RENDERED: DECEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000320-MR

HAZEL ENTERPRISES, LLC — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 14-CI-01536

BRENDA FARMER; CITIFINANCIAL SERVICES, INC.; CITY OF FRANKFORT, KENTUCKY; COUNTY OF FRANKLIN, KENTUCKY; GOLD KEY LEASE, INC.; AND SPRINGLEAF FINANCIAL SERVICES, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND COMBS, JUDGES.

KRAMER, CHIEF JUDGE: The Franklin Circuit Court set aside a prior default judgment of foreclosure entered in favor of Hazel Enterprises, LLC, against the

appellee, Brenda Farmer, and certain property she owned in Franklin County. The circuit court then entered a new judgment in favor of Hazel, but for a lesser amount and without an accompanying order of sale. Hazel now appeals, arguing the circuit court abused its discretion and committed reversible error by setting aside its default judgment and order of sale because Farmer failed to demonstrate good cause for doing so. Upon review, we agree. Therefore, we reverse and remand.

The relevant facts are as follows. Farmer held title to a small parcel of real property located in Franklin County, essentially an empty corner lot which she owned for sentimental reasons. She failed to pay a $138.01 bill from Franklin County for 2003 *ad valorem* taxes assessed against her property. On March 31, 2012, Franklin County then sold a certificate of delinquency representing Farmer's unpaid taxes and accrued interest to Hazel for $360.95. On December 24, 2014, Hazel then filed the instant foreclosure action in Franklin Circuit Court to enforce its certificate. In its complaint, Hazel sought judgment against Farmer and her property for the amount of its certificate, plus interest, an administrative fee of $100, pre-litigation attorney's fees of $288.76, and any prospective costs of a judicial sale, attorneys' fees, and court costs it would be required to expend to prosecute its suit.[1]

[1] These various fees and costs are permitted by statute in this context. *See* Kentucky Revised Statute (KRS) 134.452.

The record reflects Farmer was properly served and had notice of Hazel's suit prior to January 2015.[2] Farmer was also served with the answers of various other parties joined as defendants in Hazel's action. Farmer even contacted a warning order attorney by telephone who had been tasked with serving her "unknown spouse" and informed him she had never been married at any time relevant to Hazel's complaint.[3] And, on February 25, 2015, Farmer was also served with Hazel's motion for default judgment against her and an order of sale regarding her property. Nevertheless, Farmer did not file an answer or otherwise appear in this matter.

On March 19, 2015, the circuit court entered a default judgment in favor of Hazel and against Farmer for $4,333.70[4] and ordered the sale of Farmer's property to satisfy Hazel's judgment. Farmer was then served with the default judgment and order of sale. On April 3, 2015, Farmer was served with a notice that her property would be sold at a master commissioner's auction on April 27,

[2] During a February 3, 2016 evidentiary hearing in this matter, Farmer testified she received a copy of Hazel's complaint by certified mail about one year beforehand. The record also contains a certified letter return receipt, received by the Franklin Circuit Court and filed on December 31, 2014, bearing Farmer's signature.

[3] The warning order attorney's report also included a copy of the certified letter return receipt that had been attached to the copy of Hazel's complaint addressed to Farmer's "unknown spouse." Notably, Farmer also signed and returned that return receipt.

[4] The $4,333.70 judgment included $360.95 plus accrued interest in the amount of $129.94 through February 2015; administrative fees of $100.00; prelitigation attorney's fees of $288.76; court costs of $1,754.05; and attorney's fees in the amount of $1,700. The circuit court's order added that the amount of attorney's fees was "reasonable."

2015. On April 29, 2015, Farmer was served with a report of the master commissioner stating that her property had been advertised, appraised at $12,000, and ultimately sold to Hazel on April 27, 2015, for $5,900, subject to Farmer's right of redemption. Farmer was also served with a motion from the master commissioner to confirm the sale, which had been filed May 4, 2015.

On May 8, 2015, Farmer then made her first appearance in this matter by filing three separate motions: (1) a motion to set aside the March 19, 2015 default judgment; (2) a motion to set aside the order of sale; and (3) a motion to "waive or reconsider fees, costs, expenses, attorney's fees, and master commissioner fees in this litigation."

The substance of Farmer's three motions and the testimony she later offered in support of them at a subsequent February 3, 2016 hearing was the same. Farmer acknowledged she had been properly served in this matter and that prior to being served she had received several letters from Hazel since 2012 demanding payment of its tax lien.[5] She acknowledged that prior to being served she had spoken with Hazel's owner, Ray Gough, regarding his assertion of a tax lien on her property, and that she had refused to pay it. As to why she did not pay it, she testified she believed Hazel's various demands for payment and the various pleadings she had been receiving in relation to its suit were a "scam." She had

[5] Two such letters are of record and were mailed to Farmer in May 2012.

arrived at that belief because, shortly after Hazel had initiated contact with her in 2012, she had contacted the offices of the Franklin County Sheriff and Franklin County Attorney about whether she had any outstanding taxes on her property, and the unnamed individuals she had spoken with had informed her that "all taxes had been paid on her property."[6] She only came to believe Hazel's action was not a "scam," she added, when she was advised that her lot was being sold.

Farmer did not raise any legal defenses to Hazel's claim in her motions, nor did she contest the validity of its claim during her testimony. She merely stated she would have paid Hazel's claim earlier if she had not believed it was a "scam" and if Hazel had asked her for less money in its demand letters. She also stated she believed Hazel's judgment was "excessive," and asked the circuit court to exercise its discretion to waive or reduce various fees associated with Hazel's award, and to set aside the sale of her property and instead allow her to tender sufficient funds to pay a reduced award.

Responding to Farmer's motions, Hazel argued Farmer had made no showing of the requisite elements for setting aside a default judgment. Nevertheless, after considering Farmer's motions and testimony the circuit court ultimately set aside the March 19, 2015 judgment and entered a new judgment on

[6] Notably, Farmer testified no one had told her *she* had paid all taxes on her property. By purchasing the certificate of delinquency, Hazel had effectively paid her outstanding 2003 *ad valorem* taxes.

March 4, 2016, which reduced Hazel's award to $2,633.70; recited that Farmer had fully satisfied Hazel's award by tendering that amount in open court to the master commissioner; and set aside the prior order of sale. This appeal followed.

Hazel's argument on appeal is that the circuit court abused its discretion by setting aside its default judgment and order of sale. We agree.

When a party fails to plead or otherwise defend against a claim, the Rules of Civil Procedure provide for entry of judgment by default. Kentucky Rule of Civil Procedure (CR) 55.01. The Rules of Civil Procedure only allow the setting aside of a judgment entered by default for "good cause." CR 55.02. Default judgments are not generally looked upon with favor. *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972). Accordingly, trial courts are directed to apply a liberal standard in the determination of "good cause" to ensure that the defendant is not deprived of his day in court. *Liberty National Bank & Trust Co. v. Kummert*, 305 Ky. 769, 205 S.W.2d 342 (Ky. 1947).

With that said, a trial court's broad power to set aside a default judgment is not unfettered. It must not be exercised arbitrarily and capriciously, but as a matter of judicial discretion in the service of justice. *S.R. Blanton Dev., Inc. v. Investors Realty and Mgmt. Co., Inc.*, 819 S.W.2d 727 (Ky. App. 1991). Accordingly, whether "good cause" exists for setting aside a default judgment depends upon whether the defaulting defendant has demonstrated: (1) a valid

excuse for the default; (2) a meritorious defense to the claim at issue; and (3) the absence of prejudice to the non-defaulting party. *See PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527, 531 (Ky. App. 2003). "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) (emphasis added).

Regarding the first element, Farmer's excuse for defaulting was her subjective belief that Hazel's claim was a "scam." It is unclear whether Farmer intended her excuse to mean that she did not think Hazel had actually filed a lawsuit against her, or that she did not believe Hazel had a valid claim. Either way, her excuse cannot be considered valid. To verify that a lawsuit had been filed against her, Farmer could have simply contacted the Franklin Circuit Court. Her failure to do so, despite receiving continued notice of the several months of proceedings in that forum, was carelessness and not a valid excuse. *See, e.g.*, *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991) ("Carelessness by a party or his attorney is not reason enough to set [a default judgment] aside." (citation omitted)). Likewise, a litigant's belief in the legal merits of a lawsuit is not an excuse for ignoring a lawsuit. *See, e.g.*, *Sunrise*, 899 S.W.2d at 859 (explaining defendant's inaction in a lawsuit due to its belief that a

court lacked jurisdiction did not supply good cause for setting aside a default judgment).

Regarding the second element, Farmer never asserted any defense to Hazel's action during the proceedings below. To the contrary, she conceded liability in her motion to set aside Hazel's judgment; she cited no law or evidence that would have justified reducing Hazel's award; and the thrust of her motion was simply that she did not want to pay as much as the circuit court had previously awarded because she believed it was a harsh result. A harsh result is not a basis for setting aside a judgment. *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W.3d 133, 136 (Ky. App. 2011).

As an aside, Farmer has also attempted to justify the circuit court's decision to set aside Hazel's March 19, 2015 judgment of $4,333.70 and order of sale by asserting three arguments in this appeal that she did not assert below. In her view: (1) She was entitled to notice and a hearing on damages to the extent that any aspect of Hazel's award consisted of unliquidated damages; (2) Hazel did not produce sufficient evidence to justify the full extent of its prior award; and (3) she had a valid defense to the sale of her property because she eventually tendered $2,633.70 in "full satisfaction" of Hazel's award to the master commissioner.

These arguments are not properly before us because they were not raised or addressed below. Moreover, they misconstrue the applicable law. With

respect to her first two arguments, Farmer has not identified any "defenses" to Hazel's claim by arguing that she was entitled to notice and a hearing on damages, or by arguing that Hazel produced insufficient evidence to justify the full extent of its prior award. At most, she has identified potential legal errors that would have been properly reviewable in a direct appeal of Hazel's default judgment—not pursuant to a CR 60.02 motion.[7] Farmer is also incorrect in arguing she was entitled to notice of any damages hearing in this matter. Farmer would not have been entitled to any such notice because she failed to make any appearance in this matter until after judgment had already been entered. *See* CR 55.01; *see also Howard v. Fountain*, 749 S.W.2d 690, 693 (Ky. 1988) (explaining "fundamental fairness requires that a defaulting party be given notice of a damage assessment hearing *where he has entered an appearance in the action prior to the hearing*." (emphasis added)).

With respect to her third argument, Farmer is ostensibly asserting that she had the defense (or the basis for relief under CR 60.02(e)) of having satisfied

[7] The sufficiency of Hazel's evidence justifying its award, along with Farmer's entitlement to or notice of any damages hearing, are issues of potential legal error that could have been raised in a direct appeal of the circuit court's March 19, 2015 judgment. *See, e.g., Deskins v. Estep*, 314 S.W.3d 300 (Ky. App. 2010) (direct appeal of default judgment, wherein appellant raised issues of notice of the damages hearing and sufficiency of the evidence regarding damages). CR 60.02 relief—which is precisely what Farmer sought in this matter—is unavailable for correction of a legal error or mistake by court where the error or mistake could have been raised in a direct appeal. *Brozowski v. Johnson*, 179 S.W.3d 261, 265 (Ky. App. 2005); *see also McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997).

Hazel's judgment. However, for that defense to apply, Farmer would have been required to demonstrate that, prior to the sale of her property, she had paid in full Hazel's March 19, 2015 judgment of $4,333.70—*the judgment she was asking the circuit court to set aside*. *See, e.g.*, *Kirk v. Joseph*, 313 Ky. 773, 233 S.W.2d 524, 527 (1950) ("Appellees show a perfect defense to the sale of this farm—that the judgment had been satisfied in full prior to the sale."). The defense of satisfaction could not have applied because Farmer has never paid Hazel that amount, nor had she paid any part of it when she filed her motion to set Hazel's judgment aside. Farmer was simply asking the circuit court to set aside Hazel's judgment because she was willing to pay something *less*.

Lastly, with regard to the third element, Farmer's motion did not address the issue of whether setting aside the March 19, 2015 judgment would cause Hazel any prejudice.

In short, Farmer did not demonstrate good cause for setting aside Hazel's March 19, 2015 judgment and the order of sale relating to her property, and the circuit court abused its discretion by setting them aside. Accordingly, we REVERSE and direct the circuit court to reinstate the March 19, 2015 judgment and order of sale.

To be clear, the March 19, 2015 judgment and order of sale resolved the validity of Hazel's underlying claim, its entitlement to an award of $4,333.70,

and the necessity of a sale of Farmer's property. *See Alexander v. Springfield Prod. Credit Ass'n*, 673 S.W.2d 741, 743 (Ky. App. 1984). Because Farmer did not appeal the March 19, 2015 judgment and order of sale or show good cause for setting them aside, the manner in which the March 19, 2015 judgment and order of sale resolved those issues is final. That aside, we REMAND for further proceedings otherwise consistent with this opinion including, but not necessarily limited to, the entry of an order confirming the sale of Farmer's property.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS.

COMBS, JUDGE, DISSENTING: Neither the law, the equities, nor the facts remotely support maintaining the default judgment entered in this case. Judge Wingate wisely set it aside, and I would affirm his ruling without question. The Appellant has received everything originally sought in its Complaint, and now it will enjoy the fruits of an unconscionable windfall if we reverse the decision to set aside the default judgment. I can discern absolutely no meritorious basis for reversing the Franklin Circuit Court under the circumstances of this case.

BRIEF FOR APPELLANT:

Alan Pritchard
Memphis, Tennessee

BRIEF FOR APPELLEE FARMER:

Michael L. Hawkins
Frankfort, Kentucky