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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000315-MR

KAREN LESLIE GOSSETT — APPELLANT

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 85-CI-000230

DAVID WILLIAM GOSSETT — APPELLEE

OPINION
REVERSING AND REMANDING

* * *

BEFORE: GARDNER, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: This appeal is taken from the judgment of the Nelson Circuit Court setting aside that court's previous order of, inter alia, child support, and dismissing subsequent motions for child support. The circuit court held it lacked jurisdiction to enter an in personam judgment against appellee

when he was only constructively served, therefore, never properly before the court.

BACKGROUND

Appellant, Karen Gossett (Karen), and appellee, David Gossett (David), were married in Nelson County, Kentucky on November 1, 1980. Both parties had been raised in Nelson County where their respective parents reside. In November 1980 David became a member of the United States Navy. Between March 1981 and sometime in 1982, the parties lived in Kingsville, Texas. One (1) daughter was born to the parties on March 14, 1981. In 1982, Karen returned to Nelson County while David was stationed in Norfolk, Virginia. In 1983, Karen joined David in Norfolk where they remained until the date of their separation, July 14, 1984, at which time Karen returned to Nelson County.

On September 23, 1985, Karen filed her petition for dissolution in the Nelson County Circuit Court. Karen acknowledged in her petition that David was incarcerated somewhere outside Kentucky. In fact, David was incarcerated in the Naval brig at the Norfolk Naval Station. At the time Karen filed her petition, she further moved the court to appoint a warning order attorney to warn David of the pendency and nature of the action against him. Francis L. Dickerson, a member of the local bar, was appointed warning order attorney the following day. On September 27, 1985, Dickerson directed a letter to David advising him of the need to file any defenses to

the action within fifty (50) days of September 24, 1985.

On November 4, 1985, David responded to the warning order attorney's letter with the following:

TO: C.E. Allen Circuit Clerk
c/o Court of Justice
Commonwealth of Kentucky
Bardstown, Ky 40004

VIA: Law Office
Francis L. Dickerson
303 N. Third Street
Bardstown, Ky 40004

FROM: David William Gossett
Box 999 Naval Station
Norfolk, Va 23511

. . . .

Dear Mr. Dickerson,
Thank you for your letter of 27 Sept. 1985 concerning your appointment as the warning order attorney for the complaint filed against me in Nelson Civil Court.

At present I am confined in the Naval Station Brig with an expected release date of 16 FEB. 1986. I am asking the court for a continuance until the last week of FEB. 1986.

I will be presenting evidence to rebut several issues in the complaint. I feel that if the court were to make a judgement [sic] in my absence, I would be denied to contest these matters. I feel that many of the issues mentioned in the complaint are without merit, and could possibly be misinterpreted to my detriment.

I have intentions of finishing the requirements for my Associate Degree, and I will probably only work part-time in the next year, classifying myself as a full-time student. Based on these assumptions I cannot afford to pay maintenance, court costs, or a great amount of child support in

the upcoming future.

> I will be more than happy to appear in court after my release in late Feb. 86. At that time I may require your services to effectively present my defense in these matters. Please feel free to contact myself or my counselor here at the Brig.

David signed the document before a notary on November 6, 1985. A copy of this correspondence was attached to the warning order attorney's report filed November 13, 1985.

Karen's motion for an interlocutory decree of dissolution, reserving all other matters, was entered December 5, 1985. David was released from the Naval brig, under administrative leave, on January 16, 1986. Technically, David remained a member of the armed services until the paperwork effecting his discharge could be completed in April of that year. David made arrangements for his mail to be forwarded to his parents' Nelson County home where he returned immediately following his release.

On January 24, 1986, Karen filed a motion for custody of the parties' minor child, child support, permanent maintenance, attorney fees and court costs. The motion's certificate indicated notice had been sent to David at his Naval station address; however, David denies having ever received the forwarded document or any other papers regarding this matter. However, the motion and notice of hearing is not of record as having been returned to the circuit clerk's office, yet, David's

copy of the court's ultimate order of March 5, 1986 addressing, inter alia, David's child support obligation, is of record as having been "returned to sender." Furthermore, following his release from the brig, and return to Kentucky, David made no independent effort to contact the court or any officer thereof to ascertain the status of this action, nor did he make any child support payments pursuant to the order.

On October 10, 1995, David moved the court for CR 60.02 relief requesting the March 5, 1986 order be vacated.[1] Sometime in 1996, Karen moved the court for an order compelling David to commence paying maintenance and child support arrearages pursuant to the March 1986 order. In February 1996 an interlocutory order was issued vacating the portion of the March 5, 1986 order dissolving the marriage[2] between the parties and referring the matter of child support to the domestic relations commissioner for further proceedings.

David was summonsed via the Kentucky Secretary of State on April 17, 1996. Since the record is incomplete and fails to reflect the specific motion in issue, we shall presume the summons regarded Karen's 1996 motion to obtain maintenance and child support. In May 1996, David made a motion under CR 12.02, moving the court to dismiss the entire action as it

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1In light of the record before us, it would appear that David's motivation to seek CR 60.02 relief was precipitated by the Commonwealth's action to be reimbursed for AFDC which had been received by Karen on bealf of the parties' minor child.

2The parties were to be considered divorced as of December 5, 1985, the date of the original judgment.

relates to child support and maintenance, and quash the above-mentioned summons. On January 6, 1997, the circuit court found that it lacked jurisdiction and sustained David's motion for dismissal. This appeal ensued.

In determining the absence of jurisdiction, the circuit court concluded that David had never personally appeared in the original dissolution action. The court opined that David's response to correspondence from the warning order attorney did not operate as a personal appearance. We disagree.

Indeed, it is accurate that the court is prohibited from rendering personal judgment against a constructively served party unless they have "appeared" in the action. KRS 454.165. An appearance, however, is generally found when a party has participated in the action to an extent indicating an intention to defend. Cann v. Howard, Ky. App., 850 S.W.2d 57, 62 (1993)(citing Smith v. Gadd, Ky., 280 S.W.2d 495 (1955)).

> Therefore, our question is not whether the [respondent] has submitted himself to the jurisdiction of the court, but whether or not he has so participated in the action as to indicate an intention to defend. There must be some act which would signify that the [respondent] is contesting liability rather than admitting it, and therefore would be likely to contest the motion for judgment if given notice.
>
> In construing the word "appeared" . . ., we are of the opinion that it means the [respondent] 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, 498 (1955).

We believe David's letter to the Nelson County Circuit Clerk served not only as the requisite act signifying the intent to appear, contest and defend but as an actual appearance, invoking jurisdiction of the court.

Plainly, the face of the document reveals that David addressed his reply letter to C.E. Allen, Circuit Court Clerk, at the appropriate address provided by Dickerson, the warning order attorney. Dickerson was merely utilized as the medium by which to convey the communication. This fact is evidenced by David's use of the term "via" in reference to Dickerson's law office.

Further, a review of the actual language of the letter reveals that, but for two (2) sentences, its content addresses the court. The opening sentence thanks Dickerson for the notice of the action. The concluding paragraph contains one (1) statement referencing David's possible future need of attorney services in presenting his defenses. The remainder of the correspondence addresses: (1) David's then current status; (2) the fact that David "will be presenting evidence to rebut several issues in the complaint[;]" (3) that "many of the issues mentioned in the complaint are without merit" and misinterpretation of same may operate to his detriment; (4) future work and educational plans relating to an ability to pay maintenance and child support; and, (5) the clear statement that

"I will be more than happy to appear in court after my release . . . ."

As attested by the contents of this letter, David made known his intention to present evidence in his defense, contesting the issues, and personally advancing his case before the court. Again, David stated, "I will be more than happy to appear in court. . . ." As such, we conclude that David received notification of the dissolution action, at least in November 1985 when he, personally, responded to the court that he intended to appear and defend the action brought against him which included a claim for, inter alia, custody of the parties' minor child, child support, and maintenance, in addition to fees and costs.

Moreover, David stated, "I am asking the court for a continuance. . . ." "It is elementary law that a party who enters his appearance to any suit by filing an answer or otherwise responding waives the service of a summons." Brock v. Saylor, 300 Ky. 471, 189 S.W.2d 688, 690 (1945). It is our opinion that requesting relief from the court, in this case a continuance, constitutes an affirmative appearance, invoking personal jurisdiction.

Apparently, the circuit court treated the final decree of dissolution (March 5, 1996 order) as a default judgment, which, essentially, it was. CR 55.01. Although David's brief in support of an order setting aside all orders except the

actual decree of dissolution fails to cite the rule of civil procedure on which he relies, we believe the action could be characterized as a CR 55.02 motion to set aside a default judgment. On the other hand, even if it is more properly considered a CR 60.02 motion, the outcome remains the same because CR 55.02 provides that the court may set aside a judgment by default in accordance with CR 60.02.

CR 60.02 provides in relevant part: "On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (e) the judgment is void. . . . The motion shall be made within a reasonable time[.]" "While there is no time limit for a motion to set aside predicated on the judgment being void, the motion must still be made 'within a reasonable time. . . .' "Foremost Ins. Co. v. Whitaker, Ky. App., 892 S.W.2d 607, 610 (1995)(citing CR 60.02). The reasonable time restriction is a matter left to the discretion of the trial court, yet a factor which the trial court need take into consideration. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 858 (1983).

Likewise, CR 12 requires that the defense of lack of personal jurisdiction be timely presented.

> Whatever rights a party formerly could assert by special appearance may be preserved regardless of whether or not a general appearance has been entered, provided the defense or objection is timely presented under Rule 12. Even though the

> party at the same time or subsequently enters a general appearance, or by pleading or motion raises an issue with respect to the merits of the action, his special defenses remain intact if properly asserted.

Cann v. Howard, Ky. App., 850 S.W.2d 57, 62-3 (1993)(emphasis added)(citation omitted). Hence, under any of these scenarios, the requirement is the same, i.e., that the motion be made in a timely fashion.

This action was instituted in September 1985. As discussed supra, David received notice and responded to the complaint. On November 28, 1994, David entered into an agreed order to pay child support arrearages. According to David's own testimony, at the time he was advised that the arrearages required repayment, he "cooperated fully and made arrangements to repay [the] amount." David also testified he did not seek legal representation at this time, rather, voluntarily entered into the agreed order. It was not until October 1995, some ten (10) years following the initiation of the suit, that David asserted the court lacked in personam jurisdiction.

While review of the record does not indicate the issue of "timeliness" of David's motion to vacate and dismiss was raised before the circuit court, we believe the record clearly reflects that his motion was not timely filed, and that he waived his defense of lack of personal jurisdiction by failing to bring a CR 55.02, CR 60.02, or CR 12.02 motion within a reasonable time after becoming aware of the cause of action

against him and entering his appearance.

In sum, we disagree with the circuit court's conclusion that David never made an appearance in the original action. Rather, it is our position that David's response to the court, and request for relief, established not only an intent to appear and defend in the action against him, but an actual appearance rendering personal jurisdiction in the court. Following his release from the Naval brig, it was merely David's own inaction that resulted in his lack of representation. He cannot be said to have been denied notice nor the opportunity to be heard. Rather, David made a cognizant decision to ignore the proceedings.

Further, we find the circuit court failed to determine whether David waived his defense of lack of personal jurisdiction by failure to bring a CR 55.02, CR 60.02, or CR 12.02 motion within a reasonable time after becoming aware of the action against him and subsequent order for child support.

The order of the Nelson Circuit Court is reversed and the matter remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John S. Kelley, Jr.
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Larry Langan
Bardstown, Kentucky