COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

TOTAL QUALITY LOGISTICS, LLC	:	
Plaintiff	:	**CASE NO. 2015 CVH 00148**
vs.	:	**Judge McBride**
EDWIN SIRIN	:	**DECISION/ENTRY**
Defendant	:	

Raymond W. Lembke, counsel for the plaintiff Total Quality Logistics, LLC, 432 Walnut Street, Suite 1000, Cincinnati, Ohio 45202.

Carl A. Aveni, counsel for the defendant Edwin Sirin, 366 East Broad Street, Columbus, Ohio 43215.

This cause is before the court for consideration of a motion for leave *instanter* to file answer out of time. The court scheduled and held an evidentiary hearing on the motion on August 21, 2015. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, 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 plaintiff Total Quality Logistics, LLC (hereinafter referred to as "TQL") filed its complaint against the defendant Edwin Sirin on February 3, 2015. Certified mail service on the defendant was returned to the clerk unclaimed on April 7. Regular mail service was mailed by the clerk on April 21 and was not returned. The defendant did not file an answer within 28 days.

The court set a status conference for June 12, 2015 and the defendant asked the court on June 11 to reschedule the conference. The defendant claims he had not learned of the instant case until he received the court's notice of hearing in the mail on June 11. The defendant told the court he needed to reschedule because he did not understand what was happening. Both parties participated in a hearing by telephone on June 26. At the conclusion of the hearing, the court informed the defendant that the plaintiff would be filing a motion for default judgment soon and that the case would move forward quickly. The court counseled that the defendant needed to file an answer, and if he wanted to consult an attorney, he should do so as soon as possible.

On July 27, the plaintiff moved for default judgment. On August 7th, the defendant's counsel filed a notice of appearance and a motion for leave *instanter* to answer out of time. The plaintiff opposed the motion, and the court held an evidentiary hearing on August 21. The defendant participated by telephone from his residence in California. At the conclusion of the hearing, the court took the issues under advisement.

The defendant filed a post-evidentiary hearing memorandum in support of his position on August 28, with his answer and counterclaims attached. On September 4, the plaintiff likewise filed a post-evidentiary hearing memorandum.

The plaintiff is a company with its principal place of business in Clermont County, Ohio. The defendant is an individual who resides in California. The defendant is also the owner and operator of Sirin & Sons Trucking, which is a company that hauls freight. The defendant lives at his home in California approximately one week per month. The remainder of his time is spent on the road related to his business or visiting Guatemala. While the defendant is traveling, he does not have any person come to his home to review or collect his mail on his behalf.

The defendant immigrated to the U.S. from Guatemala in the late 1970's and is now a U.S. citizen. In Guatemala, he attended school through the sixth grade. His primary language is Spanish, and his secondary language is English, in which he claims to have functional proficiency.

The defendant claims that he did not learn of this lawsuit until June 11, at which time he received the court's notice of hearing in the mail. He further claims that he did not receive the complaint, which the clerk mailed on April 21 to the same address where he received the court's notice of hearing. The defendant further avers that he was unaware of his delinquency in filing an answer until participating in the June 26 hearing.

Between the time he learned of the suit on June 11 and the hearing on June 26, the defendant claims he tried to retain an attorney. Prior to the June 26 hearing, the defendant consulted with his insurance company about defending the suit, but his insurance company denied coverage for the claims that are involved in this case.

The defendant's memory of the court's directions to him during the June 26 hearing is that he needed to retain counsel by the next hearing. He did not recall any other instructions, including the court's directive to file an answer as soon as possible. After the hearing, the defendant continued to look for attorneys online. The attorneys he solicited only handled personal injury matters. After placing multiple calls and using a bar association's lawyer referral service, the defendant retained counsel in Columbus, Ohio on approximately August 1.

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." 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)(2) provides:

> "When by these rules or by notice given thereunder or by order of the 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 * * * 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."

Accordingly, when a party can show that its failure to timely file an answer was the product of "excusable neglect," the court has the discretion to grant or deny the extension.[1] The court's decision will not be disturbed absent an abuse of discretion.[2]

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[1] *State ex rel. Doe v. Register*, 12th Dist. Clermont No. CA2008-08-081, 2009-Ohio-2448, ¶ 12.
[2] Id. citing *Graham v. Nigh*, 3rd Dist. Hancock, No. 5-06-48, 2007-Ohio-2161.

Neglect is "conduct that falls substantially below what is reasonable under the circumstances."[3] The Supreme Court instructs that "the determination of whether neglect was excusable or inexcusable 'must of necessity take into consideration all the surrounding facts and circumstances.' "[4]

While difficult to define, a defendant's inaction is not excusable neglect when it evidences a "complete disregard for the judicial system."[5] Moreover, neglect is not excusable when "the party could have controlled or guarded against the event which caused the neglect."[6] Pro se litigants must adhere to the "same rules and procedures as counsel, and they must accept the results of their own mistakes and errors."[7]

Courts also take into consideration whether the plaintiff will suffer prejudice as a result of granting the defendant leave to file an answer.[8] In *Linville v. Kratochvill*, 11th

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[3] *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).
[4] *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, 79 514 N.E.2d 1122 (1987).
[5] *Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Central Ohio*, 10th Dist. No. 09AP-505, 09AP-506, 2009-Ohio-6849, ¶ 14, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996).
[6] *Zugg v. Wisby*, 12th Dist. Warren No. CA2010-08-079, 2011-Ohio-2468, ¶ 10.
[7] *Unger v. Unger*, 12th Dist. Brown No. CA2003-10-013, 2004-Ohio-7136, citing *Meyers v. First National Bank*, 3 Ohio App.3d 209, 444 N.E.2d 412 (1st Dist. 1981). Notably, courts have held both ways with respect to the significance of pro se status, with some agreeing with *Unger* and others finding it evidence of excusable neglect. *See Zugg v. Wisby*, 12th Dist. Warren No. CA2010-08-079, 2011-Ohio-2468, ¶ 11 (holding that there was no abuse of discretion where a juvenile court found there was no excusable neglect due to the appellant's "unfamiliarality with rules and procedures," lack of transportation to the court, and three-week long depression episode). *But See Graham v. Nigh*, 3rd Dist. Hancock, No. 5-06-48, 2007-Ohio-2161, ¶¶ 15, 17 (in finding excusable neglect, the failure to defend was "not due to a disregard of the court," but rather to "lack of resources with which she could obtain counsel or other advice, and her fear of the legal system."); *Forty-Fourth Properties L.L.C. v. Demyan*, 8th Dist. Cuyahoga No. 97831, 2012-Ohio-3085, ¶ 11 (finding excusable neglect when the defendant had not exhibited "willfulness or bad faith" that would "negate the court's duty to decide cases on their merits whenever possible," and citing the fact that the defendant was pro se and missed the deadline by only five days).
[8] *Linville v. Kratochvill*, 11th Dis. Geauga No. 2013-G-3161, 2014-Ohio-1153, ¶ 22. *See Sunbelt*, 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

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."[9]

When an answer is filed before a motion for default judgment, it "serves to enlarge the discretion of the trial court to allow a delayed responsive pleading."[10] Significantly, "the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B)."[11]

While analyzing circumstances for excusable neglect, the court "must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds."[12] 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."[13] Thus, as a general matter, "default judgements are disfavored."[14] They are a "harsh remedy" that should "be imposed only when the actions of the defaulting party create a presumption of willfulness or bad

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representation of its client, and the defendant gained no strategic advantage by extending the deadline to answer).

[9] *Kratochvill*, 2014-Ohio-1153 at ¶ 22.

[10] *Cochran*, 40 Ohio St.3d 265, 533 N.E.2d 325, at 272.

[11] *See State ex rel. Lindenschmidt v. Butler Cty. Bd. Of Commrs.*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995). *See Hillman v. Edwards*, 10th Dist. No. 10AP-58, 2010-Ohio-3524, ¶¶ 11, 14, citing *Columbus v. Kahrl*, No. 95APG09-1204, 1996 WL 117303, (10th Dist. March 12, 1996) (holding same).

[12] *Cochran* at 271, quoting *Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122, at 79 and 81.

[13] *Kratochvill*, 2014-Ohio-1153 at ¶ 18.

[14] *Edwards*, 2009-Ohio-5087 at ¶6, citing *Suki v. Blume*, 9 Ohio App.3d 289, 290, 459 N.E.2d 13119 (8th Dist. 1983).

faith."[15] Civ.R. 6(B) is purposed to "militate against the harshness of a default judgment."[16]

In *Provident Funding Associates, LP v. Ettayem et al.*, 5th Dist. Delaware No. 13 CAE 04 0037, 2013-Ohio-5275, the Fifth District Court of Appeals affirmed the trial court's finding that excusable neglect did not exist where the defendant's neglect resulted from his failure to regularly check his mail. In *Ettayem* the defendant had not resided at his house for the majority of the previous year because he and his wife separated.[17] The defendant did not re-route his mail and did not regularly retrieve the correspondence mailed to his home.[18] The complaint was served by ordinary mail on December 3, 2012, after failed certified mail service, but he did not discover it until January 7, 2013.[19] He retained an attorney on January 7, 2013 and filed a motion for leave to plead on January 16, 2013.[20] In finding no excusable neglect, the court explained that the defendant "had entrusted the responsibility of his mail to [his wife], otherwise he would have had it forwarded to a separate mailing address" that he could access, or he could have had someone check his mail on his behalf.[21] The court characterized the defendant's behavior as exhibiting "carelessness, neglect, disregard and/or lack of attention to his mail."[22] Ultimately, there could be no excusable neglect

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[15] *Edwards* at ¶ 6 citing *Haddad v. English*, 145 Ohio App.3d 598, 603, 763 N.E.2d 1199 (9th Dist. 2001).
[16] *Kratochvill*, 2014-Ohio-1153 at ¶ 18.
[17] *Provident Funding Associates, LP v. Ettayem et al.*, 5th Dist. Delaware No. 13 CAE 04 0037, 2013-Ohio-5275, ¶ 24.
[18] Id.
[19] Id. at ¶ 25.
[20] Id. at ¶¶ 24-25.
[21] Id. at ¶ 27.
[22] Id.

because the defendant had not been "prevented from obtaining his mail due to unanticipated circumstances."[23]

In *Merritt v. Cottee*, 12th Dist. No. CA89-07-061, 1990 WL 44221, *1 (April 16, 1990), the Twelfth District Court of Appeals found that a party's out-of-state residency was an adequate basis for excusable neglect in defending a suit. There, the defendant resided in California, and the plaintiff filed suit in Clermont County, Ohio.[24] Four days after the deadline to respond, counsel for the defendant filed a motion for an extension, which the court granted.[25] The defendant averred that the delay was the result of her residency in California, combined with the time required to retain counsel in Clermont County.[26] The court did note the fact that no motion for default judgment was pending when the defendant requested leave to file out of time.[27] The court reasoned that since clerical errors routinely amount to excusable neglect, it saw "no reason why a delay occasioned by appellee's geographical distance from Ohio and the corresponding need to acquire local counsel should not likewise serve as excusable neglect."[28]

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 filed four days after the deadline. The two factors that persuaded the court were that the defendant required more time because he only recently retained counsel, and his counsel complied with Civ.R. 7(B)(1) by filing

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[23] Id. at ¶ 31.
[24] *Merritt v. Cottee*, 12th Dist. No. CA89-07-061, 1990 WL 44221, *1 (April 16, 1990).
[25] Id. at *2.
[26] Id.
[27] Id.
[28] Id.

the motion in writing.[29] The court opined that the defendant's need for an extension due to recently hiring counsel is a circumstance that "clearly rises to the level of excusable neglect justifying an extension of time under Civ.R. 6(B)."[30]

In the case at bar, there has undoubtedly been neglect on the part of defendant in filing his answer. The issue is whether his neglect is excusable under the facts and circumstances of this case. Certified mail service was attempted on February 3, 2015 and returned unclaimed on April 7. Regular mail service was mailed on April 21 and was not returned, but the defendant did not respond to this suit in any way until June 11. On June 26, the court warned the defendant that the plaintiff would likely file for a default judgment soon, and counselled the defendant to file an answer and retain counsel as soon as possible. Before doing either, the plaintiff filed for a default judgment on July 27, and the defendant then retained counsel and moved to answer out of time on August 7. The defendant's long period of non-responsiveness, coupled with the fact that he moved for leave subsequent to the filing of the default judgment motion, weigh against a finding of excusable neglect.

Furthermore, the defendant's explanation for his tardiness, which is that he is only at home one week per month to receive mail, does not serve as an excuse. As the Fifth District Court of Appeals advised in *Ettayem*, the defendant's inability to regularly check his mail was not an unforeseen problem.[31] This difficulty is intrinsic to the defendant's occupation as a truck driver and his choice to regularly visit Guatemala. However, the defendant did not guard against this hazard, such as by having another person check on his mail during his absence.

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[29] *Compston v. McGlothlin*, 12th Dist. No. CA90-01-016, 1990 WL 129458, *2 (Sept. 10, 1990).
[30] Id.
[31] *Ettayem*, 2013-Ohio-5275 at ¶¶ 24-31.

However, additional considerations outweigh the circumstances outlined above, ultimately supporting a finding that the defendant's neglect is excusable. Generally, there is a strong preference for the court to decide cases on the merits instead of procedural grounds. The defendant testified that he had not received service and did not know of the suit until June 11, at which time he promptly called the court. He began looking for an attorney at that time, albeit unsuccessfully. Although the court instructed the defendant to both file an answer and retain counsel, the defendant only recalled hearing the latter. To buttress his claim of ignorance, the defendant's last words on the June 26 call were "Thank you very much and I will look for an attorney." That the defendant did not mention filing an answer tends to suggests he may have had a miscommunication with the court. Thus, the defendant argues, by retaining counsel before the August 21 hearing, the defendant had fully comported with his understanding of the court's directive and did not demonstrate willfulness to bad faith.

Furthermore, the Twelfth District Court of Appeals has deemed neglect in similar situations excusable. Much like the instant case, in *Cottee* the Twelfth District Court of Appeals found excusable neglect where a defendant was delayed in filing an answer because she lived in California and had to search for counsel to represent her in Clermont County, Ohio.[32] Similarly, the defendant testified that he had been trying to find representation since June 11 using online resources but only reached personal injury attorneys. It was not until he received the number for a bar association that he was able to find and retain counsel.

Likewise, in *McGlothlin* the Twelfth District Court of Appeals found circumstances that "clearly rise" to excusable neglect under Civ.R. 6(B), where the defendant recently

[32] *Cottee*, 1990 WL 44221 at *1.

retained counsel and therefore needed more time to file an answer.[33] As in *McGlothlin*, the defendant's request to file out of time also complied with Civ.R. 7 by moving in writing.[34] In light of all the surrounding facts and circumstances, the defendant did not exhibit bad faith or a complete disregard for the judicial system. Additionally, the plaintiff has not argued that it would suffer prejudice if the defendant is permitted to file an answer. As in *Kratochvill*, which also involved a defendant who filed a motion for leave after the plaintiff filed for default judgment, if the defendant is permitted to answer, the plaintiff could "still be able to recover the same damages, as well as any interest that accrues."[35]

The defendant also urges the court to view his education level and language proficiency as bases to excuse his neglect.[36] The defendant testified that he had received a sixth grade education in Guatemala and was more comfortable speaking in Spanish. Be that as it may, he did not testify that these two characteristics inhibited him from reading, understanding, or responding to the filings and notices in this case. From his account, the first mail he received regarding this case was June 11, he read it, and he called the court to postpone the hearing. In the record, the only potential instance where a language barrier resulted in excusable neglect was when the defendant misunderstood the court's instructions to him during the June 26 hearing to file an answer. To establish his neglect as excusable, the defendant further cites to his inexperience with the judicial system and his status as a pro se litigant.[37] As discussed, some courts attribute weight to pro se status, while others are of the view that it is

[33] *McGlothlin*, 1990 WL 129458 at *2.
[34] Id.
[35] *Kratochvill*, 2014-Ohio-1153 at ¶ 22.
[36] Def.'s Mem. at 5.
[37] Id.

immaterial. In light of this backdrop, the court does not ascribe significance to the defendant's former pro se status.

The plaintiff argues that the defendant had ample time to file an answer and obtain counsel, and his circumstances surrounding his delay are not "special" enough to be deemed excusable neglect.[38] Although the plaintiff cites to numerous cases illustrating circumstances that involve inexcusable neglect, all the cases plaintiff cited in its supplemental memorandum involve excusable neglect as construed under Civ.R. 60(B), not Civ.R. 6(B). The standard for excusable neglect under Civ.R. 60(B) is much more "stringent" than under Civ.R. 6(B).[39] As such, the cases the plaintiff cited are not instructive because they apply a much higher standard than the defendant must meet for excusable neglect under Civ.R. 6(B).

After weighing the surrounding circumstances of the case at bar and considering the binding precedent of the Twelfth District Court of Appeals, the court finds that the defendant's neglect to timely file an answer was excusable and did not constitute a complete disregard for the judicial system.

CONCLUSION

The defendants' motion to file answer out of time *instanter* is well-taken and shall be granted. The answer and counterclaims filed contemporaneously with the motion shall be considered filed as of the date of this decision. Service will be deemed to have been effected as of the date of filing.

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[38] Pl.'s Mem. at 1, 3.
[39] *See Lindenschmidt*, 72 Ohio St.3d 464, 650 N.E.2d 1343 at 466; *Edwards*, 2010-Ohio-3524 at ¶¶ 11, 14, citing *Kahrl*, 1996 WL 117303.

Counsel shall conference and call Rosemary Petts, the court's assignment clerk, within fourteen days of the date of this decision, for the purpose of scheduling a case management conference. The case management conference shall be scheduled within 45 days of the date of this decision.

Due to the fact that the answer has been accepted, the plaintiff's motion for default judgment shall be denied.

IT IS SO ORDERED.

DATED: 9.25.15

Judge Jerry R. McBride