RENDERED: AUGUST 10, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001968-MR

EUGENE ADAMS, JUDY ADAMS,
AND WILDCAT FENCE COMPANY, INC. APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 95-CI-000203

WILLIAM RUDOLPH APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Eugene Adams (Eugene), Judy Adams (Judy), and Wildcat Fence Company, Inc. (collectively Appellants) appeal from several orders of the Jefferson Circuit Court which entered a default judgment in favor of William Rudolph (Rudolph) in the amount of $312,000 and denied their motions to set aside the damage portion of the default judgment. We affirm.

Prior to instigation of this action, it appears that the parties jointly operated Wildcat Fence Company, Inc. For reasons which do not appear of record, the relationship between Eugene, Judy and Rudolph soured and a dispute over the business

arose. Although Rudolph was indicted on criminal charges stemming from the dispute over the business and spent time in jail because he was unable to afford to post bail, the Commonwealth eventually moved to have the charges dismissed with prejudice and the charges were dismissed.

On January 12, 1995, Rudolph filed a pro se complaint against the Appellants which contained counts of malicious prosecution, abuse of process, conversion, tortious interference with a contract, fraudulent inducement to convey a business interest, and defamation. The record reflects that the applicable filing fees were tendered by Frank Mascagni (Mascagni), an attorney, on behalf of Rudolph. The green return receipt cards representing service of the complaint and summons on the Appellants bore a return address for Jay Lambert, the attorney who represented Rudolph during the criminal proceedings. Lambert's address is the same as Mascagni's. The return receipt cards were not immediately filed in the record after they were returned to Lambert and/or Mascagni. On January 26, 1995, an unsigned document which appears to be a pro se answer and several accompanying exhibits were filed with the trial court.

On October 12, 1995, Rudolph filed a set of handwritten interrogatories directed to Eugene with the trial court. The certificate of service stated that a copy of the interrogatories was mailed to Eugene on the same date.

On November 28, 1995, Rudolph filed a set of handwritten requests for admission directed to Eugene. The certificate of summons stated that the requests were mailed to

Eugene on the same date. Under several of the individual requests for admission, Eugene was asked to admit or deny that Rudolph was damaged "in an amount of $300,000.00" as a result of abuse of process, conversion of property, tortious interference with his business, fraudulent inducement to convey a business interest, and defamation.

On April 29, 1995, Rudolph filed a handwritten notice of deposition with the trial court seeking to take Eugene's deposition on May 10, 1996, at Mascagni's office. Accompanying the notice was a restricted delivery return receipt card which was signed by Eugene on April 30, 1996. As there was some confusion as to whether the deposition was to occur on May 9th or May 10th, Rudolph was present with a court reporter at Mascagni's office on both dates. Eugene did not appear on either date. On both dates, Mascagni made a statement on the record noting Eugene's failure to attend the deposition and his failure to respond to the interrogatories and requests for admission.

In a deposition transcript dated June 13, 1996, entitled "Certificate of Nonattendance for the Deposition of Judy Adams," Mascagni stated on the record that a handwritten notice to take Judy's deposition on June 13, 1996, was mailed to her on June 3, 1996. A copy of the notice and an envelope showing that it was sent via certified mail was attached to the deposition. There is no copy of the deposition notice in the court record. There is no return receipt card evidencing receipt of the notice in the record or attached to the deposition. Judy did not attend this deposition.

In a deposition transcript dated July 12, 1996, Mascagni stated on the record that Rudolph prepared a second handwritten notice to take Judy's deposition on July 12, 1996, which was mailed to her. A copy of the notice attached to the deposition shows that it was mailed on June 27, 1996. There was also a copy of a return receipt card with Judy's address on it as evidence that the notice was sent via certified mail. There is no copy of the deposition notice in the court record. Mascagni stated, "I do not know for a fact that Ms. Adams has received the notification or not, but it's our intention to go forward, or at least make a record that she is not here." Mascagni also stated that there had still been no response to the outstanding discovery requests.

On June 12, 1997, Rudolph filed a handwritten motion for default judgment against the Appellants "for their failure to answer interrogatories, requests for admission, and failure to attend four scheduled depositions in 1996." The certificate of service stated that the motion was mailed to the Appellants on June 9, 1997. On June 13, 1997, the trial court entered an order denying the motion due to non-compliance with the Rules of Civil Procedure and the Jefferson County Rules of Practice. There is nothing in the record which shows that the Appellants ever responded to Rudolph's motion.

Rudolph renewed his motion for default judgment on August 1, 1997, stating the same grounds as set forth in his previous motion. Rudolph further alleged:

> Based on the failure to respond to the Request for Admissions . . . the Defendants

> have admitted the damages contained in the Complaint in the amount of $300,000.00. . . .[Defendants further admitted damages] in the amount of $7,000 in Admission No. 18 . . . [f]or a total of $307,000.00.

In the motion's certificate of service, Rudolph indicated that the motion was sent to the Appellants via certified mail return receipt requested. A review of the return receipt shows that a Linda Greenwell signed it on August 4. However, the "restricted delivery" box was not checked and there has never been any allegation made on behalf of the Appellants that they did not receive the motion.

On August 6, 1997, the trial court entered an order granting default judgment in favor of Rudolph "in the amount of $307,000.00, attorney fees in the amount of $5,000.00, and attendant court costs in the amount of $1,050.00." In so ruling, the trial court noted that because the Appellants had failed to respond to the requests for admission, they were deemed to be admitted.

It appears that the entry of default judgment finally caught the Appellants' attention as they filed a motion to set aside the default judgment on August 8, 1997. As grounds for the motion, the Appellants maintained that:

> [N]one of the Defendants have been served with summons pursuant to Ruled 4.01 and it [appears] that the record does not show that they were served by certified or registered mail or that they were served by any person authorized by the Rule to do so[.]

The motion noticed a hearing date of August 18, 1997.

Rudolph filed his response to the Appellants' motion on the day of the hearing. While Rudolph's previous pleadings were

pro se, this motion was prepared and signed by Mascagni and seemed to indicate that Mascagni was now representing Rudolph. In the response, Rudolph stated:

> Attached . . . are the original return of service green cards advising that [the Appellants] were all served by certified mail with Summons and the Complaint in January 1995. Also attached are copies of the Summons and receipts evidencing payment of the filing fee and service fee.
>
> William Rudolph was utilizing the services of attorney Jay Lambert at the time of filing of the complaint, and Mr. Lambert had his name and address listed for the return of service of the Return Receipt Requested receipt.

The three return receipt cards show that delivery of the complaint and summons was restricted to the designated addressees. Eugene signed the return receipt on January 24, 1995 and Judy signed the return receipt for Wildcat Fence on January 13, 1995. The return receipt for Judy Adams was signed by Judy but not dated.

On August 18, 1997, Mascagni was present in the courtroom for the hearing on the Appellants' motion to set aside the default judgment. No one appeared on behalf of the Appellants. Therefore, the trial court denied the Appellants' motion to set aside the default judgment by order entered August 20, 1997.

On August 21, 1997, the Appellants filed a motion seeking to renew their previous motion to set aside the default judgment and set a hearing date for August 25, 1997. In the motion, the Appellants maintained that "there was no record of service in the file in this case and so the Default Judgment was

improper because the record did not show that the defendants had been served with process." In an attempt to explain why the Appellants ignored all of the pleadings, discovery requests, and notices filed by Rudolph, counsel for the Appellants stated:

> This action was filed in early 1995, apparently January 12, 1995 though one cannot tell from the summons in the case because they are not dated though they are stamped as being from Jefferson Circuit Court Division Eleven. The undersigned began to check service in this file personally and to have service checked on January 17, 1995 and has been checking it periodically ever since. The service check record kept by the office is attached.
>
> . . . .
>
> This case or the Complaint and what little stuff there was in the file remained pretty much the same for two and a half years when suddenly there was a Motion for Default Judgment. That motion was overruled.
>
> Shortly there was a new Motion for Default Judgment the one which was entered on August 6, 1996 and as to which we have moved the Court to set aside. On August 6, 1997 there was no notation of service in the file. There was no Sheriff's return and there was no green card and there was no notation on the docket card that there had been any service but Default Judgment was entered anyway.
>
> Counsel placed the case on the docket for August 18, 1997 and then didn't show up. That happened because of an office mixup. . . For that counsel apologizes but it has nothing to do with the merits of the Default Judgment or the Motion to set it aside.

In an affidavit signed by Judy which was attached to the motion, she admitted sending the letter of December 7, 1994 to Mascagni "because he said during a telephone conversation that he represented Mr. Rudolph," and that she "sent the paper appearing

to be an Answer to Mr. Mascagni in January 1995 right after the suit was filed and I also filed it in the Court."

The hearing on the Appellants' motion was passed several times and ultimately heard on December 22, 1997. After hearing arguments on the motion, the trial court stated that it was denying the motion and made a handwritten notation denying the motion on the August 1997 default judgment order.

The Appellants filed a third motion to set aside the default judgment on May 4, 1998, and set a hearing date for May 18, 1998. In an order entered June 25, 1998, the trial court stated:

> A default judgment was granted herein by order entered August 6, 1997.
>
> Then, a notice-motion-order to again request that the default judgment be set aside was docketed for the motion docket of May 19, 1998. The matter was passed to June 1, 1998, and then to June 22, 1998. There were no appearances for the parties at the June 22 scheduled event. As things stand right now, the default judgment is still in effect. Is the motion to set aside the default judgment to be argued? Is the case settled?

The Appellants responded to the trial court's order on June 27, 1998. In the response, the Appellants explained why no one appeared on June 22 and stated that "[t]he file should be on the June 29 docket." The case then lapsed into inactivity again until February 8, 1999, when the Appellants asked the trial court to set a hearing on their motion. In response to the Appellants' request, the trial court scheduled a hearing for May 24, 1999.

Following the hearing, the trial court entered an opinion and order on July 23, 1999, denying the motion to set

aside the default judgment. In upholding the default judgment, the trial court focused on the above-referenced facts and stated:

> CR 4.01(1)(a) sets forth the requirements for serving an individual with a summons and complaint by registered or certified mail. After the envelope, containing the summons and complaint, is sent by the circuit court clerk by registered or certified mail, with a return receipt requested, Cr 4.01(1)(a) further provides:
>
> > . . . The clerk shall forthwith enter the facts of mailing on the docket and make a similar entry when the return receipt is received by him or her. . . The clerk shall file the return receipt or returned envelope in the record. Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service. [Emphasis added.]
>
> The return receipts in this case were not returned to the circuit court clerk, but instead were returned to the office of the Plaintiff's attorney. At the time that the Court entered Default Judgment, the return receipts were not filed in the circuit court file.
>
> The Court finds that the absence of the return receipts in the circuit court file did not preclude the Court from having jurisdiction over the Defendants and properly entering Default Judgment. Having the return receipts returned to the clerk is the standard procedure and preferred method; however, CR 4.01 states that service by certified or registered mail "is complete only upon delivery of the envelope." The return receipt is proof of the time, place and manner of service. The Court finds that it did have jurisdiction over the Defendants at the time Default Judgment was entered, despite the fact that the Court did not have proof of service from the file. The return receipts were returned to the clerk and entered into the circuit court file after the date on which Default Judgment was entered.

> The return receipts, which were signed and dated January 13, 1995 and January 24, 1995 are proof that service was complete on those dates. Accordingly, the Court properly had jurisdiction over the Defendants at the time it entered Default Judgment on August 6, 1997.
>
> CR 37.04(1) provides that if a party fails to appear at his or her own deposition or fails to serve answers or objections to interrogatories, the court may enter a default judgment. A trial court has broad discretion in applying the penalties provided by CR 37.04. Benjamin v. Near East Rug Co., Ky., 535 S.W.2d 848 (1976). The Kentucky Court of Appeals, however, has stated that in imposing the severe sanction of default judgment for failure to comply with discovery, the trial court is warranted to enter default judgment when "the totality of the facts and circumstances" justifies the conclusion that the defendant "willfully failed to cooperate" in discovery, [sic] Nowicke v. Central Bank & Trust Co., 551 S.W.2d 809, 810-811 (1977). The Defendants in this case failed to answer interrogatories and requests for admissions, failed to appear at four (4) noticed depositions, and failed to respond to the original Motion for Default Judgment. This Court finds that this continuous pattern of noncompliance with the discovery process, with no showing of good cause, constitutes willful disregard on behalf of the Defendants. Therefore, default judgement is warranted. In addition, this Court finds that failure of the Defendant's [sic] to respond to the Requests for Admissions, deems the Admissions admitted. CR 36.01(2).

After receipt of the July 1999 order, the Appellants retained new counsel and filed a motion on August 4, 1999, seeking to set aside the damage portion of the default judgment. The Appellants argued that "the Court's entry of a specific dollar amount as damages for the Plaintiff without notice to them or the scheduling of a hearing to determine those damages was improper and thus that portion of the default Judgment is void as

a matter of law." On August 19, 1999, the trial court entered an order denying the Appellants' motion, stating:

> After review of the Defendants' Motion, Plaintiff's Response and review of the file, the Defendants' request to set aside the damage portion of the Default Judgment is DENIED. The damages claimed by Plaintiff, though initially unliquidated, became liquidated when the Request for Admissions regarding those damages went unanswered and were therefore deemed admitted. No hearing is required to resolve the issue of appropriate damages when no legal dispute as to same exists, and once deemed admitted, damages and the amounts thereof were no longer in dispute.

This appeal followed.

I. DID THE TRIAL COURT ERR IN REFUSING TO SET ASIDE ENTRY OF THE DEFAULT JUDGMENT IN FAVOR OF RUDOLPH?

The Appellants maintain that the trial court erred in refusing to set aside entry of the default judgment because of the untimely filing of the return receipt cards in the record and the fact that a document appearing to be an answer was filed. The Appellants contend that their attorney was unable to determine whether they had been properly served in the absence of the return receipt cards. The Appellants also maintain that entry of the default judgment was improper because there was no showing of bad faith or wilfulness or violation of an order compelling discovery. We will not set aside entry of a default judgment in the absence of an abuse of discretion on behalf of the trial court. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988). Having reviewed the record on appeal, we are satisfied that no abuse of discretion occurred in regard to the trial court's refusal to set aside the default judgment.

Under CR 4.01, upon the filing of the complaint the clerk is required to issue the summons and, if the plaintiff requests that the complaint and summons be served by certified mail:

> Place a copy of the summons and complaint . . . in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. The clerk shall forthwith enter the facts of mailing on the docket and make a similar entry when the return receipt is received by him or her. . . . The clerk shall file the return receipt or returned envelope in the record. Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service.

CR 4.01(1)(a). There is nothing in CR 4.01 which requires the return receipt cards to be returned to the clerk. While this may be an oversight in CR 4.01, it is not the duty of this Court to correct oversights.

Once the return receipt cards were filed in the record, there was no question that service was proper. The cards indicated that they were to be delivered only to the addressee, bore the signatures of the Appellants, and showed the date service was made. What appears to be a pro se answer was filed on behalf of the Appellants after service was made, and this,

too, is evidence that the Appellants were served.[1] If counsel for the Appellants had any concerns as to whether the service of process was proper, he could have called Mascagni and inquired instead of basically sitting back and waiting for the return receipt cards to be filed. Although the complaint was pro se, Mascagni's name was on record as the person filing the complaint and paying the required fees.

In regard to entry of the default judgment, we note that pursuant to CR 37.04(1)(a) and (b), a party who fails to appear at a properly noticed deposition or fails to answer or object to properly served interrogatories is subject to "any action authorized under subparagraphs (a), (b), and (c) of Rule 37.02(2)." There is nothing in CR 37.04 which would require the non-answering party to disregard a motion to compel before the sanctions under CR 37.02 can be assessed. Under CR 37.02(2)(c), entry of a default judgment against the non-responding party is one of the penalties the trial court may consider. As we have noted, Eugene failed to respond to a set of interrogatories and requests for admissions which, according to the record, were mailed to him on October 12, 1995, and November 28, 1995, respectively. There has never been any allegation on behalf of Eugene that he did not receive these documents. Furthermore, neither Eugene nor Judy appeared for their depositions despite the fact that the record shows that notices were sent. Eugene's

[1]Although the answer was filed by and on behalf of Judy alone, we believe that the filing of the answer inured to the benefit of Eugene and Wildcat Fence under the rule set forth in Haddad v. Louisville Gas & Electric Company, Ky., 449 S.W.2d 916, 919-920 (1969).

signature appears on the return receipt for the April 29, 1995, notice of deposition. Although there are no return receipt cards bearing Judy's signature, there have been no allegations that Judy was unaware of the deposition notices. Furthermore, the Appellants filed no response to either of the motions for default judgment filed by Rudolph.

Appellants have offered no explanation as to why the discovery requests and deposition notices were disregarded. To the extent they base their disregard of these documents on the fact that the return receipt cards for service of the complaint and summons were not in the possession of the court clerk, this excuse does not warrant reversal of the default judgment. Again, we note that it appears that counsel for the Appellants made only a minimal attempt to ascertain whether service of process had been properly made. If he had any doubts as to the propriety of service on the Appellants in the absence of the return receipt cards, he could have challenged the discovery requests and depositions notices by motions to quash and/or motions for a protective order. Instead he chose to do nothing. Based on the foregoing, we do not believe that the trial court's refusal to set aside the default judgment was improper.

II. EVEN IF THE TRIAL COURT DID NOT ERR IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT, DID IT ERR IN ENTERING JUDGMENT IN RUDOLPH'S FAVOR IN THE AMOUNT OF $312,000?

In its order of August 19, 1999, the trial court denied the Appellants' motion to set aside the damage portion of the default judgment on the ground that the "damages claimed by

Plaintiff, though initially unliquidated, became liquidated when the Request for Admissions regarding those damages went unanswered and were therefore deemed admitted." The Appellants maintain that unliquidated damages cannot be converted into liquidated damages through requests for admission, even if they were not answered and therefore deemed to be admitted. We disagree.

> Pursuant to CR 36.01, the failure of a party to respond to [requests for admission] means that the party admits the truth of the allegations asserted. See, Commonwealth of Kentucky Department of Highways v. Compton, Ky., 387 S.W.2d 314 (1964). Furthermore, any matter admitted under the rule is held to be conclusively established unless the trial court permits the withdrawal or amendment of the admissions. CR 36.02. Thus, an inattentive party served with a request for admissions may run the risk of having judgment entered against him based upon the failure to respond. See, Lewis v. Kenady, Ky., 894 S.W.2d 619 (1995). [Emphasis in original.]

Harris v. Stewart, Ky.App., 981 S.W.2d 122, 124 (1998). The record is devoid of any attempt on behalf of the Appellants to petition the trial court to withdraw or amend the admissions.

In Smather v. May, Ky., 379 S.W.2d 230 (1964), May filed suit against Smather seeking damages incurred as a result of a collision between May's truck and Smather's car. Smather filed a counterclaim and two sets of requests for admissions on May, one of which asked May to admit that "[Smather's] car was damaged $1,500 and he incurred $580 medical expenses." Smather, 379 S.W.2d at 232. May responded to the counterclaim but failed to respond to the request for admissions. At trial, Smather asked the trial court to rule in his favor on May's complaint and

his counterclaim due to May's failure to respond to the request for admissions. The trial court denied the request and the jury returned a verdict of $1,000 in favor of May. In reversing the verdict on appeal, the Court stated:

> [W]here there is no sworn statement denying specifically the matters of which an admission is requested, or setting forth in detail why the party cannot truthfully admit or deny those matters, they are deemed admitted and may be the basis for a summary judgment. [Citations omitted.]
>
> . . . .
>
> The record shows [Smather] on two occasions served a request for admissions on [May]. . . .[N]o answer was made to them by [May].
>
> Wherefore, the judgment is reversed and directed to be vacated; and an order shall be entered dismissing the complaint and taking the allegations of the counterclaim as confessed; but only the special items of damages, set forth in the request for admissions, shall be awarded. The trial court shall at a new trial instruct the jury to find for [Smather], not to exceed $25,000 in amount, any additional special and general damages for personal injuries which he may prove.

The Appellants' reliance on Howard for the proposition that they were entitled to a hearing in regard to the amount of damages Rudolph was entitled to on the default judgment is misplaced. In that case, a default judgment was entered against Howard after he failed to respond to Fountain's complaint. The trial court held an ex parte hearing to assess damages on Fountain's complaint, and it was conceded that Howard was not notified of the hearing. Judgment was ultimately entered in favor of Fountain in the amount of $33,575.10. In reversing the judgment, this Court noted that "[s]ince a defaulting party does

not admit unliquidated damages, he should be permitted to participate in the damage assessment hearing." Howard, Ky.App., 749 S.W.2d at 693. In this case, the Appellants's failure to respond to the requests for admissions propounded by Rudolph "conclusively established" the amount of damages Rudolph was entitled to. CR 36.02. Thus, we agree with the trial court's holding that "damages claimed by [Rudolph], though initially unliquidated, became liquidated when the Request for Admissions regarding those damages went unanswered and were therefore deemed admitted."

Based on the foregoing analysis of CR 36.01 and 36.02 as well as Smather, we have no choice but to find that the Appellants' failure to respond to the requests for admissions propounded by Rudolph warrants entry of judgment against them in the amount of $312,000.

The orders of the Jefferson Circuit Clerk are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:	BRIEF FOR APPELLEE:
Marvin L. Coan Louisville, KY	Frank Mascagni, III Louisville, KY