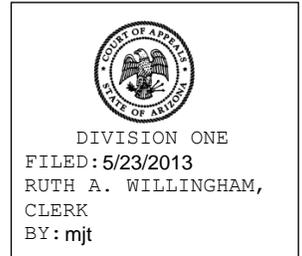


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



HENRY WILLIE SMART, III,) 1 CA-CV 12-0393
)
Plaintiff/Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
HARVEY PHILLIP, and) Rule 28, Arizona Rules
PHILLIP'S BAIL BOND AGENCY,) of Civil Appellate
INC.,) Procedure)
Defendants/Appellants.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-013236

The Honorable Maria del Mar Verdin, Judge

REVERSED AND REMANDED

Pianin and Associates, PC Scottsdale
By Michael P. Pianin
Attorneys for Plaintiff/Appellee

Robert L. Evans Phoenix
Attorney for Defendants/Appellants

O R O Z C O, Judge

¶1 Harvey Phillip (Phillip) appeals the trial court's order denying his motion to set aside entry of default and default judgment and his motion to reconsider the sanctions

imposed. For the following reasons, we reverse the trial court's entry of default and default judgment and remand for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 On January 13, 2009, Henry Willie Smart, III (Smart) suffered a gunshot wound to the chest, inflicted by bounty hunter Gregory Bryant (Bryant). Bryant was conducting a bail recovery arrest while working with two other bounty hunters, Michael Wagner (Wagner) and Ponciano Gonzalez (Gonzalez), who were also present at the time of the incident. Smart filed a complaint on April 28, 2010, against multiple parties, including Phillip, alleging that they were negligent.¹ On August 9, 2010, the complaint was served upon Phillip personally at his home address on Linden Road in Flint, Michigan. The complaint alleged that Phillip was liable for the negligent acts of the Bounty Hunters due to the scope of their employment with Phillip.²

¶13 On September 3, 2010, attorney Kyle Israel (Israel) filed a notice of appearance on behalf of Phillip and the Business. On January 4, 2011, Smart filed an application for

¹ Bryant, Wagner, and Gonzalez (collectively, the Bounty Hunters) were dismissed without prejudice. Therefore, they are not parties to this appeal.

² Phillip owned and operated Phillip's Bail Bonds Services Agency, Inc., a Michigan corporation (the Business).

entry of default, alleging that Phillip had not filed an answer to the complaint, thus failing to appropriately plead or otherwise defend. Smart attached a copy of correspondence mailed to Israel stating that Smart's counsel had attempted to contact Israel by telephone and in writing, without success in regards to Phillip filing an answer to the complaint. On the same day that Smart filed an application for the initial entry of default, Phillip filed an answer to Smart's complaint, denying all of the allegations.³ Phillip specifically denied any responsibility for the acts of the Bounty Hunters. On January 14, 2011, Phillip filed an objection to Smart's application for entry of default, stating that it was moot because an answer had been filed.

¶4 On April 8, 2011, Smart filed a request for a comprehensive pretrial conference, acknowledging his receipt of Phillip's answer to the complaint. On April 13, 2011, the court entered an order mandating that the parties submit a joint pretrial memorandum no later than May 13, 2011. The next day, Israel filed a motion to withdraw as counsel of record for Phillip and listed the address for Phillip where further legal correspondence should be sent as an address on Wood Haven Road

³ Israel filed a notice of appearance twenty-nine days after Phillip was served with the complaint; however, he did not file the answer until over five months after service.

in Flint, Michigan (Wood Haven address).⁴ The court granted Israel's motion on May 10, 2011.

¶15 On June 15, 2011, the trial court set a status conference for July 12, 2011. Smart and his counsel appeared at the hearing; however, Phillip did not appear in person or by counsel. Smart subsequently filed a second motion for default on July 14, 2011, and mailed a copy to the Wood Haven address on record. On August 31, 2011, the trial court struck Phillip's answer as a sanction pursuant to Arizona Rules of Civil Procedure 16(f) and 37(b)(2)(C) for failing to appear and plead or otherwise defend. A default judgment was entered against Phillip on October 5, 2011, granting Smart a monetary award in the amount of \$750,000.

¶16 On February 8, 2012, Phillip filed a motion to set aside entry of default and default judgment, as well as a motion to reconsider the sanctions imposed. Phillip claimed that he was unaware that Israel had withdrawn as his counsel, that he was not informed of the dates of the trial court proceedings, and that he never told Israel to send correspondence to the Wood Haven address. Israel filed a response, stating that he sent all communications to Phillip at the Wood Haven address and that he did not undertake independent research to come up with that

⁴ Phillip provided affidavits stating that the Wood Haven address was the personal address of his brother, who was also co-owner of the Business.

address. The trial court found “[n]o good cause appearing” and denied the motion to set aside entry of default and default judgment, as well as the motion to reconsider the sanctions imposed.

¶17 Phillip timely appealed. We have jurisdiction under Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.2 (Supp. 2012).

DISCUSSION

Sanctions Resulting in Default

¶18 Phillip argues that the trial court abused its discretion by refusing to set aside the default and default judgment that resulted after sanctions were imposed. Phillip also contends that the trial court erred in failing to hold an evidentiary hearing to determine whether it was Phillip’s or Israel’s fault that Phillip did not appear at pretrial conferences and otherwise participate in the legal proceedings.

¶19 The decision whether to vacate an entry of default is within the discretion of the trial court and will not be set aside unless the court has abused such discretion. *Richas v. Superior Court*, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982). “The moving party has the burden of demonstrating good cause for vacating the entry of default - that is, grounds such as mistake, inadvertence, excusable neglect and due diligence.” *State ex. rel. Corbin v. Marshall*, 161 Ariz. 429, 431-32, 778

P.2d 1325, 1327-28 (App. 1989).

¶10 The sanctions provided for under Rule 16(f) mirror discovery sanctions under Rule 37(b); therefore, the standards and case law applicable to discovery sanctions apply to Rule 16(f) sanctions. *Estate of Lewis v. Lewis*, 229 Ariz. 316, 323, ¶ 18, 275 P.3d 615, 622 (App. 2012). "In reviewing a dismissal for discovery violations, we must uphold the trial court's order unless the record reflects a clear abuse of discretion." *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P'ship*, 196 Ariz. 146, 147, ¶ 5, 993 P.2d 1110, 1111 (App. 1999). However, "when a court imposes severe sanctions such as dismissal, striking a pleading, or entering a default judgment, its discretion is more limited than when it employs lesser sanctions." *Lewis*, 229 Ariz. at 323, ¶ 18, 275 P.3d at 622 (citation and internal quotation marks omitted). Drastic sanctions that run counter to disposing of actions based on the merits are generally disfavored and "must be based on a determination of willfulness or bad faith by the party being sanctioned." *Id.* at 324, ¶ 18, 275 P.3d at 623; see also *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958) ("Rule 37 should not be construed to authorize dismissal of [a] complaint because of [a] petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability,

and not to willfulness, bad faith, or any fault of petitioner."). "[A]ny doubts should be resolved in favor of the party seeking to set aside a default judgment." *Union Oil Co. of Cal. v. Hudson Oil Co.*, 131 Ariz. 285, 288, 640 P.2d 847, 850 (1982).

¶11 Before sanctions are imposed that result in a default judgment, due process requires that the court hold an evidentiary hearing to determine whether the party or party's counsel is at fault for the discovery violation. *Seidman v. Seidman*, 222 Ariz. 408, 411, ¶ 19, 215 P.3d 382, 385 (App. 2009). During the evidentiary hearing,

the court must make express findings as to (1) whether the fault for the violation lies with the client or counsel; (2) whether the violation was committed willfully or in bad faith; and (3) whether the egregiousness of the violation warrants the ultimate sanction of dismissal or some lesser sanction.

Id. at ¶ 20. However, such a hearing may not be required when the facts are apparent from the record. *Hammoudeh v. Jada*, 222 Ariz. 570, 572-73, ¶¶ 7, 12, 218 P.3d 1027, 1029-30 (App. 2009) (an evidentiary hearing was unnecessary because it was apparent from the record that appellant, not appellant's counsel, was responsible for obstructing discovery).

¶12 Unlike in *Hammoudeh*, the record here shows that there are questions as to whether it was due to Phillip's or Israel's conduct that Phillip failed to appear at, or participate in, the

pretrial proceedings. "When questions arise as to a party's bad faith or willful misconduct in violating a[n] . . . order, fundamental fairness requires that the [trial] court hold an evidentiary hearing prior to entry of default judgment or dismissal." *Robinson v. Higuera*, 157 Ariz. 622, 625, 760 P.2d 622, 625 (App. 1988). Phillip attached an affidavit to his motion to set aside default that stated he had not received any mail related to court dates or court hearings and had not been informed that Israel had withdrawn from representation. Phillip also attached an affidavit from his brother and co-owner of the Business, who resides at the Wood Haven address, in which his brother stated that he had not received any mail from Israel that contained a motion to withdraw from representation. Phillip's brother also stated that he had not received any letters from any other attorney or any letters to Phillip from Smart's attorney containing notices of court hearings or court judgments. However, Phillip did acknowledge that he received "a letter dated October 4, 2011, from the Clerk of the Maricopa County Superior Court . . . that had been damaged and delayed by the United States Postal Services, notifying [him] of the default hearing and judgment of October 4, 2011" at the Wood Haven address.

¶13 Israel's response to the motion to set aside default does not address whether his client gave him the Wood Haven

address for purposes of corresponding with him throughout the legal proceedings. Israel merely states that he "did no independent research to obtain [the Wood Haven] address." Phillip's affidavit does state that he told Israel that the Wood Haven address was where records were kept relating to the Business, but that he in no way indicated that it was the address where he lived or could be served with notices of legal proceedings.

¶14 In this case, it is unclear whether Phillip's non-appearance was the fault of Phillip or Israel. Israel initially failed to file an answer within the appropriate time frame on behalf of Phillip. See Ariz. R. Civ. P. 4.2(m). He also did not respond to Smart's counsel's correspondence and inquiries. In addition, he withdrew from representation the day after the court ordered the parties to submit a joint pretrial memorandum at a future date. Therefore, questions remain concerning whether Phillip's lack of participation in the proceedings was due to bad faith and willful misconduct.

¶15 Based on the record before us, we find the trial court abused its discretion in denying Phillip's request for hearing on his motion to set aside the entry of default and the default judgment.

Default Judgment

¶16 Phillip argues that the trial court erred in failing

to set aside the default judgment for inadequate notice and by failing to hold a default judgment hearing as to the amount of damages awarded. Because we are reversing the trial court's order granting the default, we also vacate the default judgment.

¶17 We also remand this matter to the trial court, so that an evidentiary hearing may be held. If the court finds that Phillip willfully, with bad faith or through his own fault failed to appear, then it may, if it still deems appropriate, reinstate the default and default judgment against Phillip. If the trial court finds Phillip was not at fault, it may select whatever other sanction, if any, it deems appropriate. In remanding this matter, we offer no opinion on whether the default and default judgment should be reinstated.

Attorney Fees

¶18 Smart requests an award of attorney fees and costs associated with the appeal. Because Smart is not the prevailing party on appeal, we decline to award attorney fees and costs. As the prevailing party, Phillip is awarded costs upon his compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶19 For the foregoing reasons, we reverse the entry of default, vacate the default judgment and remand for further proceedings consistent with this decision.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

ANDREW W. GOULD, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge