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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001154-MR

MARCUS S. MINIX, SR. APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HON. JOHNNY RAY HARRIS, JUDGE
ACTION NO. 09-CI-01350

CHARITY STONE AND
JOSEPH L. GOFF, ESQ. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

SPALDING, JUDGE: Appellant, Marcus S. Minix, Sr., proceeding *pro se*, appeals an order of the Floyd Circuit Court denying his CR[1] 60.02 motion for post-judgment relief. Appellant's principal contention on appeal is that he did not

[1] Kentucky Rules of Civil Procedure.

receive multiple motions filed by the appellee[2] and various orders entered by the trial court. Because the appellant's lack of notice was due to his own failure to provide a correct address in his pleadings, we affirm.

On December 22, 2009, appellee filed a complaint in Floyd Circuit Court alleging, *inter alia*, that appellant had committed a battery upon appellee, Charity Stone, resulting in severe emotional distress. Appellee would later, in February of 2010, go on to file an amended complaint; though, the sum and substance of the allegations contained therein were the same as the initially-filed complaint. After having been served with a summons and a copy of the amended complaint, appellant filed an answer and counterclaim. This answer represents appellant's sole participation in the litigation until May 23, 2017, when he would file his CR 60.02 motion.

On March 9, 2010, appellee filed an answer to the appellant's counterclaim. Over one (1) year later, on March 16, 2011, appellee filed a motion to strike the appellant's pleadings and a motion to show cause. The appellee requested the trial court "strike the [appellant]'s pleadings and issue a show cause Order against the [appellant] for failing to keep the Court informed of his correct

[2] The Hon. Joseph Goff was the attorney for Plaintiff at one time in the circuit court action. He was named by the appellant as an appellee in the body of his Notice of Appeal. Attorney Goff was never a party to this action. Hence, he is not actually an appellee. Therefore, for the purpose of this Opinion, we will refer to Charity Stone as the appellee.

mailing address." This motion was set for a hearing on March 25, 2011, at 9:00 a.m. In support of her motion, appellee provided that "all mailings to the [appellant] have been returned with indications of no mailing receptacle or unable to forward marked by the United States Postal Service." No written order or docket notation is in the record. Any video or audio record of the proceeding on March 25, 2011 were not included in the record on appeal.

Two (2) years later, on April 23, 2013, appellee filed a motion for default judgment and a motion to dismiss counterclaim. Both of these motions were granted by the trial court, and on May 10, 2013, a default judgment was entered. In the circuit court's order, the court notes that the appellant's response and counterclaim were subsequently stricken from the record. On June 11, 2013, the trial court held a hearing on the issue of damages, and on August 4, 2014, entered findings of fact, conclusions of law, and judgment.

On May 23, 2017, the appellant filed a CR 60.02 motion.[3] On May 26, 2017, the appellant filed a "supplement" to the motion, and on May 30, 2017, would file yet another motion "to void all *ex parte* documents entered in this case which were not served upon him[,] including all motions, order dismissing

[3] The record indicates that the appellant paid for and received photocopies of the Circuit Court record on December 12, 2014 – less than five (5) months subsequent to the trial court's entry of its findings of fact, conclusions of law, and judgment, but well over two (2) years prior to appellant's filing of his CR 60.02 motion (which, again, represents the *first* pleading filed after appellant filed his answer and counterclaim, on February 17, 2010).

[appellant's] counterclaims claims [sic], default judgment, and findings of facts, conclusions of law and order for damages[.]" On June 16, 2017, appellee filed a response to the appellant's CR 60.02 motion, and on June 21, 2017, the circuit court entered an order denying the appellant's CR 60.02 motion. This appeal followed.

Civil Rule 60.02 provides two methods of relief for a party seeking to vacate a default judgment. They are that the judgment is void pursuant to CR 60.02(e) or that it is voidable pursuant to 60.02(a)(b)(c)(d) or (f). If a default judgment is entered without proper notice, it is void. *Kearns v. Ayer*, 746 S.W.2d 94, 95-96 (Ky.App. 1988). Therefore, any argument concerning the balance of equity and timeliness of the motion are not germane to the issue at hand. The trial court in such case has no discretion but to overturn the verdict. *Id*. at 95. The appellee's reliance upon the argument that this motion was not timely filed would not constitute grounds for denial of the motion if the judgment is void.

In contrast, a judgment is voidable if extenuating circumstances that amount to one of the reasons specified in CR 60.02 exist. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329, 332 (Ky. 2007). Those motions must be filed within one (1) year under 60.02(a)(b) or (c) or within a reasonable time under 60.02(d) or (f). *Id*. Then the court may set aside the judgment for good cause shown. CR 55.02. This motion was filed more than two (2) years beyond the apparent

discovery of the default by appellant. The circuit court did not err in holding that a motion to set aside the default judgment through equitable principles was not timely filed as defined in CR 60.02. Hence, the only ground for relief for appellant is that the judgment is void.

We will first address appellant's argument that, "[p]ursuant to CR 5.03[,] neither the Court [n]or the appellees were permitted to take action because [appellant]" had not been "served under CR 5.01 and CR 5.02." Appellant's argument hinges on CR 5.02, which provides, in part, that "[s]ervice is complete upon mailing unless the serving party learns or has reason to know that it did not reach the person to be served."[4] Thus, the appellant's contention is that, because various notices and motions were returned by the postal service to appellee's counsel and to the Circuit Court Clerk, there was "reason to know" on the part of the appellee that the pleadings did not reach the appellant pursuant to CR 5.02(1).

However, at the time the motion for default judgment and the motion to dismiss counterclaim were filed, April 23, 2013, and at the time the order dismissing counterclaim and the default judgment were entered, the language contained in CR 5.02 was: "[s]ervice upon the attorney or upon a party *shall be made* by delivering a copy to the attorney or party or *by mailing it to the attorney or party at the last known address of such person*; or, if no address is known, by

[4] CR 5.02(1).

leaving it with the clerk of the court." (emphasis added). The rule further stated that "[s]ervice is complete upon mailing or electronic transmission, but electronic transmission is not effective if the serving party learns that it did not reach the person to be served." *Id.* The rule did not place a "reason to know" requirement about the receipt of mailed pleadings. Thus, at the time of litigation, service was effectuated upon mailing to the last known address of the party. Therefore, it is not an issue in this appeal that the aforementioned motions were mailed to the appellant (albeit to an incorrect address supplied by the appellant).[5] Therefore, service was effective at that time.

Appellant next argues that the facts of *Leedy v. Thacker*, 245 S.W.3d 792 (Ky.App. 2008), are "remarkably analogous" to this matter. Although there are several similarities between *Leedy* and the case at hand, distinguishing factors exist. *Leedy* involved two (2) separate complaints for trespass having been filed in Pike Circuit Court. Less than one (1) week after service had been effectuated, the defendant filed a *pro se* answer, which failed to include a return address for the defendant. Approximately two (2) months afterwards, after a substitution of plaintiffs' counsel, a series of motions were brought before the trial court on behalf

[5] Although the record is bereft of the final page of appellee's motion for default judgment (*i.e.*, that portion showing the bulk of appellee's counsel's certification that a copy of the motion had been mailed to the appellant), the motion to dismiss counterclaim, which was filed on the same date as the motion for default judgment, *does* contain the entire certification. The appellant, in his briefing, does not argue that the mailing was or was not sent. He argues he did not get notice of the motions because mailing them to a known wrong address is not sufficient.

of the plaintiffs in both actions, including a motion to strike the defendant's answer for failure to include a return address on his answer, a motion for default judgment, and a motion to allow the plaintiffs to take proof on the issue of damages. The movant's certificate stated counsel was unable to certify a copy to defendant because he did not give an address. Shortly thereafter, the trial court entered orders scheduling hearings on the motions. The defendant failed to appear for the scheduled hearings, and the trial court granted the plaintiffs' motion to strike the defendant's answer, as well as the motion for default judgment. Additionally, the court scheduled the cases for evidentiary hearings on the issue of damages. Eventually, the Pike Circuit Court entered findings of fact, conclusions of law and judgment in each case, awarding over $17,000.00 in compensatory damages, punitive damages, and costs combined.

The defendant retained counsel. Counsel subsequently moved the trial court to, *inter alia*, alter, amend or vacate the judgments pursuant to CR 60.02. After holding a hearing on the issue, the court entered orders denying the motion as to both cases.

Defendant appealed. The defendant argued that the trial court had erred in denying his CR 60.02 motion because "his failure to provide a return address was not sufficient reason to strike the answer and render default judgments." *Id.* at 795.

This Court held that because a responsive pleading was filed, notice was required pursuant to CR 55.01, which requires three-day written notice of a motion for judgment. *Id.* at 796. Since there was "no evidence that any attempt was made to comply with the notice requirements of CR 55.01, even though [the defendant's] address was known to [the plaintiffs]," and because "the plaintiffs knew or at least should have known where [the defendant] could be found, as the parties had been neighbors for a number of years," we held that the trial court had improperly granted the plaintiffs' motion for default judgment. *Id.* However, this Court added the following caveat: "*[h]ad the record of this case contained some indication that the appellees made a good faith effort to provide notice as required under CR 55.01, our ruling might be different.*" *Id.* (emphasis added).

Here, the Court is of the opinion that appellee made a "good faith effort" to provide the notice required by CR 55.01. Unlike the defendant in *Leedy*, appellant here *did* include a return address on his answer. Although the last page of the appellant's answer (*i.e.*, the page containing the appellant's supplied return address) is missing from the record, appellee contends – and appellant concedes[6] –

[6] Page 7 of the answer, defense, and counterclaim of Mark Minix is also curiously missing from the record on appeal. However, appellee, in her response to the motion made in circuit court, includes as an exhibit a copy of said document including a page 7 where Mr. Minix listed his address as P.O. Box 1687, Lexington, Kentucky 40515. Further, in his brief, appellant provides, on one occasion, that "[t]he address *given by Minix* of P.O. Box 1687, Lexington, KY 40515 was incorrect. This P.O. Box 1687 was located in Paintsville, not at his home in Lexington." (emphasis added). On another occasion, appellant references the same address and states that "[t]his is the incorrect address *given by Minix*." (emphasis added). In yet another instance,

that an address was provided, and that the address was incorrect. The appellee alleges her motion for default judgment and her motion to dismiss counterclaim were mailed to the appellant on April 23, 2013. Furthermore, and as discussed previously, because the former version of CR 5.02 was in effect at the time appellee mailed appellant the motion for default judgment, service was effectuated at the time of mailing, *i.e.*, on April 23, 2013, more than two (2) weeks prior to the May 10, 2013 hearing date.

Thus, although *Leedy* is similar in many regards to the case before us, it is distinguishable in that appellee here made a good faith attempt to provide appellant with notice of the motion for default judgment and accompanying hearing date. Further, the appellant did not fail to provide an address but provided an incorrect address. Also, the appellant and appellee did not live in proximity to allow for her or her counsel to know where mail could be sent.

Finally, mail sent to the address of service by the circuit clerk was ineffective as well. The circuit court struck the pleading as deficient. Once a pleading is struck as being deficient, the pleading has no legal effect. *Roman*

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appellant suggests that, not until May 23, 2017, when he filed his CR 60.02 motion, did he supply a correct address: "[t]he CR 60.02 motion filed by Minix accurately contained his address." The above compilation is illustrative and demonstrates that the appellant himself provided an incorrect address early in the case.

Catholic Diocese of Lexington v. Noble, 92 S.W.3d 724, 733-34 (Ky. 2002). Once the answer and counterclaim were stricken, a judgment could be entered.

The appellee complied with CR 5.02 as then written and CR 55.01 by sending notice of its motion for default judgment to appellant. Further, she sent copies of "all pleadings throughout the litigation" to him (or, at the very least, to the address appellant provided).[7] As a result, a "good faith effort" to serve appellant was made.

The appellant argues that he is entitled to an actual notice of the pleadings herein. It is the opinion of this Court that, pursuant to the Rules of Civil Procedure in effect at the relevant times of this proceeding, the appellee was only required to make a good faith effort to comply with the Rules of Civil Procedure and, combined with the efforts of the Floyd Circuit Court Clerk of sending the documents to the address where he was served constitute compliance with the Civil Rules. The reason why the appellant did not get actual notice is because he gave an incorrect address and never took any action to correct that mistake. The judgment of the court below is not void. Hence, the Rule 60.02 motion of Mr. Minix was properly denied.

The order of the Floyd Circuit Court is AFFIRMED.

[7] *See* footnote 5, *supra*.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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