

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000900-MR

CECIL RIGGS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HON. C. DAVID HAGERMAN, JUDGE  
ACTION NO. 15-CI-00748

SUSAN IMES

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING WITH DIRECTIONS

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

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

TAYLOR, JUDGE: Cecil Riggs brings this *pro se* appeal from a June 1, 2016, Order of the Boyd Circuit Court, denying Riggs' motion to set aside a default judgment previously entered against Riggs in favor of Susan Imes by judgment entered December 4, 2015. For the reasons stated, we affirm in part, reverse in part, and remand with directions for additional proceedings.

## BACKGROUND

On October 9, 2015, Imes filed a complaint against Riggs in the Boyd Circuit Court to collect a purported loan made by Imes to Riggs in 2011 in Boyd County. The complaint contained seven substantive paragraphs that read as follows:

1. That Susan Imes is a resident of Boyd County, Kentucky.
2. That Cecil Riggs is a resident of 929 North 3<sup>rd</sup> Street, Ironton, Ohio 45638.
3. That all events complained of herein occurred in Boyd County, Kentucky.
4. That Cecil Riggs, being a citizen of a foreign jurisdiction, is amenable to service via the Kentucky Secretary of State.
5. That Susan Imes loaned to Cecil Riggs the sum of \$10,000.00 on or about February 17, 2011[,] together with interest at the rate of three [percent] (3%) per annum.
6. That this agreement was reduced to writing and signed by both Susan Imes, Cecil Riggs, and witnessed by Asia Timberlake.
7. That to date Cecil Riggs has not repaid the \$10,000.00 or the three [percent] (3%) interest owed.

Complaint at 1. Although the complaint states that the loan agreement was reduced to writing, signed, and witnessed, a copy of this agreement was not made a part of the record below. Additionally, the complaint was neither verified or

accompanied by a sworn affidavit from Imes. These issues will be further discussed in the Court's analysis.

At all times during these proceedings, Riggs has been a resident of Ironton, Ohio. Based on the allegations in the complaint and in accordance with Kentucky Revised Statutes (KRS) 454.210(2)(a), Riggs was subject to the long arm personal jurisdiction of the Boyd Circuit Court. Pursuant to KRS 454.210(3)(a), the Secretary of State was deemed the agent for service of process of the complaint for Riggs. The record reflects that the Secretary of State performed the duties as required by KRS 454.210 by serving the complaint via certified mail to Riggs at his Ironton address. The Secretary of State made the statutorily required return to the Boyd Circuit Court showing that the acts contemplated under the long-arm statute were complied with by the Secretary of State. Apparently, Riggs refused to accept the certified mail containing the summons and complaint as it was returned unclaimed. The Secretary of State's return to the circuit court was dated **November 10, 2015**. When the Secretary of State made its statutorily required return to the circuit court, the time for answering the complaint by Riggs, within twenty days, began to run. KRS 454.210(3)(b).

Riggs failed to answer the Complaint within twenty days. Upon a motion filed by Imes for default judgment, the circuit court rendered default judgment on December 4, 2015. The default judgment stated in relevant part that

the complaint had asserted a liquidated damage claim in the amount of \$10,000, with interest at the rate of 3 percent per annum. The judgment stated that Imes had provided the court with a document supporting the liquidated claim. The circuit court awarded Imes a judgment for \$10,000 with three percent annual interest, retroactive to February 17, 2011 – the purported date the loan agreement was entered into.

In May 2016, Riggs filed a *pro se* motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 to vacate or set aside the default judgment. In his motion, Riggs asserted he had never seen the purported contract sued upon by Imes. He further argued that there was no loan agreement or supporting affidavit with the complaint and that he had not been properly served with the summons and complaint. The circuit court denied Riggs' CR 60.02 motion, concluding that service through the Secretary of State was proper and there was no necessity to conduct a hearing as the damage claim was for a liquidated fixed amount. By Order entered June 1, 2016, the circuit court denied Riggs CR 60.02 motion. This appeal follows.

#### ANALYSIS

On appeal, Riggs argues that the court erred in failing to set aside the default judgment to allow the case to proceed on the merits. He specifically argues

he was not personally served with the complaint and that he had meritorious defenses to the complaint including that Imes never loaned him any money.

As a general rule, default judgments are not favored in Kentucky and a circuit court is vested with broad discretion to set aside such judgments.

*Hutcherson v. Hicks*, 320 S.W.3d 102, 104 (Ky. App. 2010). A party must show good cause to set aside a default judgment, including all of the following: (1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) the nondefaulting party will not suffer prejudice. *Id.* (citing *PNC Bank, N.A. v. Citizens Bank of N. Ky., Inc.*, 139 S.W.3d 527, 531 (Ky. App. 2003)). And, this Court will not disturb the circuit court's exercise of discretion, absent abuse. *Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky. App. 1988).

With this standard of review in mind, we will now turn to the issue of whether the circuit court properly entered a default judgment due to Riggs' failure to timely file an answer to the complaint. Riggs essentially argues on appeal that his valid excuse for not filing an answer is that he was not properly served with a summons and complaint. This argument fails on the face of the record on appeal. As previously discussed, Riggs' agent for service of process, the Kentucky Secretary of State, was properly served with the complaint under the Kentucky long-arm statute and all legal requirements to effectuate proper service were met. Based on the facts set out in the record of this case, and applicable law, Riggs

failed to render a valid excuse for not timely answering the complaint and thus Imes was entitled to a default judgment for liability under CR 55.01.

However, our analysis does not end here. Riggs argues he was entitled to an evidentiary hearing on damages pursuant to CR 55.01 and *Deskins v. Estep*, 314 S.W.3d 300 (Ky. App. 2010). We agree.

CR 55.01 provides in relevant part:

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 . . . as it deems necessary and proper . . . .

While the face of the complaint clearly states a cause of action, the record on appeal does not reflect a supporting affidavit, verified statement, and most importantly, any written documentation supporting the amount of the claim or damages asserted as alleged. We can find nothing in the record to support the circuit court's conclusion that a liquidated claim had been established. The circuit court erred as a matter of law on this issue. *See* CR 8.04(c).

Under CR 55.01, the circuit court must hold an evidentiary hearing to determine the amount of damages attendant to a default judgment for an unliquidated claim. *Deskins*, 314 S.W.3d 300, 304; *Howard*, 749 S.W.2d 690, 693. In this case, Imes' claims are based upon an alleged written loan agreement

with Riggs. In *Deskings*, we noted that damages are derivative of the terms and conditions of the contract. *Deskings*, 314 S.W.3d at 304. Thus, Imes must establish the existence of the agreement, its terms and how Riggs breached it at an evidentiary hearing. To recover for a breach of contract, its material terms must be established with sufficient certainty to enable the court to determine the proper amount of damages. *Mitts & Pettit, Inc. v. Burger Brewing Co.*, 317 S.W.2d 865, 866 (Ky. 1958). In the record before this Court, Imes has not established the existence of a written agreement as alleged in the complaint and alluded to by the circuit court, nor any repayment terms. Upon remand, in an evidentiary hearing, Imes must establish both the existence of the written loan agreement and repayment terms, for the court to determine the damages to which Imes is entitled, if any. *See Deskings*, 314 S.W.3d at 304 (“Notwithstanding that a default judgment has been entered, the law still requires a legal basis to support a damages claim . . . .”). Again, the circuit court’s mistaken conclusion that the damages were liquidated was error as a matter of law.

For the foregoing reasons, the default judgment of the Boyd Circuit Court is affirmed as to liability only and reversed as to any award of damages, and remanded with directions that the court conduct an evidentiary hearing on damages consistent with this opinion, with findings and conclusions thereon to be made in accordance with CR 52.01.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cecil Riggs, *Pro Se*  
Ironton, Ohio

BRIEF FOR APPELLEE:

R. Stephen McGinnis  
Greenup, Kentucky