

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003022-MR

RICHARD BASHAM, d/b/a
Basham's Wrecker Service

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 97-CI-000529

WILLIAM RICH and
PATRICIA RICH

APPELLEES

OPINION

REVERSING AND REMANDING

* * * * *

BEFORE: BUCKINGHAM, EMBERTON, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE. Richard Basham, d/b/a Basham's Wrecker Service, (Basham) appeals from an order of the Warren Circuit Court denying his motion pursuant to Kentucky Rule of Civil Procedure (CR) 55.02 to set aside a default judgment entered against him and in favor of William and Patricia Rich (the Riches) in the amount of \$8,536.74 plus costs. We conclude that the default judgment was improperly entered and reverse and remand.

The Riches were involved in a motor vehicle accident on May 16, 1996. Basham, who operates a wrecker service, came to the accident scene and towed the Riches' pickup truck, trailer/camper, and other personal property to his storage lot in Bowling Green. While the Riches' property was stored on Basham's premises, some of it was stolen.

As a result of the theft, the Riches filed a complaint against Basham in the trial court on May 12, 1997, seeking to recover damages for their loss. Summons was served on Basham on the following day. On May 16, 1997, one of the Riches' attorneys, Wesley G. Lile (Lile), sent a letter to the office of Basham's insurer, John Deere Insurance, in Jacksonville, Florida, which reads in full as follows:

Dear Mr. Patrick:

This will confirm my agreement to extend the time for you to answer the law suit filed against your insured.

This is an indefinite extension of time, in the hopes that we may resolve the claim without further litigation.

I will be providing your company with an itemization of the loss as well as any investigative materials we have concerning events after the loss was discovered. I will be in touch with you soon.
Very truly yours,

WESLEY G. LILE

On May 23, 1997, the trial court entered an order setting the case for a scheduling conference on July 7, 1997. The clerk's

docket notation indicates that a copy of the order was sent to all counsel of record and parties not represented by counsel.¹

On July 7, 1997, the trial court held a scheduling conference at which William Rudloff (Rudloff), the Riches' other attorney, was present. From a review of the videotape of the hearing, it appears that neither Basham nor anyone on his behalf was present. The trial court suggested that Rudloff move the court to grant the Riches a default judgment, as no answer had been filed by Basham. Rudloff then indicated to the court that his co-counsel, Lile, had granted an extension of time for an answer to be filed, and, at the suggestion of the Riches' counsel, a trial date of August 8, 1997, was set.

On July 25, 1997, counsel for the Riches heeded the suggestion of the trial court and filed a motion for a default judgment. The motion was not served on either Basham or his insurer, and a default judgment in the amount of \$8,536.74 was entered against Basham on July 29, 1997. The trial date was subsequently removed from the court's docket.

Negotiations to settle the case continued between Basham's insurer and the Riches' attorney after the entry of the default judgment, although the insurer was apparently unaware of the judgment. In fact, a representative of the insurer faxed a

¹ Although the clerk's docket indicates that notice of entry of the order was sent to all counsel and all parties not represented by counsel, and the order itself directs that the clerk send copies to those individuals, the name "William Rudloff" and the date "5/27/97" and a checkmark were written at the bottom of the order and apparently initialed by a deputy clerk. Despite the clerk's notation on the docket, we question whether this order was ever mailed to anyone other than Mr. Rudloff, the Riches' other attorney.

letter to one of the Riches' attorneys on August 3, 1997, offering to settle the claim for \$1,000 before assigning the case to an attorney to defend the claim. The letter acknowledged that the case was set to be tried on August 8, 1997.²

On October 1, 1997, Basham, by counsel, filed a motion to set aside the default judgment. A hearing on the motion was held on October 20, 1997, and the trial court ordered the motion passed for hearing until November 3, 1997, so as to encourage the parties to settle the claim out of court. The trial court indicated that it would likely set aside the default judgment at that time if the case was not settled. However, the trial court also related to Basham's counsel that the court did not approve of indefinite extensions of time and that it had dismissed cases in the past so as to discourage the granting of such extensions.

On November 3, 1997, the motion to set aside the default judgment again came before the trial court, as the case had not been settled in the interim. The trial court acknowledged that "I overruled his [Mr. Liles'] letter," and the motion was denied. This appeal followed.

CR 55.02 provides that "[f]or good cause shown the trial court may set aside a judgment by default in accordance with Rule 60.02." The law does not favor default judgments. Bargo v. Lewis, Ky., 305 S.W.2d 757, 758 (1957). However, "[w]hile the courts should adopt a liberal attitude on motions to set aside default judgments, good cause must be shown." Jacobs

² Basham's insurer was apparently notified of the trial date by letter from the Riches' attorney dated July 7, 1997.

v. Bell, Ky., 441 S.W.2d 448, 449 (1969). Also, even though default judgments are not favored, broad discretion rests in the trial courts in considering motions to set them aside and appellate courts will not interfere with that discretion absent abuse. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988).

We conclude that, since the judgment should never have been entered in the first place, the trial court abused its discretion in not setting it aside. We understand the trial court's desire to control its docket and to move cases to a timely disposition. We also understand the trial court's dislike of indefinite extensions of time and the delay in the timely dispositions of cases that such extensions may cause. However, such an extension was granted by the Riches' counsel in this case, and a default judgment was entered against Basham pursuant to the trial court's suggestion and without notice to Basham, despite the written "indefinite extension" that had been granted him by opposing counsel. It was surely necessary that Basham be given notice that the written extension upon which he relied was revoked prior to a default judgment being entered against him.

We are concerned with the delay of approximately sixty days from the entry of the default judgment until Basham's motion to set aside the judgment was filed. Citing Terrafirma, Inc. v. Krogdahl, Ky., 380 S.W.2d 87 (1964), and Zimmerman v. Segal, 288 Ky. 33, 155 S.W.2d 20 (1941), the Riches contend that Basham did not timely file his motion to set aside the judgment. However, in Terrafirma, the "unreasonable delay" to which the court was referring was the time between the serving of the summons on the

defendant and the granting of the default judgment and not the time between the granting of the judgment and the filing of the motion to set it aside. The defendant in Terrafirma did not wait two months to set aside the default judgment, as the Riches state in their brief, but filed the motion within fifteen days of the judgment. The court's opinion in that case was not based on the delay between the judgment and the defendant's motion to set it aside. Likewise, in Zimmerman, the delay to which the court referred included a period of time before the judgment was entered.

Furthermore, it is not perfectly clear that the clerk ever gave notice of entry of the default judgment to Basham.³ The clerk's docket notation indicates that notice was sent to "Dan Rudloff & Wes Lile," but the docket also contains a notation that notice of entry was sent to "all counsel of record and parties not represented by counsel." In examining the judgment itself, there is a clerk's notation of the names of the Riches' two attorneys and checkmarks by their names which were initialed apparently by a deputy clerk. While we cannot say that the clerk did not send a copy of the default judgment to Basham, in light of the notation on the judgment, it appears that such may have been the case. In short, it is unclear when Basham or his insurer became aware of the default judgment.

³ While the clerk was not required to serve notice of entry of the judgment on Basham since he was in default, see CR 77.04(1), the date that Basham actually became aware of the default judgment is relevant to this discussion.

At any rate, we hold that the trial court erred by not granting Basham's motion to set aside the default judgment, as the judgment was improperly entered in light of the written "indefinite extension" which had been given to Basham and on which he reasonably relied without being given notice to the contrary.

The order of the Warren Circuit Court is reversed, and the case is remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John David Cole, Jr.
Bowling Green, KY

BRIEF FOR APPELLEE:

Dan Rudloff
Bowling Green, KY