

RENDERED: September 19, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2214-MR

EAGLE CAPITAL MORTGAGE, LTD.

APPELLANT

V.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 96-CI-82

VERNON FARMER; and ALEFAIR FARMER

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, KNOPF, and SCHRODER, Judges.

GUDGEL, JUDGE: This is an appeal from a default judgment granted by the Harlan Circuit Court in favor of appellees Vernon and Alefair Farmer against appellant Eagle Capital Mortgage, Ltd. (Eagle) in an action seeking damages stemming from defective home improvement work which was financed by Eagle. Eagle contends that the court erred by granting the default judgment. We disagree. Hence, we affirm.

On February 9, 1996, the Farmers filed an action against Eagle, a Texas limited partnership, and certain codefendants in Harlan Circuit Court alleging inter alia that Eagle's codefendants had performed defective home improvement work at their home and had promised to help the Farmers obtain

financing for the work through a low interest FHA loan, but instead had induced them to enter into a retail installment loan contract and security agreement with Eagle at a much higher interest rate after the defective work had been completed. Eagle failed to file a timely answer to the complaint, but on April 9, 1996, Eagle's Texas counsel Chris Carrie requested and received from appellees' counsel an extension of time until April 19, 1996, in which to file an answer. On April 18 Carrie's office contacted appellees' counsel and requested and received a second extension of time until May 15, 1996. However, Eagle failed to file an answer until May 23, and did not file a motion seeking an extension of time in which to file the untimely answer. The trial court granted appellees' subsequent motion to strike Eagle's answer and granted them a default judgment as to liability. This appeal followed.

On appeal, Eagle contends that the court erred by granting appellees a default judgment. We disagree.

CR 55.02 states that a court may set aside a default judgment in accordance with CR 60.02 for good cause shown. The factors which must be considered in deciding whether to set a default judgment aside are: (1) is there is valid excuse for the default, (2) is there a meritorious defense to the action, and (3) will the other party be prejudiced. Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166 (1991). Appellant Eagle argues that it satisfied all three of the above factors and, thus, that the trial court should have granted it relief. Its

argument is based entirely upon an affidavit of its counsel, Chris Carrie, which was filed in response to appellees' motion for a default judgment.

In his affidavit Carrie states that after obtaining the first extension of time he was out of the country between April 19 and May 5, 1996, and that after his return he learned of the second extension obtained by an associate in his office. The affidavit further states that on May 23, 1996, he contacted local Kentucky counsel regarding the filing of an answer on behalf of Eagle. However, Carrie offered no explanation for the failure to meet the second extension deadline of May 15 or the failure to timely seek a third extension. As the court noted, even accounting for the fact that counsel was out of the country until May 5, the affidavit offered no valid explanation as to why the answer was not filed prior to the agreed deadline of May 15 or why no motion for an extension of time to file the answer was filed. Mere carelessness by a party or his attorney is not reason enough to set a default judgment aside. Perry, supra.

While it is true that courts do not favor default judgments and that it is preferable to decide cases on the merits, Dressler v. Barlow, Ky. App., 729 S.W.2d 464 (1987), trial courts possess broad discretion in considering motions to set default judgments aside and this court will not interfere absent an abuse of that discretion. Howard v. Fountain, Ky. App., 749 S.W.2d 690 (1988). Further, in the absence of a waiver by the adverse party, a litigant whose time to plead has expired

cannot be allowed to do so except upon a motion and a showing of excusable neglect. Hawes v. Cumberland Contracting Co., Ky., 422 S.W.2d 713 (1967). Here, no excusable neglect was shown for appellant's failure to timely file an answer. Hence, we cannot say that the trial court erred by failing to set the default judgment against Eagle aside.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

V. Katie Gilliam Scott
Harlan, KY

BRIEF FOR APPELLEES:

Robert M. Melvin
Harlan, KY

Lois Renfro Morris
Barbourville, KY