

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ALEXANDRIA McCOY,	:	APPEAL NO. C-080635
Plaintiff-Appellant,	:	TRIAL NO. 07CV-20027
vs.	:	<i>DECISION.</i>
SYLVESTER USUANI,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Municipal Court

Judgments Appealed From Are: Reversed in Part and Cause Remanded

Date of Judgment Entry on Appeal: June 26, 2009

Taliaferro & Eynon, LLC, and *Ernest A. Eynon, II*, for Plaintiff-Appellant,
Sylvester Usuani, pro se.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Plaintiff-appellant Alexandria McCoy appeals from the trial court’s denial of her motion for relief from judgment on her claims for damages against defendant-appellee Sylvester Usuani, contesting as well the court’s denial of her motions for default judgment and summary judgment. McCoy and Usuani had rented an apartment together and had agreed to each pay one-half of the rent and utility costs. Usuani abandoned the apartment and stopped paying his share of the apartment costs. McCoy brought this suit seeking to recover the damages she had incurred in settling the landlord’s eviction action and in satisfying the remaining utility bills, plus interest, costs, and attorney fees. Because no genuine issues of material fact remained to be litigated regarding either Usuani’s liability or the uncontested amount of damages, the trial court erred in denying McCoy’s motion for summary judgment.

{¶2} McCoy filed an amended complaint on November 2, 2007. When Usuani failed to answer, she moved for a default judgment on April 16, 2008. Usuani, acting pro se, failed to appear in person at the April 22 default hearing. Instead the court conducted the hearing with Usuani participating by telephone. Even though it had previously informed Usuani that he had until March 28 to answer, the trial court refused to enter a default judgment and ultimately warned Usuani that “[i]f you do not answer to the amended complaint by May 6th, I’m continuing this matter over to May 13th. If you have no answer, no written response, the motion for a default judgment will go through on that date.” Perhaps in response to the trial court’s comment that “the Appellate Court does not like motions for default,” as well as its remarks on the necessity of subsequent hearings on

the default motion, McCoy determined that she was being “directed”¹ to file a motion for summary judgment in lieu of pursuing a default judgment.

{¶3} One week later, McCoy moved for summary judgment with her affidavit in support attached to the motion. Usuani did not respond in any way to the motion. The trial court granted the motion in part, ruling that Usuani was liable for damages to McCoy. But it denied the motion in part on the issue of damages and scheduled the case for a trial to the court.

{¶4} Following a bench trial at which McCoy was the sole witness, the trial court journalized an entry awarding only \$2,053.80 to McCoy despite her unrebutted testimony that her damages exceeded \$5,000. McCoy moved for relief from judgment under Civ.R. 60(B). The trial court denied that motion and this appeal followed. We note that Usuani has failed to file a brief with this court and did not request permission to appear at oral argument.²

{¶5} McCoy’s first assignment of error, in which she contests the trial court’s denial of her motion for default judgment, is overruled. While we accept McCoy’s description of the events in the trial court as true, on the state of this confused record we are unwilling to disturb the trial court’s decision to resolve this case by means other than default judgment.³

{¶6} In two related assignments of error, McCoy essentially argues that the trial court erred in denying her motion for summary judgment on the issue of the amount of damages due from Usuani and in proceeding to a bench trial on that issue. Because

¹ Appellant’s Brief at 1.

² See App.R. 18(C).

³ See *id.*

summary judgment presents only questions of law, an appellate court reviews a summary-judgment ruling de novo, without deference to the trial court's determinations.⁴

{¶7} McCoy moved for summary judgment, seeking affirmative relief on her claims. In support of the motion, she attached her own affidavit identifying, with specificity, the damages she had incurred as a result of Usuani's action in abandoning the apartment. The listed damages included the \$2,555 cost of the eviction, \$750 for electrical-utility payments, \$331 for cable-television and phone payments, and \$1,200 in rent already paid by McCoy and due from Usuani. McCoy sought summary judgment in her favor in the amount of \$4,836.

{¶8} Usuani did not respond to McCoy's motion for summary judgment. The trial court concluded that no issue remained as to whether Usuani was liable to McCoy for damages. But despite the absence of any response from Usuani, the trial court concluded that "material issues remain to be litigated on damages."

{¶9} Civ.R. 56(A) makes summary judgment available to "[a] party seeking to recover upon a claim * * *."⁵ A party moving for summary judgment bears the burden of establishing that (1) no issue of material fact remains to be litigated; (2) the moving party is entitled to summary judgment as a matter of law; and (3) it appears from the evidence, when viewed in a light most favorable to the nonmoving party, that reasonable minds can only come to a conclusion adverse to that party.⁶

{¶10} A party moving for summary judgment may file its motion "with or without supporting affidavits."⁷ But however supported, the motion "must specifically

⁴ See *Polen v. Baker*, 92 Ohio St.3d 563, 564-565, 2001-Ohio-1286, 752 N.E.2d 258; see, also, *Meyer v. UPS, Inc.*, 174 Ohio App.3d 339, 2007-Ohio-7063; 882 N.E.2d 31, at ¶27.

⁵ See *Robinson v. B.O.C. Group*, 81 Ohio St.3d 361, 367, 1998-Ohio-432, 691 N.E.2d 667.

⁶ See Civ.R. 56(C); see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁷ Civ.R. 65(A).

delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.”⁸ Once the moving party demonstrates that it is entitled to summary judgment, the burden shifts to the nonmoving party to show why summary judgment is inappropriate.⁹ If that party fails to respond, or fails to support its response with evidence of the kind required by Civ.R. 56(C), the court may enter summary judgment in favor of the moving party.¹⁰

{¶11} Here, McCoy supported her motion with a detailed affidavit identifying the basis for her motion. Usuni did not produce any evidence to dispute McCoy’s claims. There being no genuine issue of material fact remaining as to the amount of damages due to McCoy, the trial court erred in denying summary judgment to McCoy on that issue. The second and third assignments of error are sustained.

{¶12} Therefore, we reverse that part of the trial court’s judgment awarding \$2,053.80 in damages to McCoy following the bench trial. The case is remanded to the trial court with instructions to enter summary judgment for McCoy on all her claims in the amount of \$4,836, and to conduct a hearing to determine the proper measure of interest, costs, and attorney fees due to McCoy.

Judgment accordingly.

HENDON, P.J., CUNNINGHAM and DINKELACKER, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

⁸ *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus; see, also, *Dresher v. Burt*, 75 Ohio St.3d at 298, 1996-Ohio-107, 662 N.E.2d 264.

⁹ See Civ.R. 56(E).

¹⁰ See *id.*; see, also, *Dresher v. Burt*, 75 Ohio St.3d at 293, 1996-Ohio-107, 662 N.E.2d 264.