "* * * counsel was just retained * * *."[34] The appellate court held that the trial court did not err in allowing the defendant to file an answer out of time due to the defendants' explanation for the late finding coupled with the short delay occasioned by it.[35]

After considering all of the surrounding facts and circumstances of this case, the court finds that the defendants' failure to timely file an answer by January 17th was the product of excusable neglect.[36] There are several factors supporting the defendants' motion for leave to file answer *instanter*.

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[30] Id. t ¶ 4.
[31] Id. at ¶ 5.
[32] Id. at ¶ 12.
[33] *Sericola v. Johnson*, 11th Dist. Trumbull No. 2015-T-0091, 2016-Ohio-1164, ¶ 20.
[34] Id.
[35] Id. at ¶ 22. *See Fontanella v. Ambrosio*, 11th Dist. Trumbull No. 2001-T-0033, 2002-Ohio-3144 (finding that there was excusable neglect where the defendant failed to file a timely answer because he had insufficient money to retain counsel).
[36] *Marion Production Credit Ass'n*, 40 Ohio St.3d at 271 quoting *Rajan*, 33 Ohio St.3d at 79.

First, as mentioned in *Compston*, *Belville*, and *Sericola*, Ohio courts have found excusable neglect where a defendant has not timely answered because he or she has recently retained counsel. Although Knipper was not prompt in opening his mail, the main cause for his failure to file a timely answer was the fact that he incurred difficulties in finding and retaining counsel.

Additionally, the defendants' failure to file a timely answer was not intended to delay or confuse the proceedings. As Knipper testified, once he discovered the complaint in the mail, he actively sought representation so that he could file an answer, including calling and meeting with multiple attorneys. His persistent pursuit of counsel once he discovered this litigation is inconsistent with the idea that he intended to show disregard for the legal process or delay this litigation. As discussed, neglect is inexcusable when it shows a complete disregard for the legal process,[37] and that is not the case here.

Furthermore, the plaintiff will not suffer prejudice as a result of allowing the defendants leave to file an answer out of time, nor has the plaintiff argued that it will suffer prejudice.[38] The plaintiff will "still be able to recover the same damages, as well as any interest that accrues."[39]

Next, in considering the length of delay and the impact to the potential proceedings,[40] the court finds the delay between the deadline to file and answer and the defendants' motion for leave to answer *instanter* is not great. It is undisputed that the defendant received ordinary mail service, and under Civ.R. 4.6(D), the date of

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[37] *Zugg*, 2011-Ohio-2468 at ¶ 10, citing *Kay* 76 Ohio St.3d at 20.
[38] *Linville*, 2014-Ohio-1153 at ¶ 22.
[39] *Kratochvill*, 2014-Ohio-1153 at ¶ 22.
[40] *Citizens Natl. Bank of SW Ohio*, 2016-Ohio-2746 at ¶ 18, citing *First-Union-Lehman Bros. Bank of Am. Commercial Mtge. Trust*, 2014-Ohio-1105 at ¶ 15.

service was December 20, 2016.[41] The defendants' answer was therefore due under Civ.R. 12(A)(1) by January 17, 2017. The defendants filed their motion for leave on February 10th, which was less than a month after the January 17th due date.

Moreover, the fact that the defendants followed the proper procedural rules in filing their motion weighs in favor of granting it. Instead of simply filing an answer without permission, the defendants followed Civ.R. 6 in requesting permission to file out of time, and they followed Civ.R. 7 by making that motion in writing.[42]

Additionally, because the defendant filed a motion for leave to file answer *instanter* before the court entered a default judgment, the court is encouraged to allow the defendants to answer rather than entering a default judgment.[43]

Finally, the court is mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds. Therefore, for all of these reasons, the court finds that the defendants' failure to timely file an answer was the product of excusable neglect. As such, the court grants their motion for leave to file answer *instanter.*

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[41] Civ.R. 4.6(D) provides, in relevant part: "If a United States certified or express mail envelope attempting service within or outside the state is returned with an endorsement stating that the envelope was unclaimed, the clerk shall forthwith notify the attorney of record * * *. 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 United States 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."

[42] *Compston*, 1990 WL 129458 at *2.

[43] *Pitts*, 2013-Ohio-3854, quoting *Suki*, 9 Ohio App.3d at 290.

The plaintiff has also filed a motion for default judgment. Under Civ.R. 55(A), "[w]hen 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 to the court or orally to the court therefore * * *."[44] Given that the defendants are being permitted to answer, default judgment is inappropriate.

CONCLUSION

The defendants' motion to file answer *instanter* is well-taken and shall be granted. The defendants have ten days from the date of this entry to serve and file their answer.

Due to the fact that the defendants' motion has been granted, the plaintiff's motion for default judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 10-25-2017

Judge Jerry R. McBride

[44] Civ.R. 55(A).