

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001779-MR

GARY BUIS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 98-CI-00107

VICKI BLACK COX,
ROGER P. ELLIOTT, and
SHEILA H. ELLIOTT

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, HUDDLESTON, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Gary Buis appeals from a default judgment, a judgment awarding damages, and an order denying his motion to set aside the default judgment and judgment awarding damages and to file an answer and cross claim. We affirm.

This case arose out of a land contract between Roger P. Elliott and Sheila H. Elliott, as sellers, and Terry Lee Cox and Vicki Black Cox, as buyers.¹ On November 16, 1994, the Elliotts

¹ Terry Lee Cox is Vicki Black Cox's former husband. He was originally a contracting party and a litigant. He quitclaimed his interest in the property to Vicki Black Cox and is no longer
(continued...)

and the Coxes entered into a land contract whereby the Coxes agreed to purchase from the Elliotts two tracts of land containing approximately 147 acres located in Casey County, Kentucky. The agreed purchase price of the property was \$40,000 with interest until paid. Installment payments were to be made by the Coxes, and they were given possession of the property upon signing the contract. The Coxes defaulted in their installment payments, and on April 28, 1998, they were informed by the Elliotts that the Elliotts were retaking the property due to the default.

Meanwhile, the Elliotts contracted with Buis to purchase the property for \$33,000. Apparently, this agreement was reached in February 1998. Buis thereafter took possession of the property.

On June 4, 1998, Cox filed a complaint in the Casey Circuit Court against the Elliotts for breach of contract and against Buis for inducing the Elliotts to breach the contract. Cox also claimed that she was entitled to damages from Buis for damages to the property. Buis was properly served with a summons and a copy of the complaint on July 18, 1998.

Buis did not file an answer or other responsive pleading to the complaint within twenty days after service of the summons upon him as required by CR² 12.01. Thus, Cox sought and procured a default judgment against Buis from the trial court on

¹(...continued)
involved in this action.

² Kentucky Rules of Civil Procedure.

October 13, 1998.³ Cox's motion for default judgment was not served on Buis, but such was not required. See CR 55.01 and Pound Mill Coal Co. v. Pennington, Ky., 309 S.W.2d 772, 774 (1958).

On September 9, 1999, a hearing was held on the issue of damages to be awarded to Cox on her complaint against Buis. Buis was present at the hearing.⁴ On August 18, 2000, the trial court entered a judgment in favor of Cox and against Buis in the amount of \$16,545.22 plus attorney's fees in the sum of \$5,250. Damages were specified as \$13,279.22 for lost profit on the lost 1998 tobacco crop, \$1,196 for damages to the old house on the property due to removing wood from the porches, \$600 for lost use of pasture land for grazing and hay production, and \$750 for punitive damages.

On August 24, 2000, Buis filed a *pro se* motion to vacate the judgment. Although the motion stated that copies of it were sent to Cox's attorney and "all defendants," there was no proof of service by certificate or otherwise as required by CR 5.03. Further, the motion was not noticed for hearing at any

³ The default judgment stated in part that Buis was liable to Cox "for trespass, trover and conversion by his tearing down of fences, cutting timber, plowing fields, disturbing plaintiff's quiet possession in said property and otherwise exercising dominion and control over the real property, fixtures thereto and personal property therein depriving plaintiff of her right of possession."

⁴ We have determined these facts from the parties' briefs. We have searched the record and have been unable to locate any motion which led to the damages hearing. Further, there is no record (tape or transcription) of the damages hearing. We assume that the damages hearing was held on September 9, 1999, and that Buis was present because Cox so stated in her brief and Buis did not dispute these facts in his reply brief.

specific time, date, and place. It merely stated that it would be "brought on for hearing at the convenience of the Court." As grounds for the motion, Buis stated that he was unaware that the matter was to be submitted for judgment, and he requested an opportunity to be heard by the court.⁵

On September 5, 2000, Cox filed a notice of judgment lien against Buis. On October 3, 2000, a check was tendered to Cox in satisfaction of the judgment, and the lien was thereafter released.

On January 12, 2001, counsel for Buis entered an appearance in the case and filed a motion to set aside the default judgment and refund funds paid.⁶ By order entered by the court on January 17, 2001, Cox's claim against the Elliotts was dismissed as settled. On July 19, 2001, the trial court entered an order denying Buis's motion. Therein, the court ruled that Buis had not established excusable neglect entitling him to relief from the default judgment under CR 60.02(a) and that there were no extraordinary circumstances such that relief should be granted under CR 60.02(f). This appeal followed.

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 support of his motion to set aside the default judgment, Buis alleged grounds of excusable neglect and reasons

⁵ The judgment was entered approximately eleven months after the damages trial.

⁶ Cox states in her brief that the entry of appearance and motion to set aside were filed on behalf of Buis on May 5, 2001. Our review of the record indicates that the entry of appearance and motion were filed on January 12, 2001.

of an extraordinary nature justifying relief. Excusable neglect is a ground for relief pursuant to CR 60.02(a). Pursuant to the terms of the rule, a motion on this ground shall be made "not more than one year after the judgment, order, or proceeding was entered or taken." CR 60.02. Cox argues and Buis apparently acknowledges that his motion on this ground was not timely filed.⁷ Relief based on a reason of an extraordinary nature justifying relief "shall be made within a reasonable time." CR 60.02.

Buis argues that he should receive relief from the default judgment because, soon after being served with a summons and a copy of the complaint, he received a letter from Roger Elliott, an appellee herein and district court judge for Casey and Adair County, advising him that the Cox lawsuit was baseless and that it would soon be dismissed. Buis asserts that he believed Elliott would understand the law, and he claims that he thought he had nothing to worry about. Thus, Buis maintains that he did not hire an attorney nor file an answer or defense to the lawsuit due to the representations of Elliott. In support of his argument, he cites the cases of Vanover v. Ashley, 298 Ky. 722, 183 S.W.2d 944 (1944), and Strother v. Day, Ky., 248 S.W.2d 347 (1952). Buis states that these cases are similar to his case in that the defendants therein relied upon promises and assertions of other parties when they failed to file responsive pleadings

⁷ In his reply brief responding to Cox's arguments, Buis argues only that he is entitled to relief pursuant to CR 60.02(f).

and were thereby thrown off-guard, misled, or lulled into a false sense of security.

Cox urges us to reject Buis's appeal on the ground that, by paying her the amount owed in the judgment, Buis should not have been allowed to reopen or otherwise attack the judgment. In support of her argument, she cites Stairs v. Riley, 306 Ky. 645, 208 S.W.2d 961 (1948), Martin v. Beach, Ky., 452 S.W.2d 418 (1970), and Sharp v. Bannon, Ky., 258 S.W.2d 713 (1953). However, those cases involved situations where a settlement for less than the amount of the full judgment was entered as satisfaction of the judgment. We believe Moss v. Smith, Ky., 361 S.W.2d 511 (1962), to be applicable. Therein, the court held that "where a litigant pays an adverse judgment he does not thereby impair his right to appeal." Id. at 514. Thus, we hold that Buis had a right to continue litigation concerning the judgment even though he satisfied the judgment by payment in full.

We now turn to the merits of Buis's appeal. Default judgments are generally not favored. Bargo v. Lewis, Ky., 305 S.W.2d 757, 758 (1957). "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). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

It has been held that factors to be considered by a court in deciding whether to set aside a default judgment are: whether there is a valid excuse for default, a meritorious defense, and absence of prejudice to the other party. Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991). "Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured." Green Seed Co. v. Harrison Tobacco, Ky. App., 663 S.W.2d 755, 757 (1984).

We conclude that the trial court did not abuse its discretion in rejecting Buis's arguments of excusable neglect and extraordinary circumstances in denying his motion to set aside the default judgment. While Buis may have had a meritorious defense to Cox's claim and while the setting aside of the default judgment may not have prejudiced the other parties, Buis simply did not demonstrate a valid excuse for default. His assertion that he would have hired an attorney and filed an answer to defend the Cox complaint if not for the assurances of Roger Elliott is not plausible. Although Elliott was a district court judge, it was not reasonable for Buis to rely, if he did so, on Elliott's representations. After all, Elliott was a co-defendant in the law suit filed by Cox, and Buis now asserts that he would have even filed a cross claim against Elliott for indemnification. Furthermore, while Elliott allegedly represented to Buis that the Cox complaint was without merit, he apparently in no way suggested to Buis that he not defend against

the claim. In short, we agree with the trial court that Buis did not demonstrate a valid reason for his default.

In addition to the reason cited by the trial court in denying Buis's motion to set aside the default judgment, we note that it does not appear Buis filed his motion within a reasonable time as required by CR 60.02. The default judgment was entered against Buis on October 13, 1998. Although the record does not indicate that the default judgment was served on Buis, he undoubtedly knew of its existence when Cox moved the court for a trial on damages. This motion was apparently made on May 14, 1999. Nevertheless, Buis took no action after learning of the default judgment until he filed a motion to vacate judgment on August 24, 2000. In fact, that motion did not request the court to vacate the default judgment but only to vacate the judgment awarding damages. The motion to set aside the default judgment was not filed until January 12, 2001, more than two years after the entry of the default judgment and at least twenty months after Buis learned of its existence. In addition to rejecting Buis's motion on its merits, we conclude that Buis did not demonstrate good cause because he did not timely show the circumstances under which the default judgment was procured by filing his motion within a reasonable time as required by CR 60.02. See Green Seed Co., 663 S.W.2d at 757.

The judgment and orders of the Casey Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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