RENDERED: SEPTEMBER 28, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

SUPREME COURT ORDERED NOT PUBLISHED: AUGUST 13, 2008
(FILE NO. 2007-SC-0780-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001604-MR

JEANNE CRAWFORD AND MICHAEL CRAWFORD — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 04-CI-008155

BOB PITTMAN AND TIMOTHY DENISON[1] — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Jeanne Crawford and Michael Crawford (collectively referred to as "Crawford") have appealed from the Jefferson Circuit Court's entry of default judgment on February 21, 2006; denial of their motion to set aside the default judgment on April 10, 2006; and denial of their motion to alter, amend, or vacate pursuant to Kentucky

[1] Hon. Timothy Denison was counsel for Bob Pittman in the underlying action in the Jefferson Circuit Court. The notice of appeal inexplicably listed him as a party to this appeal. Neither party attempts to explain his inclusion as a party, nor is any argument made for or against him. Therefore, this opinion will not contain reference to Mr. Denison as a party to this action. We note, however, Mr. Denison continues to represent Mr. Pittman on appeal.

Rules of Civil Procedure (CR) 60.02 on July 12, 2006. For the following reasons, we vacate and remand to the Jefferson Circuit Court.

In 1999 Crawford filed suit against Bob Pittman ("Pittman") concerning the refurbishment of a certain 1955 Ford Thunderbird.[2] Pittman successfully defended that suit at trial and on appeal to this Court.[3] On September 24, 2004, Pittman filed the instant suit against Crawford for fraud, libel, slander, defamation, intentional infliction of emotional distress, abuse of process, conspiracy, and malicious prosecution, all of which allegedly resulted from the previous litigation. Crawford, by counsel, timely filed an answer to the complaint on October 29, 2004. Crawford's counsel, Hon. Joseph S. Elder ("Elder"), subsequently filed a motion for a more definite statement, a motion to dismiss certain of the counts in the complaint, a motion to strike, an amended answer, and a request for a trial date. Further, Elder appeared at several motion hours, a status conference and a pretrial conference. On May 24, 2005, the trial court entered an order setting the trial date for November 15, 2005.

On June 17, 2005, Elder filed a motion to reschedule the trial date as he had been informed Crawford would be unavailable on November 15, 2005. On June 28, 2005, Hon. Thomas E. Clay ("Clay") and Hon. James M. Green ("Green") filed a motion to enter their appearance as counsel of record for Crawford in substitution of Elder. Both of these motions were noticed to be heard on July 5, 2005. Neither Clay, Green, nor Elder appeared for motion hour on July 5. The trial court remanded both motions on July 6, 2005, due to counsels' non-appearance.

---

[2] *Crawford v. Pittman*, Jefferson Circuit Court, Case No. 99-CI-006819. Crawford contracted with Pittman to restore her vehicle. Upon completion, Crawford was apparently displeased with the work performed and the offers Pittman made to correct the issues when brought to his attention. Crawford filed suit alleging breach of contract, violations of the Kentucky Consumer Protection Act, fraud, and misrepresentation.

[3] *Crawford v. Pittman*, 2001-CA-001651-MR, not-to-be-published.

On November 2, 2005, Pittman filed his witness list and trial brief and effected service on "the Plaintiff [sic] at her last known address." Pittman filed his proposed jury instructions on November 8, 2005, with service again to "the Plaintiff [sic] at her last known address." Pittman admittedly did not effectuate service upon Elder, Clay, or Green,[4] and Crawford denied receipt of any of Pittman's pretrial compliance.

On November 15, 2005, the case was called for trial, and the trial court noted "neither the Defendants nor their previous attorneys of record appeared." Upon Pittman's motion, the trial court struck Crawford's answer, granted Pittman a default judgment on the issue of liability, and then allowed Pittman to present evidence regarding damages. On February 21, 2006,[5] the trial court entered its written judgment in favor of Pittman, awarding him damages in the amount of $62,955.35.[6]

On February 23, 2006, Clay, acting as counsel for Crawford,[7] filed a motion to set aside the default judgment arguing Pittman had failed to comply with the notice requirement of CR 55.01[8] prior to seeking a default judgment. In an opinion and order

---

[4] Pittman asserts in his brief he was aware Crawford had terminated Elder from representation, but was unaware whether substitute counsel had been secured as no entry of appearance had been made. We find this assertion to be dubious at best as Pittman's counsel admits he was present on Pittman's behalf at the July 5, 2005, motion hour in which Clay and Green's motion for substitution of counsel was remanded. Further, contrary to Pittman's assertion, no motion to withdraw was ever filed by Elder, and thus he remained counsel of record and should have been served with any pleadings until a motion to withdraw was filed and the appropriate order was entered.

[5] The record is silent as to why the written judgment was not entered until some 90 days following the scheduled trial date, nor do the parties explain this delay in their briefs to this Court. Further, the judgment does not reflect the parties who were to receive copies thereof.

[6] Pittman was awarded $15,455.35 for compensatory damages, $7,500.00 for attorney fees, $10,000.00 for humiliation/embarrassment, $10,000.00 for damage to business reputation, and $20,000.00 as punitive damages.

[7] We note the record does not contain an entry of appearance by Clay or Green, nor is there an order allowing either of them to substitute for Elder as counsel of record.

[8] CR 55.01 sets forth the procedure for obtaining a default judgment which requires written notice be served three days prior to seeking such judgment against a party who has "appeared" in the action.

entered April 10, 2006, the trial court denied the motion citing CR 37.02(2)(c)[9] as authority for entry of the default judgment based on Crawford's non-appearance at trial. On April 19, 2006, Clay, again as counsel for Crawford, filed a motion to reconsider the April 10, 2006, order, and pursuant to CR 60.02, moved the court to alter, amend or vacate the February 21, 2006, default judgment. The trial court denied this motion by opinion and order entered on July 12, 2006. This appeal followed.

Crawford assigns error to the trial court on three grounds. First, Crawford argues the trial court erred in awarding Pittman a default judgment in contravention of the plain language of CR 55.01, thus making the judgment void *ab initio.* Next, Crawford contends the trial court abused its discretion in denying the post-judgment motions to set aside the judgment, or alternatively to alter, amend or vacate its prior orders. Finally, Crawford argues the trial court erred by awarding damages without providing notice of a damages assessment hearing as required by CR 55.01, and that the damages award was improper and excessive.

The standard of review on appeal from a trial court's granting of a default judgment is abuse of discretion. *Greathouse v. American National Bank and Trust Co.*, 796 S.W.2d 868 (Ky.App. 1990). We are bound by CR 52.01 to give due deference to a trial court's findings. As such, we will not disturb the findings of the trial court unless the "decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In a case such as the one before us, where sanctions are imposed, the discretion of the trial court is not unbridled. It must be supported by a finding of bad faith or willfulness on the part of the party being

---

[9] CR 37.02(2) recites the sanctions available for a party's failure to comply with a court's discovery order, including striking pleadings and entering a default judgment.

sanctioned. *Greathouse, supra*, at 870. A trial court must also "articulat[e] on the record . . . the court's resolution of the factual, legal, and discretionary issues presented." *Id.* (quoting *Quality Prefabrication, Inc. v. Daniel J. Keating Company*, 675 F.2d 77, 81 (3d Cir. 1982)). Further, in our review of a trial court's imposition of sanctions, we must consider: (1) whether the opponent was prejudiced by the dismissed party's actions, (2) whether the dismissed party was given a warning that dismissal could result from a failure to cooperate, and (3) whether other, less drastic sanctions had previously been imposed or considered prior to the party's dismissal. *Id.* (citing *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988)).

In the case *sub judice*, we have no findings of the kind mandated by *Greathouse*, nor are we able to discern from the record the precise reason the trial court chose to impose the ultimate sanction upon Crawford. Holding the allegations of a complaint to have been admitted and entering judgment accordingly as a sanction against a party "is a drastic measure, and should be utilized cautiously and judiciously." *Natural Resources and Environmental Protection Cabinet v. Williams*, 768 S.W.2d 47, 50 (Ky. 1989). The record before us does not support a finding of prejudice to Pittman so severe as to justify dismissal; nor does the record indicate Crawford was given a warning of impending dismissal, or that less drastic sanctions were imposed or even considered. There is no indication of a conscious or willful failure to comply with orders of the trial court. Thus, it appears the trial court abused its discretion when entering the default judgment in favor of Pittman.

Further, the trial court predicated its authority to enter the default judgment on CR 37.02(2)(c)[10] by stating that default judgment awards are applicable under that rule

[10] We note the trial court did not cite to this authority until it entered its opinion and order denying Crawford's motion to set aside the default judgment.

when a party fails "to comply with discovery requests or otherwise violates orders of the Court." We hold the trial court's reliance on this rule to be misplaced based on the facts before us. CR 37 deals exclusively with discovery matters and was designed to allow courts wider latitude in enforcement of the rules of discovery. Although the provision cited by the trial court, when read in isolation, appears to support its finding and selection of sanctions, a complete reading of the rule reveals these sanctions are available only when a party "fails to obey an order to provide or permit discovery[.]" Nothing in the rule indicates these sanctions are available to a party who "otherwise violates orders of the Court." Thus, the trial court erred in relying on this rule to justify the striking of Crawford's answer and the granting of Pittman's motion for default judgment. We agree with Crawford's assertion that the applicable rule is CR 55.01, and we shall examine the trial court's ruling based upon the mandates of that rule.

Pursuant to the terms of CR 55.01, notice of the application for a default judgment must be given to the alleged defaulting party at least three days prior to the hearing on the application if the alleged defaulting party has appeared in the action. "In 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." *Smith v. Gadd*, 280 S.W.2d 495, 498 (Ky. 1955). In the instant action, Crawford filed an answer and several substantive motions, and appeared personally or by counsel at several motion hours and preliminary conferences. Such affirmative actions clearly indicate Crawford was "contesting liability rather than admitting it, and therefore would be likely to contest the motion for judgment if given notice." *Id.* Therefore, she was entitled to notice of the application for default judgment, and Pittman's failure to comply with the notice requirement of CR 55.01 was a fatal defect which "raises questions of due process,

rendering the judgment void within the meaning of CR 60.02(e)." *Kearns v. Ayer*, 746 S.W.2d 94, 96 (Ky.App. 1988). *See also Hankins v. Cooper*, 551 S.W.2d 584 (Ky.App. 1977). Thus, the judgment must be vacated.

Although our initial holding is a sufficient basis for vacating the default judgment, we believe a brief discussion is warranted regarding Crawford's other allegations of error as these issues may arise again upon remand. In denying Crawford's post-judgment motions for relief, the trial court indicated Crawford had failed to show the presence of a meritorious defense or good cause sufficient to satisfy the requirements set forth in CR 55.02 necessary to set aside a default judgment. However, as the mandatory requirements of CR 55.01 were not present, the presence or absence of a meritorious defense is immaterial. *See Hankins, supra*, at 586. Additionally, as default judgments are not favored, trial courts should be liberal in finding good cause shown on motions to set aside such judgments. *Jacobs v. Bell*, 441 S.W.2d 448 (Ky. 1969). Finally, as the default judgment here was void as a matter of law, the trial court had no discretion to exercise when ruling on the motion to set aside the judgment. *Kearns, supra*, at 95. Therefore, the trial court erred in denying Crawford's post-judgment motions for relief.

Crawford finally contends the trial court erroneously held a damages assessment hearing without first giving notice of same. We agree. Although the default judgment granted herein was void as a matter of law, it was error for the trial court to proceed with a damages assessment hearing without giving notice to Crawford. Generally, in cases involving unliquidated[11] damages where a party has made an appearance, the "defaulting party admits liability but not the amount of damages."

[11] Unliquidated damages are defined as those which "exist in opinion and require ascertainment by a jury, and which cannot be ascertained or fixed by calculation." *Simons v. Douglas' Ex'r*, 189 Ky. 644, 225 S.W. 721, 724 (1920).

Howard v. Fountain, 749 S.W.2d 690, 693 (Ky.App. 1988) (citations omitted). As such, a separate hearing on damages is required and "fundamental fairness requires that a defaulting party be given notice of a damage assessment hearing . . . prior to the hearing." *Id.* (citations omitted). As Crawford had made an appearance in the matter, notice of the damage assessment hearing was required, and Crawford should have been allowed to contest the amount of damages. Thus, even if we were not vacating the underlying default judgment, we would have been required to reverse the award of damages for want of notice to Crawford of the hearing.

Finally, we are unable to determine from the record before us whether the damage award was excessive as Crawford alleges. CR 54.03(1) provides that default judgments are not to be different in kind or greater in amount than that claimed in the demand for judgment, and shall not exceed the amount proved by answers given in interrogatories. *See* CR 8.01(2). The record does not contain copies of any interrogatories which set forth the specific amounts claimed by Pittman, nor is there any documentation from which to discern the sums demanded.[12] There is no recording or transcript of the damages assessment hearing from which we could possibly glean any information. Further, the trial court's judgment does not provide any information as to the basis for the awarded amounts.[13] As such, we are simply unable to determine the propriety of the amount of the trial court's award of damages and we will not "engage in gratuitous speculation . . . based upon a silent record." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). However, we are confident that upon remand, should the

[12] The only documentation in the record setting forth with specificity any amount claimed is a letter from Pittman to his counsel dated August 17, 2004, which purports to itemize Pittman's expenses from September 1999 through June 2002. However, no supporting documentation appears in the record to confirm Pittman's total figure of $15,455.35, the amount of compensatory damages awarded by the trial court.

[13] The judgment merely states the award was "based on the testimony and evidence presented to the Court at the damages hearing."

calculation of damages become necessary, the parties and the trial court will rectify this alleged defect in the proceedings.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is vacated and remanded for proceedings consistent with this opinion. Upon remand, nothing in this opinion would limit, restrict, or otherwise curtail the trial court in applying appropriate sanctions upon trial counsel, if deemed appropriate.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEES:

Katherine H. Whitten
Louisville, Kentucky

Timothy Denison
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Timothy Denison
Louisville, Kentucky