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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002280-MR

GEORGE T. HAWKINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 97-CI-000159

JAMES R BAILEY, III AND
BOTAN CORPORATION — APPELLEES

OPINION
REVERSING IN PART, AFFIRMING AND REMANDING IN PART
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER, AND COMBS, JUDGES.

BARBER, JUDGE: Appellant George T. Hawkins (Hawkins) was, at the time the underlying action was filed, an attorney licensed in the Commonwealth of Kentucky. Hawkins filed the underlying action pro se to recover legal fees from Appellees James R. Bailey III (Bailey) and Botan Inc. (Botan). Hawkins claims that Bailey and Botan owed a fee of $22,000.00 pursuant to a contract for legal services. Bailey and Botan claim that the contract was oral and therefore unenforceable. At trial, the trial court held that the contract between the parties was oral. However, both parties agree that the terms of the contract are memorialized in

a letter setting out the services to be provided by Hawkins, and in communications regarding the services performed by Hawkins. The record is clear in showing that an initial fee payment of $11,000 was made, and one monthly payment of $2,000 was also made by Bailey and Botan, as discussed in the written communications. Under the terms of the contract, Hawkins would incorporate Botan, and assist Bailey and Botan in the initial capital formation of the business venture in return for a set fee. Clearly, a valid and binding contract existed between the parties.

Hawkins asserts that Bailey and Botan were indebted for the full payment of $22,000.00, but chose to make monthly payments on the debt rather than making a lump sum payment. Bailey and Botan failed to make any other monthly payments after the first monthly payment. The record contains written communication from Hawkins accepting assignment of choses in action and tangible property as partial payment on the debt. These communications also show Hawkins' ongoing efforts to fulfill the requirements of the agreement.

Rather than continuing to make the monthly payments, Bailey and Botan filed a counterclaim asserting that Hawkins was required to perform certain additional conditions prior to being paid any additional sums. Hawkins claims that he performed all necessary work, and that Bailey and Botan defaulted on the payment plan. Bailey and Botan also filed a counter-claim, which alleged that Hawkins had performed no services after the initial incorporation, and asked that he be required to repay a portion of the $11,000.00 initial payment. Bailey and Botan relied on an

itemized monthly bill, with hourly increments, as evidence that Hawkins had performed only $2,000 worth of work, and demanded a refund of all monies other than that sum. However, documents provided in discovery responses clearly show that, as Hawkins asserts, the hourly bill was prepared as an example of itemized billing option which was not accepted by Bailey and Botan, who instead elected to pay a flat sum of $22,000.00 in monthly payments.

Early in the proceedings, Hawkins retained counsel to protect his interests. Counsel acted on his behalf until one month before trial. Counsel for Hawkins moved to withdraw from the action on March 11 1999. Counsel also requested a continuance in the action, which was set for trial on April 13 1999. The certificate of service on these documents reflects service by certified mail on Hawkins at his current address. The trial court granted the motion to withdraw but denied the motion for continuance. The record does not show service of the trial court's orders on Hawkins at his current address. Hawkins asserts that he did not receive notice of the court's denial of the motion for continuance. Bailey and Botan failed to serve copies of their trial memorandum and jury instructions on Hawkins at his current address, but rather mailed these documents to his former office, which he had ceased to maintain two years earlier when he no longer practiced law. Hawkins denies receipt of these documents and the certificate of service on these documents fails to indicate that he was properly served.

The trial court held the trial on the scheduled date, despite the absence of Hawkins or counsel on his behalf. The trial court dismissed Hawkins' complaint at trial. The trial court then entered judgment on the counterclaim in favor of Bailey and Botan. Hawkins did not receive a copy of the judgment, as it was not served on him at his current address. On July 14 1999, Bailey and Botan served a Judgment Lien on Hawkins at his current address. The certificate of service on this lien has the correct address for Hawkins, and does not reflect service to his former office.

On August 5 1999, Hawkins filed a motion to set aside the Judgment, arguing that he had not received service of the court's orders, or the pre-trial memoranda filed by opposing counsel. The trial court denied this motion. Bailey and Botan claim that their failure to serve Hawkins at his current address was due to his never having filed a change of address notice in the record. Documents filed by counsel for Hawkins, prior to his withdrawal from the action, show service upon Hawkins at his current address.

Hawkins asserts that the judgment issued against him was a default judgment, pursuant to CR 55.01. Hawkins asserts that because he was not properly served with notice of a request for default judgment after having appeared in the action, the judgment entered is void. Kearns v. Ayer, Ky. App., 746 S.W.2d 94 (1988), holds that the moving party must give notice of the application for default judgment. Id,, at 96. Where a party has appeared and prosecuted an action, or defended against a

counterclaim, he must be given notice prior to entry of a judgment against him. Kearns v. Ayer, supra., 746 S.W.2d at 95. Bailey and Botan attempt to claim that as the original action was dismissed, and then reinstated, Hawkins had never really "appeared" in the reinstated action, and that therefore they were not required to provide him with notice of the default judgment. Such semantics may not be used to defeat the clear purpose of the civil rules. Hawkins filed the initiating complaint, and therefore must be found to have appeared in the action.

A default judgment may properly be dismissed where the defaulting party can show a reasonable excuse, and prove that he is not guilty of unreasonable delay or neglect. Liberty Nat. Bank & Trust Co. v. Kummert, 305 Ky. 769, 205 S.W.2d 342 (1947). Relief from a default judgment may be given for good cause shown. S.R. Blanton Dev. Co. v. Investors Realty & Mgmt. Co., Ky. App., 819 S.W.2d 727 (1991). Where a party against whom a default judgment has been entered shows a valid excuse for his failure to appear and defend, and there is a lack of prejudice to the non-defaulting party, a default judgment may be set aside. Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991).

The Kentucky Rules of Civil Procedure mandate that notice requirements must be met prior to permitting a default judgment to be entered. Foremost Ins. Co. v. Whitaker, Ky. App., 892 S.W.2d 607 (1995). Failure to abide by notice provisions in a law or civil rule is excused only where the party against whom judgment is entered has received actual notice, and where there is no material prejudice to the party. Taylor v. Duke, Ky. App.,

896 S.W.2d 618 (1995). It is clear that a party must receive actual or constructive notice of a proceeding before a judgment rendered against him may be considered valid and binding. Halderman v. Sanderson Forklifts Co., Ky. App., 818 S.W.2d 270 (1991).

Hawkins was negligent in failing to ensure that his current address was clearly made part of the record in the underlying action. Hawkins was also negligent in failing to ascertain whether the trial had, in fact, been continued as requested by his counsel. However, as the court allowed his counsel to withdraw, thereby leaving him without legal representation, and also refused to reschedule the trial date, set less than a month after counsel's withdrawal, the trial court should have ensured that Hawkins received notice of this fact. Hawkins' counsel clearly noted, in his certificate of service, the new address he used to communicate with Hawkins. Both the trial court and opposing counsel should have taken notice of this fact, rather than continuing to send documents to an address that Hawkins had not used for almost three years.

As Hawkins denies receipt of the trial court's orders, and the record supports his claim, we find that he did not receive proper notice of the proceedings against him. CR 60.02 permits a court to set aside a judgment on the grounds of mistake or excusable neglect. CR 59.01(a) provides that a new trial may be granted to a party where there has been an irregularity in the proceedings of the court, or an abuse of discretion which prevents a party from having a fair trial. The trial court

involuntarily dismissed Hawkins' complaint due to his failure to appear. As this failure to appear was due, in whole or in part, to the failure of the court and opposing counsel to provide proper notice to Hawkins, it must be reversed. For this reason, the dismissal of Hawkins' complaint, and the entry of judgment against him on the counterclaim are reversed, and the action is remanded for trial.

Hawkins further asserts that the judgment is void as he did not consent to Bailey and Botan's withdrawal of their request for trial by jury. CR 38.04 holds that once a demand for a jury trial is made, it may not be withdrawn without the consent of both parties. This right is waived where a default judgment is entered. CR 55.01. As it was Bailey and Botan, rather than Hawkins, who requested a trial by jury, and as Hawkins was not present at trial, any error in failing to impanel a jury is harmless, and cannot constitute grounds for reversal. As the case is remanded on other grounds, this issue is moot.

COMBS, JUDGE CONCURS.

GUDGEL, CHIEF JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Nicholas G. Hawkins
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BRIEF FOR APPELLEE:

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