

RENDERED: OCTOBER 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001036-MR

REGINA REYES; SERENA
FLORENTINO; AND KATHY CRUZ

APPELLANTS

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DANIEL A. TAPP, JUDGE
ACTION NO. 13-CI-00390

WANDA WRAY, EXECUTRIX OF
THE ESTATE OF HARVEY WRAY;
AND WANDA WRAY, INDIVIDUALLY

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MAZE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Regina Reyes, Serena Florentino, and Kathy Cruz bring this appeal from an April 10, 2015, judgment and a May 15, 2015, order of the Lincoln Circuit Court rendering a default judgment against appellants. We reverse and remand.

The pertinent facts are as follows. On November 22, 2013, Wanda Wray, executrix of the estate of Harvey Wray, and Wanda Wray, individually, (collectively referred to as appellees) filed a complaint in the Lincoln Circuit Court against, *inter alios*, Reyes, Florentino and Cruz (collectively referred to as appellants). In the complaint, appellees alleged that Wanda Wray was the surviving spouse of Harvey Wray, who died testate on April 1, 2013. Under the terms of Harvey's will, appellants were each bequeathed a separate tract of real property. Appellees claimed that Wanda exercised her statutory right to renounce the will in probate court and that there were insufficient funds to satisfy outstanding debts against the estate. Appellees, thus, sought an order directing the master commissioner to sell the three parcels of real property to satisfy the indebtedness against the estate. According to the record, Cruz was served with the summons and a copy of the complaint on November 27, 2013, and Reyes and Florentine were each served on January 19, 2014. On April 3, 2014, Florentine filed a motion for extension of time to file an answer. However, the record reveals that this motion was never ruled upon by the circuit court.

Thereafter, on April 24, 2014, appellants filed a motion for leave to file an amended complaint. By order entered May 9, 2014, the circuit court granted the motion, and an amended complaint was filed on May 9, 2014. According to the record, Cruz received notice by service of the summons and a copy of the amended complaint on May 13, 2014; Reyes received notice on May

20, 2014; and Florentine received notice on May 21, 2014. Subsequently, appellees filed a motion for summary judgment on November 4, 2014.

On April 10, 2015, the circuit court rendered a Summary Judgment; Summary of Facts, Conclusions of Law, and Judgment and Order of Sale. The circuit court ordered the three tracts of real property to be sold by the master commissioner. Eight days later, on April 18, 2015, appellants filed a motion to vacate and to set aside the judgment, asserting that the judgment was actually a default judgment and thus subject to be set aside pursuant to Kentucky Rules of Civil Procedure (CR) 55.02.

The circuit court denied the motion by order entered May 15, 2015. The order was styled “Order Denying Defendant’s Motion to Set Aside or Alter, Amend or Vacate Default Judgment.” In the order, the circuit court acknowledged that the April 10, 2015, judgment was mislabeled a summary judgment and was, in fact, a default judgment. The circuit court specifically concluded that appellants failed to show good cause for setting aside the default judgment under Kentucky Rules of Civil Procedure CR 55.02. The circuit court also stated that appellants were not entitled to relief under CR 59.05 or CR 60.02. This appeal follows.

To begin, default judgments are generally disfavored in this Commonwealth. *Hutcherson v. Hicks*, 320 S.W.3d 102 (Ky. App. 2010). However, the granting of a default judgment is within the discretion of the circuit court and will only be disturbed on appeal for an abuse of discretion. *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686 (Ky. App. 2009). Under

CR 55.02, a default judgment may be set aside for good cause shown, in accordance with CR 60.02. *See Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007).

Pursuant to CR 55.01, a default judgment may be only rendered upon a party's application for same with the court. A party's application typically takes the form of a motion for default judgment:

All default judgments must be obtained by an application to the trial court, which should be in the form of a motion. This Rule does not authorize an automatic default entered by the clerk as does FRCP [Federal Rules of Civil Procedure] 55(a).

7 David V. Kramer and David W. Burleigh, *Kentucky Practice*, CR 55.01 (2016) (footnote omitted). It is axiomatic that a default judgment may not be rendered *sua sponte* or without a party having filed a motion seeking a default judgment. CR 55.01. *Cf. Hoard v. Ocwen Loan Serv., LLC*, 357 S.W.3d 917 (Ky. App. 2011).

The procedural facts of this case are clear and undisputed. Appellees did not file or otherwise move the circuit court for entry of a default judgment against appellants. Rather, appellees simply filed a motion for summary judgment. The circuit court, *sua sponte*, rendered what it regarded a default judgment. This was clearly in error by the circuit court. This court has previously held that a motion for default judgment is not a proper vehicle to test the legal sufficiency of pleadings. *Hoard*, 357 S.W.3d at 919. Given that there was no motion for default

judgment pending, we conclude that the circuit court abused its discretion by rendering a default judgment against appellees.¹

Even if we were to consider the April 10, 2015, judgment as a summary judgment and not a default judgment, the circuit court, nevertheless, committed error. A review of the April 10, 2015, judgment reveals that the circuit court did not utilize the summary judgment standard. *See Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The circuit court made findings of fact, which arguably are disputed, rather than determine if genuine issues of material fact existed to preclude summary judgment. *See id.*; CR 56.03.

In sum, we conclude that the circuit court erred or otherwise abused its discretion by rendering the April 10, 2015, default judgment.

For the foregoing reasons, the order and judgment of the Lincoln Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Robert R. Baker
Stanford, Kentucky

BRIEF FOR APPELLEES:

Kirk A. Correll
Stanford, Kentucky

¹ Additionally, pursuant to Kentucky Rules of Civil Procedure 55.01, it is mandatory that the moving party's attorney file a certificate stating that "no papers have been served on him by the party in default." Appellees' attorney filed no such certification in this case and thus the case was not properly before the court for consideration of a default judgment.

