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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001700-MR

WILLIAM GRUNDY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 13-CI-005835

METROPOLITAN LIFE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

DIXON, JUDGE: William Grundy appeals from the order partially vacating two default judgments—one concerning liability and the other concerning damages—against Metropolitan Life Insurance Company ("MetLife") entered by the Jefferson Circuit Court. Following review of the record, briefs, and law, we affirm.

Grundy filed his complaint against MetLife on November 6, 2013, alleging various claims, including tortious interference with contract, unfair claims

settlement practices, breach of duty to act in good faith, violation of KRS[1] 367.170, *et seq*., and other statutory violations. MetLife was served with Grundy's complaint on November 8, 2013, but filed no answer. On April 28, 2014, Grundy served MetLife with requests for admission, to which MetLife failed to respond. On July 3, 2014, Grundy moved the trial court for a default judgment against MetLife concerning liability. On July 9, 2014, the trial court entered default judgment against MetLife, a copy of which was served upon MetLife. On October 1, 2014, Grundy moved the trial court for default judgment against MetLife on damages deemed admitted by MetLife's failure to respond to requests for admission. On October 8, 2014, the trial court entered a second default judgment against MetLife, awarding Grundy damages previously deemed admitted.

On October 7, 2015, MetLife moved the court to reopen and set aside the default judgment entered on October 8, 2014, pursuant to CR[2] 55.02 and CR 60.02, as well as for leave to file its answer to the complaint and responses to requests for admission out of time. Although no subsection of CR 60.02 was specifically mentioned, it appears the motion was based on the grounds listed in CR 60.02(a) for "mistake, inadvertence, surprise or excusable neglect[.]" Notably, in its argument:

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[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

> MetLife does not deny that its agent for service of process received the Complaint in this matter, nor does it deny that it failed to timely respond to the Complaint, leading to the Court's entry of a Default Judgment. However, these actions were not intentionally dilatory, or made out of any desire to deny Plaintiff his day in Court. Rather, there was inadvertence on the part of MetLife. Given the large volume of business all across the country handled by MetLife, it respectfully requests that the Court see this as a "valid excuse" for its default in this case.

MetLife concluded its motion stating:

> While MetLife cannot debate the point that it did not enter this lawsuit and defend it in a timely fashion, it is clear that the Order/Default Judgment entered by the Court was erroneous in several ways. The Default Judgment contains awards of damages that are plainly excessive and unsupported by the applicable law. For these reasons, MetLife respectfully asks the Court to reopen this case and set aside the Default Judgment.

One of the reasons MetLife argued to contest the damages judgment was its assertion that Grundy's claims are preempted by ERISA.[3] On August 15, 2016, after the matter was fully briefed and oral arguments heard, the trial court entered its order denying MetLife's motion to reopen and set aside the default judgment. MetLife appealed the trial court's August 15, 2016, order in Case Number 2016-CA-001350-MR, which was subsequently dismissed by another panel of our court as interlocutory.

[3] Employee Retirement Income Security Act. 29 United States Code ("U.S.C.") §§ 1001 *et seq*.

On August 25, 2016, MetLife moved the trial court to alter, amend, or vacate its August 15, 2016, order under CR 59.05 or, in the alternative, for relief from its orders entered on July 9, 2014, October 8, 2014, and August 15, 2016, under CR 60.02(f) for "any other reason of an extraordinary nature justifying relief." MetLife asserted the order constituted palpable error and:

> Leaving a multi-million dollar judgment in place for a $12,000 claim would be a manifest injustice, particularly in light of the multiple errors contained in the original judgment. ERISA completely preempts the complaint. The damages awarded impermissibly provide Plaintiff with multiple recoveries for a single injury and give him a windfall of other baseless damages. The Court awarded punitive damages that cannot be supported by constitutional, statutory, or common law.

On October 4, 2017, after the matter was fully briefed and oral arguments heard, the trial court entered its order granting MetLife partial relief under CR 60.02(f) by partially vacating the default judgments and finding "an unliquidated damages award of approximately $6.4 million without evidential support constitutes manifest injustice." This appeal followed.

MetLife moved our court to dismiss this appeal as interlocutory. That motion and Grundy's response were reviewed by a motion panel of our court, without the benefit of the full record, which denied the motion. By order entered July 26, 2019, the instant merits panel of our court directed Grundy to show cause why this appeal should not be dismissed as interlocutory. The Court considered

the parties' response and reply and, in a separate order, finds sufficient cause shown not to dismiss this matter as interlocutory. Specifically, this appeal fits within the narrow exception described by the Supreme Court of Kentucky in *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329, 334-35 (Ky. 2007):

> Where a final judgment has been ordered reopened, where the disrupted judgment is more than a year old, and where the reason offered for setting it aside is allegedly an "extraordinary circumstance" under CR 60.02(f), permitting an immediate appeal helps to maintain the important balance between, on the one hand, the equitable insistence on justice at all costs and, on the other, the equally vital insistence that litigation must at some point conclude and reasonable expectations founded upon long-established final judgments must not lightly be overturned. This is the balance that the limitations provisions of CR 60.02 attempt to strike, and we agree with Asset that when that balance is threatened by the trial court's alleged disregard of those provisions, an immediate appeal is appropriate.
>
> . . . .
>
> In sum, we agree with Asset that in the narrow circumstances presented by this case, an order setting aside a judgment more than a year old pursuant to the "reason of an extraordinary nature" provision of CR 60.02(f) is subject to immediate appellate review to ensure that CR 60.02(f) has not been invoked to, in effect, evade the one-year limitations period CR 60.02 imposes on claims appropriately regarded as falling under CR 60.02(a), (b), or (c).

Ultimately, the Supreme Court of Kentucky remanded *Asset*:

> for consideration of Asset's contention that Moberly's CR 60.02 motion was barred by limitations and therefore

> outside the trial court's authority to grant. If the Court determines that Moberly's motion stated "a reason of an extraordinary nature" rather than mistake, excusable neglect or one of the more common grounds for relief, the availability of which was barred by the one-year limitation period in CR 60.02, then the appropriate course would be again to dismiss the appeal.

Id. at 335.

The same guidance applies in the case at bar. CR 60.02 specifically provides "[t]he motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken."

MetLife's first 60.02 motion, which alleged grounds for relief under CR 60.02(a), was brought more than one year after the first default judgment concerning liability, but less than one year after the second default judgment concerning damages, and only requested relief from the second default judgment. As such, relief was neither sought nor available from the first default judgment. Further, as the trial court initially and correctly found, MetLife failed to support its claim for relief due to "mistake, inadvertence, surprise or excusable neglect."

MetLife's second 60.02 motion, however, alleged grounds for relief under CR 60.02(f) for "any other reason of an extraordinary nature justifying relief." Although this motion was brought well after a year from both default

judgments and ten months after its first CR 60.02 motion, given the specific facts and procedure of this case, it was still made within a reasonable time.

Among the reasons listed for granting extraordinary relief in this case is that significant unliquidated damages must be supported by competent evidence. The damages sought via default judgment following unanswered requests for admission were neither justified nor connected in any way to any evidence.

It is well established that "[n]otwithstanding that a default judgment has been entered, the law still requires a legal basis to support a damages claim[.]" *Deskins v. Estep,* 314 S.W.3d 300, 304 (Ky. App. 2010). This case is similar to *Deskins* in that "the record in this case fails to support the damage award" and a:

> review of the record reveals absolutely no evidence that addresses the accurate measure of damages as required in this case. On remand, the circuit court is instructed to identify the existence of any construction agreements and their terms, and then apply the proper measure of damages to determine what damages, if any, have arisen from the alleged breach of the construction contract at issue in this litigation.

Id. at 304, 305. In neither *Deskins* nor the case at hand was a copy of the contract or contracts at issue submitted prior to entry of judgment awarding damages. This is the most basic and essential element in determining whether, and how, Grundy is entitled to relief in this matter.

In the case herein, the complaint was filed, summons issued, proof of service filed, a motion for default judgment on liability filed, default judgment on

liability entered, a second motion for default judgment on damages filed, and a default judgment on damages entered. The only "proof" of damages were the requests for admission filed with the second motion for default judgment. That motion listing the admissions deemed admitted by MetLife addressed Grundy's damages as follows:

> No. 1. Plaintiff William Grundy's ("Mr. Grundy") damages for the unpaid short-term disability benefits total $13,061.86.
>
> No. 2. Pursuant to KRS 337.385, Mr. Grundy's damages for the unpaid short-term disability benefits total an additional $13,061.86.
>
> No. 3. Mr. Grundy's damages resulting from Met Life's intentional interference with his short-term disability benefits total $212,228.31, representing the value of his long-term disability insurance policy insured by Met Life.
>
> No. 5. In addition to his other damages, Mr. Grundy's resulting damages for Met Life's violation of Kentucky's Unfair Claims Settlement Practice Act total $238,352.04.
>
> No. 6. In addition to his other damages, Mr. Grundy's resulting damages for Met Life's violation of Kentucky's Consumer Protection Act total $238,352.04.
>
> No. 7. In addition to his other damages, Mr. Grundy's resulting damages for Met Life's breach of its duty to act in good faith total $238,352.04.

> No. 8. In addition to his other damages, Mr. Grundy's resulting damages for Met Life's use of unlicensed medical opinions total $238,352.04.
>
> No. 9. Mr. Grundy's compensatory damages total $1,191,760.18.
>
> No. 10. Met Life is liable to Mr. Grundy for punitive damages equal to four (4) times his compensatory damages.
>
> No. 11. Met Life is liable to Mr. Grundy for attorney's fees equal to 35% of his compensatory damages.

Absolutely no rationale or supporting documentation was provided to explain the calculation of damages. This is wholly insufficient to support a judgment on damages, particularly when the amounts appear to be grossly inflated and duplicative. *Id.* at 305.

Our standard of review in matters involving a trial court's rulings on evidentiary issues—such as its decision to set aside responses, or in this case non-responses, to requests for admission—is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581. CR 36.02 provides:

> Any matter admitted under Rule 36 is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the

> action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

In the case at hand, it was not an abuse of discretion for the trial court to effectively set aside its orders deeming the requests for admission admitted and, instead, allowing required due process to establish damages.

Therefore, and for the foregoing reasons, the order of the Jefferson Circuit Court is AFFIRMED.

TAYLOR, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KRAMER, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion for a variety of reasons. Primarily, I do not believe that the procedural history of this case meets the "good cause" criteria under CR 55.02, as evaluated under CR 60.02(f), to set aside the default judgment on damages, or that successive CR 60.02 motions were a permissible vehicle to attack the judgment.

Unlike the majority's view of *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007), I do not interpret it as a supporting basis to affirm the circuit court. In *Asset Acceptance*, in a detailed analysis of the interplay of the different avenues for relief under CR 60.02, the Court held that

> as the United States Supreme Court has explained with reference to the corresponding subsection of Fed.R.Civ.P. 60(b), "a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6)." *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 393, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993). **That subsection, rather, is limited to "extraordinary circumstances" beyond the movant's control which effectively prevented the movant from responding in a timely manner to the litigation**. *Id.*

Id. at 332 (emphasis added).

Digging deeper into the United States Supreme Court's explanation in *Pioneer Investment Services*, as quoted by the Kentucky Supreme Court in *Asset Acceptance*, further illuminates the point:

> The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect," but only on motion made within one year of the judgment. Rule 60(b)(6) goes further, however, and empowers the court to reopen a judgment even after one year has passed for "any other reason justifying relief from the operation of the judgment." **These provisions are mutually exclusive, and thus a party who failed to take timely action due to "excusable neglect" may not seek relief more than a year after the judgment by resorting to subsection (6).** *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, and n. 11, 108 S.Ct. 2194, 2205 n. 11, 100 L.Ed.2d 855 (1988). To justify relief under subsection (6), a party must show "extraordinary circumstances" **suggesting that the party is faultless in the delay.** See *ibid.; Ackerman v. United States*, 340 U.S. 193, 197-200, 71 S.Ct. 209, 211-213, 95 L.Ed. 207 (1950); *Klapprott v. United States*, 335 U.S. 601, 613-

> 614, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). **If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable.**

507 U.S. at 393, 113 S. Ct. at 1497 (emphasis added).

More recently, the Kentucky Supreme Court reviewed the parameters of good cause to set aside a default judgment and explained that

> "CR 55.02 allows a trial court to set aside a default if good cause is shown. Good cause is not mere inattention on the part of the defendant. . . ." *Tennill v. Talai*, 277 S.W.3d 248, 250 (Ky. 2009). More recently, we stated, "[t]o establish 'good cause,' **the party seeking relief from default judgment must demonstrate that it is not guilty of unreasonable delay or neglect.**" *Sunz Ins. Co. v. Decker*, 2017-SC-000257-WC, 2018 WL 1960571, at *5 (Ky. Apr. 26, 2018) (citing *Terrafirma, Inc. v. Krogdahl*, 380 S.W.2d 86 (Ky. 1964)).

VerraLab Ja LLC v. Cemerlic, No. 2017-SC-000675-DG, 2019 WL 4686345, at *3 (Ky. Sept. 26, 2019) (emphasis added).

Pursuant to binding authority, MetLife cannot meet the criteria for relief under CR 60.02(f), as it is not – and cannot be – disputed that it was not "faultless in the delay"; that there were "not 'extraordinary circumstances' beyond [MetLife's] control which effectively prevented [it] from responding in a timely manner to the litigation"; or that it was innocent of "unreasonable delay or neglect." These reasons alone serve as a basis for reversal of the circuit court's decision.

Moreover, however, is the fact that MetLife's successive CR 60.02 motion is impermissible, as has been held numerous times. *See e.g., Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621, 624 (Ky. App. 2003) (citing *Cloverleaf Dairy v. Michels*, 636 S.W.2d 894, 895-96 (Ky. App. 1982)); *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky. App. 2009). Nothing changed in the proceedings at the circuit court level, and no new discovery or facts were introduced between the filing of MetLife's first and second CR 60.02 motions. MetLife just took an impermissible "second bite at the apple," which should not be condoned by this Court. It was error for the circuit court to even have considered the second CR 60.02 motion. Rather, MetLife should have pursued its appeal of the denial of its first CR 60.02 motion, rather than voluntarily dismissing that appeal. Instead, MetLife thereafter filed its second CR 60.02 motion – even though nothing factually or evidentiarily whatsoever had changed between the first CR 60.02 motion and the second one.

Finally, I believe this case is distinguishable from *Deskins v. Estep*, 314 S.W.3d 300 (Ky. App. 2010). Certainly, while "a defaulting party does not admit unliquidated damages, [it] should be permitted to participate in the damage assessment hearing." *Howard v. Fountain*, 749 S.W.2d 690, 693 (Ky. App. 1988) (citing *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); *American Central Corp. v. Stevens Van Lines, Inc.*, 103 Mich. App. 507, 303

N.W.2d 234 (1981); 47 AM.JUR.2D, *Judgments*, §1187 (1969); 15 A.L.R.3d 586 (1967)). "[F]undamental 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." *Id.* (citing *Jamieson, Inc. v. Copeland Coating Co., Inc.*, 126 N.H. 101, 489 A.2d 613 (1985); *Howard v. Holiday Inns, supra*; *American Central Corp., supra*; 47 AM.JUR.2D, *Judgments*, §1188 (1969)). However, MetLife never made an appearance in this case prior to the hearing on damages or otherwise participated in this case, despite having been served on a number of occasions, including by certified mail. Despite not having entered an appearance in this case, it is further undisputed that Mr. Grundy sent actual notice to MetLife, via certified mail, of the circuit court's order of default judgment on liability and actual notice of Mr. Grundy's motion for default damages, noticed for a hearing. *Yet, MetLife failed to appear for the hearing on damages or otherwise respond*.

The circuit court entered a default judgment on damages on October 8, 2014, but it was not until October 7, 2015, that MetLife filed its first CR 60.02 motion, presumably under section a. The only "reason" MetLife gave in support of relief was "there was inadvertence on the part of MetLife. Given the large volume of business all across the country handled by MetLife, it respectfully requests that the Court see this as a 'valid excuse' for its default in this case." In a detailed and exceptionally well-reasoned fourteen-page order, the circuit court correctly denied

MetLife's motion. Then, nearly a year later, taking a second bite at the apple, on August 25, 2016, MetLife filed a motion under CR 60.02(f) seeking relief again from the default judgment on damages, despite the undisputed fact that nothing changed at all since the hearing on damages or since its first CR 60.02 motion.

This was an abuse of CR 60.02 proceedings. MetLife was given an opportunity to participate in the hearing on the default judgment on damages, even though it had not entered an appearance. It failed to do so and should not now be heard to say that there are grounds for the default judgment on damages to be set aside.

Given the procedural history of this case, it is distinguishable from *Deskins*, 314 S.W.3d 300. In that case, the defaulting defendant timely acted to protect his rights when the circuit court failed to render the requisite findings for the default judgment on damages and thereafter filed a timely appeal. The defendant followed the well-ordered and proper appellate procedures for seeking relief from the improper damages award. Here, had MetLife done the same, it likely may have been entitled to relief like the defendant in *Deskins*. But, it failed to do so. Thus, even if the circuit court erred in its damages award, MetLife did nothing whatsoever, *despite actual notice*, to defend against the default judgment on damages or to timely seek appellate review of the default judgment on damages, and that judgment became final. Under the procedural facts of this case, MetLife's

meritless CR 60.02(a) and then improper successive and meritless CR 60.02(f) motion could not serve as the bases for relief from the default judgment on damages, even if the circuit court erred in its decision on damages. That judgment became final, without any bases that fit the criteria of CR 60.02 for opening it, and without having timely appealed it.

Consequently, I would reverse the circuit court's order on MetLife's CR 60.02(f) motion and reinstate the default judgment on damages.

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