RENDERED: OCTOBER 17, 2003; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000820-MR

ALONZO SAMUELS — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 97-CI-00160

WANDA SAMUELS GROVES AND
JERRY SAMUELS — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Alonzo Samuels (Alonzo) appeals from an order of the Woodford Circuit Court that denied his motion to set aside a default judgment entered against him and denied his motion to dismiss. Alonzo argues that the default judgment should be reversed since he filed an answer and counterclaim in 1997; in the alternative, he argues that he showed good cause,

as required by CR[1] 55.02 and 60.02, to set aside the default judgment. Alonzo also argues that the circuit court's denial of his motion to dismiss should be reversed because the appellees lost standing. Finding that the court abused its discretion when it denied Alonzo's motion to set aside the default judgment, we reverse in part and remand. However, finding that the circuit court properly denied Alonzo's motion to dismiss, we affirm in part.

On June 19, 1997, the appellees, Wanda Samuels Groves (Wanda) and Jerry Samuels (Jerry), filed suit in the Woodford Circuit Court against their brother, Alonzo Samuels, to partition or sell a tract of real property, known as the Shoreacres property, owned by the three siblings as tenants in common. They acquired the property from their father shortly after he was placed in a nursing home. When Wanda and Jerry filed suit, they had a copy of their complaint served on Alonzo's attorney, Margaret Miller, not on Alonzo.[2] On July 30, 1997, Alonzo filed both an answer and counterclaim.

Along with the complaint, Wanda and Jerry filed a motion for injunctive relief to have Alonzo removed from the property. Alonzo filed a memorandum of law in which he objected. In support of his objection, Alonzo filed an

[1] Kentucky Rules of Civil Procedure.

[2] Miller had agreed to accept service on behalf of Alonzo.

affidavit stating that he had lived on the property for approximately thirty years and wished to remain there. On July 16, 1997, the Woodford Circuit Court denied injunctive relief.

Due to the federal laws regulating Medicaid, Wanda, Jerry, and Alonzo entered into an agreed order, which was signed and entered by the circuit court on April 29, 1999, to convey the Shoreacres property back to their father. In the agreed order, the circuit court directed the master commissioner assigned to the case to execute a deed to convey the Shoreacres property to the siblings' father. However, Alonzo adamantly refused to comply with the agreed order. Despite Alonzo's refusal, the master commissioner executed a deed on October 19, 2000, conveying Wanda's interest and Jerry's interest to their father and his current wife, Anna Samuels (Anna). Subsequently, Wanda, as conservator of their father's estate, conveyed their father's interest in the Shoreacres property to their stepmother, Anna.

On May 9, 2001, concerned that Alonzo had never been personally served with their complaint, Wanda and Jerry filed a motion for leave to personally serve Alonzo with a copy of their 1997 complaint. The circuit court granted their motion, and Alonzo was served with the 1997 complaint on May 15, 2001. On July 30, 2001, Wanda and Jerry filed a motion for default judgment and argued that Alonzo had failed to file an answer.

Also, they filed a motion for the circuit court to direct the master commissioner to execute a deed to convey Alonzo's interest in the Shoreacres property to Anna. On August 8, 2001, the circuit court granted both motions.

On September 7, 2001, Alonzo filed a motion to dismiss Wanda's and Jerry's lawsuit. He argued therein that they had lost standing when they conveyed their interest in the Shoreacres property to their father on October 19, 2000. Also, on September 7, 2001, Alonzo filed a motion to set aside the default judgment and to set aside the order directing the master commissioner to execute a deed conveying his interest to Anna. Alonzo argued that he had previously answered the 1997 complaint. On August 8, 2001, the Woodford Circuit Court denied Alonzo's motions and ordered the master commissioner to execute a deed conveying Alonzo's interest to Anna.

On appeal, Alonzo argues that the Woodford Circuit Court's denial of his motion to set aside default judgment should be reversed. Alonzo points out that he accepted service of process through his counsel, Margaret Miller, in 1997 and filed both an answer and counterclaim on July 30, 1997; thus, he asserts that he was not in default. Alternatively, Alonzo argues that trial courts should be very liberal in considering motions to set aside default judgments so as not to deprive individuals of their day in court. Educator & Executive

Insurers, Inc. v. Moore, Ky., 505 S.W.2d 176 (1974). Alonzo urges this court to reverse the default judgment so he will not be so deprived. Also, citing CR 55.01, Alonzo argues that Wanda and Jerry failed to give him the required three days notice regarding their motion for default judgment. He points out that they failed to send a copy of the motion to his counsel, and, while they mailed a copy of the motion to him, they sent it to the wrong address.

Alonzo argues that Woodford Circuit Court's denial of his motion to dismiss Wanda's and Jerry's complaint should be reversed since they lost standing. Alonzo points out that a person has standing to bring a lawsuit only if that person has a substantial, present, and judicially recognizable interest in the subject matter that is neither remote nor speculative. City of Louisville v. Stock Yards Bank & Trust Co., Ky., 843 S.W.2d 327, 328-29 (1992). Alonzo argues that neither Wanda nor Jerry have a present and substantial interest in the subject matter since they conveyed their interest in the Shoreacres property to their father, who subsequently conveyed it in fee simple to Anna.

In general, the law does not favor default judgments. Despite this, trial courts possess broad discretion when considering a motion to set aside default judgment, and this court will not disturb a trial court's refusal to set aside a

default judgment unless the trial court abused its discretion. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988).

As we have noted, the record reveals that Wanda and Jerry filed their complaint on June 19, 1997, and served a copy of the complaint on Alonzo's attorney, Margaret Miller. The record also reveals that along with their complaint Wanda and Jerry filed a motion for injunctive relief to remove Alonzo from the Shoreacres property. In objecting to their motion, Alonzo, through his attorney, filed both a memorandum of law and a notarized affidavit that he had signed. After the circuit court denied injunctive relief, Alonzo, through his attorney, filed both an answer and counterclaim on July 30, 1997.

In Rosenberg v. Bricken, 302 Ky. 124, 194 S.W.2d 60 (1946), a guardian *ad litem* was duly appointed to represent certain infant defendants, but a summons was never served on him. Id. at 61. Despite the lack of a summons, the guardian filed an answer on behalf of the infants, appeared at depositions for them, and represented them on appeal. Id. On appeal, the appellant argued that service of the summons on the guardian was necessary for the infants to be properly before the trial court. The appellate court stated:

> There can be no contention but that the object or purpose of a service of process is to notify of the proceeding, thereby affording an opportunity to appear before and be heard by the court. It must be

> admitted that mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction, and, *in the absence of an appearance*, there must be service of process. In 42 Am. Jur., Process, Section 4, it is stated:
>
> "The constitutional guaranty of due process of law means notice and opportunity to be heard and to defend before a competent tribunal vested with jurisdiction of the subject matter of the cause, and it is essential therefore to the exercise of that jurisdiction, *where the defendant does not enter a voluntary general appearance* or otherwise waive service of process, that process issue giving notice to those whose rights and interests will be affected. *In the absence of a voluntary appearance*, the issuance and service of process or notice is indispensable to the jurisdiction of a court to determine the adverse claims of parties to the litigation. Until notice is given to the defendant of the action or proceedings against him, and he is given thereby opportunity to appear and be heard, the court has no jurisdiction to proceed to judgment against him even though the court may have jurisdiction of the subject matter."
>
> Undeniably, there was some sort of notice. The guardian ad litem undoubtedly was apprised of the pendency of the action. He appeared and filed answer. He was present at the taking of depositions. He represented the infants in the litigation and could have done no more by notice under service of summons and return thereon. (Emphasis added.)

Id. at 62. See also 62B AM JUR 2d Process § 354 (1990), wherein it is stated that "[a] general appearance by the defendant, without previous objection to the process or return, operates as

a waiver of defects in the process or in the service or return thereof. Such an appearance for a defendant is generally made through an attorney."

As in Rosenberg, despite the lack of service, Alonzo was aware of the 1997 complaint. He hired an attorney and filed an objection to Wanda's and Jerry's motion for injunctive relief and filed both an answer and counterclaim. Thus, in 1997, Alonzo voluntarily appeared in the Woodford Circuit Court, which gave the circuit court jurisdiction over him. Wanda and Jerry had no need to serve another copy of their complaint on Alonzo in 2001, and since he had previously filed an answer in 1997, Alonzo had no need to file another one in 2001. The circuit court erroneously granted a default judgment and abused its discretion when it denied Alonzo's motion to set aside the default judgment.

Regarding standing, the Kentucky Supreme Court stated:

> Prevailing Kentucky authority establishes the standard for standing to sue as "a judicially recognizable interest in the subject matter." The interest may not be "remote and speculative," but must be a present and substantial interest in the subject matter. We have recognized the difficulty of formulating a precise standard to determine whether a party has standing and held that the issue must be decided on the facts of each case. (Citations omitted.)

City of Louisville v. Stock Yards Bank & Trust Co., Ky., 843 S.W.2d 327, 328-29 (1992). See also, Housing Authority of

Louisville v. Service Employees International Union, Local 557, Ky., 885 S.W.2d 692 (1994).

When the circuit court signed and entered the agreed order, it placed a legal obligation on all three siblings to convey their undivided interest in the Shoreacres property back to their father. Although Wanda and Jerry conveyed their individual interests in the property, by operation of the agreed order, Wanda and Jerry retained limited standing to move the circuit court to enforce that order. Thus, the Woodford Circuit Court properly denied Alonzo's motion to dismiss.

For the foregoing reasons, this court affirms the Woodford Circuit Court's denial of Alonzo's motion to dismiss, reverses the court's denial of his motion to set aside default judgment, and remands the case to the Woodford Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Margaret A. Miller
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BRIEF FOR APPELLEE:

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