RENDERED: JANUARY 28, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000938-MR

THOMAS WEIRD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CI-004102

ERIC EMBERTON — APPELLEE

OPINION
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: Thomas Weird appeals[1] from the April 3, 2007, opinion and order of the Jefferson Circuit Court granting Eric Emberton's motion to set aside an order entered on December 6, 2006, which had set aside a default judgment entered on December 6, 2005, and allowed Weird's ex-wife, Cheryl, to intervene.

[1] Whether this appeal was timely filed was the subject of a prior appeal to this Court, *Weird v. Emberton,* Case No. 2007-CA-000938-MR, in which the Supreme Court of Kentucky granted discretionary review. In *Weird v. Emberton,* 306 S.W.3d 67 (Ky. 2010), the Supreme Court determined the appeal was timely filed where the Jefferson Circuit Court Clerk's Office was closed for observance of the Kentucky Derby Parade on the last day for filing the notice of appeal.

Due to noncompliance with CR[2] 17.04(1), relative to entry of the December 6, 2005, default judgment, we reverse in part and remand for proceedings consistent with this Opinion.

FACTS

We provide a truncated version of the relevant facts. While a guest in Weird's home, Emberton claims he was the victim of assault, battery and unlawful imprisonment resulting in significant medical bills and permanent injury. On May 10, 2005, Emberton filed a civil suit against Weird in the Jefferson Circuit Court. Weird was served while in custody in the Bullitt County Jail on July 14, 2005, on unrelated drug charges. Weird failed to file a timely answer to the complaint within twenty days of receipt of service as required by CR 12.01. On August 29, 2005, forty-six days after receiving service of the complaint, Weird was released from custody on a $25,000.00 bond posted by his now ex-wife.

Following Weird's release from the Bullitt County Jail, Emberton moved for a default judgment on September 8, 2005. Default judgment as to liability was entered against Weird on September 20, 2005. Damages in the amount of $100,000.00 were awarded to Emberton on December 6, 2005, after which he began collection efforts.

On February 16, 2006, Weird moved to set aside the default judgment citing CR 55.02. Following a hearing and oral argument, the motion was denied

[2] Kentucky Rules of Civil Procedure.

on March 18, 2006. Weird did not appeal the denial nor did he move the trial court to reconsider its ruling under CR 59.05.

On November 27, 2006, Cheryl moved the trial court for permission to intervene because Emberton was seeking property in which she had an interest, and to set aside the default judgment because Weird was a prisoner when he was served with the complaint and no guardian *ad litem* was appointed for him as provided in CR 17.04(1). On December 6, 2006, without elaboration, the trial court granted Cheryl leave to intervene and set aside the default judgment which had been entered in December of 2005.

On December 15, 2006, Emberton filed a motion for reconsideration. Thereafter, on December 21, 2006, Emberton moved the trial court to require Weird to file an answer. Such an order was entered on January 4, 2007, and Weird filed an answer on January 26, 2007. Weird then moved the trial court to vacate the default judgment pursuant to CR 60.02(e) and CR 59.01(a) claiming it was void due to noncompliance with CR 17.04.

Following a hearing and oral argument, on April 3, 2007, the trial court set aside the order entered on December 6, 2006, stating in relevant part:

> [Weird's] arguments with regard to CR 17.04 must fail as a matter of law. CR 17.04(1) states that, "Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after

> careful examination of the case he or she is unable to make defense." In *Davidson v. Boggs,* Ky. App., 859 SW 2d 662 (1993), the Court held that, CR 17.04 is intended, in part, to prevent the failure of a prisoner to obtain counsel as being deemed a waiver of his right to due process." At 665, see also *Horn v. Wheeler,* Ky. App., 180 SW 3d 504 (2005).
>
> However, the plain language of the rule forbids the entry of judgment against a "prisoner" without the prior appointment of a guardian ad litem. In this case, [Weird] was not a prisoner at the time the judgment was entered. Therefore, the judgment need not be set aside on basis of CR 17.04.

Thus, the original default judgment was reinstated. Appeal of the order entered on April 3, 2007, followed.

LEGAL ANALYSIS

The limited focus of this appeal is the operation of CR 17.04(1) as it pertains to the lack of filing a timely answer to a complaint and a subsequent motion for default judgment. Weird argues default judgment should never have been entered against him because he was an inmate throughout the twenty days he had to respond to the complaint, he failed to file an answer to the complaint, and no guardian *ad litem* was appointed by the trial court to represent him prior to entry of the judgment. In contrast, Emberton argues Weird was free on bond at the time default judgment was entered and therefore the appointment of a guardian *ad litem* required under CR 17.04(1) was not triggered. We agree with Weird and reverse in part and remand.

As explained in *Davidson,* 859 S.W.2d at 664,

> [t]he language of CR 17.04 is quite clear as to the proper course of action available to the court when an imprisoned defendant fails or is unable to defend an action brought against him. In all such cases the court is required to appoint a practicing attorney as guardian ad litem and may not proceed with trial until the required duties are performed by the guardian ad litem.

Upon a careful reading of CR 17.04(1), we deem the controlling language of the rule to be, "[i]f for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem[.]"[3]

In the case before us, it is undisputed that Weird was jailed in the Bullitt County Jail at the time he was served with the complaint, as was confirmed by the sheriff's return on the summons. Further evidence of the trial court and Emberton being aware of Weird's incarceration is Emberton's motion for an order appointing a special bailiff to serve Weird and the trial court's entry of the requested order. It is also undisputed that Weird remained an inmate until his release on bond on August 29, 2005. Therefore, he was jailed for the entire twenty days allotted to him to file an answer to the complaint. CR 12.01. It is further undisputed that no timely answer was filed prior to entry of the original default judgment for liability on September 20, 2005. Indeed, no answer was filed until January 26, 2007, after the trial court had granted Emberton's motion to require Weird to answer the complaint or be subject to a motion for default judgment.

[3] The scope of this Opinion is limited to its unique facts wherein Weird remained incarcerated throughout the entire twenty days he was afforded to file an answer upon being served the complaint and the trial court being aware of Weird's incarceration.

Finally, it is undisputed that no guardian *ad litem* was ever appointed by the trial court to represent Weird prior to entry of the default judgment.

In light of the foregoing facts, we hold it was incumbent upon the trial court to appoint a guardian *ad litem* for Weird. No guardian having been appointed, reversal of that portion of the opinion reinstating the default judgment entered on December 6. 2005, is required with remand for trial and/or further proceedings.

As explained in *Davidson*,

> the application of CR 17.04 is not discretionary with the trial court. The rule does not distinguish between voluntary and involuntary absences nor does it allow consideration of whether the prisoner possessed sufficient funds to obtain counsel of his own choosing. Rather, the express terms of CR 17.04 require the court to appoint a guardian ad litem if the prisoner fails to defend for any reason. The failure of the trial court to comply with the requirements of CR 17.04 is a sufficient basis to grant a new trial under CR 59.02(a). In fact, the appointment of a guardian ad litem under CR 17.04 was designed to prevent the very type of proceeding which took place in the circuit court.

Id. at 665. Here, the trial court erroneously focused on that portion of CR 17.04(1) that reads, "and no judgment shall be rendered against the prisoner" and surmised that since Weird was not a prisoner at the time the default judgment was entered that appointment of a guardian *ad litem* was unnecessary. The trial court's reading of the rule ignores the preceding clause of the rule requiring appointment "[i]f for any reason the prisoner fails or is unable to defend an action[.]"

Having determined the trial court erred, we now turn our attention to the proper resolution of this appeal. The trial court's initial error was its failure to appoint a guardian *ad litem* for Weird as required by CR 17.04(1) since Weird was a prisoner when he was served with the complaint, remained a prisoner during the entire time allotted for filing a timely answer, and failed to file an answer. Requiring the trial court to appoint a guardian *ad litem* pursuant to CR 17.04 at this point would be superfluous because Weird ultimately filed an answer on January 26, 2007. As explained in *Davidson,* the purpose of CR 17.04 is to preserve a prisoner's due process rights. That purpose was accomplished when the trial court provided Weird additional time in which to file an answer, and he did so. The purpose of CR 17.04 having been satisfied, and the deleterious impact of the trial court's initial error having been remedied, it would be illogical to require strict compliance with the requirement of appointment of a guardian *ad litem* under these facts and at this point in the litigation, and we decline to do so.

Finally, in its order entered on April 3, 2007, the trial court acknowledged committing a second error--improvidently allowing Cheryl to intervene when she lacked standing to ask that the default judgment be set aside. The effect of the order entered on April 3, 2007, was to reinstate the original default judgment which had been entered on December 6, 2005. However, default judgment was no longer an option because by that time, Weird had filed an answer to the complaint pursuant to a trial court order entered on January 4, 2007. Entry of a default judgment under CR 55.01 is unavailable once an answer has been

filed. Thus, reversal of that portion of the April 3, 2007, order that reinstated the default judgment is necessary.

For the foregoing reasons, the April 3, 2007, opinion and order is reversed in part and remanded for trial and/or proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kyle A. Burden
Louisville, Kentucky

BRIEF FOR APPELLEE:

Andrew K. Gailor
Louisville, Kentucky