

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED
March 29, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

FREDI A DUGGER)
Plaintiff - Appellee) WASHINGTON COUNTY
) 03A01-9507-CV-00233
)
v.)
) HON. THOMAS J. SEELEY, JR.,
) JUDGE
)
MHAMED F. ALI)
Defendant - Appellant) AFFIRMED AND REMANDED

MHAMED F. ALI, Pro Se

JAMES S. ROACH OF JOHNSON CITY FOR APPELLEE

O P I N I O N

Goddard, P. J.

Mhamed Ali appeals an order of the Trial Court denying his motion for relief under Rule 60 of the Tennessee Rules of Civil Procedure, denying his request to appoint him counsel and denying his motion seeking sanctions.

This case was initiated by complaint filed on January 16, 1990, alleging the Plaintiff was sexually assaulted while under the influence of a drug administered by the Defendant who was at that time a practicing physician in Washington County. An answer was filed by counsel for the Defendant on February 16, 1990. The case was thereafter tried on May 29, 1991, after counsel for the Defendant, on the same date, moved and was permitted to withdraw as counsel. A judgment was entered on June 3, granting Mr. Dugger compensatory damages in the amount of \$1,500,000 and punitive damages in the amount of \$2,500,000.

The Rule 60 motion was filed on May 22, 1994, and resolved by the Trial Court by order entered July 12, 1995. This order contained the following pertinent information:

1. In defendant's Motion to Set Aside Judgment by Default filed June 3, 1991,¹ he recites that he was "absent from the United States...between June, 1990 and October, 1992." Defendant had fled the United States after being charged criminally in this same matter and having made bond. It was only after his recapture by bondsmen in Egypt that he returned to the United States. Defendant willfully left the United States to avoid criminal prosecution. This Motion was filed May 27, 1992, some nineteen months after his return. There is no factual or legal basis to set aside the default judgment, nor was the Motion filed within a reasonable time. See T.R.C.P. 60.02. Defendant's Motion to Set Aside Judgment by Default is, therefore, **DENIED**.

Before addressing the merits of the issues raised, we point out that contrary to Mr. Ali's motion the judgment he seeks

¹ The judgment, not the motion, was filed on June 3, 1991.

to set aside is not a default judgment because--although, as already noted, his counsel had withdrawn--the answer which had been filed was still viable.

Turning to the merits, we note there are two fatal deficiencies as to Mr. Ali's Rule 60 motion. First, the allegations recite no facts justifying setting aside the judgment, merely conclusion:

MERITORIOUS DEFENSE

(1.) As shown in the initial answer filed by Mr. James T. Bowman, attorney at law, on behalf of the Defendant, there are meritorious defenses for him. See Patterson v. Rockwell Int'l, 665 S.W 2d 96 (Tenn. 1994).

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SETTING ASIDE

(4.) A judgment taken by default was not authorized by the failure of the Defendant to appear in person or by counsel at the time the case is called for trial where there was on file his pleas putting in issue the essential averment of Plaintiff's declaration, and withdrawal of defendant's attorney from the case did not have the effect of withdrawing the pleas. See Martin v. Kirk, 3 Tenn. Civ. App. (3 Higgins) 595 (1913).

EXTRA ORDINARY CIRCUMSTANCE AND EXTREME HARDSHIP

(5.) The Defendant alleges that he is "exempt" from the one year limit that bars relief under **Rule 60.02** Tenn. R. Civ. P., due to his extraordinary circumstances and extreme hardships.

Furthermore, the Defendant alleges that he qualifies for relief under the "any other reason" clause of **Subdivision (5)** of said Rule.

Secondly, the motion was not filed within either the "reasonable time" or the "one-year" limitation specified in the Rule.

We have considered the other issues raised by Mr. Ali relating to appointment of counsel and imposition of sanctions and find both to be without merit.

In conclusion, we have not overlooked M. Dugger's insistence that this is not a final judgment in that the Court reserved the question regarding a garnishment issued subsequent to the judgment. We do not believe a controversy regarding garnishment is a multiple claim contemplated under Rule 3 of the Tennessee Rules of Appellate Procedure which proscribes appeals unless judgments are final. Indeed, if such would bar an appeal it is conceivable that an appeal as to the underlying case could be delayed for months or years by continuous litigation regarding the validity of garnishments.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Appellant.

Houston M. Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.