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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000284-MR

DR. SENAD CEMERLIC AND
ABG PAIN MANAGEMENT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 14-CI-002806

VERRALAB JA LLC, A/K/A VLJA LLC
D/B/A BIOTAP MEDICAL — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Dr. Senad Cemerlic and ABG Pain Management appeal from the Jefferson Circuit Court's order denying their motion to set aside a default judgment. They argue they showed good cause to set aside the default judgment: they have a valid excuse for their default because they were not properly served by

the Secretary of State and were unaware of the lawsuit, they have a meritorious defense and there is no prejudice.

In 2013, Cemerlic, a Delaware resident, and ABG, a Delaware entity,[1] entered into a management services agreement with VerraLab JA LLC, a/k/a VLJA LLC d/b/a Biotap Medical, a Kentucky corporation. VerraLab agreed to install, operate and maintain a diagnostic laboratory in Delaware for clinical drug screening in exchange for a monthly management fee and specimen analyzing fees.

In 2014, VerraLab filed a complaint alleging that Cemerlic and ABG failed to pay for services and/or materials totaling $216,969.37, as documented by attached invoices. Because Cemerlic and ABG were located out of state, VerraLab served them through the Kentucky Secretary of State in accordance with Kentucky Revised Statutes (KRS) 454.210.

On June 12, 2014, the office of the Secretary of State sent the circuit court separate letters regarding the service on Cemerlic and ABG. For each defendant, the letters stated that its office was served with summons and accompanying documents for them on May 28, 2014, its office served them by sending a copy of the summons and accompanying documents via certified mail, return receipt requested on May 28, 2014, and it was enclosing the undelivered

[1] It is unclear what kind of entity ABG Pain Management is. Dr. Cemerlic states in an affidavit that it is an LLC, however in the contract between VerraLab and ABG, there is no indication that it is any kind of corporation. The Delaware Division of Corporations' online searchable index of its registered corporations does not have a listing for it.

letters bearing the postal mark "refused." On the front of each envelope the word "refused" was handwritten and also appeared in capital typeface on a large sticker.

On July 21, 2014, VerraLab filed a motion for default judgment. Its attorney certified that the defendants were not engaged in active military service, no answer or other responsive pleading or papers were served on him by the defendants and they were served through the Secretary of State's office effective June 12, 2014. He attached printouts from the Secretary of State's website that indicated the summons was deemed undeliverable on June 12, 2014, return reason was a "Bad Return" and the response memo was "Refused Signature Page." VerraLab's president filed an affidavit in support of the motion, which stated that he entered into the attached management services agreement with Cemerlic and ABG, VerraLab provided services and/or materials and sent them invoices, but Cemerlic and ABG did not pay. He attached copies of statements and invoices showing they owed VerraLab $216,969.37, plus interest.

The matter was referred to the master commissioner, who recommended the default judgment be granted. On October 1, 2014, the circuit court granted the default judgment awarding VerraLab recovery from Cemerlic and ABG jointly and severally for damages of $216,969.37, plus interest and attorney fees and legal costs to be established by affidavit of counsel.

On October 13, 2014, VerraLab sent a notice to take deposition to Cemerlic via regular mail to the same address the registered letters were refused for purposes of determining how the judgment could be recovered.

On October 30, 2014, an attorney entered an appearance for Cemerlic and ABG and filed a motion to set aside the default judgment. An affidavit from Cemerlic stated his address, which was the address listed on the refused envelopes, but claimed he was never served with a copy of the complaint, only learned about the judgment when he received a notice of deposition via regular mail and disputed that he and ABG were in breach of contract or indebted to VerraLab for any amount.

At the hearing, Cemerlic and ABG argued that they were not served because Cemerlic did not know what the envelopes from the Secretary of State were and did not know about the lawsuit. They requested the default judgment be set aside because they were not served, did not breach the contract and there was no prejudice to VerraLab where they acted immediately upon receiving notice.

VerraLab argued the service was effective where it was made in compliance with KRS 454.210 to an acknowledged good address for Cemerlic and ABG to which billings, a demand letter and all other communications had been addressed, and a deliberate refusal of mail could not qualify as a good reason to set aside a default judgment.

Following the hearing, the circuit court denied the motion, reasoning as follows: "The Court finds that the Defendant's intentional act of refusing process does not alter the effective service pursuant to KRS 454.210."

Cemerlic and ABG appeal. They argue the default judgment should have been set aside because they have a valid excuse for the default (Cemerlic was unaware of the lawsuit and refusal of certified mail does not constitute a valid service of process under Kentucky Rules of Civil Procedure (CR) 4.01), have a meritorious defense (they do not owe money to VerraLab), and there is no prejudice (because they acted immediately once they learned about the default judgment, filing their motion to set aside within sixty days of the entry of judgment). They also argue their motion to set aside the default judgment meets the good cause requirement of CR 55.02 for lack of notice in accordance with CR 60.02, because the refusal of the certified letter was the result of mistake, inadvertence, surprise or excusable neglect rather than an intentional attempt to avoid service, and VerraLab's counsel's sworn statement that they were served was based on falsified evidence or fraud because the service was not effective. Finally, they argue the circuit court abused its discretion where it failed to engage in adequate factual or legal analysis regarding their arguments.

Kentucky's long arm statute is contained in KRS 454.210. KRS 454.210(1), (2)(a)1-2, permits Kentucky courts to exercise personal jurisdiction over a person, which includes an individual, personal representative, corporation or other entity, who is a nonresident of Kentucky, as to a claim arising from that person transacting any business in Kentucky or contracting to supply services or goods in Kentucky. KRS 454.210(3) provides how service can be affected over nonresidents:

> (a) When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any county in this Commonwealth, where he may be found, or on the Secretary of State who, for this purpose, shall be deemed to be the statutory agent of such person.
>
> (b) The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint. The clerk shall execute the summons either by:
>
> > 1. Sending by certified mail two (2) true copies to the Secretary of State and shall also mail with the summons two (2) attested copies of plaintiff's complaint; or
> >
> > 2. Transmitting an electronically attested copy of the complaint and summons to the Secretary of State via the Kentucky Court of Justice electronic filing system.
>
> (c) The Secretary of State shall, within seven (7) days of receipt thereof in his office, mail a copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by certified mail,

> return receipt requested, and shall bear the return address of the Secretary of State. The clerk shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure.

Kentucky courts have repeatedly ruled that nonresident defendants receive proper service under the long arm statute so long as the service complies with KRS 454.210. However, if the service of process is insufficient for failure to comply with the provisions of the applicable statute relied upon for service, a subsequent default judgment is void under CR 60.02(e) for want of personal jurisdiction. *Hertz' You Drive It Yourself Sys., Inc. v. Castle*, 317 S.W.2d 177, 177-78 (Ky. 1958); *Foremost Ins. Co. v. Whitaker*, 892 S.W.2d 607, 610 (Ky.App. 1995).

Compliance with the provisions of KRS 454.210 affects proper service even if the defendants did not receive the certified mail containing the summons and complaint. For example, in *Deskins v. Estep*, 314 S.W.3d 300, 301–02 (Ky.App. 2010), where the summons and complaint was properly forwarded by the Secretary of State via certified mail, return receipt requested, and the postal service made three attempts at delivery without success before returning the mailing to the Secretary of State and then the Secretary of State made its statutorily

required return and notice, the summons and complaint were deemed served on the defendant upon return of the Secretary of State. Similarly, in *Davis v. Wilson*, 619 S.W.2d 709, 710-11 (Ky.App. 1980), the Court concluded that where certified mail, return receipt requested, containing the summons was properly served upon and forwarded by the Secretary of State but was returned to the Secretary of State marked "unclaimed" the defendant was properly served. *See Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 690 S.W.2d 393, 395 (Ky. 1985) (certified letter from Secretary of State never returned nor return receipt returned was sufficient for service, presumption received); *Cox v. Rueff Lighting Co.*, 589 S.W.2d 606, 607 (Ky.App. 1979) (notice of registered letter which was discarded as junk mail sufficient for valid service). A signed return receipt is not required for completion of service pursuant to the long arm statute. *Haven Point Enterprises, Inc*., 690 S.W.2d at 395.

Cemerlic's and ABG's argument that they were not properly served because service through the Secretary of State did not comply with CR 4.01 is not well taken. CR 1(2) provides in relevant part that the civil rules "govern procedure and practice in all actions of a civil nature in the Court of Justice except for special statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules." As explained in *Dawson v. Hensley*, 423 S.W.2d 911, 912 (Ky. 1968), interpreting similar language

in an earlier version of CR 1, this means that "where the statute . . . sets forth the procedure, the rules must give way to it if they are in conflict or inconsistent with the statute." To the extent that KRS 454.210 and CR 4.01 are inconsistent, KRS 454.210 prevails by providing an alternative means of service of process for nonresidents.

Therefore, Cemerlic's and ABG's argument that they were never properly served is incorrect. They were properly served with the summons and complaint because VerraLab complied with the statute by serving these items on the Secretary of State who forwarded them in envelopes through certified mail, return receipt requested, to an appropriate address, they were refused and the postal service returned them to the Secretary of State who returned them to the court. Therefore, the circuit court was correct in finding that refusing process could not alter effective service in compliance with KRS 454.210.

KRS 454.165 provides that "[n]o personal judgment shall be rendered against a defendant constructively summoned, and who has not appeared in the action, except as provided in KRS 454.210." Because VerraLab and the Secretary of State properly acted in accordance with KRS 454.210, service under the long arm statute was perfected and the circuit court had personal jurisdiction over Cemerlic and ABG to enter the default judgment against them. A default judgment was appropriate under CR 55.01 because Cemerlic and ABG were in default for

failure to appear. They did not have to be served with a written notice of the application for judgment because they had not appeared. *Deskins*, 314 S.W.3d at 303. All that was necessary for a default judgment under these circumstances was for VerraLab to file an appropriate motion for default judgment accompanied by a certificate of its attorney that no papers were served on him by Cemerlic and ABG. *Id.* Because there was full compliance with KRS 454.210 and CR 55.01, the entry of the default judgment against Cemerlic and ABG was proper.

We must next address whether the circuit court erred by denying Cemerlic's and ABG's motion to set aside the default judgment. "Generally, default judgments are disfavored in this Commonwealth, and the circuit court is vested with broad discretion to set aside such judgments." *Hutcherson v. Hicks*, 320 S.W.3d 102, 104 (Ky.App. 2010). "Since every cause of action should be tried upon the merits, the rendering of judgments by default ought to be withheld where seasonable objection is made unless a persuasive reason to the contrary is submitted." *Childress v. Childress*, 335 S.W.2d 351, 354 (Ky. 1960). "A liberal attitude should be observed toward a timely application to set aside a default judgment, although delay in pleading without reasonable excuse cannot always be overlooked." *Id.*

We review the circuit court's decision granting or denying a motion to set aside a default judgment for abuse of discretion. *PNC Bank, N.A. v. Citizens Bank of N. Kentucky, Inc*., 139 S.W.3d 527, 530 (Ky.App. 2003).

> According to CR 55.02, if a defaulting party demonstrates good cause, a trial court may set aside a default judgment providing said good cause meets the requirements set forth in CR 60.02. To show good cause, and thereby justify vacating a default judgment, the defaulting party must: (1) provide the trial court with a valid excuse for the default; (2) demonstrate a meritorious defense; and (3) show the absence of prejudice to the non-defaulting party.

First Horizon Home Loan Corp. v. Barbanel, 290 S.W.3d 686, 688–89 (Ky.App. 2009) (footnote omitted). "All three elements must be present to set aside a default judgment." *S.R. Blanton Dev., Inc. v. Inv'rs Realty & Mgmt. Co.*, 819 S.W.2d 727, 729 (Ky.App. 1991).

CR 60.02 allows a court to relieve a party from a final judgment based upon "(a) mistake, inadvertence, surprise or excusable neglect; . . . (c) perjury or falsified evidence; (d) fraud affecting the proceedings . . . or (f) any other reason of an extraordinary nature justifying relief."

The circuit court in denying Cemerlic's and ABG's motion to set aside the default judgment found that they acted intentionally by refusing process. However, the refusal of certified mail does not mean that they had knowledge of its contents.

In *Cox*, 589 S.W.2d at 607, the Court examined what could be a valid excuse for the default when personal jurisdiction was properly acquired over the defendant through service through the Secretary of State:

> Accepting that in personam jurisdiction can be acquired without actual notice to a defendant does not a fortiori create a rule that a showing of no actual notice may not constitute good cause sufficient to warrant the setting aside of a default judgment. The facts and circumstances of each individual case should be weighed. We think that in a case such as the instant one which is a simple one-on-one action for debt, a trial judge would be hard pressed to refuse to set aside a default judgment if he were truly convinced that the movant had no actual notice in fact and was possessed of an arguably meritorious defense.

While the circuit court may be correct that Cemerlic and ABG intentionally refused certified mail from the Secretary of State, it does not follow they had actual knowledge of the lawsuit. Surprise can be established through Cemerlic's affidavit attesting that he was unaware that a lawsuit had been filed until after the default judgment was entered. *Thompson v. Am. Home Assurance Co.*, 95 F.3d 429, 433 (6th Cir. 1996). Surprise is an extenuating circumstance that may entitle the movant to relief so long as the motion is brought within the CR 60.02's one-year limitation. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329, 332 (Ky. 2007). Cemerlic and ABG cannot establish falsified evidence or fraud, because VerraLab's attorney's certification that they were properly served was correct.

The circuit court abused its discretion in denying Cemerlic's and ABG's motion to set aside the default judgment where it treated the refusal of service as dispositive, failed to apply the three-part test for good cause to set aside a default judgment and all three factors supported setting aside the default judgment. Cemerlic and ABG satisfied good cause by showing a valid excuse, surprise due to lack of knowledge of the lawsuit. Their lack of knowledge is established both by Cemerlic's affidavit and by their subsequent actions. Cemerlic attested that he first learned about the lawsuit after receiving a notice of deposition. VerraLab sent the notice of deposition to Cemerlic via regular mail on October 13, 2014, and seventeen days later, on October 30, 2014, counsel appeared for Cemerlic and ABG and filed a motion to set aside the default judgment. Also, the appellants promptly appeared in the circuit court once they had notice of the lawsuit.

VerraLab never contested Cemerlic's and ABG's argument that they satisfied the second and third factors. Cemerlic and ABG established they had a valid, potentially meritorious defense that they did not owe the money claimed due. There was no reason to believe that VerraLab could be prejudiced by setting aside the default judgement where less than a month after it was entered on October 1, 2014, and seventeen days after the notice of deposition was mailed, counsel appeared. This factor strongly supports setting aside the default judgment.

Under these circumstances, the motion to set aside the default judgment should have been granted and the case should have proceeded on the merits.

Accordingly, we reverse and remand the Jefferson Circuit Court's order denying the motion to set aside default judgment.

LAMBERT, J., JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent.

I agree with the majority that, pursuant to KRS 454.210, service of process was effective and *in personam* jurisdiction properly exercised in this case. That is because the Secretary of State of Kentucky is "the statutory agent of" Appellants. KRS 454.210(3)(a). However, I part from the majority where it determines the circuit court abused its discretion by finding an absence of good cause for setting aside the default judgment.

Under *Perry v. Central Bank & Trust Company*, the first "[f]actor[] to consider in deciding whether to set aside a judgment [is whether there is a] valid excuse for default . . . ." 812 S.W.2d 166, 170 (Ky. App. 1991) (citation omitted). The majority opinion effectively establishes a rule of law that this first factor – "a valid excuse for default" – is satisfied if the named defendant refuses to accept and review correspondence from our Secretary of State, a constitutional officer of a jurisdiction where Appellants chose to do business and who is by law Appellants'

agent. I believe it well within the circuit court's discretion to hold that a served party's decision to ignore correspondence from our Secretary of State is not a valid excuse for failing to respond to a lawsuit.

I am not persuaded by the majority's citation to *Cox v. Rueff Lighting*. I acknowledge *Cox* says the long-arm statute "does not [mean] that a showing of no actual notice may not constitute good cause . . . ." 589 S.W.2d 606, 607 (Ky. App. 1979). But, unlike the majority here, *Cox* did not go on to find the circuit court abused its discretion in refusing to set aside the default judgment. Rather, this Court said: "While the circuit judge could have perhaps been more lenient based on the evidence placed before him and the findings he made, we cannot say his ruling against appellant constituted an abuse of discretion." *Id.* We should say the same in this case.

Furthermore, I dissent for a broader reason. This opinion will make it a best practice for every nonresident of Kentucky (as defined by KRS 454.210(1)) to refuse every correspondence from our Secretary of State. After this opinion, there will be no good reason to accept it. We should keep in mind that not every nonresident who rejects delivery of such correspondence will choose to make an appearance as in this case. This opinion will encourage nonresidents who do business in Kentucky to: (1) refuse the Secretary's correspondence; (2) never make an appearance; and (3) wait to defend the case on procedural grounds when the

Kentucky judgment creditor seeks registration of a foreign judgment in the judgment debtor's home jurisdiction. The majority opinion in this case will be the legal basis upon which the foreign court will find the default judgment void, or at least voidable.

For the foregoing reasons, I respectfully dissent.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Andrew S. Epstein Louisville, Kentucky	No brief filed.