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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002080-MR

LESLIE PRESCOTT AND SOUTH
WILLIAMSON LODGING, INC. APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CI-01725

MARCELLA J. YATES APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Leslie Prescott appeals from the Pike Circuit Court's order and judgment striking her answer and counterclaim and awarding Marcella Yates $150,000 on her claim for damages. After careful review, we reverse and remand.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Marcella Yates filed her initial complaint on November 6, 2003, against Leslie Prescott and South Williamson Lodging, Inc. (hereinafter "Prescott"), alleging that she had been slandered by Prescott when Prescott allegedly called her a thief. Prior to filing her complaint, Yates had worked at the hotel owned by Prescott, and Prescott had accused her of stealing from the hotel.

Three years into the case, Prescott's first attorney filed a motion and was granted permission to withdraw from the case. On December 14, 2006, another attorney entered an appearance on Prescott's behalf. On October 3, 2007, Prescott's second attorney filed a motion and was also granted permission to withdraw. On January 4, 2008, a third attorney entered an appearance on behalf of Prescott.

On May 27, 2008, the trial court scheduled a trial date for October 6, 2008. On September 10, 2008, less than thirty days prior to trial, Prescott's third attorney filed a motion to withdraw. This motion was granted on September 19, 2008, and the trial court gave Prescott twenty days, or until October 9, 2008, to obtain a new attorney.

Meanwhile, a pre-trial conference occurred on October 1, 2008, and no counsel appeared on behalf of Prescott, as she had not secured counsel at this time. On October 6, 2008, the Pike Circuit Court held the trial as originally scheduled, despite its previous order indicating that Prescott had until October 9, 2008, to obtain new counsel.

At the trial, neither Prescott nor an attorney on her behalf appeared. Yates made an oral motion to strike Prescott's answer and counterclaim and the trial court sustained the motion. After six minutes of testimony the trial was concluded, and a judgment was rendered in the amount of $150,000 on Yates' claims. The minimal testimony consisted of Yates testifying that she had worked for Prescott for approximately five years and was accused of theft. She testified that she lost her job at Prescott's hotel but is presently working at the United States Post Office. She claimed that as a result of Prescott's comments, her feelings were hurt, and she suffered anxiety attacks which required medical treatment.

Prescott now appeals the trial court's order striking her answer and counterclaim and the judgment in favor of Yates in the amount of $150,000, arguing that the trial court abused its discretion by holding the trial three days before the deadline for her to obtain a new attorney had passed.

Yates argues that this court is without authority to review this appeal because the issues were not first raised before the trial court. "A question not raised or adjudicated in the Court below cannot be considered when raised for the first time in this Court." *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (1940) (citing *Benefit Ass'n of Railway Employees v. Secrest*, 39 S.W.2d 682 (1931). In the instant case, Prescott had an attorney of record within four days of the entry of judgment, when an attorney appeared on her behalf on October 10, 2008. However, no motions were filed to set aside the judgment or to bring any of the arguments presented herein to the attention of the trial court.

While it is true that Prescott did not file a motion to set aside the order and judgment of the Pike Circuit Court, it is permissible to appeal directly from a default judgment, but the appeal is limited to determining whether the pleadings were sufficient to uphold the judgment or whether the appellant was actually in default. *Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986) (citing *Rouse v. Craig Realty Co.*, 262 S.W. 1083 (1924)).

In the instant case, when the Pike Circuit Court struck Prescott's answer and counterclaim, it was effectively entering a default judgment on liability, even though the Court did not specifically title its order and judgment as a default judgment. To be sure, the six minute trial conducted by the trial court in this case primarily encompassed the extent of damages claimed by Yates and in fact, the court awarded her $150,000 based on this very limited testimony. We therefore hold that the Pike Circuit Court's order amounted to a default judgment and will review this matter accordingly.

Before a default judgment may be granted, the party seeking such a judgment must comply with the terms of Kentucky Rules of Civil Procedure (CR) 55.01, which states in relevant 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 therefore. 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. 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.

In the instant case, Prescott had appeared and conducted three years of discovery and trial preparation. "When an appearance has been made, the party seeking a default judgment must comply with the three-day notice rule. Failure to do so is a 'fatal defect' in the proceedings and requires the judgment be set aside." *Leedy v. Thacker*, 245 S.W.3d 792 (Ky. App. 2008) (citing *Hankins v. Cooper*, 551 S.W.2d 584, 585 (Ky. 1977)).

Because three days' notice was not given to Prescott and she was not present at the trial where the judgment was entered against her, the judgment must be set aside. A default judgment obtained without giving the notice required by the rule "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).

Furthermore, even if the three days' notice requirement had been satisfied, we are not convinced that Prescott was in default. Given that the trial court permitted Prescott until October 9, 2008, to find new counsel, holding her in default prior to that deadline was patently unreasonable. Thus, the trial court's conducting of a pre-trial conference and trial prior to October 9, 2008, constituted an abuse of discretion and was in fact in violation of the court's own orders.

While this case had been going on for some time and Prescott has had several lawyers throughout the proceedings, the record reflects that Prescott always

obtained a new lawyer as permitted by the court and was prepared to move forward with the litigation. Furthermore, had the trial court believed that it was important to advance the case, it could have denied Prescott's attorney's motion to withdraw, which was granted on September 10, 2008, less than thirty days prior to the trial date.

Yates argues that under *Pound Mill Coal Co. v. Pennington*, 309 S.W.2d 772 (Ky. 1958), a failure to show up for trial is a failure to "appear" in the action and therefore it is not necessary to serve written notice of the application for default judgment under CR 55.01. However, we find *Pound Mill Coal* to be distinguishable from the facts of this case. In *Pound Mill Coal*, the defendants never filed an answer to the complaint and never appeared in any way in the action. In the instant case, Prescott filed an answer and appeared numerous times before the court, but failed to appear at the trial because she had been permitted additional time to obtain new counsel. Thus, *Pound Mill Coal* does not control this case.

Accordingly, because three day's notice was not given to Prescott and because she was not in default at the time of the October 6, 2008, trial, the trial court's order striking Prescott's answer and counterclaim and judgment in the amount of $150,000 is invalid and must be set aside. Therefore, we reverse the Pike Circuit Court's order and judgment entered on October 6, 2008, and remand for proceedings consistent with this opinion.

HENRY, SENIOR JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILE SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: Respectfully, I must dissent. The majority opinion sets forth the facts herein carefully, but does not emphasize that each time this case came within striking distance of a trial, counsel withdrew. At one point, when the same attorney filed his second motion to withdraw, the trial court ordered that the attorney would not be re-admitted as counsel in this case. It was not until an actual judgment was entered that her counsel actually took action and then it was too late. Appellee failed to raise this issue before the trial court by post judgment motion, even though counsel had entered an appearance within the time permitted. I would not reward this pattern of delay by granting a new trial.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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