RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000868-MR

BRIAN S. ROTH, D.C. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 05-CI-000663

WILLIAM W. LAWRENCE, TRUSTEE,
UNCLE PAUL CHIROPRACTIC BUSINESS
TRAINING, LLC, AND PAUL HOLLERN, D.C. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

NICKELL, JUDGE: Dr. Brian S. Roth, D.C. (Roth), appeals from an April 4, 2008, final order of the Jefferson Circuit Court denying his motion to set aside a default judgment entered against him on December 18, 2006, in the amount of

[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 Kentucky Revised Statutes (KRS) 21.580.

$371,242.60. Concluding the trial court properly denied Roth's motion to set aside the default judgment entered against him based on his failure to show good cause, and determining the court was correct in refusing to consider Roth's allegedly meritorious defenses, we affirm.

This appeal stems from a Purchase and Management Agreement executed on or about June 30, 1999, between Roth and Dr. Paul Hollern, D.C. (Hollern), who apparently operated a chiropractic practice and professional consulting business with a mailing address in Jefferson County, Kentucky. Roth agreed[2] to purchase a chiropractic practice owned or to be established by Hollern in Norristown, Pennsylvania, together with Hollern's management and consulting support, for the sum of $375,000.00.[3] The parties further agreed their contract would be construed and governed by the laws of the Commonwealth of Kentucky and all legal issues would be resolved by the civil courts of Jefferson County, Kentucky. In addition to helping Roth establish the chiropractic practice and providing management and consulting support, Hollern advanced Roth $110,978.00 in cash, amounting to a total debt owed of $485,978.00. Roth made payments on this debt from March 15, 2001, through January 21, 2004, when he ceased making payments to Hollern without notice. As of October 16, 2004, Roth still owed Hollern $371,242.60.

[2] Roth consulted with his attorney before signing the agreement. Both Roth and his attorney signed the agreement.

[3] The record does not specify any services Hollern was to provide under the agreement.

In October 2004, Hollern mailed a certified letter to Roth, in Pennsylvania, indicating he would pursue litigation if the delinquent payments were not made. Hollern received no payments[4] after mailing the certified letter to Roth. One year after receiving Roth's last payment, Hollern filed a complaint against Roth in the Jefferson Circuit Court. A copy of the complaint was sent by certified mail to Roth's office in Norristown, Pennsylvania. A return receipt, erroneously dated "1/3/05",[5] was allegedly signed by Roth. The Jefferson Circuit Court Clerk received notice and proof of service and the certified mail receipt bearing what appeared to be Roth's signature from the Kentucky Secretary of State[6] on February 7, 2005. Roth filed no answer or responsive pleading.

Over three years after the complaint was filed, Hollern petitioned for protection under the United States Bankruptcy Code[7] in October 2008. All of his assets, including the debt owed to him by Roth, were transferred to the bankruptcy trustee, William W. Lawrence (Lawrence). On June 19, 2008, Lawrence filed an amended complaint setting out his rights as trustee to the litigation and mailed a copy to Roth. Roth still did nothing.

Citing Roth's inaction, Lawrence moved for a default judgment on September 25, 2006. On December 18, 2006, the circuit court entered a default

[4] The record does not indicate whether Roth corresponded with Hollern after January 2004.

[5] The correct date is presumed to be February 3, 2005, because the complaint was not filed until January 21, 2005.

[6] Service was effectuated through the Secretary of State pursuant to KRS 454.210 as Roth was a resident of Pennsylvania.

[7] 11 U.S.C. § 101 et seq.

judgment against Roth in the amount of $371,242.60, and mailed a copy to Roth at the same address as the notice of complaint was sent on December 27, 2006. The default judgment was registered[8] in Roth's place of residence, Montgomery County, Pennsylvania, on August 17, 2007.

In December 2007, Roth filed his first pleading in the Jefferson Circuit Court, a motion to set aside the default judgment that had been entered against him a year earlier. Roth argued the default judgment was void because he had a meritorious defense[9] and he was never served with process. Roth claims the notice of the default judgment being registered in Pennsylvania was the first notice he received.

In an order entered April 9, 2008, the circuit court found striking similarities between the four signatures Roth admitted were his and the signed return receipt he claimed was a forgery. As a result, the court concluded Roth, or someone who had practiced Roth's signature, had signed the return receipt indicating acceptance of the original complaint. Finding Roth could not show good cause for his failure to respond to the complaint, the court found it

[8] Pursuant to Article IV, Section 1 of the United States Constitution, states are required to give full faith and credit to the judicial proceedings from every other state. To aid in the enforcement of judgments, a majority of states, including Kentucky and Pennsylvania, have adopted the Uniform Enforcement of Foreign Judgments Act, codified in Kentucky at KRS 426.950 et seq.

Consistent with the Act, notice of the judgment was filed with the Jefferson Circuit Court Clerk and mailed by the clerk to Pennsylvania. A Pennsylvania clerk then mailed notice to Roth at the address provided by the Kentucky court clerk.

[9] Roth argued the contract was illegal because it did not conform to the requirements of Kentucky's Sale of Business Opportunities statutes codified at KRS 367.801, et seq.

unnecessary to discuss Roth's contention that he had a meritorious defense to Lawrence's claim. Thereafter, the Court denied Roth's motion to set aside the default judgment. This appeal followed.

Neither party's brief mentions whether the alleged trial errors were preserved for our review. CR[10] 76.12(4)(c)(v) requires that the ARGUMENT in the appellant's brief begin with "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Roth's brief does not comply with this rule and Lawrence does not comment on the lack of a statement of preservation, nor does he request sanctions due to the deficiency.

Additionally, CR 76.12(4)(c)(iv) requires that the STATEMENT OF THE CASE contain "ample references to the specific pages of the record, or tape and digital counter number [for] untranscribed videotape or audiotape recordings[.]" For a recording to be included in the record on appeal, parties must designate such recording within ten days of filing a notice of appeal. CR 75.01. Furthermore, in making his arguments, Roth's brief fails to refer to specific pages in the record. He also relies heavily upon a hearing held on February 29, 2008, but neither a video recording nor a transcribed copy of that hearing was designated as part of the record for our review. Failure to cite to the record authorizes this Court to strike the party's brief, or to rely only on the contents of the briefs filed by both parties. *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky. App. 1993). Roth's brief

[10] Kentucky Rules of Civil Procedure (CR).

falls short of compliance with CR 76.12(4)(c)(vi) and with CR 76.12(6) in that it fails to set forth the specific relief sought from this Court, and does not contain a certificate of service on the cover of the brief. Because Roth's argument fails on the merits, we will not strike his brief, though we would be well within our authority to do so. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990).

Trial courts are vested with broad discretion in ruling on motions to set aside default judgments. *Howard v. Fountain*, 749 S.W. 2d 690, 692 (Ky. App. 1988). In light of that discretion, a trial court's decision will not be disturbed absent abuse. *Id.* "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Abuse of discretion exists where there is a capricious disposition under the circumstances, or "at least an unreasonable and unfair decision." *Id.*

Under CR 55.02, if a party is able to show good cause, a trial court may set aside a default judgment if such cause meets the requirements of CR 60.02. Though a trial court has broad discretion, a default judgment may be set aside only if the moving party can show three factors: (1) a valid excuse for his default, (2) a meritorious defense, and (3) the absence of prejudice to the non-defaulting party. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991) (citing 7 W. Bertelsman and K. Philipps, Kentucky Practice, CR 55.02, comment 2 (4th ed. 1984)). "All three elements must be present to set aside a default judgment." *S.R. Blanton Development, Inc. v. Investors Realty and*

Management, 819 S.W.2d 727, 729 (Ky. App. 1991). The moving party must demonstrate that he is not himself guilty of unreasonable delay in showing good cause. *Terrafirma, Inc. v. Krogdahl,* 380 S.W.2d 86, 87 (Ky. App. 1964). Absent a timely showing, a court cannot be held to have abused its discretion. *Jacobs v. Bell*, 441 S.W.2d 448, 449 (Ky. App. 1969).

Roth argues he did not receive a copy of the summons and complaint from the Kentucky Secretary of State and that the return receipt bearing his purported signature is a forgery. Roth states he does not recall receipt of the complaint or subsequent mailings, and claims he did not receive any notice of the action being filed against him until the default judgment was domesticated in Pennsylvania in August 2007.[11] Roth argues these circumstances constituted good cause for his delay in responding to the complaints of Hollern and later Lawrence.

As a reviewing Court, we set aside default judgments with extreme caution, and then under only the most unusual circumstances. *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. App. 1959). Roth's excuse for waiting four months to show good cause in his motion to set aside the judgment is that he had trouble acquiring adequate legal representation. This does not constitute an unusual circumstance because most parties to litigation are faced with the task of choosing counsel. In *Terrafirma*, the Court held that waiting just sixty days before filing a defense was unreasonable. In the case *sub judice*, the trial court's finding that Roth did not show good cause for his three-year delay (January 2004 – December

[11] However, upon receiving effective service in August 2007, Roth waited four months to file a motion to set aside the judgment.

2007) was not unfair or arbitrary, and was based on sound legal principles. Therefore, there was no abuse of discretion. *Jacobs*.

As stated earlier, the test for whether a default judgment may be set aside is threefold. A showing of good cause for the delay must be timely made, a party must assert a meritorious defense, and the absence of prejudice to the other party must be demonstrated. Even if the circuit court had determined Roth had a meritorious defense, his failure to satisfy the good cause requirement would have been fatal to his defense. Thus, the trial court did not err in refusing to address Roth's alleged meritorious defense and we will not discuss it further. In addition, Roth presented no evidence whatsoever regarding the absence of prejudice to Hollern if the judgment were to be set aside. Such failure is likewise fatal to his argument. *S.R. Blanton Development, Inc.*, 819 S.W.2d at 729. The trial court did not err.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, DISSENTS.

GRAVES, SENIOR JUDGE, DISSENTING: Respectfully, I dissent.

The trial court has merely recited the evidence and indicated the facts elicited by the testimony given at the hearing. The record lacks findings of ultimate or conclusionary facts needed for appellate review.

This matter should be remanded to the trial court with direction to make specific findings of fact sufficient to justify the credibility judgment and inference that service of process was legally efficacious. It appears the appellee has overstated a biased impression of the facts. This matter should be resolved on the merits.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE:

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