IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SEVERANCE SPE LEASECO, L.L.C.	)	**CASE NO. CV 12 781709**
	)	
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
AKARI TICHAVAKUNDA, M.D., *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

Plaintiff Severance SPE Leaseco, L.L.C., filed this lawsuit on May 1, 2012. The plaintiff is the landlord of a commercial building at 3486 Mayfield Road, Cleveland Heights. The complaint alleges that the plaintiff leased space at the property to defendants Akari Tichavakunda, M.D. and We Care Two Pediatrics, LLC, for use as a medical office. According to the complaint, the defendants breached the lease by failing to pay rent. The plaintiff seeks unpaid past rent, accelerated future rent, the costs of collection, and other damages. In addition to the claim for breach of contract, the complaint includes a cause of action for unjust enrichment.

On May 7, before the clerk issued certified mail service of the summons and complaint to the defendants, the court scheduled an initial pre-trial conference for June 6. Thereafter, on May 16, the clerk sent the summons and complaint to the defendants by certified mail.

The June 6 pre-trial conference was continued upon the oral motion of the defendants' attorney until June 18, by which time the fact of service on the defendants was still not

reflected on the docket, but all counsel appeared and a trial schedule was set. Despite appearing for the conference, defense counsel did not then file a notice of appearance. Ultimately, a summons and the complaint were reissued by a special process server and service was effected on both defendants on July 19. That fact is shown by docket entries journalized July 23.

Under Rule 12(A)(1) of the Ohio Rules of Civil Procedure, the defendants' answers or other responsive pleadings were due on August 16, 2012. That date came and went with no answers filed.

On September 11, the plaintiff filed a motion for default judgment against both defendants. Even though defense counsel had not entered a formal appearance by then, the plaintiff did serve a copy of the motion on defense counsel.

On September 14, defense counsel filed a "motion to continue motion for leave to file response" on behalf of defendant Tichavakunda only. That motion is construed by the court as a Civil Rule 6(B)(2) motion for an extension of time within which to file an answer. At the same time, defense counsel filed a motion to dismiss for defendant We Care Two Pediatrics, LLC. That motion was denied because, by then, the motion for default judgment was pending and leave to file a motion to dismiss was necessary but never requested.[1]

Both the motion for an extension and the motion for default judgment were argued at a hearing held on October 16. This entry follows.

Civil Rule 6(B)(2) provides, in pertinent part, as follows:

> **RULE 6. Time**
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> ***

[1] The motion to dismiss could also have been denied on the merits since the cover page of the lease names the lessee as "Akari Tichavakunda, M.D., d/b/a We Care Two Pediatrics."

> **(B) Time: extension.** 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 . . . (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; . . .
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> ***

In his motion, Tichavakunda writes that he "accepted service numerous times" but "neglected to inform counsel of personal service." These assertions are not supported by affidavit or other evidence with the motion, nor did the defendant produce at the hearing evidence of his neglect or the reason for it.

Neglect under Civil Rule 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances. *Davis v. Immediate Medical Servs.*, 80 Ohio St.3d 10, 14 (1997). Accepting as true the motion's representation that Tichavakunda was served "numerous times" and did nothing about it, his conduct fell substantially below what was reasonable and amounts to neglect.

In determining whether neglect is excusable or inexcusable, all of the surrounding facts and circumstances must be taken into consideration. *Griffey v. Rajan*, 33 Ohio St.3d 75, (1987), syllabus. In this case there are no circumstances that justify the neglect. The defendant simply admits to accepting service "numerous times" but taking no action to answer the lawsuit even in the face of the printed admonition on the summons that "if you fail to [answer], judgment by default will be rendered against you for the relief demanded in the complaint." Based on that limited evidence,[2] it is impossible for the court to discern a reason for the neglect, thereby making it impossible to find that the neglect was excusable. Rule 6(B)(2) may not require a compelling or unique excuse but it does require evidence of some excuse.

[2] Assuming it can even be accepted as evidence since it is not supported by a written affidavit or sworn oral testimony.

Besides Tichavakunda's own unexplained neglect, it is also worth noting that his counsel was undoubtedly aware of this lawsuit no later than June 6 when he asked that the pre-trial conference be continued. Furthermore, he appeared on June 18 and participated in a pre-trial conference. After that, the fact of service was shown by the July 23 entries. Parties and counsel are expected to keep themselves informed of the progress of a case. *State Farm Mut. Auto. Ins. Co. v Peller*, 63 Ohio App.3d 357, 360 (8th Dist., 1989). The Ohio Supreme Court has held that an entry on the court's docket constitutes reasonable, constructive notice of the facts reflected in the entry. See *Ohio Valley Radiology Assoc., Inc. v Valley Hosp. Assn.*, 28 Ohio St.3d 118, 124 (1986). Yet counsel offers no explanation why he took no steps to prevent a default even if his client failed to inform him of service.

There is no question, based upon his own admission, that Tichavakunda was properly served and aware of the answer date and there is a presumption that counsel knew of service, and neither the defendant nor counsel have offered even the barest of reasons why the answer date was neglected. Therefore, they have failed to show excusable neglect under Civil Rule 6(B)(2) and the motion for extension of time is denied.

That leaves the motion for default judgment. That motion is granted and a judgment is hereby entered in favor of the plaintiff Severance SEP Leaseco, L.L.C., and against the defendants Akari Tichavakunda, M.D., and We Care Two Pediatrics, LLC, jointly and severally, in the total amount of $155,520. Those damages include $43,200 in unpaid past rent, $4,320 in late charges for the unpaid past rent, and $108,000 in future rent. Because the late charges on the unpaid past rent will compensate the plaintiff for the loss of the use of its money, interest will not be assessed on the past due rent. However, interest at the statutory rate from the date of this judgment is assessed on $108,000 of the total judgment. The plaintiff is also

entitled under section 52 of the contract to its costs of collection, including a reasonable attorney's fee. An evidentiary hearing on those costs will be scheduled by the court only upon specific request of the plaintiff. Finally, court costs are assessed against the defendants.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this journal entry was sent by email, this 29th day of October, 2012, to the following:

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Judge John P. O'Donnell