

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002154-MR

LA EXOTIC MOTOR CARS, INC.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 10-CI-002840

VINCENT WIMSETT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KELLER, STUMBO AND VANMETER, JUDGES.

STUMBO, JUDGE: LA Exotic Motorcars, Inc.¹ appeals from an order of the Jefferson Circuit Court overruling its motion to set aside a default judgment rendered in favor of Vincent Wimsett. The default judgment was rendered after LA Exotic Motorcars' answer to Wimsett's complaint was stricken by order of the Jefferson Circuit Court. LA

¹ The Notice of Appeal in this case lists the Appellant's name as LA Exotic Motor Cars, Inc., but the briefs refer to it as LA Exotic Motorcars, Inc.

Exotic Motorcars maintains that it never received notice that its answer was stricken, and that it was prepared to assert valid defenses to the complaint and move forward to trial. Since LA Exotic Motorcars tendered no response either to the motion to strike its answer or to Wimsett's subsequent Application for Default Judgment, we find no error in the order of dismissal and accordingly affirm.

In November, 2009, LA Exotic Motorcars listed a 1972 Chevrolet Camaro for sale on the e-Bay Motors internet auction service. LA Exotic Motorcars, a California corporation, advertised that the vehicle had a "Z-28" performance package. Wimsett was the successful bidder, and after purchasing the vehicle he made arrangements with LA Exotic Motorcars to have the vehicle shipped to Kentucky by a third party at additional cost.

When Wimsett received the vehicle, it appeared to him that the vehicle had been damaged by the shipper. Wimsett also determined that the vehicle did not have the "Z-28" package as advertised. On April 23, 2010, Wimsett filed a complaint in Jefferson Circuit Court against LA Exotic Motorcars alleging breach of contract, violation of the Kentucky Consumer Protection Act and fraud.

Martin C. Yacoobian owns LA Exotic Motorcars. He was served with the complaint by certified mail, and within 20 days filed a *pro se* "Response to Complaint" which contained an answer and defense. Wimsett then moved to strike the Response to Complaint on the grounds that Yacoobian is not an attorney

authorized to practice law in Kentucky. Wimsett also argued in the motion to strike that Yacoobian improperly referenced the parties' attempt to settle the action.

Notice of Wimsett's motion to strike was mailed to Yacoobian, who tendered no response. The motion to strike was subsequently granted by way of an order entered on May 25, 2010, which gave LA Exotic Motorcars 15 days to file an answer to the complaint. LA Exotic Motorcars did not file an answer by the June 14, 2010 deadline. Approximately 6 weeks later, Wimsett filed with the circuit court an Application for Default Judgment with supporting affidavit. Notice of the Application for Default Judgment was mailed to LA Exotic Motorcars, which did not respond. Thereafter, the Jefferson Circuit Court rendered a default judgment as to liability in favor of Wimsett, reserving for later adjudication the issue of damages.

After receiving the default judgment, LA Exotic Motorcars retained Kentucky counsel. A hearing on damages was conducted on September 24, 2010, at which time LA Exotic Motorcars tendered a motion to set aside the default judgment. The motion was denied. The court heard proof on Wimsett's alleged damages, including expert testimony as to the difference in value between a base model 1972 Camaro and a 1972 Z-28 Camaro. Additional proof was tendered as to the cost of certain repairs which resulted from LA Exotic Motorcars' alleged misrepresentation in its e-Bay Motor's listing. LA Exotic Motorcars was represented by counsel at the hearing, but presented no proof. The circuit court

rendered an Opinion and Order on October 29, 2010, awarding damages in the amount of \$16,883.33. This appeal followed.

LA Exotic Motorcars now argues that the Jefferson Circuit Court erred in denying its motion to set aside the default judgment in favor of Wimsett. It contends that the order was erroneous because the default judgment was not rendered as a result of LA Exotic Motorcars' willful or culpable conduct. Additionally, it argues that Wimsett would not have been prejudiced by the denial of his Application for Default Judgment, that LA Exotic Motorcars provided a reasonable explanation for its failure to file an answer, and that it was prepared to prosecute a defense to the complaint. LA Exotic Motorcars alleges that it never received the order striking its initial response and had no knowledge that its response was insufficient and not accepted by the court. It contends that it did everything it could to participate in the action and respond to Wimsett's complaint and that there is nothing in the record to contradict its affidavit asserting that it never received the order striking its response. LA Exotic Motorcars goes on to maintain that it has several meritorious defenses to the action, including its statement in the e-Bay Motors advertisement that the vehicle had no warranty and was available in Canoga Park, California for inspection. In sum, it seeks an order reversing the default judgment and remanding the matter for further proceedings.

Wimsett's Application for Default Judgment was filed pursuant to Kentucky Rules of Civil Procedure (CR) 55.01, which states that,

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. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the Constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

While default judgments are not looked upon with favor and it is the hope that every case will be decided on its merits, *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972), the entry of a default judgment nevertheless falls within the discretion of the trial court. *Harris v. Commonwealth*, 688 S.W.2d 338 (Ky. App. 1984). Abuse of discretion has been found, for example, where a dismissal was rendered after a defendant made an untimely motion for leave to file an answer and defend the action. *Childress v. Childress*, 335 S.W.2d 351 (Ky. 1960). Similarly, a panel of this Court found that a trial court abused its discretion when it dismissed an action after having given the defendant leave to produce untimely *prima facie*

defenses and counterclaims. *Dressler v. Barlow*, 729 S.W.2d 464 (Ky. App. 1987).

CR 55.02 provides that a default judgment may be set aside “for good cause shown[.]” In order to set aside a default judgment, the movant must show that there is good cause by setting forth a valid excuse for the default, a meritorious defense to the claims and an absence of prejudice to the non-defaulting party.

Sunrise Turquoise, Inc. v. Chemical Design Co., Inc., 899 S.W.2d 856 (Ky. App. 1995). LA Exotic Motorcars contends that it has met this burden by demonstrating that it did not receive the motion to strike, that it would assert valid defenses at trial, and because Wimsett would not be prejudiced by setting aside the default judgment.

We conclude that the matter at bar is properly distinguished from *Childress* and *Dresser*. Whereas the *Childress* and *Dresser* defendants sought leave to file untimely answers *before* dismissal, LA Exotic Motor did not respond either to the motion to strike its initial pleading or to Wimsett’s Application for Default Judgment. Additionally, LA Exotic Motorcars does not claim that it failed to receive notice of the Application for Default Judgment, though it has had ample opportunity to do so if that were the case.

Not only has LA Exotic Motorcars failed to demonstrate a valid reason for not responding to the Application for Default Judgment, it has not asserted *any* reason. A rebuttable presumption exists that a mailed notice has been received by the addressee, *Goodin v. Gen. Accident Fire & Life Assurance Corp.*,

450 S.W.2d 252 (Ky. 1970), and LA Exotic Motorcars has not overcome that presumption.

Ultimately the question is whether, given the totality of the record before it, the Jefferson Circuit Court abused its discretion in dismissing the action after LA Exotic Motorcars failed to respond to either the motion to strike or the motion to dismiss. *Harris, supra*. We must conclude that it did not and accordingly affirm the Default Judgment and Opinion and Order awarding damages of the Jefferson Circuit Court.

ALL CONCUR.

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