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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001080-MR
And
NO. 2005-CA-001528-MR

HIGH DESERT LIVESTOCK SUPPLY
AND RICHARD HIGHT — APPELLANTS

v.

APPEALS FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 04-CI-00297

WALTERS GATE COMPANY, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,[1] SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: A default judgment in the amount of $34,530.50 was entered against appellant High Desert Livestock Supply, a Nevada company, and its owner, Richard Hight, stemming from the failure to pay for custom metal products manufactured in Kentucky and delivered to appellants in Nevada. Appellants argue that the trial court erred in failing to quash service of

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

process and to dismiss the complaint for lack of personal jurisdiction over either defendant and in refusing to set aside the default judgment entered upon appellee's claim. We disagree and affirm.

Service of process was accomplished under KRS 454.210, the Kentucky long-arm statute. In support of their contention that the minimum contacts requirement of that enactment had not been satisfied, appellants rely on the following version of the business relationship between the parties: During a chance meeting in Nevada, Richie Walters, owner of Walters Gate, became acquainted with Richard Hight. In the course of a discussion about their respective businesses, Walters suggested the possibility of supplying products to High Desert. Hight subsequently contacted Walters by telephone to discuss the specifics of the initial order. After engaging in one or two additional telephone conversations, High Desert placed an order which included feed panels, horse shelters, gates and other livestock products. At all times during these telephone conversations, Hight remained in the state of Nevada. Thereafter Walters Gate filled High Desert's order, shipping the requested items from Kentucky to High Desert's business location in Nevada. Additional orders for similar goods were placed by Hight, again by placing calls from Nevada to Walters Gate in Kentucky. Hight accepted Walters Gate's terms on all these

orders without negotiation and without executing written contracts.

There appears to be no dispute that Richard Hight ultimately visited Walters Gate's facility in Kentucky to determine whether Walters Gate had the capacity to manufacture specially designed gates for High Desert. After a verbal agreement was reached, Walters Gate manufactured and shipped the gates to High Desert in Nevada. Between April 2003 and February 2004, eleven semi-truck loads of gates were shipped. Hight paid in full for the first nine of these shipments, invoices totaling $163,606. When the tenth shipment was received, Hight made a payment of $1,500, leaving a balance due of $16,012. No payment was made on the invoice price of $18,518.50 on the eleventh shipment. In December 2004, Walters Gate instituted this action to recover the sum of $34,530.50, the amount owing from these two shipments.

Service of process was accomplished on High Desert and Richard Hight on January 4 and January 10, 2005, respectively. On February 22, 2005, before any other steps had been taken in the case, but well after the expiration of the 20-day time limit for answering set out in CR 12, High Desert and Hight filed motions to quash service and to dismiss the complaint for lack of personal jurisdiction. After hearings, the trial judge denied appellants' motions and entered default judgment for

Walters Gate, precipitating the first of these appeals. The second appeal stems from the trial judge's refusal to set aside the judgment of default.

Citing International Shoe Company v. Washington[2] and Tube Turns Division of Chemetron Corp v. Patterson Co., Inc.,[3] appellants argue that subjecting them to the jurisdiction of this Commonwealth for merely placing an order offends "traditional notions of fair play and substantial justice"[4] They liken their situation to the that of the non-resident buyer in Tube Turns, whose single telephone order was determined insufficient to establish the requisite minimum contacts for personal jurisdiction.

We are convinced, however, that the undisputed facts of this case place it squarely within the rationale set out in First National Bank of Louisville v. Shore Tire Co., Inc.,[5] in which this Court distinguished the situation of an isolated purchaser from that of an out-of-state buyer who establishes a significant on-going business relationship with an in-state seller:

> These cases do not involve an isolated transaction as was the case in *Tube Turns,*

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[2] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.95 (1945).

[3] 562 S.W.2d 99 (Ky.App. 1978).

[4] International Shoe, 326 U.S. at 316.

[5] 651 S.W.2d 472 (Ky.App. 1982).

> *supra.* The factual situation here is also altogether different from that of an individual who makes occasional purchases from a mail order supplier. Here, we have an on-going business relationship between business entities doing a considerable volume of business.
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> * * *
>
> When a resident and a non-resident business entity engage in interstate business transactions with each other in which the non-resident places orders with the resident and the resident manufactures the product and ships it to the non-resident, it is our view that each of them have transacted business in both states. The fact that this relationship has continued over an extended period of time and has involved substantial amounts of money will, in itself, satisfy the minimum contacts test established by *International Shoe Co. v. Washington Case, supra,* unless there is a showing of other factors which would affect the balancing of equities and make the exercise of jurisdiction over the non-resident fundamentally unfair. There is no showing of such other factors in this record.
>
> There seems to be no question here that each of the appellees intentionally and purposely availed themselves of the opportunity and privilege of placing business orders in Kentucky and thereby causing a consequence in this state; the cause of action here arises out of the placing of those orders and the extended business relationship and considerable volume of business transacted provides a substantial enough connection with this state to make the exercise of jurisdiction reasonable under these circumstances.

Despite appellants' attempt to characterize the orders placed with Walters Gate as isolated purchases, it is clear to us that an on-going business relationship transacting a

"considerable volume of business" had been established between the parties. Hight even made a trip to Kentucky to insure that Walters Gate was capable of manufacturing certain products to its specifications, resulting in the shipment of goods in excess of $163,000. We are thus convinced that appellants' act of "intentionally and purposely" placing significant business orders which "caused a consequence" within this state was sufficient to satisfy minimum contacts requirements. On the undisputed facts of this case, there is nothing unjust or unfair in subjecting them to the jurisdiction of this Commonwealth to answer litigation arising from those transactions.

Since their motions to quash service and to dismiss were pending, appellants also argue that the trial court erred in entering default judgment. They cite the tolling provisions of CR 12 as extending the time for them to answer until 10 days after the denial of their motions, as well as local court rules concerning the timing of hearings on motions. The basic fallacy in their argument lies in the fact that the motions to dismiss for lack of personal jurisdiction and to quash service of process were not timely filed. In order to avail themselves of the additional ten days for answering after the denial of their CR 12 motions, appellants were required to file those motions

within the time provided for responsive pleadings.[6] Having failed to do so, we find no error in the trial court's decision to consider the various motions filed by both sides at approximately the same time.

Nor do we find any error in the trial judge's refusal to grant appellants' motion to set aside the default judgment. In Perry v. Central Bank & Trust Co.,[7] this Court reiterated the well-established criteria for setting aside a judgment of default:

> CR 55.02 provides that a court may set aside a default judgment in accordance with CR 60.02 for good cause shown. Factors to consider in deciding whether to set aside a judgment are: (1) valid excuse for default, (2) meritorious defense, and (3) absence of prejudice to the other party. 7 W. Bertelsman and K. Philipps, Kentucky Practice,CR 55.02, comment 2 (4th ed.1984) [hereinafter " *Ky.Prac.*"].

Rather than addressing these factors, the motion to set aside the default judgment focuses solely upon the timeliness of the motion for default judgment. Under these circumstances, we find no error in the trial court's refusal to set the default judgment aside.

In their brief to this Court, appellants seek to excuse their failure to timely respond by pointing solely to the fact that they are out of state and needed additional time to

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[6] CR 12.01.

[7] 812 S.W.2d 166, 170 (Ky.App. 1991).

obtain local counsel. Their only attempt at advancing a meritorious defense is the belated assertion that the quality of the unpaid shipments was inferior. Neither of these arguments is persuasive.

Lack of diligence in obtaining local counsel does not amount to good cause. Other than stating that they reside out of state, appellants offer absolutely no explanation as to why this fact precluded them from obtaining counsel in a timely manner. Furthermore, considering the fact that they voiced no objection to the quality of the goods received in the last two shipments of a multi-shipment order until after the institution of this action, their defective product complaint appears to be less than meritorious.[8]

Accordingly, because we find no error in the refusal to set aside the default judgment or in the rulings on the motions to quash service and to dismiss the complaint, the judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

[8] See Perry, supra.

BRIEF FOR APPELLANT:

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