

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001373-MR

CONNIE WALKER

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 01-CI-00624

KENNY STEWART

APPELLEE

OPINION
VACATING AND REMANDING

** **

BEFORE: BAKER, COMBS, and SCHRODER, Judges.

COMBS, JUDGE. Connie Walker appeals from the June 6, 2002, order of the Whitley Circuit Court denying her motion filed pursuant to Kentucky Rules of Civil Procedure (CR) 55.02 to set aside the default judgment entered against her in an action to recover personal property. We vacate and remand.

While unmarried, Connie Walker, the appellant, and Kenny Stewart, the appellee, decided to share a residence. Stewart made a cash contribution as a down payment toward the

purchase of a mobile home to be titled in Walker's name.

Stewart and Walker furnished the home and added amenities -- including a deck and pool. The relationship soon deteriorated, and Stewart moved out of the home.

On November 5, 2001, Stewart filed a complaint in Whitley Circuit Court seeking to recover his personal property and the cash contribution toward the acquisition of the mobile home, its furnishings, and additions. However, the summons issued by the clerk and forwarded to the sheriff for service was defective and was returned to the clerk's office for correction on November 29, 2001.

In the meantime, Walker was served with a summons and a copy of the complaint by certified mail on December 1, 2001. On December 4, 2001, Walker was personally served with a summons and another copy of the complaint. Finally, the sheriff served Walker with yet another summons and copy of the complaint on December 20, 2001.

On January 2, 2002, Stewart filed a motion for default judgment. In his motion, Stewart explained that Walker had been properly served on December 1, 2001, and had failed to respond. Walker filed her answer on January 9, 2002, within twenty days after receiving her third summons. Nevertheless, on January 10, 2002, the Whitley Circuit Court entered a default judgment against her. The judgment ordered her to turn over numerous

items of personal property and to reimburse Stewart in the amount of \$8,000.00. On February 1, 2002, Walker filed a motion to set aside the default judgment. On June 6, 2002, the trial court entered an order denying the motion. This appeal followed.

Walker contends that the trial court erred by failing to set aside the default judgment pursuant to her timely motion. CR 55.02 provides that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02." As Walker observes, "[d]efault judgments are not favored." Bargo v. Lewis, Ky., 305 S.W.2d 757, 758 (1957).

At the threshold of our review, we address whether the trial court should have granted the default judgment in the first instance. As noted in the summary of events, Walker was served with three separate summonses on three different occasions. Each summons notified Walker that legal action had been taken against her and advised her that:

[u]nless a written defense is made by you or by an attorney in your behalf within 20 days following the day this paper is delivered to you, judgment by default may be taken against you. . . .

While Walker's answer was arguably filed out of time with regard to two of the summonses, the numerous summonses served upon her surely created confusion as to the proper date from which to calculate the running of time. If the date of the

last summons is utilized, the answer filed on January 9, 2002, was timely. Walker's immediate appearance in court to challenge Stewart's motion for default judgment against her was also significant and must be considered. Finally, Walker filed her answer one day before the default judgment was entered against her by the trial court.

It is true that the dilatory filing of pleadings cannot generally be ignored. However, in light of the unique circumstances of this case, we conclude that the trial court abused its discretion in granting default judgment. In Childress v. Childress, Ky., 335 S.W.2d 351, 354 (1960), the court held:

since every cause of action should be tried upon the merits, the rendering of judgments by default ought to be withheld where seasonable objection is made unless a persuasive reason to the contrary is submitted.

The granting of default judgment is discretionary with the trial court, but that discretion is not unlimited. Walker had seasonably objected to the entry of judgment and had filed an arguably timely and otherwise proper answer. Therefore, guided by the reasoning of Childress, supra, we believe that it was an abuse of discretion for the trial court to grant default judgment in Stewart's favor.

Since entry of default judgment was erroneous, the order denying the appellant's motion to set aside the default judgment was necessarily erroneous as well. Accordingly, the judgment of the Whitley Circuit Court is vacated, and this case is remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Otis Doan, Jr.
Harlan, Kentucky

BRIEF FOR APPELLEE:

Sandra J. Reeves
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