

RENDERED: FEBRUARY 21, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001366-MR

JAZETTE ENTERPRISES LIMITED, OWNER
OF SPORTSBOOK.COM, PLAYERONLY.COM,
AND MYSPORTSBOOK.COM; SPORTSBOOK.COM;
PLAYERONLY.COM; AND MYSPORTSBOOK.COM APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-01409

COMMONWEALTH OF KENTUCKY
Ex rel. J. MICHAEL BROWN, SECRETARY
JUSTICE AND PUBLIC PROTECTION CABINET APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: This appeal follows several years of litigation wherein the Appellee, the Commonwealth of Kentucky (hereinafter “the Commonwealth”) sought forfeiture of domain names allegedly used for illegal internet gambling. On

appeal, Appellant, Jazette Enterprises Limited (hereinafter “Jazette”), argues that the Franklin Circuit Court erred by failing to allow it to file belated pleadings contesting the forfeiture of its domain names after the court’s thirty (30) day deadline to appear to contest the forfeiture had passed. For the reasons more fully explained below, we AFFIRM.

I. BACKGROUND

This case is procedurally and factually complicated. For brevity’s sake, we summarize only the facts and history necessary to place the narrow issue on appeal in the proper context.

On August 26, 2008, the Commonwealth filed a civil *in rem* action in the Franklin Circuit Court seeking forfeiture to the Commonwealth of 141 internet domain names it alleged were illegal gambling devices, and therefore, subject to forfeiture pursuant to KRS¹ 528.100 and KRS 500.090. From the outset, one of the major issues in the forfeiture was whether the individual domain name owners had to come forward and assert their interests and identities before the court.

Initially, the domain names themselves sought to appear to contest the forfeiture. The trial court ruled that actual owners, as opposed to the domain names, had to come forward because the domains were intangible properties that did not have standing. The trial court's decision on this issue was challenged via a writ of prohibition filed by an attorney representing several of the domain names, including the three domains later revealed to be owned by Jazette. The Kentucky

¹ Kentucky Revised Statutes.

Supreme Court held that the domain names could not appear through counsel “due to the incapacity of domain names to contest their own seizure.” *Com. ex rel. Brown v. Interactive Media Entm't and Gaming Ass'n, Inc.*, 306 S.W.3d 32, 40 (Ky. 2010).

Thereafter, the trial court conducted additional proceedings. Eventually, the trial court entered a final order of forfeiture on April 20, 2012. The trial court’s order gave the named domain owners, including Jazette, “thirty (30) days in which to make a personal appearance and make a claim to the domain names. If the Defendants do not appear within thirty (30) days from the entry of this Order, the domain names shall be forfeited fifteen (15) days following the expiration of that time.” The thirty day deadline passed on May 21, 2012, with no response from Jazette. The forfeiture of those domains was therefore set for fifteen days later, on June 5, 2012.

However, on June 4, 2012, Jazette filed a motion for leave to file an answer and an entry of appearance admitting, for the first time, to owning the three domain names in question. Jazette also filed an attached memorandum and (proposed) answer. Then, on June 5, 2012, Jazette filed a revised motion for leave to file an answer. In the motions, Jazette acknowledged that it did not comply with the thirty day deadline. Jazette explained that it was not able to comply with the deadline because it had taken more than thirty days for it to make a corporate decision regarding whether it should enter an appearance.

On June 5, 2012, the domains were forfeited to the Commonwealth pursuant to the terms of the prior orders. Thereafter, the trial court entered an order denying Jazette's motion for leave and striking the answer on June 15, 2012.

In its order, the trial court explained that:

[The April 20, 2012 Order] was not a subpoena or a demand to appear and defend against the forfeiture. Rather, the Order was a "last chance" time period in which any Defendant who wished to prove that it had complied with this Court's October 16, 2008 Order, which required geographical blocking ("geo-blocking") of all illegal gambling websites accessible within the Commonwealth within thirty days of the entry of the Order, could come before the Court and be removed from the forfeiture action. Jazette readily admits that the three domain names did not geo-block pursuant to this Court's Order.

Jazette then filed a motion for reconsideration, which the trial court also denied. It is from these orders that Jazette now appeals.

II. STANDARD OF REVIEW

Jazette's sole assignment of error on appeal is that the trial court erred by denying it the right to contest the forfeiture of its property by refusing to accept its belated answer. Jazette argues that it acted within the time specified in the trial court's order, or, alternatively, that its failure to enter an appearance within 30 days was excusable neglect.

Trial courts have considerable discretion in managing their dockets and the cases before them. In [*Warfield Natural Gas Co. v. Allen*, 33 S.W.2d 34, 35](#) (Ky. 1930), the court held that "as an aid in the orderly dispatch of litigation,

courts are vested with the right to adopt and promulgate reasonable rules for the guidance of litigants and their counsel and which they are as much under duty to observe as if the rules had been created by statutory enactment in the form of a Code of Practice.” *See also Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky.1961) (“[C]ourt’s have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice.”) Additionally, Civil Rule 6.02 states:

When ... by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (a) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or (b) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect...

Since the setting and enforcement of such deadlines are within the trial court’s discretion, we review this matter under the abuse of discretion standard. Kentucky courts generally define an abuse of discretion as a court acting arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles. [*Commonwealth v. English*, 993 S.W.2d 941, 945 \(Ky.1999\)](#).

III. ANALYSIS

We begin our analysis by noting the limited issue raised on appeal. The only question is whether the trial court erred by denying Jazette’s motion for leave to file an answer and striking the answer.

Jazette first argues that it filed its motion and answer within the time period allocated by the trial court and thus the court erred by striking its answer. Jazette specifically asserts that the fifteen day period after the expiration of the thirty day entry of appearance deadline indicates that the trial court intended to allow additional time for an owner to come forward. We are reluctant to assign such an intention to the trial court when there is no evidence to support such an interpretation in the record. In fact, the same judge that originally ordered the fifteen day period before the forfeiture, also ordered that Jazette's failure to file during the original thirty day period was fatal.

While we cannot speculate as to the trial court's decision to delay the forfeiture by an additional fifteen days past the deadline, it is very clear from the trial court's orders that the owners had thirty days to come forward and appear. Jazette failed to comply with this unambiguous deadline. Jazette waited fourteen days after the deadline to file an appearance and to seek leave to file an answer and then submitted a revised version on the day of the forfeiture deadline. Given these long delays and the very clear thirty day deadline, we do not believe that the trial court was under any obligation to extend the date of filing into the fifteen day period. The trial court was therefore clearly acting well within its discretion in denying Jazette's motion for leave to file an answer.

Jazette also argues that CR15.01 is applicable in this matter. It states that:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Jazette argues that a prior motion to dismiss filed by the domain names should be treated as an answer, and therefore, its June 4 and 5 proposed answer was merely an amendment, which mandates leave being freely given when justice so requires.

This argument is without merit primarily because a motion to dismiss is not a pleading. *See* CR 7.01. Moreover, our Civil Rules have never indicated that a motion to dismiss takes the place of an answer. To the contrary, the Civil Rules provide a date for filing an answer after a trial court denies a motion to dismiss. *See* CR 12.01. Furthermore, Jazette's proposed answer and all subsequent pleadings make no mention that the answer was merely an amendment.

Finally, Jazette argues that its failure to enter an appearance within the thirty day deadline was excusable neglect. As discussed above, pursuant to CR 6.02 a trial court may, in its discretion, permit an extension of the time period for action when the failure to act was due to excusable neglect. Excusable neglect is generally defined as:

A failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

Black's Law Dictionary 479 (3rd P.Ed. 2006). Furthermore, excusable neglect is ordinarily understood to be the act of a reasonably prudent person under the same circumstances. [*Sieb's Hatcheries, Inc. v. Lindley*, 13 F.R.D. 113 \(W.D. Ark. 1952\)](#).

The record in this case does not support Jazette's contention that its failure to file within the thirty day period was excusable neglect. When Jazette filed its motion for leave to file an answer, it admitted that it did not meet the thirty day deadline and stated that it took longer than the thirty days to make a corporate decision as to whether to come forward. Clearly the failure to file within thirty days was a conscious/deliberate *choice* made by Jazette as it contemplated its decision, and was therefore not an unexpected or unavoidable hindrance or accident.

Additionally, while thirty days may be not be an abundant amount of time to make a major corporate decision under certain circumstances, Jazette, through its ownership of the domains, was involved in this matter for nearly four years before the issuance of the trial court's April 20, 2012, order. In fact, the attorney who attempted to represent the Jazette domains themselves had been

ordered to reveal the identity or identities of his client(s) multiple times over the course of the litigation. This same attorney ultimately filed the notice of appearance acknowledging that he actually represented Jazette. There was no last minute surprise that Jazette, as the owner of the domains, would have to come forward to fight the forfeiture. There is also no record of an attempt to have the thirty day deadline extended before it elapsed.

Though Jazette initially stated that its delay was due to needing more time to make a decision, Jazette later argued that “a reasonably prudent person would interpret the fifteen (15) day window prior to forfeiture as a period of time in which an entry of appearance could be made to contest forfeiture. Thus [Jazette’s] delay in filing is excusable neglect.” We disagree.

It is our view a reasonably prudent person faced with a clear and unambiguous thirty day deadline would not have waited fifteen days after the deadline to act. We fail to understand how a reasonably prudent person could have interpreted the phrase “if the Defendants do not appear within thirty (30) days from the entry of this Order, the domain names shall be forfeited fifteen (15) days following the expiration of that time,” to mean he had forty-five days to appear.

We also note that our decision is supported by the content of Jazette’s proposed answer. As discussed above, the trial court’s April 20, 2012, order related back to a prior order requiring the domain defendants to present evidence of geo-blocking in order to prevent forfeiture. Jazette did not even mention geo-

blocking in its answer. It is abundantly clear that Jazette did not follow the trial court's order as to timing or content.

There were several years in which Jazette could have come forward and contested the forfeiture of its domain names. Instead, Jazette waited until fourteen days after the final deadline to file a substantially deficient answer. Therefore, with additional consideration for the dramatic and lengthy tenure of this matter, we hold that the trial court acted soundly within its discretion by denying Jazette's motion for leave to file an answer and by striking the answer.

VI. CONCLUSION

Under the totality of the circumstances in this case, we cannot say that the trial court acted arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles. It is our view that the trial court acted soundly within its discretion in denying Jazette's motion for leave to file an answer. Finding no other ground for reversible error, we AFFIRM the order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANTS:

William E. Johnson
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

D. Eric Lycan
Lexington, Kentucky