

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

GUNNING & ASSOCIATES	:	APPEAL NO. C-110211
MARKETING, INC., d/b/a/ G&A	:	TRIAL NO. A-1007802
MARKETING,	:	
Plaintiff-Appellee,	:	JUDGMENT ENTRY.
vs.	:	
ROE HUBBARD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Defendant-appellant Roe Hubbard entered into an agreement with plaintiff-appellee Gunning & Associates Marketing, Inc., (“G&A”) involving the promotion of automobile sales by dealerships. G&A, through representatives like Hubbard, would sell “super sale” packages to the dealerships in order to assist them in the promotion of their sales events. The agreement between Hubbard and G&A contained a confidentiality agreement and an 18-month noncompete clause. Four years later, Hubbard left G&A and formed his own company. According to the allegations in G&A’s complaint, Hubbard’s stole both G&A’s sales force and its prospective and existing client lists.

G&A sent Hubbard a cease-and-desist letter to his address in Texas. Shortly after, the two sides discussed the issue over the telephone, and Hubbard indicated that he would abide by the terms of the agreement. When he failed to do so, G&A filed suit.

G&A sent the complaint by certified mail to the same Texas address. The certified mail was returned, stamped as not deliverable as addressed with a hand-

written notation that delivery had been refused. On September 16, 2010, the clerk sent a copy of the complaint by regular mail. Hubbard failed to answer, and G&A filed a motion for a default judgment on February 1, 2011. Without leave to do so, Hubbard filed an answer on February 9. G&A filed a motion to strike the answer, and a hearing was held on the motion on March 14. On that same day, Hubbard filed a motion for leave to answer the complaint out of time. The trial court denied Hubbard's motion for leave, struck his answer, and granted a default judgment for G&A. In two assignments of error, Hubbard now appeals.

In his first assignment of error, Hubbard claims that the trial court abused its discretion when it granted the default judgment in favor of G&A. We disagree.

When serving an out-of-state defendant, Civ.R. 4.3 requires service by certified mail. When that service is refused, a subsequent attempt may be made by regular mail. See *Kvinta v. Kvinta* (Feb. 22, 2000), 10th Dist. No. 99AP-508; *Brown v. Miami Vacations, Inc.* (Feb. 24, 1977), 10th Dist. No. 76AP-801. In this case, while the envelope was stamped as undeliverable, the envelope was also marked as "refused" when it was received by the Clerk of Courts. Therefore, subsequent service by regular mail was proper.

Hubbard also argues that the granting of the default judgment was improper because he did not receive written notice of the hearing as required by Civ.R. 55(A). But such notice is only required when a party has made an appearance in the action. Since Hubbard had not appeared in the action, no notice was required. Even if it were, Hubbard was served with a copy of the motion for a default judgment, which was filed 41 days before the hearing.

Hubbard next argues that the entry of the default judgment was improper because the amount of the judgment had not been established. But the record reflects that the trial court conducted a hearing, and that evidence was presented to support the amount of the judgment.

Finally, Hubbard argues that the trial court improperly granted injunctive relief. But the injunctive relief granted by the trial court was simply a recitation of the restrictions in the noncompete agreement that Hubbard had signed when he was retained by G&A.

For these reasons, Hubbard's first assignment of error is overruled.

In his second assignment of error, Hubbard claims that the trial court abused its discretion when it denied his motion to answer out of time. But Hubbard did not ask for leave to file his answer until after G&A had sought to strike the answer that he had filed without permission. Apparently, Hubbard's counsel had believed that the regular-mail service had been improper and that the time to answer had not yet begun. On this record, we cannot say that the trial court abused its discretion when it determined that counsel's belief did not rise to the level of excusable neglect required by Civ.R. 6(B)(2).

Hubbard's second assignment of error is overruled. The judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and SUNDERMANN, JJ.

To the clerk:

Enter upon the journal of the court on December 14, 2011
per order of the court _____.
Presiding Judge