RENDERED: DECEMBER 15, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001290-MR

CYRUS M. TALAI — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 04-CI-003573

JAMES B. TENNILL, SR. — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,[1] SENIOR JUDGE.

JOHNSON, JUDGE: Cyrus M. Talai has appealed from an order of the Jefferson Circuit Court entered on April 6, 2005, in favor of James B. Tennill which awarded Tennill $45,076.00 in damages. Having concluded that the trial court did not abuse its discretion in entering the default judgment, we affirm as to that issue. However, having further concluded that Tennill was not entitled to any amount of damages, because of his failure to

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

answer interrogatories propounded upon him, we vacate the judgment and remand.

On May 2, 2002, Tennill was leaving a gas station on Shelbyville Road in Louisville, Jefferson County, Kentucky, when his vehicle was struck by a vehicle being driven by Talai. Tennill suffered injuries to his head, neck and back, and his vehicle was heavily damaged. Talai's insurer, Safe Auto Insurance Company, repeatedly failed to respond to Tennill's requests to settle the claim for the minimum liability coverage limits of $25,000.00,[2] and he filed a complaint against Talai in the Jefferson Circuit Court on April 28, 2004. The complaint alleged that Tennill suffered serious and permanent physical injury as a result of the automobile accident. Tennill attempted to serve the complaint on Talai by certified mail, but was unsuccessful. Subsequently, the complaint was personally served on Talai by a special bailiff on July 19, 2004. Talai did not file a response to the complaint.

On August 23, 2004, Tennill filed a motion for judgment pro confesso, along with an affidavit, stating that although Talai had been served with the complaint he had failed to respond. A default judgment was entered against Talai by the

[2] The only objection Safe Auto voiced to the proposed resolution was its concern about a potential "Medicare lien," which apparently does not exist.

trial court on August 25, 2004, and a hearing was set to determine the damages owed to Tennill.

On August 30, 2004, Talai, by counsel, filed a motion for relief from the default judgment. He attached thereto an answer to the complaint, but such answer was stricken by the trial court's order entered on December 20, 2004. In a memorandum, Talai requested that the default judgment be set aside and that the trial court grant him leave to file an answer to the complaint. Talai's counsel claimed that he had not filed an answer to the complaint on Talai's behalf because he was unaware that Talai had ever been served. Tennill responded to the motion on October 11, 2004. The trial court denied the motion on the same date. The trial court also rescheduled the hearing to determine the amount of damages owed to Tennill.

Talai propounded interrogatories to Tennill on October 19, 2004, in an attempt to determine medical expenses, pain and suffering, and lost wages. The interrogatories and requests for production of documents went unanswered by Tennill.

Following the taking of both parties' depositions[3] and the filing of trial memoranda by both parties, the trial court held the hearing on damages on March 7, 2005, at which time Tennill was permitted to introduce evidence of unliquidated

[3] Tennill's discovery deposition was taken on November 8, 2004, and Talai's discovery deposition was taken on February 8, 2005.

damages.[4] On April 6, 2005, the trial court entered its findings of fact, conclusions of law, and judgment. The trial court concluded as follows:

> The Court concludes that Mr. Talai was at fault in causing the May, 2002, motor vehicle accident. The Court further concludes that it would have been extraordinary for an 83-year-old man not to have suffered injuries as a result of the collision. It is not uncommon for injuries to manifest several days after such an accident. It was more than reasonable for Mr. Tennill to seek medical attention to address his injuries following the accident.
>
> . . .
>
> The Court concludes that Mr. Tennill has more than met the $1,000.00 medical expense threshold to maintain this action under KRS 304.390-060. The listing of Mr. Tennill's medical expenses admitted into evidence exceeded $8,000.00. Mr. Tennill acknowledged that one of the expenses listed to the Family Allergy and Asthma Center in the amount of $1,002.00 was not directly related to the accident. Still, the remaining expenses exceeded $7,000.00. And these expenses did not include a January 6th, 2003, CT scan performed at Baptist Hospital East or a statement for services by Mr. Tennill's neurologist, Dr. Bangash. Therefore, the Court concludes that Mr. Tennill easily exceeded the $1,000.00 threshold.
>
> It appears that Mr. Tennill has continued to work actively even at his age.

[4] Tennill was allowed to introduce previously unproduced and unknown evidence, including evidence of his past income. The trial court agreed with Tennill's argument that the Kentucky Rules of Civil Procedure (CR) did not apply to Talai because he was in default and that Talai had neither a right to compel discovery, nor a right to notice of the damage assessment hearing.

> His real estate business has been both his love and his hobby. The Court concludes that Mr. Tennill suffered a loss of income in 2002 as a result of the injuries he received from the accident. Exactly how much he lost is more difficult to quantify. His Schedule Cs reflect the following total gross receipts for the past four years:
>
> | YEAR | GROSS RECEIPTS |
> |---|---|
> | 2000 | $53,365.00 |
> | 2001 | $15,642.00 |
> | 2002 | $42,827.00 |
> | 2003 | $66,096.00 |
>
> Given this earning history, it appears that 2001 was an aberration. When the Court averages Mr. Tennill's earnings for 2000, 2002 and 2003, it appears that his average gross receipts for those three years were $54,096.00. Thus, his 2002 earnings were $11,269.00 below that average.
>
> It appears that there was no reason other than the automobile accident attributable to this decline. Because of this, the Court will award him $11,269.00 in lost income for 2002.
>
> It is also apparent that Mr. Tennill has suffered pain and suffering and continues to suffer as a result of this accident. A multiple of three times his special damages appears to be an appropriate amount for pain and suffering. Because of this, the Court will award him $33,807.00 in pain and suffering and a total judgment of $45,076.00 (11,269.00 + $33,807.00).

Talai filed a motion on April 15, 2005, pursuant to CR[5] 59.05, asking the trial court to alter, amend, or vacate its judgment, claiming that he was entitled to relief from the

[5] Kentucky Rules of Civil Procedure.

default judgment because there was no evidence that he was served with the complaint. Tennill responded on April 19, 2005. Talai then filed a reply memorandum. The trial court denied the motion on May 23, 2005. This appeal followed.

Talai has raised several claims of error in this appeal. First, Talai has argued that the trial court abused its discretion in denying his motion to set aside the default judgment. He states that his "failure to file an answer within the requisite time period was a result of [counsel's] mistake, inadvertence, surprise, or excusable neglect."[6] We reject this argument.

Generally, when a party is seeking relief from a default judgment, it "must show good cause; . . . i.e., . . . '(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.'"[7] "Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured."[8] "Absent a showing of all three elements, the

[6] Talai's motion was filed in accordance with CR 55.02, which states that "[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

[7] PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, 139 S.W.3d 527, 531 (Ky.App. 2003) (citing Sunrise Turquoise, Inc. v. Chemical Design Co., Inc., 899 S.W.2d 856, 859 (Ky.App. 1995)).

[8] Green Seed Co. Inc. v. Harrison Tobacco Storage Warehouse, Inc., 663 S.W.2d 755, 757 (Ky.App. 1984).

default judgment will not be set aside."[9] "Although default judgments are not favored, a trial court is vested with broad discretion when considering motions to set them aside, and an appellate court will not overturn the trial court's decision absent a showing that the trial court abused its discretion."[10]

In this case, while there may have been little or no prejudice in setting aside the default judgment and while there may have been a defense to the claims, we conclude that the trial court did not abuse its discretion by finding that Talai has not provided any good cause to show why his answer was not filed in a timely manner. Talai's counsel states that he continually checked with the Jefferson Circuit Clerk's office concerning service of the complaint upon Talai and was consistently told that service had not been perfected. Counsel went so far as to procure an affidavit from a deputy clerk which states that "according to the Jefferson County Clerk's computer database no service of summons was perfected upon the defendant, Cyrus Talai, as of 4-15-05" [emphasis added]. However, what counsel fails to discuss is the existence in the record of a summons showing that Talai was personally served with Tennill's

[9] Sunrise Turquoise, 899 S.W.2d at 859.

[10] PNC Bank, 139 S.W.3d at 530 (citing Howard v. Fountain, 749 S.W.2d 690, 692 (Ky.App. 1988)). (In Howard, a motion to set aside a default judgment was denied where the "good cause" shown was mere inattention on the part of the defendant and his attorney. The basis for the late filing of a responsive pleading was that the complaint had been filed on November 13, 1985, but the attorney was not contacted regarding the summons and complaint until December 5, 1985.)

complaint by special bailiff on July 19, 2004. Talai's signature appears on the summons.

While we understand that Talai's counsel was employed for him by his insurance company, Safe Auto, "negligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)" [citations omitted].[11] Counsel's ignorance of the fact that Talai had been personally served with the complaint does not compel a finding of good cause by the trial court. The trial court did not abuse its discretion in this instance.

Next, Talai claims that the trial court should not have allowed Tennill to introduce evidence of unliquidated damages[12] at the damages hearing, because Tennill failed to respond or to object to Talai's written discovery requests served on Tennill on October 19, 2004. Tennill contends, and the trial court agreed, that because Talai was adjudged in default, he was not entitled to a response to his interrogatories, nor was he entitled to participate at the

[11] See Vanhook v. Standford-Lincoln County Rescue Squad, Inc., 678 S.W.2d 797, 799 (Ky.App. 1984).

[12] See Simons v. Douglas' Ex'r, 189 Ky. 644, 225 S.W. 721, 724 (1920)(stating that "[u]nliquidated damages are . . . only such damages as exist in opinion and require ascertainment by a [fact finder], and which cannot be ascertained or fixed by calculation"). See also Nucor Corp. v. General Elec. Co., 812 S.W.2d 136, 141 (Ky. 1991) (citing Black's Law Dictionary 930 (6th ed. 1990) (stating that "in general 'liquidated' means '[m]ade certain or fixed by agreement of parties or by operation of law'").

damages hearing.[13] Because we agree with Talai, we must vacate the trial court's award of unliquidated damages to Tennill.

In Howard, this Court stated that "[a]s a general rule, in an action for unliquidated damages, a defaulting party admits liability but not the amount of damages" [citations omitted].[14] CR 55.01 authorizes the trial court to conduct a hearing for determination of damages before it enters its judgment. CR 55.01 states, in part, as follows:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he, or if appearing by representative, his representative shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. . . . 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[.]

[13] On page nine of Tennill's brief, he states that he never actually received the discovery requests allegedly propounded by Talai. On that same page of his brief, he asserts that all answers to the discovery requests were given during Tennill's discovery deposition. However, this Court sees no evidence in the record, including this deposition, where Tennill revealed his claim for unliquidated damages. Tennill goes on to argue that, regardless, the "purpose in providing CR 8.01 information is not present in a default proceeding." However, Tennill provides this Court with no authority to support this contention.

[14] Howard, 749 S.W.2d at 693.

Thus, "[s]ince a defaulting party does not admit unliquidated damages, he should be permitted to participate in the damage assessment hearing" [citations omitted].[15] Howard further recognizes the right of the defaulting party to be given notice of the damage assessment hearing if he has entered an appearance in the action prior to the hearing.[16] In Smith v. Gadd,[17] the Court stated that "[i]n construing the word 'appeared' in CR 55.01, we are of the opinion that it means the defendant has voluntarily taken a step in the main action that shows or from which it may be inferred that he has the intention of making some defense."

CR 8.01(2) provides that "[w]hen a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories[.]" The rule further states that "if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories." CR 8.01 has been interpreted to require a plaintiff to specify the amount of unliquidated damages sought in response to an interrogatory in order to recover those damages.[18] The language of the rule is mandatory and gives a

[15] Howard, 749 S.W.2d at 693.

[16] Id.

[17] 280 S.W.2d 495, 498 (Ky. 1955).

[18] Fratzke v. Murphy, 12 S.W.3d 269, 271 (Ky. 1999); LaFleur v. Shoney's Inc., 83 S.W.3d 474, 477 (Ky. 2002).

trial court no discretion as to its application.[19] Our Supreme Court has stated as follows:

> The purpose of the rule is to put a party on notice as to the amount of unliquidated damages at stake to allow that party to make economically rational decisions concerning trial preparation and trial strategy. Its purpose is not to put a party on notice as to the type of damages at stake.[20]

In Fratzke, the defendant propounded an interrogatory which requested Fratzke to identify "'each item of damage, including pain and suffering, which you claim arises out of this action. . . .'"[21] The Supreme Court held that this interrogatory "clearly encompassed Fratzke's claims of damages for pain and suffering, future medicals, lost wages, and impairment of earning power as these claims were stated in the complaint."[22] The Court noted that because Fratzke did not provide a full answer to the interrogatory on damages, nor object to the interrogatory, other than her medical expenses, she effectively stated that her claim for unliquidated damages was zero.[23]

In the case before us, Talai filed his motion to set aside the default judgment five days after the judgment was

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[19] See Fratzke, 12 S.W.3d at 273.

[20] LaFleur, 83 S.W.3d at 481.

[21] Fratzke, 12 S.W.3d at 270.

[22] Id. at 271.

[23] Id.

entered. Although his motion was denied, the trial court allowed Talai to file a trial memorandum prior to the damages hearing. Furthermore, the depositions of both parties were taken prior to the hearing. Thus, it is clear from the record that Talai "appeared" in the case for the purpose of CR 55.01;[24] and therefore, he was entitled to participate in the damages hearing and to contest the amount of damages.

Furthermore, Talai was entitled to propound interrogatories upon Tennill to discover the amount of damages he was claiming. Interrogatory question number 20 stated, "[i]f you are making a lost wage claim or claim for lost income, profit or compensation, please state the name and address of your employer, the dates and hours of work missed and the amount of lost wages claimed." Interrogatory question number 21 stated as follows:

> Pursuant to Civil Rule 8.01, please identify each element of general and special damages that you are claiming and identify the manner in which each amount was computed: medical and hospital expenses – itemized by date, name of health care provider and amount; past and further physical, mental and emotional pain and suffering; permanent impairment of power to labor and earn money; funeral or burial expenses; and, any other element of damages claimed. Please attach any documents supporting the damages claimed herein to these answers.

[24] See Howard, 749 S.W.2d at 693 (noting that where the answer to the complaint was untimely filed, the mere filing of the document constituted appearance in the case.)

Tennill failed to answer or to object to the discovery requests in any manner prior to the damages hearing. Subsequently, Talai moved pursuant to CR 8.01, 26.05, and 37.02 to preclude Tennill from introducing evidence of unliquidated damages at the damages hearing. Tennill failed to move for leave to answer such requests, but rather argued that he was not obligated to comply with discovery because Talai was in default. The trial court agreed, as set out in its April 6, 2005, order. However, the strict standards in CR 8.01, which under Fratzke included lost wages and pain and suffering,[25] required Tennill to specify those damages, and he should have done so by responding to Talai's interrogatories seeking that information. It was an abuse of discretion for the trial court to allow Tennill to introduce any evidence of unliquidated damages where the damages had not been previously disclosed; and therefore, we vacate the trial court's award of $45,076.00 for lost wages and pain and suffering.

Because we are vacating on the damages issue, there is no need to address Talai's remaining three claims, including (1) that the trial court rendered a judgment wholly inconsistent with the evidence presented by Tennill at the damages hearing; (2) that Tennill failed to meet the $1,000.00 economic threshold

[25] Fratzke, 12 S.W.3d at 271.

requirement under KRS 304.39-060(2)(b),[26] before claiming medical expenses, and (3) that the trial court erred by not reducing its award to Tennill based upon personal injury protection benefits (PIP).[27]

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed in part and vacated in part, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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[26] The Kentucky Motor Vehicle Reparations Act requires a plaintiff to prove he has incurred “medical expenses” in excess of $1,000.00 to recover in tort.

[27] According to KRS 304.39-060(2)(a), to the extent that PIP is payable for damages because of bodily injury, tort liability for those claims is “abolished”.