

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000982-MR

STERLING RESOURCES, INC.

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
ACTION NO. 99-CI-00186

CHARLES B. PERDUE

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Sterling Resources, Inc., appeals from a default judgment entered by the Lee Circuit Court and from an order overruling its motion to set aside that default judgment. We find no error and thus affirm.

The appellee, Charles B. Perdue, owned property in Lee County, Kentucky, which he had purchased from Ashland Oil Company. He set up an oil producing operation and began drilling on the property under the name of Perdue Davidson Oil Company. The operation resulted in numerous citations from the Environmental Protection Agency (EPA), ultimately leading to a civil action being filed and a judgment being entered in favor of

the United States against Perdue and his company for \$3,800,000. As a further result of the operation, the Commonwealth of Kentucky took administrative action against Perdue resulting in approximately \$80,000 in fines.

As a result of the fines and judgment against him, Perdue elected to sell the company. During 1996 and 1997, he entered into a stock purchase agreement with Central Gas Utilities. Under the agreement, the sale and transfer of the company's stock was conditioned upon the buyer obtaining financing and negotiating a satisfactory settlement of the environmental citations so as to allow resumption of the operation.

In August 1997, Sterling Resources assumed the rights and obligations of Central Gas Utilities. Just as the stock purchase agreement required Central Gas Utilities to resolve the EPA dispute, the agreement with Sterling Resources included the same condition. With the execution of the contract to sell, Perdue transferred the stock of the company to Sterling Resources.

On April 19, 1999, Perdue's attorney sent a letter to Sterling Resources indicating that it was in default of its obligations under the stock purchase agreement. The letter mentioned that the disputes between the EPA and the Commonwealth had yet to be resolved and that Sterling Resources had failed to meet payment obligations it had assumed. Although the letter stated that legal action would commence after forty-five days if the default conditions were not resolved, Perdue did not file his

declaratory judgment action until December 2, 1999. In his complaint, Perdue alleged that Sterling Resources had failed to perform its duties, and he asked for a rescission of the contract and for the entry of an order requiring the return of the company's stock.

Summons for Sterling Resources was issued on December 2, 1999, and was served on the Kentucky Secretary of State on December 3, 1999. It was not received by the process agent for Sterling Resources until January 11, 2000. Sterling Resources, a Texas corporation, sought local counsel and sought to resolve the dispute without further litigation. The parties agreed to a continuance which would allow Sterling Resources until February 8, 2000, to file an answer. Sterling Resources' president, Charles Davis, signed and filed an answer to Perdue's complaint on February 22, 2000. In its answer, Sterling Resources generally denied the allegations in the complaint.

Following the filing of Sterling Resources' answer, Perdue moved the court to strike the answer and to award him a default judgment. In support of his motion, he alleged that the answer was not timely filed and that it was signed by an individual who was not a practicing attorney and was thus engaged in the unauthorized practice of law. On March 7, 2000, an attorney from Kentucky moved the court to enter an order allowing an attorney from Tulsa, Oklahoma, to represent Sterling Resources *pro hac vice*.

After a hearing on March 8, 2000, the trial court entered a default judgment against Sterling Resources. The

judgment, which was entered on March 20, 2000, held in pertinent part as follows:

On December 2, 1999, a Complaint for Declaratory Judgment was filed by the Plaintiff. No proper Response thereto has been filed as of yet, however, one was tendered at the Hearing on this matter on March 8, 2000. In reviewing the Answer of the Defendant, the Court finds that the Defendant has admitted that it has not met certain conditions pertaining to the Contract but asserts that Perdue has agreed to Sterling's continued efforts to satisfy these conditions.

Obviously, the Plaintiff has filed a suit and has not agreed to any continuance of time.

Furthermore, the Defendant requested of Plaintiff's counsel a continuance through February 7, 2000, which the then attorney for the Plaintiff agreed to. However, as noted above, no Answer has yet been filed, however, one has been tendered.

On March 30, 2000, Sterling Resources filed a motion to stay the enforcement of the judgment and a motion to set it aside. In an order entered on April 13, 2000, the trial court granted the motion to stay the enforcement of the judgment but denied the motion to set the judgment aside.<sup>1</sup> This appeal by Sterling Resources followed.

Sterling Resources' first argument is that the trial court erred in granting Perdue a default judgment and erred in

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<sup>1</sup> The motion to stay enforcement of the judgment was granted because a federal court had previously entered a writ of garnishment ordering Sterling Resources to "hold property belonging to, or indebted to, the judgment debtor" [Perdue] and restraining Sterling Resources "from paying to the judgment debtor, or to anyone for him, money or property in your possession belonging to him or in which he has any interest." The federal court has since released this writ of garnishment.

failing to set it aside. CR<sup>2</sup> 12.01 requires a defendant to serve his answer within twenty days after service of the summons upon him. Sterling Resources was served on January 11, 2000, and its answer should have been filed by no later than January 31, 2000, in order to meet the requirements of CR 12.01. Sterling Resources' answer to the complaint, which was filed by a company representative who was not an attorney, was filed on February 22, 2000, twenty-two days late. When Perdue moved the court to grant him a default judgment three days later, he complied with CR 55.01 by serving written notice of the motion on Sterling Resources since it had previously appeared in the action. No further answer was filed on behalf of Sterling Resources prior to the March 8, 2000, hearing, although the court noted that one was tendered at that time.<sup>3</sup>

Sterling Resources also contends that the trial court should have set aside the default judgment pursuant to its timely motion.<sup>4</sup> 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." As Sterling Resources has argued, "[d]efault judgments are not favored." Bargo v. Lewis, Ky., 305 S.W.2d 757, 758 (1957).

In Childress v. Childress, Ky., 335 S.W.2d 351 (1960), the court held that "since every cause of action should be tried

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<sup>2</sup> Kentucky Rules of Civil Procedure.

<sup>3</sup> The tendered answer was apparently not made a part of the record herein.

<sup>4</sup> The judgment was entered on March 20, 2000, and the motion to set it aside was filed on March 30, 2000.

upon the merits, the rendering of judgments by default ought to be withheld where seasonable objection is made unless a persuasive reason to the contrary is submitted." Id. at 354. The court also held that "[a] liberal attitude should be observed toward a timely application to set aside a default judgment, although delay in pleading without reasonable excuse cannot always be overlooked." Id. Further, in Educator & Executive Insurers, Inc. v. Moore, Ky., 505 S.W.2d 176 (1974), the court held that two factors to be considered by the trial court in determining whether to set aside a default judgment are "whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to the other parties." Id. at 177.

The first issue is whether the trial court should have granted the default judgment in the first instance. As we have noted, Sterling Resources' answer was due no later than January 31, 2000. Its answer, filed on February 22, 2000, was untimely and was prepared by a person apparently not authorized to practice law. When the matter came before the trial court on Perdue's motion for default judgment on March 8, 2000, Sterling Resources had still not filed a proper answer. Under these circumstances, we conclude the trial court did not abuse its discretion in granting the default judgment. See Dressler v. Barlow, Ky.App., 729 S.W.2d 464 (1987), wherein the court held that the granting of default judgments is discretionary with the trial court in most cases. Id. at 465.

The second issue is whether the trial court should have set the default judgment aside. As we have noted, it may do so if good cause is shown. CR 55.02. "Although default judgments are not favored, trial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse." Howard v. Fountain, Ky.App., 749 S.W.2d 690, 692 (1988). Furthermore, the court in S.R. Blanton Dev., Inc. v. Investors Realty and Management Co., Ky.App., 819 S.W.2d 727 (1991), held that a party moving to set aside a default judgment must show a valid excuse for default, a meritorious defense to the claim, and the absence of prejudice to the nondefaulting party." Id. at 729. See also Perry v. Central Bank & Trust Co., Ky.App., 812 S.W.2d 166, 170 (1991).

Having reviewed the factors to be considered in setting aside a default judgment, we conclude the trial court did not abuse its discretion in denying Sterling Resources' motion. The trial court entered findings rejecting Sterling Resources' excuses for not filing an answer in a timely manner. Further, the trial court noted that Sterling Resources had admitted that it had not met certain contract conditions. As in the Perry case, "we believe the excuses for failing to answer are weak as are the defenses[.]" Id. at 170.

Sterling Resources' second argument is that even if the trial court was within its discretion in granting a default judgment and refusing to set it aside, it nonetheless erred in granting equitable relief where there were no specific allegations or evidentiary findings sufficient to sustain

rescission of the contract. It argues that (1) the trial court was required to hold further hearings for the parties to present evidence on damages, (2) rescission is an extraordinary form of equitable relief which is not available in this case, and (3) the court's findings do not support the granting of this remedy.

Sterling Resources refers to the language in CR 55.01 which states as follows:

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 an 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 by the constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

The rule clearly leaves it in the court's discretion to make a determination as to whether further evidence is necessary. The remedy sought by Perdue was the return of the stock he had transferred to Sterling Resources in reliance on the purchase agreement. Since the court had determined in its findings that Sterling Resources had admittedly failed to meet its obligations under the agreement, the court was within its discretion in not conducting a further hearing.

Sterling Resources also asserts that the remedy of rescission could not have been granted in this case. The cases cited in its brief have distinguishing facts, and we conclude the remedy of rescission was appropriate. Sterling Resources' argument that the remedy of rescission was inappropriate without



further fact findings is without merit since no further findings were requested. See CR 52.04.

Sterling Resources' last argument is that the trial court erred in ordering it to transfer the stock of the company back to Perdue because such transfer was contrary to a writ of garnishment that had been entered by the federal court. In fact, after the default judgment had been entered, the trial court granted Sterling Resources' motion to stay enforcement of the judgment due to the federal writ. Because the writ has now been released, the issue is moot.

For the foregoing reasons, the judgment and order of the Lee Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John F. Kelley, Jr.  
London, Kentucky

BRIEF FOR APPELLEE:

Charles B. Perdue, Pro Se  
Beattyville, Kentucky