

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

**VILLAGE OF MOSCOW, OHIO** :  
Plaintiff : **CASE NO. 2015 CVH 00014**  
vs. : **Judge McBride**  
**DENNIS SKEENE, et al.** : **DECISION/ENTRY**  
Defendants :

BARBARA A. WIEDENBEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH.

2015 MAY -7 AM 11:20

FILED

Strauss Troy Co., L.P.A., Emily Supinger, counsel for the plaintiff Village of Moscow, Ohio, 150 E. 4<sup>th</sup> Street, 4<sup>th</sup> Floor, Cincinnati, Ohio 45202.

T. David Burgess Co., L.P.A., T. David Burgess, counsel for the defendants Dennis Skeene and Karen Skeene, 110 North Third Street, Williamsburg, Ohio 45176.

This cause is before the court for consideration of a motion to file answer out of time instanter filed by the defendants Dennis Skeene and Karen Skeene.

The court scheduled and held an evidentiary hearing on the motion on April 23, 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

The plaintiff Village of Moscow, Ohio filed its complaint for declaratory judgment and for preliminary and permanent injunctive relief on January 6, 2015. The defendants were served via certified mail on January 8, 2015 when Dennis Skeene signed for both certified mail envelopes.<sup>1</sup>

On February 3, 2015, T. David Burgess, counsel for the defendants, filed a motion for extension of time in which to move or plead pursuant to Civ.R. 6(B). In the memorandum attached to that motion, the defendants requested thirty days from the original answer date of February 5, 2015 in which to file a responsive pleading. On February 6, 2015, the court signed and filed an entry extending time in which to move or plead, granting an extension until March 7, 2015. There is no certificate of service on this entry.

Neither T. David Burgess nor his legal assistant Kim Imbus received a copy of the entry extending time. Attorney Burgess testified that if the entry was sent to his office, it was somehow misplaced or possibly inadvertently sent to the SPAM folder of his office's email account. As such, the date by which a responsive pleading was required to be filed was not placed in defense counsel's electronic or written calendar.<sup>2</sup>

Attorney Burgess did not check the docket for the present case until after March 9, 2015. When he did check the docket and discovered that the extended time to file a responsive pleading had passed, he immediately prepared the present motion for leave

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<sup>1</sup> Return of Service for Dennis Skeene and Return of Service for Karen Skeene, filed January 13, 2015.

<sup>2</sup> Defendant's Exhibits 1 and 2.

to file an answer out of time and attached an answer and counterclaim to the motion. The motion for leave was filed on March 12, 2015.

## LEGAL ANALYSIS

Pursuant to Civ.R. 6(B):

**“When by these rules or by a notice given thereunder or by order of court 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 (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (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; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.”**

Civ. R. 12(A)(1) provides that a “defendant shall serve his answer within twenty-eight days after service of the summons and complaint.” As quoted above, Civ.R. 6(B)(2) allows a court, within its discretion, to grant a party an extension of time to file an answer after the expiration of that twenty-eight-day period where the failure to act was the result of excusable neglect.

According to the Ohio Supreme Court, “ ‘ ‘ ‘ ‘ the determination of whether neglect was excusable or inexcusable must of necessity take into consideration all the surrounding facts and circumstances. Courts must also remain mindful of the

admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds.’ ”<sup>3</sup>

“ ‘Neglect under Civ.R. 6(B) has been described as conduct that falls substantially below what is reasonable under the circumstances.’ ”<sup>4</sup> “Excusable neglect cannot be defined in the abstract, however the test for excusable neglect under Civ.R. 6(B) is less stringent than that applied under Civ.R. 60(B).’ ”<sup>5</sup> “However, the inaction of a defendant is not excusable neglect if it can be labeled as a complete disregard for the judicial system.”<sup>6</sup>

In *Mt. Pleasant Volunteer Fire Dept. v. Stuart*, 7<sup>th</sup> Dist. Jefferson No. 01JE11, 2002-Ohio-5227, the court concurred with the Fourth District Court of Appeals in its holding that “ ‘if the party or his attorney could have controlled or guarded against the happening of the special or unusual circumstance, the neglect is not excusable.’ ”<sup>7</sup> The court concluded that the defendant’s last-minute retention of counsel and said counsel’s failure to file a responsive pleading or motion for extension of time within the applicable time period was not excusable neglect.<sup>8</sup>

In *Hale v. Hale*, 11<sup>th</sup> Dist. Lake Nos. 2005-L-101 and 2005-L-114, 2006-Ohio-5164, the plaintiff “filed a motion for leave to file objections instanter, indicating that a calendaring problem in the attorney’s office had created a situation which made the

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<sup>3</sup> *State ex rel. Doe v. Register*, 12<sup>th</sup> Dist. Clermont No. CA2008-08-081, 2009-Ohio-2448, ¶ 13, quoting *Marion Production Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 271, 533 N.E.2d 325 (1988).

<sup>4</sup> *Stumpff v. Harris*, 2<sup>nd</sup> Dist. Montgomery No. 23354, 2010-Ohio-1241, \*3, quoting *Davis v. Immediate Medical Services, Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292 (1997).

<sup>5</sup> *State of Ohio Dept. of Dev. v. Matrix Centennial, L.L.C.*, 10<sup>th</sup> Dist. Franklin No. 14AP-47, 2014-Ohio-3251, ¶ 26, quoting *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995).

<sup>6</sup> *Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Central Ohio*, 10<sup>th</sup> Dist. Franklin Nos. 09AP-505 and 09AP-506, 2009-Ohio-6849, ¶ 14, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996).

<sup>7</sup> *Stuart*, supra, 2002-Ohio-5227 at ¶ 14, quoting *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 706 N.E.2d 825 (4<sup>th</sup> Dist.1997).

<sup>8</sup> *Id.* at ¶ 16.

objections one day late."<sup>9</sup> The trial court denied the motion for leave and the appellate court found no abuse of discretion in that decision.<sup>10</sup> The appellate court stated that "[i]t was entirely within the trial court's discretion to determine whether a calendar problem was 'excusable neglect.'"<sup>11</sup>

In *Rush v. Oblinger*, 8<sup>th</sup> Dist. Cuyahoga No. 86751, 2006-Ohio-2459, the defendant moved the trial court for an extension of time to file objections to a magistrate's decision.<sup>12</sup> The motion was filed after the fourteen-day deadline to file objections had expired.<sup>13</sup> The motion for extension was filed three business days after the objections were due and there was no evidence that the plaintiff was prejudiced by the delay.<sup>14</sup> The defendant asserted that he was out of town when the magistrate's decision was issued and that as a result he was unable to review the decision within the fourteen-day time period.<sup>15</sup> The appellate court found that this explanation sufficiently showed excusable neglect as to why the objections were not filed in a timely manner.<sup>16</sup>

In *State of Ohio Dept. of Dev. v. Matrix Centennial, L.L.C.*, 10<sup>th</sup> Dist. Franklin No. 14AP-47, the court extended the time for the filing of summary judgment motions on several occasions and eventually set the deadline on Labor Day.<sup>17</sup> Due to this deadline being placed on a federal holiday, it was "inadequately recorded on [plaintiff's] counsel's calendar."<sup>18</sup> The defendant did not argue that it experienced any prejudice by allowing

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<sup>9</sup> *Hale*, supra, 2006-Ohio-5164 at ¶ 10.

<sup>10</sup> *Id.* at ¶ 33.

<sup>11</sup> *Id.*, citing *Knapp v. Knapp*, 4<sup>th</sup> Dist. Lawrence No. 05CA2, 2005-Ohio-7105 at ¶ 18.

<sup>12</sup> *Rush*, supra, 2006-Ohio-2459 at ¶ 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at ¶ 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Matrix Centennial*, supra, 2014-Ohio-3251 at ¶ 28.

<sup>18</sup> *Id.*

the plaintiff to file its motion for summary judgment after the deadline.<sup>19</sup> The appellate court found that “\* \* \* the trial court was mindful that cases should be decided on the merits where possible and did not abuse its discretion in granting [plaintiff’s] leave to file summary judgment.”<sup>20</sup>

In *Hillman v. Edwards*, 10<sup>th</sup> Dist. Franklin No. 10AP-58, 2010-Ohio-3524, the defendant moved for leave to file an answer out of time.<sup>21</sup> Counsel for the defendant explained that “office error” occurred because the complaint was mistakenly placed in the case file without counsel being notified of it having arrived.<sup>22</sup> The appellate court noted that counsel did not show disregard for the judicial system and, when he discovered the complaint in the file and that the deadline to file an answer had passed, counsel attempted to rectify the problem immediately by filing an answer within one week.<sup>23</sup> The court concluded that the defendant demonstrated excusable neglect for his untimely answer.<sup>24</sup>

“\* \* \* [C]ourt’s have found it within the trial court’s sound discretion to find counsel’s neglectfulness or clerical errors (as reasons for the delay) to be just cause for denying a motion for default[,]” and granting leave to file an answer out of time.<sup>25</sup>

In the case at bar, the date for filing a responsive pleading was extended by the court and was inadvertently placed on a Saturday. Therefore, the answer was due on the following business day, which was Monday, March 9, 2015. The motion for leave with the accompanying answer and counterclaim was filed on March 12<sup>th</sup>. As such, the

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<sup>19</sup> Id. at ¶ 29.

<sup>20</sup> Id.

<sup>21</sup> *Hillman*, supra, 2010-Ohio-3524 at ¶ 1.

<sup>22</sup> Id. at ¶ 12.

<sup>23</sup> Id. at ¶ 13.

<sup>24</sup> Id. at ¶ 12.

<sup>25</sup> *Gee v. Sun*, 8<sup>th</sup> Dist. Cuyahoga No. 90597, 2008-Ohio-6282, ¶ 13, citing *Evans v. Chapman*, 28 Ohio St.3d 132, 502 N.E.2d 1012 (1986); and *Speaks v. Anderson*, 10<sup>th</sup> Dist. Franklin No. 87AP-780, 1988 WL 4648 (Jan. 21, 1988).

motion for leave was filed only three days past the deadline. The plaintiff did not file a motion for default until April 23<sup>rd</sup>, which was the day of the evidentiary hearing on this matter. Therefore, there is no prejudice to the plaintiff in allowing the defendants leave to file the answer out of time.

Counsel for the defendants and his legal assistant testified that their office did not receive the entry granting the extension of time. It appears likely that the entry was never sent to any party or counsel in this case given the fact that there is no certificate of service on that entry. When counsel for the defendants eventually checked the online docket and saw that the court had granted the extension, the extended deadline had already passed. Defendants' counsel immediately filed a motion for leave and attached an answer and counterclaim to that motion.

The court agrees with plaintiff's counsel that attorneys have a responsibility to check the case docket in a timely manner in order to keep abreast of filings and actions by the court.<sup>26</sup> However, defense counsel submitted a motion for extension of time and had not yet received notice as to whether that extension was granted or denied. Counsel checked the docket a little over thirty days after he filed his motion and, when he saw that his client's pleading was overdue, he tried to rectify the issue immediately. The court finds that the neglect to check the case docket earlier and, consequently, the

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<sup>26</sup> *Griesmer v. Allstate Insurance Co.*, 8<sup>th</sup> Dist. Cuyahoga No. 91194, 2009-Ohio-725, citing *MBA Realty v. Little G, Inc.*, 116 Ohio App.3d 334, 338, 688 N.E.2d 39 (8<sup>th</sup> Dist.1996) (“the burden is on the parties to follow the progress of their own case”); *P. Maynard v. C. Maynard* (Feb. 11, 1982), 8<sup>th</sup> Dist. Cuyahoga No. 43642, 1982 WL 2340 (appellant “was duty bound to keep abreast of the docket entries”); *In re Adoption of J.H.*, Lorain App. No. 06CA008902, 2006-Ohio-5957, ¶ 8 (noting that it is “well established that the parties to the case have a duty to keep apprised of the progress of the case on the docket”). See, also, *PHH Mortgage Corp. v. Northup*, 1<sup>st</sup> Dist. Hamilton No. 11CA6, 2011-Ohio-6814 (a party to an action must keep himself informed of the status of the case”), citing *Metcalfe v. Ohio State Univ. Hosp.* (1981), 2 Ohio App.3d 166, 441 N.E.2d 299 (10<sup>th</sup> Dist.1981); *Whitman v. Whitman*, 3<sup>rd</sup> Dist. Hancock No. 5-05-36, 2007-Ohio-4231, ¶ 24 (“[t]he parties to an action have a duty to remain informed about the progress of their case”).

neglect to file the answer within the extended time period, was excusable and did not constitute a disregard for the judicial system.

**CONCLUSION**


The defendants' motion to file answer out of time instanter is well-taken and is hereby granted. The answer and counterclaim filed contemporaneously with the motion shall be considered filed as of the date of this decision. The Clerk of Courts is hereby directed to serve the plaintiff with the answer and counterclaim in the manner provided for service of summons in Civ.R. 4 through Civ.R. 4.6.

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

A case management conference shall be held in this case on May 15, 2015 at 9:30 a.m. Counsel may appear in person or by telephone at that time.

**IT IS SO ORDERED.**

DATED: 5-7-15

  
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Judge Jerry R. McBride