RENDERED: February 23, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002620-MR

KELLY FINNELL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CI-006753

GLENN A. COHEN — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a default judgment awarding compensatory and punitive damages in an action for malicious prosecution arising out of two complaints filed by appellant with the Kentucky Bar Association against appellee, his former lawyer. Appellant asserts numerous assignments of error. After reviewing these arguments, the record herein and the applicable law, we do not see that any reversible error was committed. Thus, we affirm.

In 1993, appellant, Kelly Finnell, Jonathon Geer, and four other individuals were sued for insurance fraud and breach of fiduciary duty in the Jefferson Circuit Court. Appellee,

Glenn Cohen, who was a member of the law firm of Seiller & Handmaker, LLP, represented Finnell and the other five defendants in that action. Prior to May 9, 1997, Geer had been responsible for and had paid all of the attorney fees in the action. On that date, Geer informed Finnell and Cohen that he would no longer pay the attorney fees incurred by all of the defendants. According to Cohen, Finnell specifically asked Cohen if he would continue to represent the defendants in the action, to which Cohen agreed. However, Cohen did not believe it was necessary to obtain a new written fee agreement.

Cohen thereafter continued to represent the defendants in the action for some months. After a settlement was finally reached in the matter, Seiller & Handmaker sent Finnell a final bill for $3,800 for legal work performed after May 9, 1997. After sending the bill, Cohen did not hear from Finnell until Finnell called him and stated that he had no intention of paying the bill since there was nothing in writing obligating him to do so. Given Finnell's unwillingness to honor the fee, Cohen advised Finnell that his firm would be forced to file suit to adjudicate the fee dispute. In response, Finnell stated that if the firm filed suit to try and collect its fee, he would file disciplinary charges with the Bar Association against Cohen accusing him of various, unspecified ethical charges.

On November 21, 1997, Seiller & Handmaker filed a collection action against Finnell and the other five defendants. On December 2, 1997, Finnell sent Cohen a copy of a complaint he had filed with the Kentucky Bar Association regarding Cohen. The

complaint alleged that Cohen should have discussed any new fee arrangements with him prior to sending him a bill after May 9, 1997. Finnell's second claim was that Cohen had abused his power as an attorney by bringing the collection action against him when Finnell had asked that the matter be resolved through mediation. In his cover letter to Cohen, Finnell stated that if the law firm abandoned its collection action, he would withdraw his Bar complaint. If they did not abandon the action, he would file additional charges against Cohen. Finnell's letter reads in part:

> This is just the beginning. I will file a supplemental complaint in which I allege that the acts enumerated in the original complaint are part of a pattern of unethical behavior on your part that includes breach of attorney-client confidentiality. . . . I will save you the embarrassment of pursuing this original complaint and filing my supplemental complaint if you will withdraw your lawsuit.

The Kentucky Bar Association responded to Finnell's Bar complaint in a letter of December 29, 1997 which stated that the matter was not appropriate for disciplinary action in that it was primarily a fee dispute. The letter also stated that Finnell's complaint was being returned to him and that the same did not require forwarding to Cohen.

On January 28, 1998, following the filing of the aforementioned Bar complaint, Cohen petitioned for and was granted leave to file an amended complaint against Finnell and the other defendants, alleging malicious prosecution and abuse of process, seeking compensatory and punitive damages. On February 17, 1998, Finnell filed a second Bar complaint against Cohen

repeating the same charges as in the first complaint, with the addition of a claim that Cohen had breached his attorney/client privilege. Finnell alleged that this breach occurred when Cohen mentioned the fee dispute at a dinner party in the presence of Geer and other non-parties. Upon receipt of the second Bar complaint, the Kentucky Bar Association requested a response from Cohen. Ultimately, on April 28, 1998, the Bar Association also dismissed this second complaint against Cohen.

Finnell filed an answer to the original collection action. However, Finnell never filed an answer to the amended complaint of January 28, 1998. A pre-trial conference on the matter was scheduled for March 23, 1998 which Finnell did not attend. At the request of Finnell, the pre-trial hearing was rescheduled for April 14, 1998. On April 1, 1998, Cohen filed a motion for default judgment. Thereafter, Finnell informed the trial court by letter that he would not be able to attend the April 14 pre-trial hearing, but did not request a continuance of the matter. On April 16, 1998, the court entered an order stating that the matter would be reset for a hearing on May 11, 1998, and that if Finnell failed to appear, default judgment would be entered against him. Finnell failed to appear at the May 11 hearing. Consequently, the court entered default judgment against Finnell on May 12, 1998. A hearing to determine damages was then set for May 27, 1998. At that hearing, counsel for Finnell appeared and moved the court to continue the hearing, set aside the default judgment, try the damages issue before a jury, and to dismiss for lack of jurisdiction. All of these motions

were denied. Prior to the hearing on damages, the original claim for attorney fees was satisfied. Finnell paid the fee in its entirety with interest at judgment rate. Thus, the only remaining issue was damages on the malicious prosecution claim.

At the hearing on damages, Finnell was represented by counsel. Subsequently, on August 19, 1998, the court entered its order awarding Seiller & Handmaker: $20,000 "for economic loss resulting from the time spent by the law firm and Cohen to review the complaints as well as defend against same"; $25,000 "for emotional distress, humiliation, and embarrassment suffered by Cohen"; and $25,000 in punitive damages. From the order denying Finnell's motion to alter, amend, or vacate the order of August 19, Finnell now appeals.

Finnell first argues that the trial court should have dismissed the action for lack of jurisdiction because the amount in controversy was less than the $4,000 jurisdictional amount which is required for circuit court jurisdiction. KRS 24A.120. Finnell maintains that since $3,800 was the only amount specifically sought in appellant's complaint, circuit court jurisdiction was improper. In reviewing the amended complaint, we see that not only did appellee seek the $3,800 in attorney fees, it also sought compensatory and punitive damages for the malicious prosecution claim in an amount to be determined by the trier of fact. Indeed, appellee recovered far in excess of the $4,000 required to establish circuit court jurisdiction. Accordingly, this argument is without merit.

Finnell next argues that the trial court erred in entering a default judgment against him. CR 55.01 provides in pertinent part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor. . . . The motion for judgment against a party for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default.

The granting of default judgment is in most cases discretionary with the trial court. Harris v. Commonwealth, Ky. App., 688 S.W.2d 338 (1984), cert. denied, 474 U.S. 842, 106 S. Ct. 127, 88 L. Ed. 2d 104 (1985).

Finnell contends that since he filed an answer to the original complaint, default judgment was improperly entered. We do not agree. To this day, Finnell has not filed an answer to the amended complaint for malicious prosecution. Even after the trial court gave Finnell numerous opportunities to defend his position at pre-trial hearings, Finnell failed to do so. Thus, we cannot say that the trial court abused its discretion in entering default judgment against Finnell.

Finnell also contends that if the court adjudged that he failed to appear in the action, a certificate of the attorney stating that no papers have been served on him by the defaulting party was required to be filed under CR 55.01. It is not disputed that no such certificate was filed in this action. The word "appeared" in CR 55.01 means that a defendant has voluntarily taken a step in the main action that shows or from

which it may be inferred that he has the intention of making some defense. Smith v. Gadd, Ky., 280 S.W.2d 495 (1955). Since Finnell filed an answer to the original complaint and was in communication with the trial court and appellant regarding his inability to attend the various scheduled pre-trial hearings, we believe that Finnell "appeared" in the action within the meaning of CR 55.01. Hence, no such certificate was required.

Finnell then claims that if he did make an appearance in the action, he was entitled to a jury trial on the issue of punitive damages. CR 55.01 further states:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make such investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

Although Finnell did make a demand for a jury trial on damages, he did not file his motion for a jury trial until the day of the hearing on damages, May 27, 1998, after the case had already been called. CR 38.02 provides in pertinent part:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

The last pleading on the issue was the amended complaint filed on January 28, 1998. As Finnell's motion was filed well outside the

10-day period, we deem that Finnell waived any right he had to a jury trial on damages.

Finnell next complains that the trial court erred in entering the default judgment as to the second Bar complaint filed by Finnell and in considering the second Bar complaint in assessing damages. Finnell points out that the second Bar complaint was not filed with the Kentucky Bar Association until after the appellee's amended complaint was filed. Finnell maintains that if the second Bar complaint is to be considered in appellee's action, appellee's action should have been further amended to allege the facts pertaining to the second Bar complaint. We do not agree. Appellee's amended complaint alleges, among other things, that:

> 11. After receipt of Seiller & Handmaker, LLP's invoice, Defendant Kelly Finnell ("Finnell") advised Cohen that Defendants did not intend to pay Seiller & Handmaker, LLP's fee. Further, in an attempt to dissuade Cohen from collecting the fee, Finnell advised Cohen that if Seiller & Handmaker, LLP attempted to seek payment of the fee, he would embarrass Cohen by filing a complaint against Cohen with the Kentucky Bar Association ("Bar") alleging unethical conduct on the part of Cohen.
> . . .
> 14. On December 2, 1997, Defendant Finnell filed a complaint against Cohen with the Kentucky Bar Association alleging unethical conduct on the part of Cohen. Said complaint was completely frivolous and without merit. At that time, Finnell advised Cohen that if Seiller & Handmaker, LLP withdrew its claim for legal fees, he would withdraw said bar complaint.
> . . .
> 16. On December 15, 1997, Defendant Finnell issued additional threats and advised Cohen that he (Finnell) would take further action against Cohen with the Kentucky Bar

Association unless Seiller & Handmaker, LLP withdrew its claim for legal fees.

From our view of appellee's amended complaint, appellee was alleging a pattern of willful behavior intended to intimidate Cohen into forfeiting his fee. Finnell's second Bar complaint was merely his carrying through with the threats in allegation #16 of appellee's amended complaint and was essentially part of this pattern of behavior. As we have already held, the court was justified in entering default judgment on the facts alleged in the amended complaint. Likewise, we see no problem with the court considering the second Bar complaint in its assessment of damages.

We shall now address four of appellant's arguments which we deem waived by the entry of the default judgment against Finnell. Finnell argues that the trial court erred: in failing to consider the fact that he relied on advice of counsel in filing the Bar complaints; in finding that Finnell's actions constituted malicious prosecution; in failing to consider the issue of publication as to the malicious prosecution claim; and in not considering public policy as it relates to the claim for malicious prosecution.

In a default judgment, the defaulting party admits those allegations necessary to obtain the particular relief sought by the complaint. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988). By defaulting in the instant case, Finnell admitted those allegations comprising the malicious prosecution claim and has therefore waived any defenses to that claim. After the default judgment was entered, the only issues

Finnell could contest were those related solely to damages and not to the merits of the case. Id. at 693. The four arguments cited above relate to the merits of the malicious prosecution claim and, thus, cannot be considered on appeal.

Finnell next argues that the trial court erred in failing to make specific findings supported by the record on the issues of compensatory and punitive damages. As to punitive damages and the portion of compensatory damages encompassing emotional distress, humiliation, and embarrassment, the court made detailed findings supporting appellee's entitlement thereto as we shall discuss further below. As to the compensatory damages encompassing the $20,000 awarded for "economic loss resulting from the time spent by the law firm and Cohen to review the complaints as well as defend against the same," the court found that:

> Cohen and the law firm also incurred considerable expenses and time in meeting the complaints filed by Finnell. The Court is concerned that there may have been an inordinate amount of time spent by the law firm members in meeting with each other and reviewing the same documents.

The trial court made no finding as to how many hours were reasonably spent on the case, nor any findings as to the firm's hourly rate. However, contrary to Finnell's assertion, the court had before it an accounting of how many hours the four members of Cohen's law firm each spent defending the case and the hourly rate for each attorney. The total amount alleged to have been spent on the case was $43,100, of which the court allowed only $20,000. Although it would have been preferable for the court to

specify what of the $43,100 it was allowing, the court did find that the firm spent a great deal of time on the case, finding, in fact, that actually too much time had been spent on the matter. Damages must be shown with reasonable certainty. Commonwealth, Dept. Of Highways v. Jent, Ky., 525 S.W.2d 121 (1975). Since the court had sufficient evidence before it to justify its award of $20,000 in compensatory damages, we deem that the court's findings, even if they were not specific enough, constituted harmless error.

Finnell also complains about findings made by the trial court regarding the original $3,800 fee. The court found that Finnell "certainly could have demanded an accounting of anticipated charges, hourly fees, etc." Further, the court found that "an agreement was reached between Finnell and Cohen that Finnell would pay his own attorney fees." As to the former finding, Finnell maintains that it was not his responsibility to demand an accounting. As to the latter finding, Finnell argues that said finding was not supported by the evidence. Although the court did make these findings in its order on damages, we do not see that they are relevant to the issue of damages, since Finnell admitted owing the $3,800 fee by his default judgment and even paid the fee prior to the hearing on damages. Accordingly, these arguments are deemed waived.

Another assignment of error proffered by Finnell is that the trial court erred in finding appellee was entitled to punitive damages. KRS 411.184(2) provides that "[a] plaintiff shall recover punitive damages only upon proving, by clear and

convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Finnell contends that his filing of the Bar complaint does not meet the requirement of oppressiveness because he filed the complaint based upon his reasonable belief that an ethical violation had been committed. We again note that Finnell admitted to the allegation of malicious prosecution which has as one of its elements "malice in the institution of such proceeding." Raine v. Drasin, Ky., 621 S.W.2d 895, 899 (1981). It follows that when Finnell allowed the default judgment to be entered against him on the claim of malicious prosecution, he set himself up for an award of punitive damages to be awarded against him as well. The court made the following specific findings supporting its award of punitive damages:

> On December 2, 1997, Finnell sent a proposed bar complaint against Cohen with a letter demanding Cohen voluntarily dismiss the action against him. The Court finds the sole purpose of this letter and proposed bar complaint was to intimidate and harass Cohen and the law firm. Finnell followed the letter with a telephone call on December 15, 1997, again seeking to persuade Cohen to dismiss the lawsuit. Finnell testified he anticipated Cohen would be embarrassed by the bar action.

From our review of the evidence, the above findings were supported by substantial evidence in the record and were thus not clearly erroneous. See Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1964). Hence, appellee's entitlement to punitive damages is upheld.

Finnell's final argument is that the trial court erred in awarding compensatory and punitive damages that were

disproportionate to the appellee's actual injury. The test before the trial court of the excessiveness of a verdict is whether the award is so great as to strike the mind at first blush as being the result of passion or prejudice or disproportionate to the injuries suffered. Cooper v. Fultz, Ky., 812 S.W.2d 497 (1991); Commercial Carriers, Inc. v. Matracia, Ky., 311 S.W.2d 565 (1958).

Brewer v. Hillard, Ky., 15 S.W.3d 1, 9 (2000) quotes Morrow v. Stivers, Ky. App., 836 S.W.2d 424, 430 (1992) for the proposition that the "first blush" rule is not the proper appellate standard. "Once the issue is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals substitute our judgment on excessiveness for his unless clearly erroneous." Morrow, 836 S.W.2d at 431. The trial court reconsidered the excessiveness of damages in the motion to alter, amend or vacate the judgment filed on August 31, 1998, and affirmed its earlier decision. Having reviewed the record and testimony, we conclude the trial court did not abuse its discretion in so finding.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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