

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001598-MR

CHAD ZIMMERMAN AND
SANDRA ZIMMERMAN

APPELLANTS

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 09-CI-00085

THE BANK OF NEW YORK
MELLON TRUST COMPANY, NA

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

MOORE, JUDGE: Chad and Sandra Zimmerman appeal from the Henry Circuit Court's order denying their motion to set aside the default judgment in favor of the Bank of New York Mellon Trust Company, NA (Bank of New York). Because the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Zimmermans failed to demonstrate good cause as to why the default judgment should be set aside, we affirm.

The Bank of New York instituted this foreclosure action against the Zimmermans on March 27, 2009. Although the Zimmermans were properly served, they did not make an appearance or file any responsive pleading. Accordingly, on October 20, 2009, the circuit court entered a default judgment on behalf of the Bank of New York. Subsequent to the entry of the default judgment, the Zimmermans filed for bankruptcy. As a part of the bankruptcy proceedings, the Zimmermans unsuccessfully contested the Bank of New York's proof of claim, arguing that The Bank of New York was not the holder of the note and did not have a legal interest in the mortgage under which it sought to bring a claim. On June 17, 2010, the Zimmermans filed a CR² 55.02 motion with the circuit court to set aside the default judgment. The Zimmermans, appearing for the first time before the circuit court, asserted among other things that the Bank of New York did not have standing to bring the foreclosure action because it was not the real party at interest. The circuit court overruled the Zimmerman's motion. This appeal followed.

We review a circuit court's refusal to set aside default judgment for an abuse of discretion. *Perry v. Central Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991); *see also Educator & Executive Insurers, Inc. v. Moore*, 505 S.W.2d 176, 178 (Ky. 1974). The Bank of New York asserts that the circuit court properly

² Kentucky Rule of Civil Procedure.

denied the Zimmerman's motion to set aside the default judgment because the Zimmermans failed to show good cause to justify setting aside the default judgment. We agree.

Kentucky Rule of Civil Procedure 55.02 states that “[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.” “A party seeking to have a default judgment set aside must show good cause; *i.e.*, the moving party must show: ‘(1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.’” *PNC Bank, N.A. v. Citizens Bank of N. Ky., Inc.*, 139 S.W.3d 527, 530-531 (Ky. App. 2003) (quoting *Sunrise Turquoise, Inc. v. Chemical Design Co. Inc.*, 899 S.W.2d 856, 859 (Ky. App. 1995)). “All three of these elements must be present to set aside a default judgment.” *S.R. Blanton Dev., Inc. v. Investors Realty and Mgmt. Co., Inc.*, 819 S.W.2d 727, 729 (Ky. App. 1991). Moreover, “[c]arelessness by a party or his attorney is not reason enough to set an entry aside.” *Id.*

As preliminary matter, the Zimmermans argue that the Bank of New York lacked standing to bring the foreclosure action, which they purport divested the circuit court of its jurisdiction to enter the default judgment. However, the Kentucky Supreme Court has recently classified standing as a defense rather than a jurisdictional inquiry, which is therefore waived if not timely pled. *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). As mentioned previously, the Zimmermans failed to file any responsive pleading prior to the circuit court's entry

of default judgment. Consequently, we need not inquire as to whether the circuit court had jurisdiction over this matter.

That aside, the Zimmermans offer no explanation as to why they failed to raise any of the defenses asserted in their CR 55.02 motion prior to the circuit court's entry of default judgment. Absent a valid excuse for default, a court cannot set aside a default judgment. *S.R. Blanton Dev., Inc.*, 819 S.W.2d at 729. Accordingly, we conclude that the circuit court did not abuse its discretion when declining to set aside the default judgment, and therefore affirm.

ALL CONCUR.

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