COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

NTL COLLEGIATEMASTER STD LN TRUST-1	:	
	:	**CASE NO. 2015 CVH 00749**
Plaintiff	:	
vs.	:	**Judge McBride**
KYLE M. RUSCHER, et al.	:	
	:	**DECISION/ENTRY**
Defendants	:	

Reimer, Arnovitz, Cherke & Jeffrey Co., L.P.A., Evana Carolyn Delon, counsel for the plaintiff NTL Collegiatemaster STD LN Trust-1, 30455 Solon Road, Solon, Ohio 44139

Ciolek Ltd., Scott A. Ciolek, counsel for the defendant Deborah Nickell, 901 Washington St., Toledo, Ohio 43604

This cause is before the court for consideration of a written motion to have requests for admissions deemed admitted filed by the defendant on October 1, 2015 and what the court has construed, as set forth below, as an oral request or motion of the plaintiff that the court permit the withdrawal of any deemed admissions.

The complaint was filed in this case on June 10, 2015, seeking judgment on a promissory note signed with respect to a student loan. The written note, a copy of

which is attached to the complaint, provides for repayment of the loan over 24 years beginning in December 2003.

The defendant Deborah Nickell sent a letter to the court, which was filed as an answer in the case on June 23, 2015, admitting that she was responsible for the debt which is being collected in this case. Subsequently, the defendant's counsel filed an answer on July 7, 2015 generally denying the allegations of the complaint and raising a number of affirmative defenses. A first set of interrogatories, requests for production of documents, and requests for admissions was served by the defendant's counsel on July 7, 2015.

It is unknown what response was made with respect to this first set of discovery requests, but the record reflects that a second set of interrogatories, requests for production of documents, and requests for admissions was served on the plaintiff's counsel on August 24, 2015.

A case management conference was held on September 18, 2015, and a dispositive motion deadline was established. There was no mention made by either counsel during the case management conference of the outstanding paper discovery.

On October 1, 2015, the defendant filed a motion to have the second set for requests for admissions deemed admitted. The defendant also filed a motion for summary judgment which is based on a statute of limitations defense. The only evidence pointed to by the defendant in support of this defense is the failure of the plaintiff to respond to a request for admission that the default on the loan evidenced by the promissory note occurred more than eight years ago.

On October 2, 2015, an affidavit was filed by the plaintiff, in support of a motion for default judgment filed against the codefendant Kyle Ruscher, in which it is averred that no payment had been made on the loan since August 15, 2012, which would be less than three years prior to the filing of the complaint in this case. This affidavit was filed outside the twenty-eight days within which the plaintiff had to respond to the requests for admissions and there is no evidence that it was made in response to the requests for admissions.

The court established a briefing hearing schedule on October 6, 2015, with respect to the motion to have matters in the requests for admissions deemed admitted. Responses to the defendant's requests for admission were served on the plaintiff's counsel on October 15, 2015 by ordinary mail. On October 19, 2015, plaintiff's counsel filed a rather brief response to the defendant's motion requesting that the defendant's motion be denied and that the plaintiff be permitted to continue with the prosecution of its action.

No written motion was filed by the plaintiff for the court to permit the withdrawal of the admissions, but reference was made by plaintiff's counsel to allowing the matter to be decided on its merits, which is referenced in Civ.R. 36(B). During the oral argument on the plaintiff's motion, the court inquired as to whether the plaintiff was requesting that it be permitted to withdraw its admissions, and the plaintiff's counsel responded affirmatively, stating that plaintiff's counsel needed to wait for the responses to be completed by appropriate personnel in the offices of the plaintiff. The court will construe the plaintiff's position, although it has not been articulated as clearly as could

be the case, as requesting or moving for permission to withdraw any deemed admissions.

LEGAL ANALYSIS

Civ. R. 36 provides:

> " * * * A party may serve upon any other party a written request for admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ.R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. * * *
>
> (1) * * * The matter is deemed admitted unless, within a period designated in the request, not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. * * *
>
> (B) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. * * * [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. * * * "

"Any matter admitted under Civ.R. 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission."[1] A trial court may permit withdrawal of an admission if it will aid in presenting the merits of the case and the party who obtained the admission fails to demonstrate that

[1] *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985), citing Civ.R. 36(B).

withdrawal will prejudice him in maintaining his action.[2] Civ.R. 36(B) "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice."[3] "Civ.R. 36(B) does not require that a written motion be filed, nor does it specify when such motion must be filed."[4]

The rule is clear that unless action is taken within the period of time designated, whether that action be to admit, deny or request additional time, the matter as to which admission is requested and not responded to is deemed admitted.[5] While there may be exceptions for cases of excusable neglect or other Rule 60(B) grounds, they have not been alleged and are not applicable in this case.

Requests for admissions were served by defendant's counsel on August 24, 2015, and the plaintiff was required to respond to those requests on or before September 21, 2015. As a result, the matters contained in the defendant's requests for admission are deemed admitted by the plaintiff for purposes of this case.

However, the plaintiff has requested an opportunity to prosecute this case on its merits and has effectively moved that its requests for admissions be withdrawn. Here, it is clear that granting the motion would aid in the case being decided on its merits.

Moreover, the defendant has not demonstrated any prejudice resulting from the withdrawal. Prejudice under Civ.R. 36(B) does not result simply because the party who

---

[2] Id., citing *Balson v. Dodds*, 62 Ohio St.2d 287, 405 N.E.2d 294, paragraph two of the syllabus (1980).
[3] Id.
[4] *Balson* at 291, 405 N.E.2d 293, at fn. 2.
[5] *State ex rel. Davila v. City of Bucyrus*, 194 Ohio App.3d 325, 2011-Ohio-1731, 956 N.E.2d 332, ¶ 27.

initially obtained the admission will now have to convince the fact finder of its truth.[6] Similarly, the fact that a motion for summary judgment was prepared and filed based upon the admission does not constitute prejudice under Civ.R. 36(B).[7]

Responses to the requests for admissions were served on the defendant's counsel on October 15, 2015, less than four weeks after they were due. The entire case has been pending for a period of less than six months. The defendant can still raise her statute of limitations defense, and she can still present this defense, at least initially, through a motion for summary judgment. The only difference is that the defendant will need to point to other portions of the record, and if necessary present evidence, to prove that this defense is well-taken. The fact that proof will now be required does not constitute prejudice, particularly at this early stage of the proceedings, which would justify the court in denying the plaintiff's motion. In contrast, since the statute of limitations is an absolute defense, the denial of the plaintiff's motion would practically end the case and eliminate any presentation of the case on the merits.

The court finds that the plaintiff's its motion to withdraw her admissions is well-taken and shall be granted.

IT IS SO ORDERED.

DATED: 11-28-15

Judge Jerry R. McBride

[6] Id. at ¶30, citing *Kutscherousky v. Integrated Communications Solutions, LLC*, 5th Dist. Stark No. 2004 CA 00338, 2005-Ohio-4275, at ¶ 26.
[7] Id, citing *Kutscherousky* at ¶ 26, 29.