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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002324-MR

DANNY L. EMBRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 06-CI-007627

MAC'S CONVENIENCE STORES, LLC (D/B/A/ CIRCLE K & CIRCLE K MIDWEST; UNKNOWN EMPLOYEES AND AGENTS OF MAC'S CONVENIENCE STORES, LLC; CONSTITUTION STATE SERVICES, LLC; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; AND SYLVIA FIERROS — APPELLEES

OPINION
AFFIRMING IN PART
REVERSING AND REMANDING
IN PART

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

ISAAC, SENIOR JUDGE: On June 23, 2006, Danny Embry injured his ankle as he stepped from his trailer onto uneven pavement at a Circle K gas station and convenience store. He brought suit in Jefferson Circuit Court against Circle K Midwest.[2] Embry was initially granted a default judgment which was later set aside on the grounds of excusable neglect. The circuit court thereafter granted summary judgment to the defendants and this appeal by Embry followed.

Embry visited the Circle K to buy gasoline. He was driving a pickup truck which hauled a trailer carrying two commercial lawn mowers, weed eaters and a backpack blower. Embry parked next to a gas pump, opened the gas caps on the lawn mowers and then stepped into the trailer to check the gas levels of the mowers. He then stepped backwards from the trailer to the ground and fell, injuring his ankle. According to Embry, his fall was caused by stepping onto an area of uneven pavement. Embry alleges that as a result of the fall, he developed reflex sympathetic dystrophy, a chronic and debilitating neurological condition.

The manager of the Circle K notified the company's insurance administrator, Karen Frazer, of Embry's accident. Frazer in turn reported the incident to Sylvia Fierros, of Constitution State Services, LLC (CSS). CSS is the third-party administrator for liability claims for Mac's Convenience Stores, LLC.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] "Circle K" and "Circle K Midwest" are official assumed names of Mac's Convenience Stores, LLC. On July 23, 2007, Embry was granted leave to amend his complaint to name Mac's Convenience Stores, LLC as the appropriate defendant.

CSS handles claims for Circle K and Circle K's liability carrier, St. Paul Fire and Marine Insurance Company.

Embry filed suit against Circle K Midwest on August 29, 2006, alleging negligence on the part of Circle K in maintaining its property. He was later granted leave to amend his complaint to name Mac's Convenience Stores, LLC, as the appropriate defendant. Prior to the filing of the complaint, Embry's counsel had already made contact with Fierros, who wrote him a letter on August 17, 2006, informing him that Embry's claim was being denied. In a letter of August 28, 2006, she refused counsel's request for a copy of video surveillance tape of the gas station from the day Embry's injury occurred. Embry's counsel tendered a courtesy copy of the complaint and discovery requests to Fierros the day before he filed the complaint.

When Frazer received Embry's complaint from Circle K's registered agent, she forwarded it to Fierros, who confirmed receipt of the complaint and advised Frazer that legal counsel would be retained to take over handling of the claim. Fierros and plaintiff's counsel agreed to an extension of time for Mac's Stores to file an answer to the complaint. According to Embry's counsel, he agreed to the extension in order to give Fierros time to "clear up the picture" on the video surveillance tape. He also states that when Fierros forwarded the tape, the portion showing Embry's fall was missing.

After receiving the extension of time to file an answer, CSS claims handler John McCarthy instructed attorney Michael S. Maloney of the law firm

Schiller, Osbourne and Barnes, to file an answer. As evidence for this, CSS produced a facsimile cover sheet, dated September 29, 2006, which was allegedly sent by McCarthy to Maloney. The cover sheet states, "We have extension until October 4th. Sylvia [Fierros] would like you to file Answer ASAP. File to follow next week." At Maloney's law firm, incoming facsimiles are initially transmitted to a telecommunications provider who in turn forwards the facsimile to the attorney's e-mail inbox. According to Maloney, he never received the e-mail facsimile. Consequently, no answer or responsive pleading was filed.

Five days after the expiration of the extended time to file an answer, Embry filed a motion for entry of default and a default judgment certificate. The trial court entered an order on October 16, 2006, granting the motion. A bench trial on damages was held on February 26, 2007. Embry requested damages of slightly over $3.9 million, which included items such as past and future medical expenses, lost wages and pain and suffering. The trial court entered judgment in the amount of $2.29 million. During the course of the hearing, the trial court commented to Embry's counsel that the court assumed Circle K Midwest had no defenses to Embry's claims. Counsel responded by stating, "We tried, we really tried."[3]

[3] This account of what occurred at the hearing is taken from the appellate brief of Mac's Convenience Stores, LLC, which provides a citation to a videotape of the damages hearing held on February 26, 2007. The appellant has not designated the videotape of this hearing and hence it is not in the record before us. Appellant does not dispute Mac's Convenience Stores' account of what occurred at the hearing.

On April 2, 2007, Maloney received a package from CSS containing a letter from Fierros and the Embry claims file. The letter stated that the claims file had previously been sent to Maloney and requested a current status on the case. Maloney had no idea what the letter was about. He contacted Embry's counsel and an employee of CSS, who sent over a copy of the fax cover sheet. Maloney immediately filed a notice of appeal on behalf of Circle K as well as a motion to set aside the default judgment and a motion to file a late answer.

The trial court granted the motion to set aside the default judgment based upon a finding of excusable neglect. In setting aside the judgment, the court acknowledged that Fierros had been negligent in failing to make certain that Maloney received the facsimile transmission requesting that he file an answer in the lawsuit. The court also found a valid excuse for that negligence, however, in that Fierros apparently sent the facsimile, obtained a confirmation sheet for it, and earnestly believed that the transmission had gone through. The court concluded that "some indeterminate error in cyberspace" caused the disappearance of the facsimile. The court found that the evidence of the confirmation sheet and Fierros's confidence in Maloney excused her neglect in failing to follow up on the facsimile.

Embry filed a motion for reconsideration and requested that he be allowed to conduct discovery regarding Circle K's excuse for its failure to file an answer. Although the court had originally granted the request for limited discovery from the bench, the court ultimately entered a written order denying it.

On July 18, 2007, Embry successfully moved for leave to file an amended complaint and named Mac's Convenience Stores, LLC, as the appropriate party defendant. The complaint also added CSS, St. Paul Insurance and Sylvia Fierros as defendants. The complaint added allegations of falsifying business records, civil conspiracy, common law bad faith and violation of the Unfair Claims Settlement Practices Act. These latter claims were based on the allegations that the video surveillance tape had been altered.

On June 4, 2009, Mac's Stores moved for summary judgment arguing that it had no duty to Embry because the uneven pavement was an open and obvious condition. The trial court granted partial summary judgment dismissing Embry's personal injury claims on August 25, 2009, and then dismissed the remaining claims on November 13, 2009. This appeal followed.

Embry argues that the trial court erred in: (1) setting aside the default judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02; (2) granting summary judgment based on the hazard being "open and obvious"; and finally, (3) granting summary judgment in favor of the remaining appellees on Embry's derivative claims.

The Default Judgment

Embry argues that the trial court abused its discretion in setting aside the default judgment because Circle K failed to meet its burden for extraordinary relief under CR 60.02. CR 55.02 states, "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." To have a default

judgment set aside, the moving party must demonstrate good cause by showing: "(1) a valid excuse for the default, (2) a meritorious defense to the claim, and (3) absence of prejudice to the non-defaulting party. 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). A movant seeking to set aside a default judgment must show that the extenuating circumstances amount to one of the reasons specified in CR 60.02. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329, 332 (Ky. 2007).

CR 60.02 reads in its entirety:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

If the circumstances constitute "mistake, inadvertence, surprise, or excusable neglect," then the movant may be entitled to relief, but only if she brings her motion within the rule's one-year limitations period. *Asset Acceptance,* 241

S.W.3d at 332. In the case before us, the motion was brought within the one-year limitations period and the trial court found excusable neglect.

"[T]he determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court. . . ." *Schott v. Citizens Fidelity Bank and Trust Co*., 692 S.W.2d 810, 814 (Ky.App. 1985). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Although default judgments are not favored, trial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse. *Howard v. Fountain,* 749 S.W.2d 690, 692 (Ky.App. 1988). "Carelessness by a party or his attorney is not reason enough to set an entry aside." *Blanton*, 819 S.W.2d at 729. However, "[a] default judgment deprives the client of his day in court, and should not be used as a vehicle for disciplining attorneys." *Shepard Claims Service, Inc. v. William Darrah & Associates*, 796 F.2d 190, 192 (6th. Cir. 1986).

In *Tennill v. Talai*, 277 S.W.3d 248, 250 (Ky. 2009), the Kentucky Supreme Court stated that "[g]ood cause is not mere inattention on the part of the defendant . . . his attorney, or his insurance carrier." Embry argues that the excuse in this case amounted to mere inattention on the part of Fierros. He further argues that the court's decision is internally contradictory because the court found negligence on the part of CSS but also found that Mac's had a valid excuse for

default. He argues that the negligence of CSS must be imputed to Mac's under the theory of agent and principal.

There is no question that the trial court found negligence on the part of Fierros, but CR 60.02(a) expressly allows a judgment to be set aside for *excusable* neglect. The trial court in this case found the neglect to be excusable because Fierros received a facsimile confirmation sheet and had no reason to believe that Maloney, a well-respected attorney, had not received the facsimile. Furthermore, as the trial court aptly noted, "[w]hile it is true that the negligence of Mac's Stores' counsel or other agent is imputed to the company itself, it is equally true that the agent's excuse for her negligence also excuses Mac's Stores."

Embry next argues that Mac's failed to meet its evidentiary burden under CR 60.02 and suggests that it should have tendered affidavits from CSS employees or the letter that was sent to Maloney with the claims file. An appellate court will set aside a circuit court's findings of fact only if those findings are clearly erroneous. CR 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, [that] has sufficient probative value to induce conviction in the mind of a reasonable person." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (internal citations omitted). In denying Embry's motion to conduct discovery for the purpose of determining the truth of Mac's proffered excuse, the trial court stated as follows:

> The uncontroverted evidence of record (the facsimile confirmation sheet and Mr. Maloney's affidavit) supports Mac's Store's version of the facts. Without more than an unsupported allegation, the court is more than hesitant to believe that both Mac's Stores and Mr. Maloney (who no longer has an interest in the outcome of this case) would risk legal sanction and professional discredit by filing false documents and statements with the Court. Discovering where in cyberspace the transmission lost its way will not advance the investigation of the merits of this case.

We are required to give due regard to the trial court's assessment of Maloney's credibility. CR 52.01. We conclude that the findings of the trial court are supported by substantial evidence.

Embry further argues that, because the court specifically found that Embry had suffered prejudice stemming from the setting aside of the default judgment, Mac's failed to meet its burden of showing absence of prejudice to the non-defaulting party. The trial court stated that "[i]t would be disingenuous . . . to find a complete absence of prejudice to Mr. Embry in setting aside the default judgment." In an effort to mitigate any prejudice, the trial court awarded attorney's fees to Embry. Embry's attorneys refused the award, claiming that acceptance would signal acquiescence in the lower court's ruling and a waiver of error on behalf of Embry, which they describe as professional malpractice. Embry argues that he has incurred significant legal costs and personal costs paying for physical therapy which is not covered by his health insurance. He has also not been able to work and consequently has used up his personal savings and has begun to sell his belongings.

Setting aside any default judgment will prejudice the non-defaulting party to some extent. The trial court found that the prejudice to Embry in having to prosecute his case was hardly significant in comparison to the $2 million in damages that Mac's would be obliged to pay if the default judgment were reinstated. We see no error in the trial court's reasoning and its orders setting aside the default judgments are affirmed.

Embry has also asked us to consider his case in light of *Hutcherson v. Hicks*, 320 S.W.3d 102 (Ky.App. 2010), which was rendered after briefing was completed in this appeal. The facts of *Hutcherson*, in which this Court held that the trial court had abused its discretion in setting aside a default judgment, are distinguishable. The defendant in that case acknowledged receipt of proper notice of the filing of a malpractice action against him but did not respond for over four years. In Embry's case, Fierros did respond in a timely manner to the receipt of the complaint but neglected to check that the facsimile directing counsel to file an answer had reached its destination at Maloney's office.

The Summary Judgment

Also after briefing was completed in this appeal, the Kentucky Supreme Court rendered its opinion in *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), which modified the "open and obvious" doctrine of premises liability. In *Kentucky River*, the Kentucky Supreme Court adopted the position of the Restatement (Second) of Torts with respect to "open and obvious conditions," which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*.

Kentucky River, 319 S.W.3d at 389 quoting Restatement (Second) of Torts § 343A(1) (1965)(emphasis added).

The Supreme Court provided the following directions to the trial courts to assist them in implementing the modified standard:

> The lower courts should not merely label a danger as "obvious" and then deny recovery. Rather, they must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable.

Id. at 392.

Recognizing the pertinence of *Kentucky River* to his case, Embry filed a notice of supplemental authority with this Court which we treated as a motion to supplement authority and subsequently granted. The circuit court, however, never had the opportunity to consider the facts of this case in light of the modified standard. Nor did counsel for the parties have the opportunity to present evidence and arguments in light of the modified standard. "Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review." *Commonwealth, Department of Highways v. Williams*, 317 S.W.2d 482, 484 (Ky. 1958). "[T]he trial court . . . is in the best position to consider any

additional arguments presented to it on remand. . . . ." *Brown v. Louisville Jefferson County Redevelopment Authority, Inc.*, 310 S.W.3d 221, 225 -226 (Ky.App. 2010). Therefore, we remand this case to the trial court to consider what effect, if any, the holding in *Kentucky River* and the presentation of evidence and arguments by counsel may have on its grant of summary judgment to the appellees.

Conclusion

The order setting aside the default judgment is therefore affirmed. The orders granting summary judgment to the appellees are hereby reversed and the matter is remanded for further consideration in accordance with this opinion.

ALL CONCUR.

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