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**BARBARA A. WIEDENSEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO**

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

**HOME AGAIN RESTORATION, LTD :
Plaintiff : CASE NO. 2015 CVE 00384
vs. : Judge McBride
CYNTHIA GARRETT, ET AL. : DECISION/ENTRY
Defendants :**

Kent W. Seifried, counsel for the plaintiff Home Again Restoration, LTD, 2039 Dixie Highway, Ft. Mitchel, Kentucky 41011.

Elizabeth A. Tull, counsel for the defendant Cynthia Garrett, 215 East Ninth Street, Suite 500, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion of the defendant Cynthia L. Slagle, formerly known as Cynthia L. Garrett, for leave to file her answer out of time. The court scheduled and held an evidentiary hearing on the motion on July 2, 2015. At the conclusion of that 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 Home Again Restoration, LTD filed its complaint against the defendant Cynthia L. Slagle, formerly known as Cynthia L. Garrett, on March 26, 2015. Certified mail service on the defendant was returned to the clerk unclaimed on April 22. Regular mail service was mailed by the clerk on April 24 and was not returned. The defendant did not serve and file an answer within 28 days thereafter, which would have been May 22.

On May 29, the plaintiff moved for default judgment. On June 18, the defendant's counsel filed a notice of appearance. On June 19, the defendant filed a motion for leave to answer out of time and a memorandum in opposition to the plaintiff's motion for default judgment.

The defendant attached her proposed answer to her motion for leave. The plaintiff opposed the motion for leave. The court held an evidentiary hearing on July 2 on both the defendant's motion for leave and the plaintiff's motion for default judgment.

At the conclusion of the hearing, the court took the issues raised by the motions under advisement. The plaintiff filed a memorandum of additional authority in support of its motion for default judgment on September 18.

The plaintiff is an Ohio limited liability company. The defendant is an individual who resides in Clermont County, Ohio.

The plaintiff has a judgment lien against the defendant's property. As of July 2, 2015, the lien amount was \$27,598, plus daily interest of \$3.83.

The defendant has defaulted on her payment obligation to the plaintiff. The plaintiff now seeks to have its judgment lien enforced and to have the defendant's property subjected to foreclosure proceedings.

In her affidavit, the defendant asserts that after the plaintiff filed the complaint in this case she contacted opposing counsel via telephone. She also came to the courthouse to speak with the staff in the Clerk of Courts Office. In mid-June, she spoke to the court mediator regarding her desire to mediate. She also exchanged several emails with the court mediator and opposing counsel.

Until the filing of her request for leave, the defendant did not have counsel representing her and did not know that she needed to file an answer to the plaintiff's complaint. The defendant believed that she was fulfilling her legal obligations through her efforts to participate in mediation.

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, a trial court has discretion under Civ.R. 6(B) 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

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

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.

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 not an abuse of discretion where a juvenile court found there was no excusable neglect due to the appellant's "unfamiliarity 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

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 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 Notably, "the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B)."¹¹

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 seven 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

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 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).

the motion in writing.¹² 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)."¹³

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."¹⁴ 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."¹⁵

Thus, as a general matter, "default judgements are disfavored."¹⁶ 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."¹⁷ In this regard, Civ.R. 6(B) is purposed to "militate against the harshness of a default judgment."¹⁸

Under the facts and circumstances of the instant case, the court finds that the defendant's neglect is excusable. It is not the case here that the plaintiff postponed taking action for weeks or months on end before moving for leave. Regular mail service was mailed on April 24. The deadline for the defendant to answer was May 22, and the plaintiff filed for a default judgment only a week later on May 29. On June 19, the defendant filed a motion for leave to answer out of time. This compressed timeframe

¹² *Compston v. McGlothlin*, 12th Dist. No. CA90-01-016, 1990 WL 129458, *2 (Sept. 10, 1990).

¹³ *Id.*

¹⁴ *Cochran* at 271 quoting *Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122, at 79 and 81.

¹⁵ *Kratochvill*, 2014-Ohio-1153 at ¶ 18.

¹⁶ *Edwards*, 2009-Ohio-5087 at ¶6, citing *Suki v. Blume*, 9 Ohio App.3d 289, 290, 459 N.E.2d 13119 (8th Dist. 1983).

¹⁷ *Edwards* at ¶ 6, citing *Haddad v. English*, 145 Ohio App.3d 598, 603, 763 N.E.2d 1199 (9th Dist. 2001).

¹⁸ *Kratochvill*, 2014-Ohio-1153 at ¶ 18.

supports a finding of excusable neglect, in part because it lessens the risk that the plaintiff will suffer prejudice when the defendant files her answer out of time.

There was only one week between the deadline expiration and the defendant's motion for default judgment, which is a brief time span. Likewise, the defendant filed a motion for leave only three weeks after the filing of the plaintiff's motion, which again is a relatively short time. The plaintiff has not claimed that allowing the defendant to answer will give her a strategic advantage by extending the deadline.¹⁹ Nor will allowing the defendant to answer preclude the plaintiff from being "able to recover the same damages, as well as any interest that accrues."²⁰

The defendant's failure to timely file an answer cannot be regarded as a complete disregard for the judicial system. Before and after the deadline expired, she was actively communicating with opposing counsel and the court mediator to try and resolve the case through mediation. She made phone calls, engaged in emails, and made an in-person visit to the courthouse. Being unrepresented at the time, she wrongly, but understandably, believed that participating in mediation served as an answer to the plaintiff's complaint.

Once the defendant did secure representation, she promptly began complying with the Civil Rules by moving to file her answer out of time and responding to the plaintiff's motion for default judgment. 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 retained counsel and therefore needed more time to file

¹⁹ *Sunbelt*, 2009-Ohio-6849 at ¶ 20.

²⁰ *Kratochvill*, 2014-Ohio-1153 at ¶ 22.

an answer.²¹ As in *McGlothlin*, the defendant in the case at bar had also recently obtained counsel and her request to file out of time complied with Civ.R. 7 by moving in writing.²² When viewing the affirmative steps the defendant took to resolve her case, it is clear that there is no willfulness or bad faith on the defendant's part that would negate the strong preference for cases to "be decided upon their merits, where possible, rather than on procedural grounds."²³

In its briefing in opposition to the defendant's motion and at oral argument, the plaintiff submitted that granting the defendant leave to answer would be futile because she does not have a meritorious defense.²⁴ However, whether the defendant's defenses are meritorious is not part of a Rule 6(B) analysis for excusable neglect.

Furthermore, it was apparent during the oral arguments of counsel that the defendant's defenses present multiple, complex legal issues, some of which may be questions of first impression. Hence, it is not abundantly clear that allowing the defendant to file an answer will be futile and will unquestionably result in dismissal of this case. The plaintiff's briefing has not identified any other grounds or authorities for finding that the defendant's tardiness constitutes to inexcusable neglect.

After weighing the surrounding circumstances of the case at bar, 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.

²¹ *McGlothlin*, 1990 WL 129458 at *2.

²² *Id.*

²³ *Cochran* at 271 quoting *Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122, at 79 and 81.

²⁴ Pl.'s Mem. at 2.

CONCLUSION

The defendant's motion to file her answer out of time 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.

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

Counsel shall conference and call Rosemary Petts (the Assignment Commissioner) at (513) 732-7594 within 7 days of the date of this decision in order to schedule a case management conference, which shall be held within 30 days thereafter.

IT IS SO ORDERED.

DATED: 9-30-15



Judge Jerry R. McBride