RENDERED: March 6, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2706-MR

TERRY L. MASTERS APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 95-FC-06285

MARGARET C. MASTERS;
B. MARK MULLOY APPELLEES

AFFIRMING

** ** ** ** ** ** ** **

BEFORE: COMBS, EMBERTON AND MILLER, JUDGES.

MILLER, JUDGE. Terry L. Masters brings this appeal from an order of the Jefferson Circuit Court, Family Court Division Nine, granting a default judgment to his former wife, co-appellee Margaret C. Masters, in her action to dissolve their marriage. We affirm.

The parties were married on April 25, 1986. The marriage produced one child, McKenzie Chandler Masters, born February 26, 1992. In November 1993 the parties separated. On or about September 1, 1994, Margaret filed her first petition for dissolution of the marriage. In October 1995 that action was

dismissed for lack of prosecution. On November 20, 1995, Margaret filed the present dissolution action; however, apparently because Terry avoided service of process, he was not served until February 20, 1996.

On April 23, 1996, Margaret's counsel, co-appellee B. Mark Mulloy, forwarded to Terry a letter containing a settlement proposal. The correspondence gave Terry two weeks to respond and advised that Margaret would request a pre-trial conference if he did not respond. Although he did not reply to Margaret's counsel, Terry contends that he and Margaret discussed the proposal between themselves and agreed upon the majority of issues. Having received no direct response from Terry, Margaret's counsel filed a June 5, 1997 motion for a pre-trial conference and sent proper notice to Terry. The conference was scheduled for June 17, 1996. Margaret's counsel sent notice of this date to Terry, and Terry received same on the evening of June 14, 1996. Terry contends that he communicated to Margaret and her counsel that he would be on a business trip in Cleveland, Ohio, on June 17. Margaret's counsel denies having received such message from Terry.

On June 17, 1997, the pre-trial conference was held as scheduled. Margaret and her counsel were present; Terry was not. Upon determining that no response had been filed in the action, the court conducted a brief hearing on the issues and directed Margaret's counsel to tender a proposed order granting Margaret default judgment.

Terry, allegedly unaware of the events of June 17, retained counsel when he returned from Cleveland. Subsequently, Terry's counsel, herself allegedly unaware of the June 17 events, commenced communications with Margaret's counsel. Among other things, she inquired as to a trial date and advised that a formal written answer to the petition and the settlement offer would be forthcoming. On July 22, 1997, the trial court entered findings of fact, conclusions of law and judgment, wherein he divided the assets, assigned debts, granted Margaret attorney's fees, and awarded Margaret sole custody of McKenzie. Thereafter, Terry's counsel filed, inter alia, a motion to set aside the default judgment. The trial court denied same by order dated August 29, 1996. This appeal followed.

Ky. R. Civ. P. (CR) 55.01 allows a trial court to grant default judgment against a party if a party, against whom a judgment for affirmative relief is sought, has failed to plead or otherwise defend the action. The granting of a default judgment is, in most instances, a matter of the court's discretion. Dressler v. Barlow, Ky. App., 729 S.W.2d 464 (1987). See also S.R. Blanton Development, Inc. v. Investors Realty and Management Company, Ky. App., 819 S.W.2d 727 (1991). However, as Terry correctly argues, as it legal policy to have every case decided on its merits, default judgments are not looked upon with favor. See Childress v. Childress, Ky., 335 S.W.2d 351 (1960); Bargo v. Lewis, Ky., 305 S.W.2d 757 (1957); and Dressler, supra.

Once granted, a default judgment may be set aside. CR 55.02 states that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." To set aside a default judgment, the moving party must show (1) a valid excuse for his default, (2) a meritorious defense to the claim, and (3) an absence of prejudice to the non-defaulting party. 7 Philipps, Kentucky Practice, CR 55.02, Comment 2 (5th ed. 1995). All three elements must be present to set aside a default judgment. S.R. Blanton Development, supra. The moving party, however, cannot have the judgment set aside and achieve his day in court if he cannot show good cause and a meritorious defense. CR 55.02, and Jacobs v. Bell, Ky., 441 S.W.2d 448 (1969). "Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured." Green Seed Company, Inc. v. Harrison Tobacco Storage Warehouse, Inc., Ky. App., 663 S.W.2d 755, 757 (1984). Trial courts possess broad discretion in considering motions to set aside default judgments, and a reviewing court will not disturb exercise of that discretion absent abuse. Howard v. Fountain, Ky. App., 749 S.W.2d 690 (1988).

Terry's brief includes an extensive list of excuses for his failure to make an appearance or otherwise defend the action between February 17, 1997, the day he was served, and July 22, 1997, the day default judgment was entered. Some of the reasons include: (1) given the parties' past history, he had reason to believe he would receive additional notice before the

marriage was dissolved; (2) in the prior action, he had not timely filed an answer and no default was entered; (3) since notice of the June 17 conference was characterized as a pre-trial conference, this was insufficient notice that judgment would be entered without his active participation; (4) the parties had a history of negotiating litigation issues; (5) there was less activity in the second action than what occurred in the first, and the first was dismissed; (6) he had historically dealt with Margaret independent of counsel; (7) he was lulled into a false sense of security by Margaret's prior lengthy delays in actively pursuing final dissolution in two separate actions; and (8) he was away on a legitimate business trip at the time of the June 17, 1997 pre-trial conference.

Even if the trial court accepted these assertions as true, it did not abuse its discretion in entering default judgment in Margaret's favor. A defendant, having been notified of an action through personal service, must exercise due foresight and diligence to prevent entry of default judgment. Hoskins v. Bloomer, Ky. 201 S.W.2d 716 (1947). In the case at hand, Terry stood idly by from the time he received service of process until entry of default judgment. During this five-month period, he failed to make even a rudimentary response asserting his intention to defend. Further, the summons served on Terry on February 17, 1997, included the statement:

> Unless a written defense is made by you or by an attorney in your behalf within 20 days following the day this paper is delivered to

> you, **judgment by default may be taken against you** for the relief demanded in the attached complaint (emphasis added).

Terry ignored this explicit warning. His excuses fail to establish good cause for his failure to respond. Since he failed to (1) show a reasonable excuse for the delay in answering and (2) establish that he was not guilty of unreasonable delay, the trial court did not abuse its discretion in awarding default judgment in Margaret's favor. See Dressler v. Barlow, supra.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kristin Dawson Henderson
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. Mark Mulloy
Louisville, Kentucky