RENDERED: SEPTEMBER 28, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001123-MR

FRED MONTELEONE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 10-CI-01203

JOHN R. CUMMINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Fred Monteleone appeals the denial of a motion to set aside a default judgment entered in favor of John R. Cummins, D.V.M. for the collection of unpaid veterinary fees in the amount of $5,343.65 plus interest. Monteleone argues that the trial court erred by denying this motion since he did not have actual

notice of the claim and had a meritorious defense to it. After careful review, we affirm.

Cummins is a veterinarian who provided veterinary services for Monteleone's horses between April 8, 2008, and June 12, 2008. Monteleone lives in Broward County, Florida. On March 2, 2010, Cummins filed a complaint in the Fayette Circuit Court seeking a default judgment in the amount of $5,343.65 plus interest for the veterinary fees owed by Monteleone to him. On September 20, 2010, Fayette Circuit Court entered a default judgment for $5,343.65 plus interest. Monteleone then sought to have default judgment set aside but the motion was denied on May 24, 2011.

The record indicates that Monteleone was served with the original complaint on March 29, 2010. Then, Cummins's counsel alleges that he was contacted in early April 2010 by Andrew Feldman, an attorney, who said that he was representing Monteleone in the matter. Further, Feldman requested an extension to file a response until May 1, 2010, and Cummins's counsel acquiesced. But, after receiving no response from Feldman, in late May 2010 Cummins's counsel contacted Feldman again and advised him that he would give him until June 15, 2010, to answer the complaint. Then, after not receiving any response, in late June 2010, Cummins's counsel contacted Feldman again. He informed Feldman that if he did not receive a response in the next five days, a motion for a default judgment would be filed.

On September 3, 2010, Cummins filed a motion for default judgment. And, on September 20, 2010, the trial court granted the motion for a default judgment in the amount of $5,343.65 with pre-judgment interest at the rate of 1.5 per cent per month from December 20, 2009, until judgment followed by post-judgment interest at the rate of 12 percent per year. The trial court also ordered that Monteleone pay Cummins $200.54 in costs for the action.

Eventually, after the entry of the default judgment, Monteleone who, as previously observed, is a Florida resident, sought counsel. On April 13, 2011, he filed a motion, pursuant to Kentucky Rules of Civil Procedure (CR) 55.02 to set aside the judgment. The grounds for the motion were that Monteleone never received actual notice of the case and that he had a meritorious defense to the claim. To support these assertions, Monteleone submitted a sworn affidavit that detailed the reasons for his failure to respond to the complaint. In the affidavit, Monteleone admitted that while it is possible that he signed for the receipt of the complaint, he either lost it or neglected to open it. Thus, based on these factors, he claims that he was unaware of the complaint until he received a copy of the default judgment in September 2010. (This copy was sent by mail to the same address as the copy of the complaint.) In addition, he proffered, with the affidavit, a copy of a check that he claimed illustrated that he had paid the fees in question. The copy of a check, dated November 11, 2008, showed an amount of $9,605.89, had "paid in full" on the memo line, and appeared to have been accepted and deposited by

Cummins. Monteleone points out that Cummins did not dispute that the debt had been paid.

Cummins, however, asserts that regardless of whether Monteleone has a legal defense, his motion to set aside the default judgment should be denied because the information in the affidavit is false. Specifically, Cummins claims that Monteleone knew about the case against him and chose to ignore it. On May 24, 2011, the trial court denied Monteleone's motion to set aside the default judgment. Monteleone now appeals from this order.

We review a trial court's decision to deny a motion to set aside a default judgment under an abuse of discretion standard. *PNC Bank, N.A. v. Citizens Bank of N. Kentucky, Inc.*, 139 S.W.3d 527, 530 (Ky. App. 2003). Still, default judgments are not favored. *Id.* Further, appellate courts are less inclined to find an abuse of discretion when a trial court sets aside a judgment by default as opposed to when it denies a motion to set aside such a judgment. *Kidd v. B. Perini & Sons, Inc.*, 313 Ky. 727, 732, 233 S.W.2d 255, 257 (Ky. 1950). The test for an abuse of discretion is whether a "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

As in the instant case, a party subject to a default judgment may challenge the judgment under CR 55.02 and 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 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 Dev., Inc. v. Investors Realty and Mgmt. Co., Inc.*, 819 S.W.2d 727, 729 (Ky. App. 1991)(citation omitted).

Therefore, Monteleone, in order to have the default judgment set aside, must demonstrate all three elements – a valid excuse for the default, a meritorious defense, and an absence of prejudice to Cummins. Further, the moving party must demonstrate that he is not guilty of unreasonable delay in showing good cause. *Terrafirma, Inc. v. Krogdahl*, 380 S.W.2d 86, 87 (Ky. 1964). And finally, absent a timely showing, a court cannot be held to have abused its discretion when it denies a motion to set aside a default judgment. *See Jacobs v. Bell*, 441 S.W.2d 448, 449 (Ky. 1969).

Monteleone offers no explanation as to the reasons for neglecting to raise the defense asserted in his CR 55.02 motion prior to the trial court's entry of default judgment. The record shows that Monteleone was served with the original complaint on March 29, 2010. Additionally, an attorney purportedly representing Monteleone asked for an extension in time to reply to the complaint. Cummins's attorney, after several efforts to contact Monteleone's attorney, did not file a motion for a default judgment until September 3, 2010, which was five months after the complaint was served on Monteleone. The default judgment was not entered until September 20, 2010.

As an aside, we observe that it was more than a year after the filing of the original complaint and six months after the entry of the default judgment, that Monteleone, on April 13, 2011, filed his motion to set aside the default judgment. The lapse of time between the entry of the judgment and the motion to set it aside is not prompt or assiduous. And, although Monteleone never addresses the third element, that a motion to set aside a default judgment must not prejudice the non-defaulting party, the delay itself appears prejudicial to Cummins. Nor are we are persuaded by Monteleone's representations that being a Florida resident was the primary cause of his lengthy delay in obtaining counsel. Regardless, this factor does not ameliorate the prejudice caused to Cummins by the delay.

Without a valid excuse for default, a court cannot set aside a default judgment. *S.R. Blanton Dev., Inc*, 819 S.W.2d at 729. As we have said under similar circumstances, "[c]arelessness by a party or his attorney [in responding to a complaint and summons] is not reason enough to set an entry [of default judgment] aside." *Perry v. Cent. Bank & Trust Co*., 812 S.W.2d 166, 170 (Ky. App. 1991). Here, as in *Perry*, the reasons given for failing to answer the complaint and the motion for the default judgment are weak. Monteleone's contention that he did not receive actual notice is specious. He asserts that he either lost the summons or neglected to open it but never states that he did not timely receive it.

Moreover, we remain unconvinced by Monteleone's arguments regarding *Howard v. Fountain*, 749 S.W.2d 690 (Ky. App. 1988). In that case, our Court clearly expressed that good cause to set aside a default judgment is not mere

inattention on the part of the defendant or his professional representatives. *Id*. at 692. The Court said:

> We cannot say that it is an abuse of discretion in this case where "good cause" was mere inattention on the part of the defendant or his attorney, and good cause was not shown until seven months after entry of judgment regarding damages and ten months after entry of the default on the liability issue. *See Jacobs v. Bell*, Ky., 441 S.W.2d 448 (1969); *Childress v. Childress*, Ky., 335 S.W.2d 351 (1960).

Id. In essence, the Court is saying that it was not an abuse of discretion where mere inattention, which was the good cause therein, was not shown for some period of time after the entry of the judgment. Moreover, because CR 55.02 requires that all three elements be established and Monteleone was unable to meet the requisites of element one, that is, provide a valid explanation for neglecting to respond initially to the action, it is not necessary to address the other two elements.

Monteleone also contends that because the trial court's order did not comply with Kentucky Rules of the Fayette Circuit Criminal and Civil Court (KY RFCC) Rule 19, it is defective. Besides requiring that orders of the Fayette Circuit Court be endorsed, the rule also provides for exceptions when:

> 1. Counsel for the party(s) against whom the order is to be entered refuses to attest the order;
>
> 2. Counsel for the party(s) against whom the order is to be entered fails to return the order to counsel who prepared it within three business days of receipt of order;
>
> 3. The party against whom the order is to be entered is not represented by counsel; or

4. There was no opposition to the motion at Motion Hour.

FRCC Rule 19(B)(1-4). Neither Monteleone nor the record clarifies whether any exceptions to this rule occurred here. Notwithstanding this factor, although a technical violation of the local rule may have occurred, the error was harmless. Monteleone clearly was made aware that his motion to set aside the default judgment was denied.

Accordingly, we conclude that the trial court's decision declining to set aside the default judgment was not arbitrary, unreasonable, unfair, or unsupported by sound legal principle, and hence, not an abuse of discretion. For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard A. Getty
Kristopher D. Collman
Lexington, Kentucky

BRIEF FOR APPELLEE:

David A. Franklin
Natalie J. Damron
Lexington, Kentucky