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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000453-MR
AND
NO. 2012-CA-000515-MR

BOLLMAN HAT COMPANY APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CI-01363

RON W. ASHFORD APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: These appeals arise from several orders of the Fayette Circuit Court related to Ron Ashford's complaint alleging causes of action against Bollman Hat Company (Bollman Hat) for age discrimination, breach of contract, and breach of the covenant of good faith and fair dealing. On direct appeal,

Bollman Hat disputes the entry of the default judgment, summary judgment in favor of Ashford on damages, and the award of $250,000.00 in attorney fees to Ashford as a discovery sanction. On cross-appeal, Ashford contends that the circuit court erred in allowing Bollman Hat to present affirmative defenses and in failing to award additional damages. Because we hold that the circuit court abused its discretion in failing to set aside the default judgment, we reverse.

On March 8, 2010, Ashford filed suit against Bollman Hat seeking damages for age discrimination and for breach of contract and breach of implied covenant of good faith and fair dealing. Ashford was a resident of Lexington, Kentucky, which he treated as his regular work station, and acted on behalf of Bollman Hat in Kentucky, Indiana, and Tennessee. Bollman Hat is a Pennsylvania corporation with a principal place of business in Adamstown, Pennsylvania. Ashford claimed to have been employed by Bollman Hat as a sales representative in 1986 until his termination on December 17, 2006. He stated that he consistently obtained excellent evaluations, but along with other similarly situated individuals, was terminated on December 17, 2006, due to his age. Ashford filed a charge of discrimination with the Equal Employment Opportunity Commission's New York District Office and received a formal notice of right to sue on December 8, 2009. In his complaint, Ashford alleged that he was terminated solely on the basis of his age, for which he sought compensatory and punitive damages. He also alleged that Bollman Hat breached its contract and covenant of good faith and fair dealing with

him related to the commissions he was to receive pursuant to the contract the two parties entered into previously.

Ashford sought service of the complaint on Bollman Hat pursuant to Kentucky's long arm statute, Kentucky Revised Statutes (KRS) 454.210, through service by the Kentucky Secretary of State to Donald I. Rongione, Bollman Hat's president, in Adamstown, Pennsylvania. The Office of the Secretary of State received the summons and documents on March 17, 2010, and attempted to serve Bollman Hat on March 19, 2010, by sending a copy of the summons and documents via certified mail, return receipt requested. The envelope, including the summons and complaint, was returned to the Office of the Secretary of State marked "unclaimed" and "unable to forward." The envelope showed that it was subject to restricted delivery and that notifications were sent on March 23, March 28, and April 5, 2010. The Office of the Secretary of State returned the undelivered letter to the circuit court clerk by memorandum dated April 12, 2010. The memorandum was received and entered on April 14, 2010.

On May 19, 2010, Ashford filed an *ex parte* motion for a default judgment pursuant to Kentucky Rules of Civil Procedure (CR) 55.01. In the motion, Ashford stated that twenty days had elapsed since the Secretary of State filed a return on April 14, 2010, which reflected repeated attempts to serve Bollman Hat at its principal place of business, and that Bollman Hat had failed to file an answer or otherwise respond to the complaint. Ashford stated that Bollman Hat's out-of-state counsel had been served with a courtesy copy of the complaint

on March 23, 2010, and that an attorney from Louisville had advised of his involvement in the case, but had not served Ashford with any legal papers or made an appearance in the case. In support of the motion, Ashford filed a certificate of attorney and military affidavit. The circuit court entered a default judgment and order on May 19, 2010, in which it granted Ashford a personal judgment against Bollman Hat, including reasonable attorney fees and court costs in an amount to be determined.

Five days later, Ashford filed a motion for a damages hearing pursuant to CR 55.01, serving Bollman Hat via Mr. Rongione in Adamstown, Pennsylvania. On May 28, 2010, Bollman Hat, through local counsel Paul Hershberg, filed a motion to set aside the default judgment pursuant to CR 60.02(e). In the motion, Bollman Hat stated that the default judgment had been improperly entered because Bollman Hat had never been properly served with the complaint. Bollman Hat attached correspondence between the attorneys. The first was a letter dated May 4, 2010, from attorney Hershberg to James Morris, Ashford's counsel. The body of the letter read as follows:

> Thank you for taking time to talk with me yesterday afternoon about Mr. Ashford's claims. As we discussed, I have been retained by Bollman Hat Company, and am authorized to accept service on the company's behalf. You may send the Complaint and Summons to me by regular mail, and I will consider Bollman served as of the date that I receive them. I will further notify you by e-mail of the date when I receive these pleadings, such that we may be on the same page with respect to applicable dates for future activity.

> Please call me if you have any question wit [sic] regard to the above. I look forward to working with you on this case.

The next correspondence was a letter sent by electronic mail dated May 19, 2010, from attorney Morris to attorney Hershberg. The body read as follows:

> Pursuant to our previous discussions, I enclose herewith a scanned version of the Complaint and Summons served through the Secretary of State's Office upon your client at its principal place of business. Given that the Complaint was properly served through the Secretary of State's Office, there is no need to re-issue service.

In response to Bollman Hat's motion to set aside, Ashford stated that the complaint was served through Kentucky's long arm statute as of April 12, 2010, when the Secretary of State made the required return to the circuit court after Mr. Rongione had been sent notice of the certified mail on March 18, March 23, and April 5, 2010, but ignored the notices.

Bollman Hat then moved to remand the damages hearing scheduled for June 10, 2010, and for a protective order to relieve any of its representatives from appearing at the damages-related depositions Ashford had noticed. Bollman Hat also filed a reply to Ashford's response to its motion to set aside the default judgment. In the reply, Bollman Hat stated that both it and its counsel were unaware of the entry of the default judgment, and contended that it had been sought and secured by ambush because Ashford's counsel never mentioned the motion for default judgment in communications with Bollman Hat's counsel, who had agreed to accept service of the complaint. While it agreed that it may have

been constructively served pursuant to KRS 454.210, Bollman Hat continued to argue that the default judgment should be set aside pursuant to CR 60.02(a) and (f). Bollman Hat argued that Ashford's certification in his motion for default judgment that Bollman Hat had not served any "papers" on his attorney was incorrect, specifically referencing letters and e-mail communications regarding the lawsuit and the intention to defend the case. Bollman Hat also explained that Mr. Rongione did not know what the certified mailer included. In addition, Bollman Hat raised equitable grounds for setting aside the default judgment, noting that a court has great discretion to set aside a default judgment in the interest of justice and reminding the court that the two parties had significant contact and it had manifested an intention to participate in and defend the case. Likewise, Bollman Hat contended that it had meritorious defenses and that Ashford would not experience any prejudice as a result of having to litigate the claim on the merits.

In addition to the two letters included with the original motion, Bollman Hat attached an affidavit from its Pennsylvania counsel, Richard L. Hackman, as well as other communication between the attorneys. The affidavit set forth the chronological timeline following the filing of the complaint:

> 1. I am Pennsylvania counsel for Defendant Bollman Hat Company.
>
> 2. On or about March 9, 2010, I received a voicemail message from James Morris, Counsel for Plaintiff, indicating that he had filed a lawsuit against

Defendant in Fayette Circuit Court. See Exhibit A, attached hereto.[1]

3. On March 10, 2010, I requested that Mr. Morris send me a courtesy copy of the complaint. Id.

4. After several phone calls and emails to Mr. Morris from March 10, 2010 through March 23, 2010 in which I continued to request a courtesy copy of the complaint, on March 23, 2010 Mr. Morris forwarded to me a courtesy copy of the complaint. Id.

5. On April 7, 2010, I sent Mr. Morris correspondence indicating my initial response to the complaint, and my offer to accept service on behalf of Defendant. See Exhibit B, attached hereto.[2] To date, Defendant had not been served with the complaint.

6. On April 7, 2010, Mr. Morris sent me an email indicating that Defendant had been served, and he "[did

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[1] Exhibit A is a copy of two e-mail messages between attorney Hackman and attorney Morris. The message from attorney Hackman, sent March 10, 2010, at 12:16 p.m., states:

> Mr. Morris:
>
> Thank you for your courtesy call yesterday. As I indicated in your voicemail, you advised that you would furnish a courtesy copy of the complaint and agreement. I would like to review this prior to discussing with my client, although I understand that you are traveling today. Would it be possible for someone else from your office to forward this to me today?
>
> Thanks for your time. I look forward to speaking with you after my review of the complaint.

The response from attorney Morris, sent March 23, 2010, at 11:40 a.m., states:

> Mr. Hackman: Please find enclosed a copy of the Complaint filed earlier this month in the Fayette Circuit Court, Lexington, Kentucky, against Bollman Hat Co. If you would like to discuss further, please do not hesitate to contact me at the telephone number and address provided previously. Thank you. JMM[.]

[2] Exhibit B is a letter dated April 7, 2010, and sent via e-mail and first-class mail. In the letter, attorney Hackman addressed each of Ashford's allegations and explained why he believed each claim was not sustainable, including Ashford's status as an independent contractor and the terms of his contract, which included a choice of forum clause.

not] intend to send additional service upon [me] as their legal representative." See Exhibit C, attached hereto. However, once again, Defendant had not yet been served with the complaint.

7. Subsequently, on Friday, April 30, 2010, I received another email from Mr. Morris regarding service of the complaint. See Exhibit D, attached hereto. Specifically, that email stated, in pertinent part:

> "Mr. Hackman: I have not heard further from you regarding the above-referenced matter, although I assume that Bollman has been served with process at this juncture. If not, please advise, and I will obtain another Summons and have process issued again. If you are willing to accept without a new Summons, please advise, and I will forward a copy to your attention…."

8. In response to Mr. Morris' email offering to serve the complaint on me, on Monday, May 3, 2010, at 9:59 a.m., I sent Mr. Morris the following email response, once again advising him that the Defendant had not been served:

> "Mr. Morris:
>
> The client has not received service. In order to protect both parties, and avoid any defective service issues at some point, please have the summons re-issued and have the complaint served on me as counsel. Serving the document on me by FedEx or certified mail is fine. Thank you."

See Exhibit E, attached hereto.

9. Subsequently, on May 3, 2010 at 1:54 p.m., after securing the services of local counsel, I sent Mr. Morris a further email indicating that local counsel was authorized to accept service of the complaint. Specifically,

> "Mr. Morris:
>
> Please be advised that Bollman Hat has retained the services of Seiler Waterman LLC in Louisville to defend its interests and to act as local counsel in this matter. Specifically, your local contact for purposes of this lawsuit is Paul J. Hershberg. Mr. Hershberg's telephone number is (502) ***-****, and he also may be reached by email at ***.
>
> Please feel free to contact Mr. Hershberg regarding service of the complaint. He is authorized to accept service on Bollman's behalf in this matter."

See Exhibit F, attached hereto.

10. The foregoing is true to the best of my knowledge, information and belief.

Bollman Hat also attached an affidavit from Mr. Rongione, the company's President and CEO, describing his receipt of the postcard from the post office regarding the certified mail letter or package, that he did not know what was in the package, that he asked his assistant to pick it up as his agent, that the post office would not permit his assistant to pick up the package on his behalf, and that he forgot to retrieve the package himself. He received a final notice on April 1, 2010, the day before the office was closed for Good Friday, and he was unable to get to the post office before it was returned on April 5, 2010, the following Monday.

Ashford filed a sur-reply on June 4, 2010, arguing that Bollman Hat's original motion was limited to whether the judgment was void and that there was no justification for setting aside the default judgment because it was properly

served through the Secretary of State's Office and Mr. Rongione chose to ignore repeated requests to obtain the summons and complaint. Ashford also responded to Bollman Hat's "second" motion to set aside, arguing that the supplemental motion was inappropriate and further justifying his actions in the procurement of the default judgment.

On June 8, 2010, the court scheduled a hearing on the motion to set aside and on damages for June 10, 2010. On June 9, 2010, Bollman Hat filed an answer to the complaint, along with affirmative defenses it intended to assert. The same day, Bollman Hat filed a notice of removal to federal court based upon diversity jurisdiction, stating that the notice of removal was filed within thirty days after receiving the initial complaint and summons, which it stated was May 19, 2010. Ashford moved to strike Bollman Hat's answer, noting that the circuit court had lost jurisdiction upon the removal to federal court.

The court heard argument from the parties on June 25, 2010, generally related to whether Bollman Hat's answer was properly filed due to the removal to federal court. By order entered July 6, 2010, the court indicated that the answer was filed by the clerk's office prior to the filing of the notice of removal, despite the fact that the removal had been made the day before, holding that the date of filing in the state court action controlled. However, based upon the notice of removal, the court lost jurisdiction to rule on Ashford's motion to strike.

On January 14, 2011, the federal court remanded the case to state court, holding that service had been effectuated on April 12, 2010, through

Kentucky's long arm statute and that, therefore, Bollman Hat's notice of removal filed June 8, 2010, was untimely. The same day, Ashford filed a renewed motion to strike Bollman Hat's answer because the default judgment had already been entered as well as a renewed motion for a final damages hearing. Bollman Hat also renewed its motion to set aside the default judgment, or to defend the action as a constructively served party, pursuant to CR 4.01, 55.02, and 60.02(e).

The court held a hearing on February 7, 2011, regarding the motions to set aside the default judgment and to strike the answer, but limited the discussion to the default judgment only. The court stated that it had reviewed the record and Judge Coffman's order in the federal case, and noted that Judge Coffman ruled that service was effective pursuant to the long arm statute on April 12, 2010. The court agreed with this ruling, stating that Mr. Rongione's inaction in failing to pick up the certified package despite three notices was not an excuse, and declined to revisit this issue. Bollman Hat argued that the default judgment should be declared void or set aside. The court stated that the default judgment was not void because service was made, as set forth in the federal court's order. The court then considered whether the default judgment should be vacated pursuant to CR 60.02, but held that Bollman Hat had not met the three-prong test because Mr. Rongione's failure to pick up the package, despite the communication between the attorneys that the complaint and summons had been served through the Secretary of State, was not a valid excuse for default. The court also held that Ashford would be prejudiced because several months had passed.

In addition, the parties discussed whether there was a waiver of the time to file an answer based upon the correspondence between the attorneys prior to May 4, 2010. The court held that a waiver must be explicit and in the record. Ultimately, the court held that the answer was not timely filed, the default judgment was entered as a result, and there was no good reason to set that aside. Therefore, the court denied the motion to set aside, ordered Bollman Hat's answer stricken, and set the matter for a damages hearing.

The court entered a written order memorializing its ruling on March 2, 2011. In the order, the court specifically stated that the burden was on Bollman Hat to comply with the Civil Rules and file a responsive pleading or seek an extension of time to do so, and that Ashford complied with the Civil Rules related to the entry of the default judgment.

On February 28, 2011, prior to the entry of the written order, Bollman Hat filed a motion to reconsider the court's oral ruling, setting forth the timeline related to the procedural history of the suit. Bollman Hat contended that the parties had agreed to substitute service on counsel for service under the long arm statute based upon the correspondence between the parties. Ashford filed motions for attorney fees and for expedited discovery.

The court held a hearing on March 10, 2011, on the parties' pending motions, including Bollman Hat's motion to reconsider its motion to set aside the default judgment. At the outset, the court stated its general belief that opposing counsel should be given notice of a motion for default judgment, regardless of the

Civil Rules. In the court's view, an attorney should be given notice to ascertain whether that party intends to respond. In this case, the court noted that there was clearly communication between counsel regarding how the complaint was going to be served, something the court did not address in its initial opinion and order, warranting additional argument on the issue. The parties then discussed what constituted an appearance, and Ashford filed a brief on the issue.

The court held a subsequent hearing on the motion for reconsideration on March 22, 2011. The court focused on the notice requirement for the motion for default judgment. Bollman Hat argued that it provided Ashford's counsel with a clear indication of its intent to defend, so it should have been provided notice of the motion for a default judgment. On the other hand, Ashford argued that the e-mail communications did not reveal an agreement between the attorneys. Ashford then stated that he did not want the case to be tried in the Pennsylvania courts, and was worried that Bollman Hat was going to try to remove the matter to federal court and then transfer it to Pennsylvania, which he claims would have been prejudicial. Ashford also accused Bollman Hat's attorney of telling his client to not pick up the certified package due to need for personal service in Pennsylvania. Rather, Ashford asserted that Bollman Hat's counsel had an obligation to tell his client to pick up the package when he got notice of it. Because Bollman Hat petitioned to remove the case to federal court, it had not invoked the jurisdiction of the state circuit court or shown an intention to defend. Bollman Hat stated that it had always intended to defend, but in a different court.

On March 24, 2011, the circuit court entered an opinion and order ruling on Bollman Hat's motion to reconsider, specifically whether Bollman Hat was entitled to notice prior to the entry of the default judgment pursuant to CR 55. Based upon its review of the record, the court determined that Bollman Hat had not actually filed any responsive pleadings, entered an appearance, or otherwise indicated an intent to defend the suit prior to May 19, 2010, the day the default judgment was entered. The court noted that the correspondence Bollman Hat relied upon was not filed in the court's record prior to May 19, 2010. In its analysis, the court recognized that CR 55.01 does not require that a motion for default judgment be served on a defendant if that defendant has not appeared in the action when the motion is filed, but does require the attorney submitting the motion to certify that no papers have been served by him on the defaulting party. The court concluded that Ashford's counsel complied with the certificate requirement. In reaching its conclusion, the court relied upon the cases of *Smith v. Gadd*, 280 S.W.2d 495 (Ky. 1955), and *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972), in which the relevant inquiry was what was contained in the record, not conversations or agreements that had been made outside of court. The court specifically held:

> This Court finds and concludes that both *Gadd* and *Collins* stands [sic] for the proposition that a defendant must either file something in the record or take some affirmative step to invoke or trigger Court action within the allotted time to file an answer to constitute an "appearance" as that term is used in CR 55.01 triggering the notice requirement contained therein. Nothing was

> filed in the record on or before May 2, 2010. The communications between attorneys outlined in the chronology above did not invoke or trigger action and, thus, does [sic] not constitute an appearance. Bollman was not entitled to notice of Ashford's intent to seek a default judgment. Therefore, Bollman's Motion to Reconsider is hereby OVERRULED.

The court held a damages hearing on July 13 and 14, 2011, and entered an opinion and order on September 28, 2011, ruling on several prehearing motions as well as setting the appropriate amount of damages. The court granted Bollman Hat's motion for partial summary judgment on Ashford's age discrimination claims, concluding that Ashford was operating as an independent contractor and was not an employee. The court also granted Ashford's motion for partial summary judgment on his claims for breach of contract and breach of the covenant of good faith and fair dealing. The court found that a contract existed between Ashford and Bollman Hat dated July 1, 2002, providing for commissions, including a 4% commission for HatWorld sales, which Bollman Hat had not been paying. The court also found that Ashford's territory included Indianapolis. The court found that Bollman Hat interfered with sales to Genesco and manipulated sales data, amounting to a breach of the covenant of good faith and fair dealing. The court also found that Ashford was entitled to a 4% commission on HatWorld sales from July 1, 2002, through the end of 2006, and a 10% commission on Genesco sales, and the court calculated damages based upon sales figures for the years at issue. For breach of contract, the court calculated that Ashford was entitled to damages in the amount of $1,280,967.00, representing his unpaid

commissions and interest through September 30, 2011. For breach of the covenant of good faith and fair dealing, the court awarded Ashford damages in the amount of $111,020.60, based upon Bollman Hat's interference in the lost sale and subsequent lost re-orders with Genesco. The court declined to award damages associated with the years 1996 through 2001, as Ashford requested. The court also declined to award punitive damages, but found it appropriate to award discovery sanctions against Bollman Hat of up to $250,000.00 in attorney fees, which amount was to be verified by Ashford's counsel.

Both parties filed motions to alter, amend, or vacate the court's opinion and order. Ashford also filed a petition in support of the award of attorney fees, and Bollman Hat moved the court to reduce or eliminate pre-judgment interest and to reduce the interest rate on all judgments on fees and costs. The court denied the cross-motions to alter, amend, or vacate, as well as Bollman Hat's motion to reduce the interest rate. Finally, the court confirmed the $250,000.00 discovery sanction amount. From these orders, Bollman Hat has appealed and Ashford has cross-appealed.

In its direct appeal, Bollman Hat contends that Ashford was not entitled to a default judgment, a summary judgment on his claim for breach of contract, or to discovery sanctions. In his cross-appeal, Ashford contends that the circuit court erred by permitting Bollman Hat to present affirmative defenses, failing to address his entitlement to a 10% commission differential, failing to permit him to recover

money withheld as bad debt or charge backs, and failing to award pre-2002 contract damages.

In its argument that Ashford was not entitled to a default judgment pursuant to CR 55.01, Bollman Hat presents two reasons that the circuit court's ruling should be reversed, asserting that it was improperly entered *ex parte*, without notice to Bollman Hat or its counsel and with a defective certification, and that it should have been set aside pursuant to CR 60.02. CR 55.01 provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he, or if appearing by representative, his representative shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. The motion for judgment against a party in default for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the Constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

Fayette County's local rule provides:

> A party seeking a judgment by default under CR 55.01 shall file a written motion therefore. The motion shall be accompanied (a) by a certificate of the attorney that no

> papers have been served upon the attorney by the party in default and (b) by an affidavit stating whether the party in default is in the military service.
>
> If the party in default has failed to appear in the action, the motion need not appear on the motion docket and no notice thereof need be given the party against whom judgment by default is sought. To submit an action for judgment against a party in default for failure to appear, the party seeking the judgment shall place the entire record in the action, the motion and the proposed judgment, in the appropriate division's orders/judgments box in the Clerk's office.
>
> If the party in default has appeared in the action, the motion shall appear on the motion docket and the party in default, or if the party is appearing by representative, the party's representative, shall be served with written notice of the motion at least three (3) days prior to the hearing thereon. If the action is ordered submitted at the hearing the party seeking the judgment shall place the entire record in the action and the proposed judgment in the appropriate division's orders/judgments box in the Clerk's office.

Kentucky Fayette Circuit Criminal and Civil Court Rule (RFCC) 20.

Bollman Hat's first argument relates to whether Ashford's certification on the motion for default judgment was proper. Both the Civil Rules and Fayette County's local rules require "a certificate of the attorney that no papers have been served on [him/the attorney] by the party in default." In the certificate attached to the motion for default judgment, Ashford's attorney stated under oath that

> no responsive pleading has been filed or served upon [counsel for Ashford], and that [counsel for Ashford] has received no legal documentation from Defendant or its stated counsel, Paul Hershberg, Esq., although Plaintiff did agree to provide a courtesy copy of the Complaint to out-of-state counsel, and did so, on or about March 23,

> 2010, and also provided another copy of the Summons and Complaint to local counsel, Paul Hershberg, on May 19, 2010.

Bollman Hat points out that the rules only require that "no papers" have been served, but do not limit those papers to legal documentation or responsive pleadings. Therefore, Bollman Hat contends that the correspondence dated April 7, 2010, between its Pennsylvania counsel, Richard Hackman, and Ashford's counsel, in which attorney Hackman articulated Bollman Hat's response to the complaint, as well as other correspondence, constitute "papers" as stated in the rule.

Intertwined with this consideration is whether Bollman Hat should have been served with the motion for default judgment. Both the state and local rules require that the party in default be provided notice only if that party has made an appearance. *See* CR 55.02 ("If the party against whom judgment by default is sought has appeared in the action, he, or if appearing by representative, his representative shall be served with written notice of the application for judgment at least three days prior to the hearing on such application."); RFCC 20 ("If the party in default has failed to appear in the action, the motion need not appear on the motion docket and no notice thereof need be given the party against whom judgment by default is sought.").

The circuit court relied upon the former Court of Appeals holding in *Smith v. Gadd*, 280 S.W.2d 497, 497-98 (Ky. 1955), which provides:

> It may be noted that most of the cases considering the question of 'appearance' are those in which the jurisdiction of the court over the person of the defendant is dependent upon some act of his that would bring him into the lawsuit when he has not been served with summons. Under CR 55.01 the word 'appeared' has a more particularized meaning because it must be assumed that the defendant has been properly served with summons and is before the court. Otherwise, of course, no default judgment could be rendered against him. Therefore, our question is not whether the defendant 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 defendant 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' in CR 55.01, we are of the opinion that it means the defendant 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.
>
> An examination of the record of proceedings on May 24, which we have quoted above, does not establish that the defendants made any sort of appearance to defend the injunction suit. While the record shows that plaintiffs and defendants had reached an agreement (doubtless oral) by virtue of which the plaintiffs were willing to suspend action on the contempt rule, as far as we know this agreement may have been reached outside of court at some other time. Even if it was made in court on that day, it related to a collateral matter, and did not further the progress of the main action.

See also Ryan v. Collins, 481 S.W.2d 85, 88 (Ky. 1972), citing *Smith v. Gadd*, *supra*, ("[W]e construed the word 'appeared' in CR 55.01 to mean that the defendant had voluntarily taken a step in the main action that showed or from which it might be inferred that he had the intention of making some defense.").

Based upon our review of the rules and the cases construing CR 55.01, we must agree with Ashford that the circuit court did not commit any error in entering the default judgment *ex parte*. Despite the correspondence between the attorneys, there was never any document "served" on counsel for Ashford, and the court's record does not reveal that anything was filed or served, or that Bollman Hat had made any type of appearance before the court showing its intention to defend prior to the entry of the default judgment. Therefore, the certification attached to the motion for default judgment was not defective, regardless of the language used, and Ashford was not technically required to provide Bollman Hat with notice of the motion for default judgment.

Next, we shall consider Bollman Hat's argument that the circuit court abused its discretion in denying its motion to set aside the default judgment. CR 55.02 provides that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." In *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686, 688-89 (Ky. App. 2009), this Court addressed the application of CR 55.02:

> A trial court has broad discretion when it comes to default judgments, and we will not disturb a default judgment unless the trial court abused that broad discretion. *S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc.*, 819 S.W.2d 727, 730 (Ky. App. 1991). For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007).

> According to CR 55.02, if a defaulting party demonstrates good cause, a trial court may set aside a default judgment providing said good cause meets the requirements set forth in CR 60.02. [Footnote omitted] To show good cause, and thereby justify vacating a default judgment, the defaulting party must: (1) provide the trial court with a valid excuse for the default; (2) demonstrate a meritorious defense; and (3) show the absence of prejudice to the non-defaulting party. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991), citing 7 W. Bertelsman and K. Philipps, Kentucky Practice, CR 55.02, comment 2 (4th ed. 1984). "All three elements must be present to set aside a default judgment." *S.R. Blanton Development, Inc.* at 729.

Considering each of these three elements, we must hold that Bollman Hat demonstrated good cause to justify setting aside the default judgment, and the circuit court abused its discretion in failing to do so.

The first element is whether Bollman Hat presented a valid excuse for the default. The circuit court relied upon the federal court's ruling that Bollman Hat did not receive proper notice of the complaint through Mr. Rongione's "forgetfulness and indifference," which it held was not a valid excuse. The court further noted that Bollman Hat's Pennsylvania counsel was in receipt of a copy of the complaint indicating that it was being served through the Secretary of State's Office. Finally, the court rejected Bollman Hat's assertion that its counsel had been tricked or misled by Ashford's counsel. In its brief, however, Bollman Hat does not rely upon allegations of faulty service, but instead contends that counsel for both parties had reached an understanding regarding service of the complaint and summons, or at least Bollman Hat's counsel was under the good faith belief

that an arrangement had been made and that the time for filing an answer had not expired. We have considered the correspondence between the attorneys and the timeline of the events in this case, and we agree that under the circumstances of this case, Bollman Hat has set forth a valid excuse for failing to file a timely answer to Ashford's complaint.

The correspondence clearly reflects that Bollman Hat's counsel did not believe that service had been completed, specifically informing Ashford's counsel that his client had not been served and that both Pennsylvania and local counsel would accept service. On May 3, 2010, the day the answer was due to be filed, attorney Hackman sent an e-mail to Ashford's counsel again stating that Bollman Hat had not been served and would accept service. The same day, attorney Hackman sent another e-mail stating that Bollman Hat had retained local counsel (attorney Hershberg), who was also authorized to accept service. On May 19, 2010, the same day Ashford filed the motion for a default judgment, attorney Morris sent attorney Hershberg an e-mail message stating:

> Pursuant to our previous discussions, I enclose herewith a scanned version of the Complaint and Summons served through the Secretary of State's Office upon your client at its principal place of business. Given that the Complaint was properly served through the Secretary of State's Office, there is no need to re-issue service.

The message makes no mention of the fact that the motion for a default judgment had already been or would be filed the same day. And because neither Bollman

Hat nor any of its counsel were served with or notified of the motion for default judgment, Bollman Hat could not defend against it.

While the circuit court rejected Bollman Hat's assertion that attorney Morris had tricked or misled its counsel, we must disagree to an extent with this statement. Ashford's attorney knew that Bollman Hat intended to defend against the lawsuit, and he and Bollman Hat's Pennsylvania and local attorneys were in frequent contact during that period of time. Attorney Morris's failure to even mention that he intended to seek a default judgment – on the same day he sent a courtesy copy of the complaint and summons to Bollman Hat's local counsel – leads the Court to the conclusion that he purposely withheld this information in order to "win" the case without having to litigate it. Based upon the specific circumstances of this case as set forth in the affidavits and correspondence in the record, we must hold that Bollman Hat has presented a valid excuse for the default.

The second element is whether Bollman Hat can demonstrate a meritorious defense. In its brief, Bollman Hat lists several defenses it intended to raise, including Ashford's status as an independent contractor, the choice of law and forum selection clause in Ashford's contract requiring claims to be filed in Pennsylvania and tried under its laws, and judicial estoppel for Ashford's failure to disclose his contract in his bankruptcy proceeding, among others. The circuit court did not address this element, and neither does Ashford, except to state that Bollman Hat did nothing to establish any meritorious defenses. However, the April 7, 2010, letter to attorney Morris in which attorney Hackman detailed the defenses it

intended to raise is included in the circuit court's record. Accordingly, Bollman Hat has met this element.

The third and final element is whether Ashford would be prejudiced. The circuit court found that Ashford would be at a "tremendous disadvantage" if the default judgment were to be set aside, noting the affirmative defenses Bollman Hat would raise, lost or misplaced evidence, faded memories, preservation of evidence, and the added expense of litigation. Bollman Hat contends that Ashford would suffer no prejudice and that the only factors the circuit court listed in support of its ruling were related to litigation costs. Furthermore, Bollman Hat moved to set the default judgment aside days after it was entered. Bollman Hat cites to *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996), for the Sixth Circuit Court of Appeals' description of the prejudice element:

> [F]or the setting aside of a default judgment to be considered prejudicial, it must result in more than delay. Rather, the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.

We must agree with Bollman Hat that Ashford cannot show any tangible harm that it would have encountered had the circuit court set aside the default judgment. Having to respond to affirmative defenses and expend money in order to litigate Ashford's claim is simply not enough to establish prejudice in these circumstances.

Accordingly, we hold that the circuit court abused its discretion in failing to set aside the default judgment pursuant to CR 55.02, and we must reverse the circuit court's rulings holding otherwise.

Because this ruling is determinative for the remainder of Bollman Hat's direct appeal and Ashford's cross-appeal, we need not address the remaining issues the parties have raised. However, we specifically reverse the $250,000.00 discovery sanction imposed by the circuit court. Furthermore, we specifically set aside the summary judgment related to damages entered September 28, 2011, because that determination has been tainted by the denial of an opportunity for Bollman Hat to defend as to the other issues in the proper sequence, beginning with liability. We recognize that discovery regarding, and the resolution of, the liability issue could raise genuine issues of material fact related to damages, which could make the summary judgment on damages erroneous. This holding does not foreclose that damages may still be determinable by summary judgment once Bollman Hat has the opportunity to defend against Ashford's suit in the proper order.

For the foregoing reasons, the judgments and orders of the Fayette Circuit Court are reversed, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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