

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001580-MR

CHAUNCY TUDOR

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE STEPHEN FRAZIER, JUDGE
ACTION NO. 96-CI-00069

JOHN GRAY PONTIAC BUICK GMC TRUCKS, INC.

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, EMBERTON, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Chauncy Tudor, appeals a default judgment in favor of appellees, John Gray Pontiac Buick GMC Trucks, Inc., entered on June 5, 1998, by the Johnson Circuit Court based upon the appellant's failure to comply with a court order requiring him to obtain new counsel within thirty days. The appellant argues that the entry of default judgment was erroneous under the circumstances of the case. We agree and vacate and remand for further proceedings.

A complaint was originally filed by John Gray Pontiac Buick GMC Trucks, Inc., (Gray) on February 22, 1996, alleging that Chauncy Tudor (Tudor) had deceived Gray as to the value of a

traded boat and the existence of a lien upon its title. An answer and counterclaim were filed by Tudor on March 18, 1996. Over the course of the next sixteen months, both sides engaged in a long course of pre-trial activity. During that period, counsel for both parties made motions to withdraw. Gray obtained new counsel, and the parties proceeded accordingly.

By agreed order of January 23, 1997, a trial date was set for June 10, 1997. However, on June 3, 1997, a motion to continue was filed by Tudor's attorney. The record also reflects that on July 11, 1997, Tudor's attorney filed a motion to withdraw. The court's order of August 14, 1997, granted Tudor "thirty (30) days in which to secure additional counsel and have counsel enter his appearance in the case." Subsequently, on September 7, 1997, Gray filed a motion for default judgment, citing Tudor's failure to obtain new counsel as its basis.

Despite recitations to the contrary in Gray's brief, our careful search of the record does not reveal that notice was given to Tudor or his attorney regarding the motion for default judgment nor was notice sent as to when that motion was to be heard. On October 1, 1997, when the trial court orally granted Gray's motion for default judgment, neither Tudor nor his attorney was present; Tudor contends that neither had been given notice.

On October 10, 1997, Tudor's original counsel entered a notice of re-entry. Gray followed with a "notice of filing" on October 30, 1997, which gave notice of the filing of an affidavit in support of damages and the "proposed" default judgment to

Tudor's counsel. However, this notice occurred some thirty days after the court had orally granted the default judgment; the affidavit apparently purported to substantiate and bolster claims that had been the subject matter of the default judgment.

Although the judgment orally granted on October 1, 1997, had not yet been entered of record, Tudor's counsel filed a motion to vacate or set aside the default judgment on November 5, 1997. Little action followed other than two filings of a motion for a rule by Gray. Finally, on June 5, 1998, the default judgment was entered of record by the trial court.

Tudor argues on appeal that the trial court abused its discretion by entering a default judgment in favor of Gray. The standard of review of the propriety of a default judgment is whether the trial court abused its discretion. Greathouse v. American National Bank and Trust Co., Ky.App., 796 S.W.2d 868, (1990) citing Nowicke v. Central Bank & Trust Co., Ky.App., 551 S.W.2d 809 (1977).

In reviewing a default judgment for abuse of discretion, appellate courts search the record for indicators that essentially would demonstrate that the court had no other recourse than entry of what is tantamount to civil capital punishment. Whether the party dismissed was warned that noncompliance could lead to dismissal and whether less drastic sanctions were ever considered or imposed are both relevant factors. Id. The record of this case does not reveal that either of these alternative courses preceded entry of the default judgment.

It is virtually a maxim that default judgments are not favored in the law since they truncate the opportunity for litigants to have their cases decided on the merits. Dressler v. Barlow, Ky.App. 729 S.W.2d 464 (1987). It is certainly understandable that aggravating omissions and procrastination by both of the parties and their counsel may often drive a trial court to the drastic action of entry of a default judgment. Appellee correctly contends that CR 55.01 permits a court to enter a default judgment against a party for noncompliance with court orders. Appellee then cites a considerable litany of Tudor's failures to comply with court orders. It is not surprising that the court resorted to such an ultimate sanction.

However, we are seriously concerned with the fact that appellant did not receive notice of the filing of the September 9, 1997, motion for default judgment; nor did he or his counsel receive notice of the hearing of October 1, 1997, at which that motion was heard and the judgment was orally granted. Although there is some dispute between counsel on this point, we have scoured the record and have found no trace of compliance with the notice requirement in this case. Giving of notice is a fundamental component of due process, and its importance looms even larger where the specter of a default judgment is at issue.

If the party against whom judgment by default is sought has appeared in the action, he, . . . shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. (Emphasis added.)

CR 55.01.

The language of the rule is clearly mandatory. The proper question to determine if a party has entered an appearance is "whether or not he has so participated in the action as to indicate an intention to defend." Smith v. Gadd, Ky., 280 S.W.2d 495, 498 (1955). The appellant here had appeared before the trial court. He filed an answer to the complaint and participated in other pre-trial activity in a manner sufficient to demonstrate his intent to defend the action against him.

Thus, CR 55.01 is a bar to entry of default judgment where the party defended the action and had not been given notice prior to the hearing. "The court's entry of default judgment . . . having been obtained without notice to the appellant, is void as a matter of law." Kearns v. Ayer, Ky.App., 746 S.W.2d 94, 95 (1988). We are compelled, therefore, to vacate the default judgment in this case.

The appellant raised other issues to be considered on appeal. However, those issues need not be addressed as they are moot in light of our ruling.

For the forgoing reasons, the default judgment of the Johnson Circuit Court is vacated, and this matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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