

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001769-MR

KNIGHTS OF ST. JOHN #130

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ERNEST A. JASMIN, JUDGE  
CIVIL ACTION NO. 98-CI-01668

HORNER NOVELTY CO., INC.

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Knights of St. John #130 appeals from a default judgment granted to Horner Novelty Co., Inc. and an order denying its motion to set aside the judgment. The issues presented are: (1) whether the circuit court erred by failing to apply the appropriate standard for setting aside a default judgment; and (2) whether the circuit judge erred in denying the Knights' motion to recuse.

Horner Novelty, located in Jeffersonville, Indiana, sold bingo supplies and other items to the Knights. Over a period of time, the Knights purchased supplies in the amount of \$13,173.23, but failed to pay Horner Novelty. After unsuccessful attempts to

obtain payment, Horner Novelty sued the Knights on March 26, 1998. The Knights' registered agent, Michael Meyer, was served with a summons and copy of the complaint on April 4, 1998. On April 28, Horner Novelty filed a motion and affidavit seeking a default judgment because the Knights had failed to answer or otherwise defend against the complaint. On May 12, 1995, a default judgment was entered.

The Knights did not file and serve an answer until May 1. In its answer, the Knights denied being liable for the debt and alleged that an unnamed third party was ultimately responsible for its payment. On May 14, the Knights moved to set aside the default judgment. On June 10, the circuit court held a hearing and denied the motion.

On June 11, the Knights moved to recuse the circuit judge and filed an affidavit setting forth grounds for recusal. In particular, the Knights expressed concern about animosity between its attorney and the circuit judge based on prior interactions unrelated to this case. Following a hearing on June 15, 1998, the circuit court denied the motion to recuse. The court found that the Knights had failed show bias which prevented a fair trial and that the Knights had failed to timely move for recusal.

On June 18, the Knights moved to alter, vacate or amend the judgment pursuant to Kentucky Rule of Civil Procedure (CR) 59.05. Following a hearing on June 29, the court denied the motion, finding that the Knights had failed to advance any reason

to vacate the judgment other than the arguments that the Knights had previously made. This appeal followed.<sup>1</sup>

On appeal, the Knights argue that the circuit court erred in not setting aside the default judgment. While it is true that courts prefer to decide cases on their merits rather than by default,<sup>2</sup> we must consider the standard for setting aside a default judgment. CR 55.02 provides that “[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.” In Perry v. Central Bank & Trust Co.,<sup>3</sup> this Court outlined the factors to be considered when deciding whether to set aside a default judgment: “(1) valid excuse for default, (2) meritorious defense, and (3) absence of prejudice to [the] other party.”<sup>4</sup>

In addressing whether a valid excuse for default existed, we must consider the circumstances. The Knights did not file and serve an answer until May 1, 1998. The Knights’ answer was due by April 24, so it was clearly not timely.

The Knights claim to have a valid excuse because it is a charitable organization, which made it more difficult to timely respond to Horner Novelty’s complaint. The organization did not

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<sup>1</sup> In its brief, Horner Novelty Co. appends exhibits that are not in the transcript of evidence and thus, not properly before us. The inclusion of these items is improper, and they will not be considered on appeal. Ky. R. Civ. Proc. (CR) 75.01; CR 76.12(4)(a)(vi). See also Croley v. Alsip, Ky., 602 S.W.2d 418 (1980) (noting that it is improper to include in a party’s brief items not in the record).

<sup>2</sup> Dressler v. Barlow, Ky. App., 729 S.W.2d 464, 465 (1987).

<sup>3</sup> Ky. App., 812 S.W.2d 166 (1991).

<sup>4</sup> Id. at 170 (citing 7 W. Bertelsman & K. Phillips, Kentucky Practice, CR 55.02, cmt. 2 (4th ed. 1984)).

employ in-house counsel and had to retain an attorney. We are not persuaded that this is a valid excuse for the delay in filing and serving an answer. The Kentucky Rules of Civil Procedure do not provide any such exception for charitable organizations.

Furthermore, in order to be successful, the Knights must show that it had a meritorious defense. This it has failed to do. In its answer, the only defense that the Knights raise is that Horner Novelty has failed to name an indispensable party. However, the Knights misstate whose responsibility it is to join a party in this case. The Knights claim that some unnamed third party is responsible for the outstanding debt. For that reason, it was the responsibility of the Knights to either join that party as a third-party defendant pursuant to CR 14 to seek indemnification or to file a separate lawsuit against the third party to obtain indemnification after Horner Novelty obtained a judgment against the Knights.

The Knights must show that Horner Novelty will not be prejudiced if the circuit sets aside the default judgment. The amount in controversy has been outstanding for a considerable period of time, and Horner Novelty has the right to collect the debt. While it may be a closer question on the issue of prejudice, the lack of support for the other two factors is enough to justify the circuit court's decision.

The Knights also insist that the circuit judge erred in failing to recuse. We disagree.

As the Supreme Court noted in Bussell v. Commonwealth,<sup>5</sup> “[a] motion for recusal should be made immediately upon discovery of the facts upon which the disqualification rests.”<sup>6</sup> If a party fails to object, the objection is waived.<sup>7</sup>

In this case, the Knights knew which circuit judge was assigned to the case when it filed and served its answer. Instead of objecting immediately, the Knights did not move to recuse the circuit judge until after the court issued an unfavorable ruling. The Knights could have applied to the Chief Justice of Kentucky or the Court of Appeals for relief, but did not do so. The Knights failed to show bias in this routine case involving a dispute between a business and a purchaser of supplies. Because the Knights failed to timely raise this issue, it was waived.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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<sup>5</sup> Ky., 882 S.W.2d 111 (1994).

<sup>6</sup> Id. at 113 (citing Kohler v. Commonwealth, Ky., 492 S.W.2d 198 (1973); Bailey v. Bailey, Ky., 474 S.W.2d 389 (1972)).

<sup>7</sup> Id.