

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

NO. 2014-CA-000491-MR

MICHAEL HAWTHORNE

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT  
HONORABLE C. RENÉ WILLIAMS, JUDGE  
ACTION NO. 07-CI-00013

RICHARD MAYO AND  
DEANNA MASKELL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, the Appellant, Michael Hawthorne, brings this appeal to challenge a default judgment entered against him by the Crittenden Circuit Court. Upon review, we AFFIRM.

## I. Background

On July 14, 2006, the Appellees, Richard Mayo and Deanna Maskell, secured a Federal Housing Administration ("FHA") 203(k) loan from Countrywide Home Loans, Inc., for the purpose of purchasing and renovating a historic Victorian mansion located in Marion, Kentucky.<sup>1</sup> The loan, which was secured with a mortgage on the property, was for a total of \$197,087. Of this amount, \$30,000 was used to purchase the property and the balance (after closing costs) was to be placed in escrow to fund renovations to the home.

Typically, 203(k) borrowers select a general contractor to perform and supervise the work done to their property. The loan proceeds are dispersed to the general contractor incrementally. An FHA-approved inspector must certify completion of various portions of the project before additional draws are released to the general contractor. The Appellees hired Hawthorne as their general contractor and Carl Shepherd as their FHA inspector.

According to the Appellees, Hawthorne completed repair and replacement of the roof during the last week of August 2006. By the beginning of September 2006, Hawthorne moved on to repairing and renovating the inside of the home. Three draw requests were subsequently made, approved by Shepherd, and signed for by the Appellees: the first, on September 11, 2006, in the amount of

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<sup>1</sup> A FHA 203(k) loan is a specialized loan sponsored by the U.S. Department of Housing and Urban Development. It is designed to provide borrowers with the opportunity to fund rehabilitations and repairs to residential properties. The loan is insured by the FHA and administered by FHA-approved lending institutions.

\$35,011.60; the second, on September 25, 2006, in the amount of \$33,639.03; and the third, on October 9, 2006, in the amount of \$46,133.60.

By the beginning of November 2006, the Appellees began to get concerned because Hawthorne did not appear to be making any substantial progress towards the renovations. On January 17, 2007, Countrywide filed a foreclosure action against the Appellees alleging that they were in default because the loan disbursements had not been used on the home. In September of 2011, the trial court granted Countrywide leave to file an amended complaint joining Hawthorne and Shepherd as defendants. The record indicates Hawthorne was served with a copy of the amended complaint via certified mail. Hawthorne signed the green card evidencing service on October 1, 2011.

On September 17, 2012, the Appellees filed a motion to file a cross-claim against Hawthorne. When Hawthorne did not object, the circuit court granted the motion. On October 2, 2012, the Appellees filed their cross-claim complaint against Hawthorne.<sup>2</sup> The Appellees asserted that Hawthorne was liable to them for breach of contract, fraud, aiding and abetting breach of fiduciary duty, conversion, and conspiracy. These claims all stemmed from the Appellees' allegations that Hawthorne misappropriated the loan proceeds and failed to perform the work he agreed to perform on their historic home.

According to an affidavit filed by Appellees' counsel, Hawthorne was served "via U.S. Postal Service, Regular Delivery" by her office on October 2,

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<sup>2</sup> The Appellees also filed a cross-claim against Carl Shepherd.

2012. On February 28, 2013, Appellees moved for default judgment against Hawthorne. On March 5, 2013, without obtaining leave of court, Hawthorne filed an answer. He also filed a motion for judgment on the pleadings to dismiss the cross-claim. Appellees objected to Hawthorne's filings.

The circuit court held a hearing at which all parties appeared and argued the pending motions. By Order entered June 21, 2013, the circuit court granted Appellees' motion. Hawthorne filed a motion to set aside the default judgment arguing that he would have "responded properly if he had been served properly." The Court denied Hawthorne's motion. Following a trial on damages, the court entered a judgment against Hawthorne in the amount of \$159,001.38. This appeal followed.

## **II. Analysis**

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. *Sunrise Turquoise, Inc. v. Chemical Design Co., Inc.*, 899 S.W.2d 856, 859 (Ky. App. 1995). "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." *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686, 688 (Ky. App. 2009).

Before the trial court, Hawthorne argued that he was not served with a copy of the cross-claim. The trial court found, however, that Hawthorne did

receive the cross-claim. In so finding, the trial court relied on counsel's affidavit that she had served the cross-claim on Hawthorne by mail.

Hawthorne was first brought into this action as a defendant by Countrywide when it added him as a defendant to its amended complaint. Countrywide personally served Hawthorne via certified mail in accordance with Kentucky Rules of Civil Procedure (“CR”) 4.01 at that time. Thereafter, it was permissible for the parties to serve Hawthorne via CR 5.02. *See* CR 5.01.

Appellees' counsel filed a certificate of service with the cross-claim in compliance with CR 5.03. As part of the default judgment proceedings, counsel submitted an affidavit stating that she served Hawthorne with the cross-claim in compliance with CR 5.02. Counsel's affidavit is sufficient proof of service. *See* CR 5.03.

Hawthorne's only excuse for his failure to answer the cross-claim was that he was not properly served with it. Having reviewed the record, we believe that substantial evidence supported the trial court's conclusion that Hawthorne was properly served with a copy of the cross-claim. Accordingly, we find no abuse of discretion.

### **III. CONCLUSION**

For the foregoing reasons, the judgment of the Crittenden Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Hawthorne, *pro se*  
Paducah, Kentucky

BRIEF FOR APPELLEES:

April L. Board, *pro hac vice*  
Boonville, Indiana