

RENDERED: MAY 25, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000751-MR

GREAT SENECA FINANCIAL CORPORATION

APPELLANT

v. APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 05-CI-00312

MARGIE J. JOHNSON

APPELLEE

OPINION VACATING AND REMANDING

** ** * ** * ** *

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

NICKELL, JUDGE: Great Seneca Financial (hereinafter “GSF”) appeals a sua sponte order of the Logan Circuit Court entered on February 10, 2006, directing counsel for GSF to pay \$500.00 to Margie Johnson as a result of its failure to appear at a noticed hearing. GSF also appeals a second order of the same court entered on March 31, 2006, overruling

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.

a request for reconsideration of the prior order assessing the sanction. We vacate both orders and remand for an evidentiary hearing.

On August 1, 2005, GSF filed suit to collect money owed to it by Margie Johnson and Michael Posey. Posey was dismissed upon submitting his bankruptcy petition and proof of discharge of debtor. Johnson never filed a written response to the complaint. On January 9, 2006, the law firm of Javitch, Block and Rathbone, LLC, representing GSF, moved the Logan Circuit Court for a default judgment against Johnson. The motion was noticed for a hearing one month later.

On February 9, 2006, Johnson appeared in person but no one appeared for GSF. During a discussion with Johnson at the bench, the trial court said it would have GSF's attorney give her \$500.00 toward satisfying her approximately \$9,000.00 debt. The judge said he hated for attorneys to notice a hearing and then not appear because it "makes the court look bad."

Hearing nothing from GSF or its attorneys, the court denied the default judgment on February 10, 2006, noting on GSF's proposed order, "Denied [Defendant] appeared[.] Counsel for [Plaintiff] did not." The trial court further noted on its docket sheet, which it read aloud at the hearing:

No appearance by counsel for Movant. [Defendant] Margie Johnson appeared in person. Counsel for [Plaintiff] sanctioned \$500.00 to be paid to [Johnson] in lieu of sanctions in the form of contempt. It embarrasses the Court for attorneys to notice a motion [and] not appear for it [and] to have parties appear in opposition.

GSF's next contact with the trial court was February 17, 2006, when counsel moved the trial court to lift the \$500.00 sanction and noticed the motion for a hearing on March 30, 2006. GSF's counsel's supporting memorandum of law stated that the firm's practice is to arrange for local attorneys to handle matters scheduled in courts that are several hours away from their Cincinnati office. On this occasion, however, GSF's counsel's employee who handled local attorney assignments was hospitalized suddenly with a staph infection. While the employee's co-workers tried to cover her work, this particular assignment was overlooked and no one appeared on behalf of GSF's counsel. The employee was hospitalized February 3, 2006, and had not returned to work two weeks later when GSF's counsel asked that the sanction for contempt be rescinded. The memorandum asserted that it was never GSF's counsel's intention to disobey or disrespect the trial court and characterized its failure to appear at the hearing for default judgment as excusable neglect.

On March 30, 2006, a local attorney appeared in Logan Circuit Court on behalf of Javitch, Block and Rathbone to ask that the \$500.00 sanction be rescinded. The attorney reiterated that the failure of counsel to appear on behalf of GSF on February 9, 2006, resulted from an employee's illness and not willful disrespect for the trial court. Johnson was again present in the courtroom on March 30, 2006, having received notice of the hearing. The trial court refused to lift the sanction, and again ordered GSF's counsel to pay Johnson the \$500.00. This time the trial court specified payment was to be made to Johnson within ten days.

In mid-April, 2006, the trial court set a status conference for May 18, 2006, to resolve a jurisdictional issue and to determine whether GSF intended to go forward with the case. Johnson was ordered to appear personally. GSF's counsel was ordered to appear with her calendar and to be prepared to set a trial date. The matter was dismissed with prejudice when no one appeared for either side. This appeal followed.

GSF's counsel contends the trial court wrongly imposed a \$500.00 criminal contempt sanction against it for failing to appear at a hearing for which it had given notice. Counsel claims the sanction was levied in error because its absence from the hearing resulted from excusable neglect and not from any intention to disobey or disrespect the trial court.

Failure of an attorney to appear for trial or at motion hour is traditionally treated as criminal contempt requiring proof of criminal intent. *Brockman v. Commonwealth*, 185 S.W.3d 205, 208 (Ky.App. 2005). Criminal contempt may be either direct or indirect. A direct contempt occurs when an actor is before the court and commits "an affront to the dignity of the court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). Because all the elements needed to find a direct criminal contempt has occurred are personally known to the court, it may be punished summarily. *Commonwealth v. Pace*, 15 S.W.3d 393, 395 (Ky.App. 2000). In contrast, an indirect criminal contempt occurs "outside the presence of the court" and requires an evidentiary hearing comporting with due process to determine whether a court order has been violated. *Brockman, supra*, at 208; *Burge, supra*, at 808. All elements of a criminal

contempt, including “willful disobedience toward, or open disrespect for, the rule or order of a court[,]” must be established beyond a reasonable doubt. *Pace*, 15 S.W.3d at 395 (citing *Burge*, 947 S.W.2d at 808).

The failure of GSF's attorney to appear at the default hearing on February 9, 2006, was an indirect criminal contempt. As such, an evidentiary hearing was required to determine whether GSF's counsel's absence was willful disobedience, open disrespect for the trial court, or perhaps excusable neglect. No such hearing occurred before the \$500.00 sanction was imposed by the trial court. Furthermore, nothing in the record refutes GSF's counsel's subsequent written explanation that the failure to appear resulted from an employee's sudden illness. According to the memorandum filed by GSF's counsel, the employee responsible for securing local counsel became ill and was hospitalized with a lingering staph infection. The employee's mother had apparently called the law firm on February 3, 2006, anticipating her daughter would miss only about a day of work, but two weeks later she was still on leave. While fellow employees attempted to cover assignments for the ailing co-worker, the firm overlooked the need to secure local counsel for the February 9, 2006, default judgment hearing, and the trial court and Johnson were left to wonder why.

While the trial court and Johnson were inconvenienced, based upon the record before us we cannot say GSF's counsel was willfully disobedient toward the trial court or openly disrespectful of its orders. Therefore, imposing the sanction without an opportunity for counsel to explain the absence was inappropriate. *Pace, supra*, at 396.

The trial court should have scheduled a show cause hearing to provide GSF's counsel an opportunity to explain the absence before deciding whether to impose a sanction for failure to appear at the scheduled proceeding. The troubling facts of this case demonstrate that GSF's counsel would do well to adopt stricter office practices aimed at ensuring that all employee tasks are timely performed regardless of illness.

For the foregoing reasons, the orders of the Logan Circuit Court imposing a \$500.00 sanction and denying reconsideration of that sanction are vacated, and this matter is remanded for an evidentiary hearing and entry of an order consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Karen A. Saunders
Robert K. Hogan
Cincinnati, Ohio

BRIEF FOR APPELLEE:

No brief filed.