

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002334-MR

DENCIL MONTGOMERY

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE ALLAN BERTRAM, JUDGE
ACTION NO. 04-CI-00162

COMMONWEALTH OF KENTUCKY,
GREEN COUNTY, BY AND ON
RELATION OF ROBBIE RUDOLPH,
SECRETARY, REVENUE CABINET

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: ABRAMSON AND DIXON, JUDGES; HOWARD,¹ SPECIAL JUDGE.

DIXON, JUDGE: Appellant, through his Guardian Ad Litem, appeals from the Green Circuit Court's order denying his motion to set aside the default judgment in this civil debt collection case.

The Commonwealth has filed a notice in this Court adopting Appellant's position. As such, and because we believe the trial

¹ Judge James Howard, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

court failed to consider all relevant factors, we reverse and remand.

On November 3, 2004, Appellant was indicted in the Green Circuit Court for violating graves, second offense or greater. The record reflects that Appellant had several other related misdemeanor charges pending as well. On April 6, 2005, the trial court ordered a competency evaluation. Appellant was subsequently declared incompetent to stand trial by licensed psychologist Horace Stewart, who concluded that Appellant's condition of dementia "had been present for some time." The criminal charges were later dismissed.

Around the same time as the criminal charges were filed against Appellant, the Green County Attorney filed a civil action against Appellant to collect delinquent taxes on Appellant's farm located in Greensburg, Kentucky. Appellant failed to file a response and a default judgment and order of sale was signed by the trial court on March 10, 2005. The order directed the sale of Appellant's principal residence to satisfy the lien for delinquent taxes (including fines and penalties) in the amount of \$8,580.04. A Master Commissioner sold Appellant's property to Edwin Froggett² at a public auction on May 27, 2005.

² Froggett has filed a motion in this Court to intervene for the sole purpose of moving the court to dismiss this appeal. By separate order dated January 25, 2007, we denied Froggett's motion.

On July 27, 2005, the County Attorney moved the trial court to appoint a Guardian Ad Litem for Appellant. The County Attorney thereafter moved the trial court to review the default judgment based upon Appellant's incompetence. Similarly, the Guardian Ad Litem also filed a motion to set aside the default judgment against Appellant on the grounds that his failure to respond to the civil complaint was solely due to his mental illness and incapacity. Following a hearing, the trial court denied the motion. This appeal ensued.

As we previously noted, the Commonwealth has filed a notice in this Court adopting Appellant's argument that the trial court abused its discretion in denying the motion to set aside the default judgment. We agree.

Factors for a court to consider in setting aside a default judgment include: (1) valid excuse for the default; (2) meritorious defense; and (3) absence of prejudice to the other party. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991). All three elements must be present and the issue of fairness must be viewed from both sides. *S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc.*, 819 S.W.2d 727, 729 (Ky. App. 1991).

The psychiatric evaluation of Appellant, which was performed just a little over four months after the civil complaint was filed, established that Appellant had been

mentally incapacitated for "some time." As such, we find that mental incapacity to be a valid excuse under *Perry* for Appellant's failure to file a response to the complaint. In a similar vein, said incapacity certainly can also be construed as a meritorious defense to the allegations contained in the civil complaint, as it is undisputed that Appellant is wholly unable to maintain his financial affairs. Finally, as the Commonwealth has joined with Appellant in seeking a reversal of the trial court's order, we cannot find that either party would be prejudiced if the default judgment was set aside. See *S.R. Blanton Development, Inc., supra*.

We further agree with Appellant that the trial court herein was on notice that Appellant's mental competence was in question since it presided over both the criminal and civil cases. In fact, the trial court ordered the psychiatric evaluation. While it is true that a trial court in a civil case, in the absence of an adjudication of incompetency, has no duty to take steps to protect the interest of any defendant, *Goff v. Walker By and Through Field*, 809 S.W.2d 698 (Ky. 1991), the facts herein are distinguishable in that a legal adjudication of incompetence was pending in the parallel criminal proceeding presided over by the same trial judge.

All parties agree that Appellant did not consciously or intentionally fail to comply with the Civil Rules when he did

not respond to the County Attorney's complaint. Rather, he was simply incompetent at the time of the civil summons. In any event, Appellant is entitled to have the default judgment set aside and have his case proceed on the merits.

We conclude that the trial court failed to consider the relevant law and factors in denying the Guardian Ad Litem's motion to set aside the default judgment. Accordingly, the trial court's order is reversed and the matter is remanded to the Green Circuit Court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott T. Foster
Somerset, Kentucky

BRIEF FOR APPELLEE:

Jeffrey Lyle Eastham
Greensburg, Kentucky

Philip S. George, Jr.
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