

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-000035-MR

JOHN B. MEYERS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NO. 09-CI-005920

ATLANTIS NORTH, INC.

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: John B. Meyers appeals from the trial court's denial of a motion, under Kentucky Rules of Civil Procedure (CR) 60.02, to set aside a default judgment entered against Meyers on April 8, 2010. After a thorough review of the parties' arguments, the record, and the applicable law, we find no error in the trial court's entry of the default judgment and the corresponding denial of CR 60.02

relief from said judgment; accordingly, we affirm on this ground. However, we have concluded that the trial court did not enter the required findings of fact and conclusions of law in its award of damages; thus, we reverse the award of damages in this case and remand this matter for further proceedings.

On June 15, 2009, Appellee, Atlantis North, Inc., (hereinafter “Atlantis”) filed a complaint against Meyers seeking an accounting and damages for conversion and breach of fiduciary duty, alleging that Meyers had mismanaged and mishandled funds belonging to Atlantis. Atlantis in 2007 had retained Meyers to act as its agent and to manage a portion of its real estate business regarding five condominium units at the Brown Suburban complex in Louisville. Meyers was to acquire and then manage, maintain, and collect rents on the units.

Thereafter, Meyers ceased communications with Atlantis. Atlantis then initiated this action after it learned that Meyers had not paid maintenance fees on the properties. Meyers was properly served with the summons and complaint. Meyers did not retain defense counsel in regards to this action. Prior to this action Meyers underwent a dissolution of marriage proceeding initiated in 2006. Meyers’s divorce attorney, W. Waverly Townes, contacted Atlantis for Meyers. Through Townes, Atlantis received keys to the units and obtained financial files. Townes eventually informed Atlantis that Meyers had stopped communicating with him and that Atlantis should proceed as necessary. Neither Meyers nor Townes filed an answer or any responsive pleading of any kind in this action.

Atlantis moved for default judgment on the issue of liability on October 6, 2009, which was entered by the trial court on October 8, 2009. On February 19, 2010, Atlantis moved for a hearing to determine damages; said hearing was conducted on April 8, 2010. At the hearing Atlantis set forth its proof, including testimony from a certified public accountant, regarding the amount of money which was missing or unaccounted for and the lost profits regarding the mismanagement of funds by Meyers.<sup>1</sup> Thereafter, the court entered a judgment against Meyers in the amount of \$240,145.27.

Atlantis then filed a non-wage garnishment against Meyers on April 12, 2010, and received \$33,283.39 from Meyers's bank. Meyers received a copy of this document in accordance with law. On April 23, 2010, Atlantis filed a judgment lien against Meyers's property and initiated a foreclosure action on May 28, 2010. Meyers was again personally served with the summons and complaint in the foreclosure action; Meyers again failed to answer or respond in any fashion. On July 28, 2010, Atlantis moved for default judgment and order of sale in the foreclosure action. Finally, on September 8, 2010, Meyers filed and served a motion for leave to file a late answer in the original action. However, on September 14, 2010, the trial court entered a default judgment and order of sale in the foreclosure action. The sale was set for December 7, 2010.

---

<sup>1</sup> Meyers argues on appeal that this proof was flawed because the hearing lasted only 26 minutes, only one witness testified, and only one exhibit was entered into evidence. Meyers argues that some of the funds which were allegedly for the purchase of additional condominium units were in fact for services rendered by Meyers.

On December 2, 2010, the trial court entered the order *sub judice* denying Meyers's motion to set aside the default judgment entered on April 8, 2010, and for leave to file a late answer. The trial court noted that Meyers's primary argument was that his contentious divorce left him in such a poor mental state that he was unable to defend against this action. While the court was empathetic to Meyers's plight, the court was not satisfied that Meyers's argument was a "valid excuse," considering that the divorce was final in 2006 and this case was not filed until 2009. The court also found that to grant Meyers's motion would result in prejudice to Atlantis. It is from this that Meyers now appeals.

On appeal, Meyers presents two arguments, namely: (1) the trial court abused its discretion by upholding the default judgment despite Kentucky's longstanding policy disfavoring default judgments; and (2) the trial court abused its discretion by upholding the default judgment after Meyers showed that he had a reasonable excuse, a meritorious defense and that Atlantis would not be prejudiced if the default judgment was set aside. Atlantis argues that the trial court did not abuse its discretion. We now address the issues raised *sub judice*.

Meyer is correct that default judgments are generally disfavored in Kentucky. *See Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky.App. 1988). However, a trial court is vested with broad discretion when considering motions to set them aside, and an appellate court will not overturn the trial court's decision absent a showing that the trial court abused its discretion. *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527, 530 (Ky.App. 2003).

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*, 993 S.W.2d 941, 945 (Ky. 1999).

A party seeking to have a default judgment set aside must show good cause; i.e., the moving party must show “(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.” *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527, 530-31 (Ky.App. 2003)(internal citations omitted). “Absent a showing of all three elements, the default judgment will not be set aside.” *Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S.W.2d 856, 859 (Ky.App. 1995).

Additionally, CR 60.02 states in 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: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief...

As an appellate court we review the denial of a CR 60.02 motion under an abuse of discretion standard, and will only overturn the trial court's exercise of discretion in the event of a miscarriage of justice. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky.

1957), and *Richardson v. Bruner*, 327 S.W.2d 572, 573 (Ky. 1959). Absent a showing of abuse of discretion, the trial court's decision in this matter should be affirmed. *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994).

*Sub judice*, Meyers argues that he had a reasonable excuse, a meritorious defense and that Atlantis would not be prejudiced if the default judgment was set aside. In support thereof, Meyers argues that his divorce in 2006 left him extremely depressed which resulted in excusable neglect for failure to respond to the action. Meyers points to numerous examples of how his life was in shambles following the divorce, and how this resulted in both mistake and extraordinary circumstances as used in CR 60.02 to justify setting aside the default judgment. Meyers contends that he did not think a formal response was necessary since he had Townes turn the keys and financial documents over to Atlantis.

While this may have been the case, under the law, Meyers was required to show good cause. We agree with the trial court that Meyers did not sustain this burden. Meyers does not contest that he entered into the agreement with Atlantis in 2007 following his divorce in 2006 and that this action was initiated in 2009. We agree that the trial court's denial of the motion to set aside the default based on the evidence presented was not an abuse of discretion. *See PNC Bank, infra*. As such, we do not find that the trial court committed an abuse of discretion; accordingly, we affirm on this ground. However, our review of the judgment in question reveals that there was a dearth of findings of fact and

conclusions of law regarding damages; the trial court simply stated what damages were ordered. This Court in *Deskins v. Estep*, 314 S.W.3d 300, 304 (Ky. App. 2010) held:

CR 55.01 clearly contemplates that damages hearings in cases where a default judgment for liability has been entered should be evidentiary in nature to determine the amount of damages and establish the truth of any other allegations or evidence supporting the damage claim. Kentucky Courts have concluded that proceedings of this nature are governed by CR 52.01. *Greathouse v. Am. Nat'l Bank & Trust Co.*, 796 S.W.2d 868 (Ky.App.1990). The provisions in CR 52.01 are mandatory and require the court to make specific findings of fact and separate conclusions of law before rendering a judgment. *Brown v. Shelton*, 156 S.W.3d 319 (Ky.App.2004). In this case, the circuit court made absolutely no findings of fact or conclusions of law which clearly precludes this Court from making any type of meaningful appellate review of the judgment entered in this action. This error alone constitutes sufficient grounds for this Court to reverse and remand the judgment entered February 16, 2007, for additional proceedings.

In light of *Deskins* we believe that it is appropriate to reverse the award of damages and remand this matter for further proceedings.

In light of the aforementioned, we affirm the denial of Meyers's motion to set aside the default judgment, reverse the award of damages and remand this matter for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donald H. Smith  
Timothy E. Ash  
Louisville, Kentucky

BRIEF FOR APPELLEE:

David B. Mour  
Zachary L. Taylor  
Louisville, Kentucky