

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-00241-MR

JO ELLEN RULE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CI-01865

CAPITAL ONE BANK

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF, SENIOR JUDGE.¹

KNOPF, SENIOR JUDGE: Appellant, Jo Ellen Rule, pro se, appeals the default judgment entered against her in a breach of contract action. We affirm.

Jo Ellen Rule had a line of credit with appellee Capital One Bank for use in connection with the homebuilding business she operated with her husband, Leonard Rule. On April 27, 2005, Capital One filed a complaint seeking to collect the unpaid balance on the credit card. Mrs. Rule was the only defendant named in the complaint, which was

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

personally served on her on September 24, 2005. On October 14, 2005, Mr. Rule filed an answer and counterclaim that listed both Mrs. Rule and himself as defendants. The document was signed by Mr. Rule alone and did not contain a signature line for Mrs. Rule. Mr. Rule states in the answer that he is a defendant because he was the one who primarily utilized the credit card despite Mrs. Rule's name appearing solely on the contract.

Capital One filed a motion to strike the answer and a motion for default judgment on October 31, 2005. The motions were noticed to Mrs. Rule at the same address where she was served. On November 14, 2005, Mr. Rule filed a reply to the motion that was signed only by himself. The next day, the affidavit of Mrs. Rule was filed, however, both the cover letter submitting the affidavit to the court and the certificate of service were signed by Leonard Rule. On November 18, 2005, the trial court held a hearing on Capital One's motions at which only Mr. Rule was present. The trial court informed Mr. Rule that Mrs. Rule was the party in the action and that he could not represent her. The court also found that the affidavit of Mrs. Rule only requested that Mr. Rule be allowed to act as her "attorney in fact" and did not deny that she owed the debt. The trial court then entered default judgment and awarded Capital One damages in the amount of \$5,409.90. A hearing was conducted on Mrs. Rule's subsequent motion to set aside the default judgment. In response to the trial court's inquiry as to why she had failed to answer the complaint herself or to hire an attorney, Mrs. Rule stated that she thought the affidavit was sufficient. She also stated that the Capital One account was only in her name and

that the persons who made the charges on that account had incurred the debt. The trial court denied the motion to set aside the default judgment. This appeal follows.

At the outset, we must determine whether the entry of default judgment was proper. CR 55.01 provides:

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 (3) days prior to the hearing on such application. The motion for judgment against a party in default for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default... A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

In the present case, Mr. Rule, a non-party and non-attorney, answered the complaint for Mrs. Rule despite the fact that she was the only named defendant and the only individual served. Mrs. Rule received notice of the motion for default judgment, but she did not respond or appear at the hearing. Even after notice had been given that Mr. Rule could not represent her, only Mr. Rule appeared at the hearing to contest the motion. At the hearing, Mr. Rule presented his wife's affidavit. However, Mrs. Rule neither signed the cover letter for the affidavit to be filed with the court nor signed the certificate of service for the affidavit. The motion for default judgment was properly certified by counsel for Capital One.

Mrs. Rule relies on the cases of *Hankins v. Cooper*, 551 S.W.2d 584 (Ky.App. 1977) and *Smith v. Gadd*, 280 S.W.2d 495 (Ky. 1955), for the proposition that the answer filed by Mr. Rule and her affidavit constitute an appearance that precludes default judgment. In *Smith*, the Court defined the word “appeared” in the context of CR 55.01 as a circumstance where “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.” 280 S.W.2d at 498. However, the appearance only gives the defendant the right to written notice of the application for default judgment under CR 55.01. Although, Mrs. Rule was given notice, she failed to attend the hearing on the motion for default judgment. Based on these circumstances, we conclude that the entry of default judgment was proper under CR 55.01.

Next, Mrs. Rule argues that the trial court erred by failing to set aside the default judgment. CR 55.02 states that trial courts may set aside default judgments in accordance with CR 60.02 “for good cause shown.” Although default judgments are disfavored, the decision to set aside a default judgment is committed to the discretion of the trial court. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky.App. 1991). In deciding whether to set aside a default judgment, the trial court should consider: (1) whether there is a valid excuse for default; (2) whether there is a meritorious defense; and (3) prejudice to the other party. *Id.* As stated above, Mrs. Rule did not appear before the court even after receiving notice that her husband could not represent her. Additionally, the affidavit did not state a meritorious defense or otherwise contest liability. Under the facts of this

case, we cannot conclude that the trial court abused its discretion by refusing to set aside the default judgment.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jo Ellen Rule, pro se
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BRIEF FOR APPELLEE:

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