

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001599-MR

DONALD L. GREEN

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 02-CI-008969

ELOYCE BARBOUR

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Donald L. Green brings this appeal from a July 5, 2005, Opinion and Order of the Jefferson Circuit Court dismissing Green's amended complaint against Eloyce Barbour. The circuit court concluded that Green's amended complaint was time-barred pursuant to Kentucky Revised Statutes (KRS) 304.39-230(6). Additionally, Green

¹ Senior Judge Lewis G. Paisley 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.

appeals the April 13, 2005, Opinion and Order entered by the Jefferson Circuit Court setting aside a default judgment entered against Eloyce on January 14, 2005. For the reasons hereafter stated, we affirm.

I. BACKGROUND

This case arises from an automobile-pedestrian collision in 2000. The underlying facts and events relevant to this appeal are both extensive and convoluted and thus, are chronologically summarized as follows:

- On June 10, 2000, Green was struck by a motor vehicle in a crosswalk in front of Dillard's Department Store at the Mall of St. Matthews in Jefferson County.

- The motor vehicle did not stop after hitting Green. However, Green was able to locate the vehicle at another location in the parking lot and obtained a Maryland license plate number on the vehicle.

- The motor vehicle in question was a 1992 Honda that was owned by Glen and Martha Barbour of Accokeek, Maryland. Although unbeknownst to Green, the driver of the vehicle was Glen and Martha's daughter, Eloyce. Eloyce was working in Louisville for the summer.

- On June 12, 2000, Green sent a letter to Glen and Martha at their residence in Maryland notifying them of the accident and further advising them that he had received injuries as a result of being hit by their vehicle. In his letter to Glen and Martha, Green indicated that the driver was a "young, african-american, female."

Although he did not request the identity of the driver, he did request the name of Glen and Martha's insurance company.

- On November 27, 2002, more than two years and five months after the accident, Green filed a complaint in the Jefferson Circuit Court against Glen, Martha, and the unknown person who was driving the motor vehicle at the time of the accident. The complaint asserted a damage claim for injuries sustained by Green as a result of their negligence.

- In October 2003, Glen and Martha's counsel initiated discovery from Green. From this, it was determined that Green's medical bills incurred as a result of the accident were paid by Medicare and other personal insurance carriers. Green admitted there were no payments made for any of his medical expenses by any automobile insurance company via personal injury protection (PIP) benefits nor had he received any basic or added reparation payments from any reparation obligor.

- On December 29, 2003, Glen and Martha filed a motion for summary judgment on the basis that Green's claim was time-barred by the two year statute of limitation set forth in KRS 304.39-230(6).

- After Glen and Martha filed their motion for summary judgment, Green served interrogatories upon Glen and Martha seeking to identify the name and address of the person who was operating the 1992 Honda in June of 2000 at the time of the collision with Green.

- In February of 2004, Glen and Martha served responses to the interrogatory request identifying their daughter, Eloyce, as the driver of the motor vehicle in June of 2000.

- On April 7, 2004, the Jefferson Circuit Court granted Glen and Martha a summary judgment, holding the claim was barred by the two year statute of limitations set forth in KRS 304.39-230(6). In addition, the court permitted Green to file an amended complaint against Eloyce, as the driver of the motor vehicle that hit Green in June of 2000.

- Although the court permitted Green to file an amended complaint naming Eloyce as a defendant in April 2004, no attempt was made to serve the amended complaint on Eloyce until the Kentucky Secretary of State was served with a summons and accompanying documents on September 22, 2004. The secretary of state was served as the statutory agent for Eloyce pursuant to Kentucky's Long-Arm Statute for establishing personal jurisdiction over non-residents as set forth in KRS 454.210(3). The secretary of state attempted to serve Eloyce by certified mail at her last known address in Maryland. The certified mail was unclaimed and subsequently returned to the secretary of state, whereupon the secretary of state made its return to the Jefferson Circuit Court Clerk on November 12, 2004. Pursuant to KRS 454.210(3), upon the return of the secretary of state, the summons and amended complaint were deemed to have been served on Eloyce as of the return date.

- On December 7, 2004, Green filed a "Motion for Judgment" against Eloyce seeking a default judgment for liability.

- On December 9, 2004, the Jefferson Circuit Court entered a judgment by default against Eloyce and further scheduled a hearing for damages on January 13, 2005.
- After the hearing, on January 14, 2005, the Jefferson Circuit Court entered a judgment against Eloyce in the amount of \$50,000.00.
- On January 24, 2005, Eloyce, by special appearance of counsel, moved to set aside the default judgment.
- By Opinion and Order entered April 13, 2005, the Jefferson Circuit Court set aside the default judgment against Eloyce.
- On April 26, 2005, Eloyce moved to dismiss the amended complaint filed by Green on the basis that she was entitled to the same two year statute of limitations defense which had previously resulted in dismissal of the original complaint against her parents, Glen and Martha.
- By Opinion and Order entered July 5, 2005, the Jefferson Circuit Court dismissed the amended complaint against Eloyce on the basis that the action was filed outside the two year statute of limitations pursuant to KRS 304.39-230(6). This appeal followed upon the filing of a notice of appeal on August 3, 2005.

II. ISSUES

Green raises two issues on appeal. First, Green asserts that the circuit court erred in setting aside the default judgment against Eloyce. Second, after setting aside the default judgment against Eloyce, Green argues that the circuit court erred by dismissing the amended complaint against Eloyce for being outside the two year statute of limitation

period set forth in KRS 304.39-230(6).² Green specifically argues that the statute of limitations in this case was tolled by KRS 413.190 and thus, dismissal was improper.³

III. LEGAL ANALYSIS

a. Setting Aside the Default Judgment against Eloyce.

We begin our analysis of whether the circuit court properly set aside the default judgment against Eloyce by determining the appropriate standard of review. When a party fails to plead or otherwise defend against a claim, the Rules of Civil Procedure provide for entry of judgment by default. Ky. R. Civ. P. (CR) 55.01. However, as a general rule, default judgments are not looked upon with favor by our courts. *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972). The Rules of Civil Procedure allow the setting aside of a judgment entered by default if “good cause” may be shown. CR 55.02. This is true notwithstanding the compulsory language found in CR 8.02 and CR 8.03 with respect to the duty to file a responsive pleading and assert affirmative defenses.

Trial judges are directed to apply a liberal standard in the determination of “good cause” in order to ensure that the defendant is not deprived of his day in court. *Liberty National Bank & Trust Co. v. Kummert*, 205 S.W.2d 342 (Ky. 1947). The trial court has broad power to set aside a default judgment. However, that power must not be exercised capriciously, but as a matter of judicial discretion in the service of justice. *S.R.*

² KRS 304.39-230(6) reads as follows:

An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

³ There are no issues raised on appeal regarding the dismissal of the complaint against Glen and Martha Barbour.

Blanton Dev., Inc. v. Investors Realty and Mgmt. Co., Inc., 819 S.W.2d 727 (Ky.App. 1991). “Although default judgments are not favored, trial courts possess broad discretion in considering motions to set them aside and we will not disturb the exercise of that discretion absent abuse.” *Howard v. Fountain*, 749 S.W.2d 690, 692 (Ky.App. 1988).

With this standard of review in mind we now turn to the first issue raised by Green as to whether the circuit court abused its discretion in setting aside the default judgment entered against Eloyce as set forth in the Opinion and Order entered April 13, 2005. CR 55.02 allows a default judgment to be set aside in accordance with CR 60.02. As noted, courts are to apply liberal standards in determining “good cause” to set aside default judgments. In *PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc.*, 139 S.W.3d 527 (Ky.App. 2003), a panel of this Court held that good cause should consist of a “(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.” *Id.* at 531. There is no dispute Eloyce could demonstrate a meritorious defense to the claim, that being the statute of limitations defense upon which her parents Glen and Martha had earlier prevailed on in this action. As concerns Eloyce's excuse, she argues that she was not served with the motion for default judgment nor did she receive notice of the subsequent hearing on damages. Upon a close review of the record, it is obviously apparent that Eloyce was not served a copy of the motion for default judgment. In fact, there is no certificate of service attached to the motion nor does the caption of the motion identify it as a motion for default judgment, but rather a “motion for judgment.” We acknowledge that service on a defaulting party who has not appeared in the action is not required and that the motion did contain the

required CR 55.01 attorney certification that no papers had been served upon counsel. However, this certification is somewhat misleading in that it states Eloyce was served notice of the complaint on September 22, 2004, when in fact this notice, along with the amended complaint, was served on her statutory agent, the Kentucky Secretary of State. Since Green was relying on KRS 454.210 to obtain personal jurisdiction over Eloyce and given that this statute “deems” the secretary of state to be Eloyce's statutory agent in this proceeding, we believe it was incumbent upon Green, at minimum, to serve a copy of the motion upon the secretary of state. In fact, it appears the motion was served on no one.

Notwithstanding, Green argues in his brief that Eloyce had actual notice of the amended complaint and submits that Eloyce's parents, the attorney for her parents, and her parents' insurance company, were all “representatives” of Eloyce and thus had knowledge of the claims set forth in the amended complaint. If so, we believe this is sufficient to constitute an appearance on Eloyce's behalf. CR 55.01 requires that if a representative of a defendant has appeared in the action, the motion for default judgment must be served on that representative at least three days prior to the hearing scheduled thereon. In this case the record clearly reflects that the “representatives” of Eloyce, as alleged by Green, were not served notice of the motion for judgment nor were they given notice of the hearing conducted in January 2005 to determine damages on the default judgment. Thus, we agree with the circuit court's finding that these circumstances constitute a valid excuse for Eloyce's default and further, given the totality of the circumstances, does not constitute any prejudice against Green to allow the matter to be

resolved on the merits rather than by default judgment. Accordingly, we do not believe the circuit court abused its discretion in setting aside the default judgment against Eloyce.

b. Dismissal of the Amended Complaint Against Eloyce.

In dismissing the amended complaint against Eloyce, the circuit court applied the same legal rationale that it applied in dismissing the original complaint against Glen and Martha, that being that the amended complaint against Eloyce was outside the two year statute of limitations set forth in KRS 304.39-230(6) and thus the claim was time-barred. However, Green argues that the two year statute of limitation was tolled as concerns the claim against Eloyce as a result of KRS 413.190. KRS 413.190 tolls the running of statutes of limitation against residents of this state if the resident is absent from the state or absconds or conceals himself to prevent the prosecution of the action against him. The record in this case reflects very little on the status of Eloyce as a “resident.” The meager discovery taken in this case indicates that Eloyce worked in Louisville during the summer of 2000. There is no other evidence to support her residency in Kentucky. Green failed to establish that Eloyce was a Kentucky resident. Accordingly, we conclude that KRS 413.190 is simply not applicable in this case since it can only accrue against a resident of this Commonwealth. Further, we note that Green's argument that Eloyce is a resident of Kentucky totally contradicts his argument that she was properly before the court since he obtained service on Eloyce pursuant to KRS 454.210, which is the primary method for obtaining personal jurisdiction over non-residents by Kentucky courts.

Moreover, it is hard to conceive Eloyce concealed herself from prosecution in this case. Green quickly learned the identity of Eloyce when he served a discovery request, more than one year after the case had been filed. Additionally, the record reflects that Green knew the identity of the out-of-state residents who owned the motor vehicle that struck him on the same day that the accident occurred. Yet, for some unexplained reason, Green waited over two years and five months to assert his initial complaint against Glen and Martha only. Had Green promptly filed his complaint and conducted discovery in timely fashion, he could have determined the identity of Eloyce and asserted his claim against her within the two year limitation period. We can find no error in the circuit court's conclusion that the claims against Eloyce were barred by the applicable two year statute of limitations.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court dismissing the amended complaint against Eloyce is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Dennis R. Carrithers
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

William Clifton Travis
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