

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001791-MR

JAMIE ROBERT WADE III

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 97-CI-00171

FARMERS NATIONAL BANK

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Jamie Wade (“Jamie”) has appealed *pro se* from the Marion Circuit Court’s default judgment in favor of Farmers National Bank (“Farmers”) and against Jamie. After careful review of the record and the applicable law, we affirm.

¹ Senior Judge William L. Knopf 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.

FACTUAL AND PROCEDURAL BACKGROUND

This case was commenced on August 15, 1997, by Star Bank, N.A. (“Star”) against Jamie and Farmers resulting from Jamie’s default under the terms of various loan and security documents executed by Jamie in favor of Star. Star included Farmers as a defendant in the action because it believed that Farmers might have a security interest in some of the same property in which Star held a security interest. Jamie was represented by counsel, and filed an answer to Star’s complaint. Farmers asserted a cross-claim against Jamie, alleging default under two promissory notes, one of which was co-signed by his aunt, Sharon Wade (“Sharon”), and security documents granting Farmers security interests in Jamie’s equipment and other assets. Jamie also filed an answer to this cross-claim.

On May 6, 1998, the Marion Circuit Court entered an order granting Star a judgment against Jamie in the sum of \$101,884.47 and adjudicated Star’s lien against Jamie’s assets as valid and enforceable, subject only to Farmers’ claims if later found to be prior and superior to those of Star. Thereafter, Jamie’s attorney requested leave to withdraw as his counsel, stating that Jamie had obtained new counsel. The court permitted the withdrawal and gave Jamie fourteen days to have his new counsel make an entry of appearance. No entry of appearance was ever made.

Thereafter, Jamie filed a Chapter 13 bankruptcy petition, which was subsequently converted to a Chapter 11. Additional activity in the trial court was stayed while Jamie and his creditors, including Farmers, litigated numerous claims

in the bankruptcy proceeding. Ultimately, Jamie's plan of reorganization was confirmed by the bankruptcy judge following two amendments. Concerning Farmers' claims, the plan provided as follows:

D. Class 5 of the Amended Plan consists of the allowed secured claim of [Farmers] in the sum of \$95,146.00. This is a fully secured claim, collateralized by a security interest in [Jamie's] equipment and accounts receivable. Interest shall accrue on the outstanding balance at the rate of 10.25% and payments of \$1,456.37 per month will commence thirty (30) days after the Effective Date of the Amended Plan for a term of ninety-six (96) months. This claimant's lien shall remain on its collateral until the indebtedness is satisfied in full.

Jamie never appealed any aspect of the plan, and thus became final.

Jamie subsequently defaulted under the plan. Consequently, on May 31, 2001, Farmers filed an amended cross-claim against Jamie detailing his default and an amended counterclaim against Star asserting Farmers' claim of a superior lien. The trial court gave Jamie and Star twenty days to file responsive pleadings. Neither party filed a response, and on September 21, 2001, the Marion Circuit Court granted Farmers' motion for default judgment against Star, thus adjudicating the liens held by Farmers as superior to any interest of Star.

Meanwhile, Sharon was made a party to Farmers' cross-claim and first amended cross-claim on August 8, 2001. On February 18, 2002, Farmers and Sharon entered into an agreed order that Farmers would recover \$48,207.22 from Sharon, and that Farmers was entitled to an order directing the sale of Jamie's equipment to satisfy the judgment, which was approved by the trial court. The

Marion Circuit Clerk issued a writ of possession on November 21, 2002, authorizing the Sheriff of Marion County to seize certain property securing Farmers' loan. Those items were eventually repossessed and sold by Farmers.

Almost six years after Farmers filed its first amended cross-claim against Jamie, and due to the lack of any filing by Jamie of a response to the cross-claim, on May 26, 2007, Farmers moved for a default judgment or, alternatively, a summary judgment. A hearing on the motion was held, and Jamie appeared at the hearing with counsel and was granted twenty additional days to file a response to the motion. Jamie did not file a response. Accordingly, seventeen days after Jamie's response was due, the Marion Circuit Court issued a default judgment in favor of Farmers. Although it granted a default judgment, the trial court also found that Farmers would prevail on a summary judgment as well because of Jamie's failure to establish the existence of any issue of material fact. The judgment endorsed Farmers' secured status, confirmed the appropriateness of Farmers' repossession and sale of its collateral, and awarded Farmers the balance payable by Jamie.

On August 25, 2006, Jamie filed this appeal from the trial court's default judgment. Throughout the pendency of this appeal, Jamie filed over twenty procedural motions, including three motions pending before the Court: a motion to amend his pre-hearing statement, a motion for enlargement of time to amend his pre-hearing statement, and a motion requesting the Court to review and consider the amended pre-hearing statement. In addition to filing a response and objection

to these motions, Farmers made a motion to strike Jamie's brief and to dismiss the appeal. We will address these motions at the conclusion of this opinion.

ANALYSIS

Because Jamie is appealing directly from a default judgment, the only issue which may be considered by this Court is whether the pleadings are sufficient to support the judgment. *Jeffrey v. Jeffrey*, 153 S.W.3d 849, 851-52 (Ky. App. 2005). Our review of the pleadings in this case shows them to be more than sufficient to uphold the default judgment. Farmers alleged in its amended cross-claim that Jamie was indebted to Farmers, that Farmers was the holder of a valid security interest in Jamie's business equipment which, upon Jamie's default, was lawfully possessed and sold. Farmers' pleadings also showed that Jamie, without any cause shown, failed to respond to Farmers' claims, even when he appeared personally and with counsel at the hearing in which the trial court allowed him twenty days to respond to Farmers' motion for default judgment. Therefore, the pleadings were sufficient to support the default judgment.

Even if Jamie's claims of error by the Marion Circuit Court were a proper subject for this Court's review, in not a single one of the claims does Jamie provide a citation to the record illustrating whether and in what method the issue was preserved for review. None of the arguments he advocates in his brief was presented to and ruled on by the lower court, although Jamie was presented with multiple opportunities to do so. The foundation of appellate review is based on the principle that the lower court has first had a chance to deliberate and decide upon

the issues. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App.

2006). As stated by this Court:

The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.

Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky. App. 1980). Jamie has failed to preserve any of his claims of error in the lower court, thus none can be considered for the first time in this appeal.

The only claim that may be subject to appellate review without preserving the issue at the trial court level is Jamie's claim that the default judgment is null and void because the agreed order entered into between Sharon and Farmers resulted in manifest injustice towards Jamie. An error under Kentucky Rules of Civil Procedure (CR) 61.02 to avoid "manifest injustice" does not have to be preserved to be subject to appellate review. CR 61.02. The rule is applied sparingly and only to exceptional situations affecting the fairness, integrity or public reputation of judicial proceedings. *See Deemer v. Finger*, 817 S.W.2d 435 (Ky. 1990). The rule is inapplicable to a situation such as this, in which Sharon was merely satisfying that portion of Jamie's debt which she had personally guaranteed, thereby securing her financial wellbeing.

Based on the foregoing, the judgment of the Marion Circuit Court is affirmed.

ORDER

Jamie filed a motion to amend his pre-hearing statement, a motion for enlargement of time to amend his pre-hearing statement, and a motion requesting the Court to review and consider the amended pre-hearing statement. Additionally, Farmers filed a motion to strike Jamie's brief and to dismiss the appeal. The Court, having considered such motions, and the responses thereto, ORDERS that the foregoing motions are hereby DENIED AS MOOT.

ALL CONCUR.

ENTERED: November 20, 2009

/s/ Denise G. Clayton
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Jamie R. Wade, III
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Joseph H. Mattingly, III
Lebanon, Kentucky