

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000432-MR

SUNNYSIDE HOMES OF
ROCKLEDGE, INC. AND
MICHAEL MORLEY

APPELLANTS

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 03-CI-00037

JOE A. OWEN AND
KAREN OWEN

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Sunnyside Homes of Rockledge, Inc. and Michael Morley appeal from an order of Marshall Circuit Court granting a default judgment pursuant to Kentucky Rules of Civil Procedure (CR) 37.02 in favor of Joe Owen and Karen Owen (“the Owens”). We affirm.

¹ Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The Owens, who are Kentucky residents, were two of the original investors in the Sunnyside Homes corporation which develops assisted living communities in Florida. In 2001, the Owens sold their interest in Sunnyside Homes to Avonlea Cottages, LLC, a company owned by Morley and his business partners, who are all residents of Utah. This appeal arises from a cross-claim filed by the Owens against Morley and his partners in an underlying cause of action. In the original action, the Owens and the principals of Avonlea Cottages, LLC were found liable as guarantors on a promissory note executed by Sunnyside Homes. Marshall Circuit Court granted partial summary judgment in favor of the creditor, and Sunnyside Homes, Morley, and his partners appealed. A panel of this Court affirmed the partial summary judgment in an unpublished opinion. *Gordon v. Sunnyside Homes of Rockledge*, 2004-CA-001719-MR (March 10, 2006).

Other than Morley and the Owens, the principal defendants in the original action became judgment proof due to bankruptcy. As such, the Owens prosecuted their cross-claim against Sunnyside Homes and Morley, seeking indemnity for the Owens' obligation on the promissory note. In March 2004, the Owens served interrogatories and requests for production of documents upon Morley. Morley, who was represented by attorneys in both Kentucky and Utah, failed to respond to the interrogatories.

In July 2004, the Owens filed a motion to compel discovery. On August 17, 2004, the court held a hearing on the motion to compel. Morley's Kentucky counsel appeared. Counsel opined that communication with his client was difficult because

Morley lived in Utah. The court issued an order compelling Morley to comply with the Owens' discovery requests. The order specifically required:

full and complete responses to the outstanding discovery requests propounded by Joe and Karen Owen not later than August 23, 2004. Failure to do so will result in sanctions including, but not limited to, prejudicial dismissal of all claims filed herein by the defendants

Morley filed his answers to the interrogatories on August 26, 2004. However, none of the requested documents were produced. Instead, Morley answered:

Given the volume of the requested documents, they are available, upon reasonable notice for copying and inspection at the offices of Kemp, Ison, Harton, Tilley & Holland, LLP.

The Owens made several attempts to set up a time to inspect the documents, but received no response from Morley's attorney. More than a year later, the documents still had not been made available for inspection. In December 2005, the Owens moved the trial court to enter default judgment against Morley pursuant to CR 37.02 for failure to comply with the court's discovery order. Morley did not file a response prior to the hearing, nor did he or his attorney attend the hearing.

On December 27, 2005, the court rendered a default judgment against Morley. Soon thereafter, Morley moved the court to vacate the default judgment and tendered a belated response to the Owens' motion. In January 2006, the court held a hearing on Morley's motion and considered Morley's argument. In a written order, the court denied Morley relief, and this appeal followed.

CR 37.02 addresses a party's failure to comply with a court order. It states in pertinent part:

(2) Sanctions by court in which action is pending.

If a party . . . fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

CR 37.02(2) (emphasis added).

Our standard of review is whether the Marshall Circuit Court abused its discretion by entering a default judgment against Morley and Sunnyside Homes.

Greathouse v. Am. Nat'l Bank & Trust Co., 796 S.W.2d 868, 870 (Ky.App. 1990). As such, we will not disturb the findings of the trial court unless the “decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Morley first argues the court erred in granting a default judgment because his conduct was not willful or in bad faith. *See Greathouse*, 769 S.W.2d at 870. We disagree.

In *Greathouse*, a panel of this Court emphasized that the trial court must take care to “articulat[e] on the record . . . the court's resolution of the factual, legal, and

discretionary issues presented.” *Id.*, quoting *Quality Prefabrication, Inc. v. Daniel J. Keating Co.*, 675 F.2d 77, 81 (3d Cir. 1982). The Court also advised:

Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Id.

In this case, the trial court rendered detailed findings in support of its grant of default judgment. Furthermore, the court's order clearly took into consideration the mandates of *Greathouse*. The court noted that Morley's conduct displayed a willful failure to cooperate with the discovery order and prejudiced the Owens by impeding resolution of the case while other parties declared bankruptcy and interest accrued on the promissory note. After reviewing the record on appeal, we find the trial court did not abuse its discretion by granting a default judgment against Morley.

In his second assignment of error, Morley contends the court should have considered alternative sanctions rather than granting a default judgment. However, the court's order states in part:

The Court finds that while other remedies might be available, none would be effective to address the conduct and resulting prejudice which is apparent in this case. The Court reiterates the longstanding default in Morley's obligations and this Court's explicit warning that failure to comply in good faith with its previous order would be subject to severe sanction.

Morley also opines that, in the interest of justice, courts should avoid dismissing claims for technical violations. However, in the case at bar, the trial court was within its power to grant a default judgment because Morley failed to fully comply with the August 17, 2004, court order. CR 37.02(2)(c). *See also Sublett v. Hall*, 589 S.W.2d 888, 892 (Ky. 1979). This Court previously noted in *Greathouse*, “if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion.” 796 S.W.2d at 870 (citation omitted). Accordingly, we find no error.

Finally, Morley argues his Kentucky counsel did not receive notice of the Owens' motion for default judgment until five days prior to the December 19, 2005, hearing. However, it is undisputed that counsel did not attempt to secure a continuance on Morley's behalf, nor attempt to attend the hearing. We also note that the court entertained Morley's belated response to the Owens' motion. The court heard from Morley's counsel and considered his arguments, but still concluded default judgment was warranted. Consequently, after reviewing the record on appeal, we find no error.

For the reasons stated herein, the order of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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