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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001109-MR

PATRICIA PRICE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 10-CI-005129

REX A. NORRINGTON, JR. AND
STACY N. ROBERTSON

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Patricia Price appeals from the Jefferson Circuit Court's interlocutory order denying a motion for default judgment, its order dismissing the matter, and its order denying the motion to vacate the judgment of dismissal.

This case involves a motor vehicle negligence case where the defendants, although ostensibly served, never responded or made an entry of

appearance. The trial court denied the motion for default judgment holding that Price failed to provide “sufficient evidence” to support the complaint. The trial court ultimately dismissed the action as authorized by Kentucky Rules of Civil Procedure (CR) 77.02.

After careful consideration, we affirm.

BACKGROUND

According to the complaint, in January 2010, a collision occurred in Jefferson County which involved a car driven by Rex A. Norrington, who drove with the permission of the vehicle owner, Stacy N. Robertson. The complaint maintains that Norrington was driving negligently when he collided with Price. Further, it alleges that Robertson failed to obtain proper insurance for the vehicle. Lastly, the complaint asserted that Price suffered severe and permanent injuries from the accident. The complaint was filed on July 21, 2010, and Price sought to recover damages for her injuries including damages for past and future medical expenses; past and future pain and suffering; lost wages; and, diminished capacity to labor and earn income.

According to Price, Norrington, a resident of Indiana, was served with the complaint and summons via the Kentucky Secretary of State on August 1, 2011, after the certified letter to him was returned “Not deliverable as addressed/Unable to forward.” Originally, it was believed that Robertson was a resident of Kentucky, but she was later determined to be an Indiana resident. Therefore, ostensibly, she too was served with the complaint and summons via the

Kentucky Secretary of State. Nonetheless, during the entire history of the litigation, the defendants/appellees never filed an answer, pleadings, or other documentation responding to the complaint.

The record consists primarily of notices to dismiss for lack of prosecution under CR 77.02, motions for default judgment under CR 55.01, and orders referring the case to the master commissioner for review. Significantly, no additional evidence besides the allegations in the complaint was provided by Price. And Price not only never appeared but also never provided a police report or documentation of Robertson's lack of insurance.

The history of the six years, 2010 to 2016, is as follows:

Approximately two years after the complaint was filed, on August 24, 2012, under CR 77.02, the clerk served a notice to dismiss for lack of prosecution. Price moved for a status conference on September 10, 2012. On September 25, 2012, the trial court continued the motion until December 12, 2012, to permit Price to file an affidavit under CR 77.02 showing good cause as to why no steps had been taken for a year.

On November 27, 2012, Price filed a motion under CR 55.01 for a default judgment. Attached to the motion were a military affidavit and a certificate of counsel under CR 55.01 that no answers, pleadings, or other documentation were received from Norrington and Robertson. Additionally, the affidavit stated that the defendants were served by the Kentucky Secretary of State - Norrington on

August 3, 2010, and Robertson on August 11, 2011.¹ Subsequently, the trial court entered an order referring the case to the master commissioner for review.

However, on December 13, 2012, after the status hearing, the trial court remanded the matter from the docket so that Price could file an affidavit in response to the CR 77.02 motion showing good cause for not taking any pretrial steps in the preceding 12 months and to permit Norrington and Robertson to respond to motion for default judgment.

From December 2012 until February 2014, Price took no action. Thereafter, on February 17, 2014, the clerk entered a second CR 77.02 notice to dismiss the matter for lack of prosecution. Price again moved for a status conference on March 10, 2014. Again, Price claimed inability to serve the appellees as the reason for no action. The trial court ordered that the matter was held in abeyance to permit Price to file an affidavit showing the reason for no action.

Price filed an affidavit explaining why no pretrial steps had been taken in the preceding 24 months and an affidavit that the motion for default judgment remained pending as well as Administrative Office of the Court (“AOC”) 280 form² as preferred by the trial court. On March 20, 2014, the matter was again referred to the master commissioner for review. A motion for default judgment was filed which was to be heard on March 24, 2014.

¹ The proffered dates of service via the Secretary of State, which are cited in the affidavit, do not correspond to the record.

² “Notice of Submission for Final Adjudication”

On March 26, 2014, an order was entered denying the motion for default judgment for failure to provide sufficient evidence of record establishing Norrington and Robertson's obligation in the matter. The trial court also remanded the CR 77.02 notice. The record does not reflect any action taken on the court's referral to the commissioner.

A third CR 77.02 notice was entered by the clerk on February 8, 2016. As before, nothing had occurred in the ensuing two years. Price filed another motion for a status hearing. The matter was continued until June 15, 2016. On June 15, 2016, the trial court dismissed the case for lack of prosecution under CR 77.02. In its order, the trial court noted that Price failed to file a pleading with affidavit, showing good cause for taking no steps in the matter for two years.

Thereafter, Price filed CR 59.05 motion to vacate the order dismissing the case. The trial court denied the motion on June 29, 2016. Price now appeals the denial of the default judgment, the denial of the motion to dismiss, and the denial of the motion to vacate the order to dismiss.

ANALYSIS

We begin our analysis with a consideration of the interlocutory order denying the motion for a default judgment. Default judgments are a recognized judicial tool to prevent parties from procrastinating and causing unnecessary delays. While there is a paucity of Kentucky case law on the resolution of a negligence action in the context of a default judgment, it is accurate to observe that default judgments are not favored. Nonetheless, trial courts possess broad

discretion in considering such motions, and will not be disturbed absent an abuse of discretion. *Kidd v. B. Perini & Sons*, 313 Ky. 727, 233 S.W.2d 255 (Ky. 1950). An abuse of discretion occurs if a trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In the matter at hand, Price is appealing the trial court's denial of a motion for default judgment. In Kentucky, it is permissible to appeal directly from a default judgment. *Jeffrey v. Jeffrey*, 153 S.W.3d 849, 851 (Ky. App. 2004). But "the issue in such an 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.*, 203 Ky. 697, 262 S.W. 1083 (1924)). This language is addressing the requirements for setting aside a default judgment rather than the denial of a default judgment but still provides guidance for appellate review.

Thus, the question becomes whether the pleadings were sufficient to uphold a default judgment and whether the appellees in this case were in default. The reasoning supporting such review is that the defaulting party admits only such allegations on the pleadings that are necessary to obtain the relief sought by the complaint. *Wilson's Administrator v. Wilson*, 288 Ky. 522, 156 S.W.2d 832 (1941).

Below is the civil rule for default judgments:

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 therefor. 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.

CR 55.01.

Here, the trial court denied the default judgment because Price failed to provide sufficient evidence of record to establish Norrington and Price's obligation. We concur.

First, an examination of the complaint shows that it perfunctorily states that an accident occurred; it was Norrington's fault; and, Robertson did not obtain insurance as required by law. Further, it maintains that Price suffered severe and permanent damage. While the complaint is signed by Price's attorney, it is not verified. Clearly, under CR 11, verification of the veracity of the complaint is not required in this case, but the complaint is the only information

about the collision in the record. Thus, the trial court's calculus as whether to grant a default judgment included that Price never testified or verified the information in the complaint.

Second, Norrington and Robertson, residents of Indiana, were served constructively by service on Kentucky's Secretary of State. The record is inconsistent regarding when the service took place and several different addresses are provided for the parties in the briefs, on the notices, and in the affidavits. Further, the information provided as to service is inconsistent in the affidavits, and in the brief. Indisputably, Norrington and Robertson never responded to the suit. But notwithstanding the constructive service, nothing indicates that the appellees had actual knowledge of the suit. This is another factor for the trial court to consider in determining whether to grant default judgment.

Third, this matter was ordered to the master commissioner for review. Price does not provide an explanation for not procuring the services of the master commissioner. This factor was also weighed by the trial judge in his determination of whether to grant a default judgment.

Therefore, the trial court, acting within its discretion, denied the motion for default judgment for failure to provide sufficient evidence. It indicated that sufficient evidence was not on the record, and given that the only evidence is unverified pleadings, we do not believe that the trial court's order was an abuse of discretion. Moreover, when the motion for a default judgment was denied, the case was not terminated. Price still had an opportunity to prosecute the matter but

instead, two years later, received a third CR 77.02 motion to dismiss the case because it continued to languish.

The next question is whether the case was properly dismissed pursuant to CR 77.02(2), which provides that “[a]t least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.” The standard of review for dismissals for lack of prosecution under CR 77.02 is abuse of discretion. *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89, 93 (Ky. App. 2009).

This rule has been referred to as a “housekeeping” rule to expedite the removal from the docket of stale cases. 7 Ky. Prac. R. Civ. Proc. Ann. Rule 77.02. This procedure is not taken lightly, nor was it here. Over the course of six years, three separate motions to dismiss for want of prosecution were served on Price. In each case, the trial court instructed Price’s counsel on how to respond to the notice. The trial court directed Price about the necessity for an affidavit to continue the case explaining why no steps had been taken. As an aside, during the six-year pendency of the action, Price never provided additional evidence.

After the third notice to dismiss the case for lack of prosecution, Price once again failed to file a pleading with affidavit showing good cause why no steps

had been taken of record for more than two years. Under these circumstances, the trial court did not abuse its discretion in dismissing the case or denying the motion to vacate this decision.

Lastly, we are unpersuaded by Price's arguments that the dismissal in this matter was particularly harsh. The use of the word "sanction" in the trial court's order was merely descriptive of the trial court's actions in entering a dismissal under CR 77.02 because counsel performed no steps in the litigation during the preceding year to move the case to fruition. Further, the fact that the statute of limitations has run does not make this decision any more onerous. Price had over six years to move the case along. Every two years, like clockwork, a "notice to dismiss for want of prosecution" was entered, the trial court instructed counsel, they perfunctorily responded, but never moved the case beyond the entry of an affidavit explaining their inaction. Here, the trial court exercised its inherent power to preserve the judicial process by dismissing this matter. *See Manning v. Wilkinson*, 264 S.W.3d 620 (Ky. App. 2007). The trial court did not abuse its discretion.

CONCLUSION

Because there was no abuse of discretion, we affirm the decision of the Jefferson Circuit Court in denying the motion for default judgment, dismissing the case, and denying the motion to vacate the dismissal.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Vincent Johnson
Louisville, Kentucky