IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
Assigned on Briefs September 25, 2003 Session

JUDITH A. JOHNSON, SURVIVING WIDOW OF DAVID C. JOHNSON, ET AL. v. ROBERT B. RICHARDSON, d/b/a RICHARDSON LANDSCAPING & TRUCKING

Direct Appeal from the Circuit Court for Houston County
No. 1111 Allen W. Wallace, Judge

No. M2002-02968-WC-R3-CV - Mailed - February 2, 2004
Filed - March 5, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann.§ 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant/appellant has appealed the action of the trial court, which overruled his motion to set aside a default judgment under the provisions of Tenn. R. Civ. P., Rule 60. The standard of review is whether the trial court abused its discretion in denying the motion to set aside the judgment.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Reversed and Remanded

JOHN K. BYERS, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH and WILLIAM C. KOCH, JJ., joined.

Debra A. Wall, Clarksville, Tennessee, attorney for appellant, Robert B. Richardson.

Timothy K. Barnes, Clarksville, Tennessee, attorney for appellee, Judith A. Johnson, Kimberly Ann Mahoney and Sean Patrick Mahoney.

MEMORANDUM OPINION

Facts

The plaintiffs brought this compensation suit to recover benefits under the Workers' Compensation Act as a result of an accident on July 22, 1994 in which her husband and the step-father of the two minor children was killed.

The suit was filed on September 7, 1994. The defendant subsequently filed a motion for summary judgment. On December 30, 1994 the trial judge overruled the motion for summary judgment.

There are no orders in the record before us from the date of the overruling of the summary judgment on December 30, 1994 until the entry of the default judgment which was entered on September 7, 2001. The plaintiffs were awarded $167,832.00.

Subsequent to the order amending the motion for a summary judgment, the defendant filed a petition in the federal court declaring bankruptcy. This stayed the proceedings in the trial court.

On August 10, 2001, the defendant filed a motion to have a default judgment set aside which he averred was entered on May 25, 2001. The motion further avers that on May 10, 2001 the trial judge ordered the plaintiff to "place a document in the court file evidencing this matter had been removed from bankruptcy court" and the defendant further avers the plaintiff did not place said document in the file prior to May 25, 2001, as directed by the trial judge.

On the record before this court is a document designating notice as an order entered in the United States Bankruptcy Court granting relief from a stay of the proceedings in the Bankruptcy Court. This document recites that the relief from the automatic stay of this case was granted on October 20, 1998. Marked on the order was the notation "Received for Entry,"*nunc pro tunc* to 10/20/98." This appears to be placed there by the Bankruptcy Court. The order also shows a stamp which is "2001 August 23 a.m. 9:32." This also appears to be an entry by the Bankruptcy Court. There is nothing in the record to show when this order was placed in the record in this case.

There are no orders in the record memorializing any proceedings being held in the trial court on either May 10, 2001 or May 25, 2001.

On September 7, 2001 the trial judge entered a default judgment against the defendant in favor of the plaintiffs. The order recited that defendant was not present despite being duly notified of said court date. The order, approved by plaintiff's attorney for entry has a certification of service thereof on defendant's attorney which is undated.

On September 19, 2002, the plaintiff filed a "supplemental response to the motion to set aside the default judgment." (There is not another response to the motion to set aside the default judgment in the record.)

On October 1, 2001, the defendant filed another motion to have the default judgment set aside. This motions was accompanied by an affidavit from the defendant. Also on October 1, 2001, the defendant filed a motion seeking to have the operation and effect of the default judgment suspended.

On October 25, 2002, the trial court entered an order denying the defendant's motion to set

aside the default judgment. The order recited that the defendant had been given 45 days by the trial court to prosecute a motion to set aside the order in the bankruptcy court which allowed the plaintiffs to proceed against him and that no evidence was offered in the trial court by the defendant to show this had been done. The order does not show the defendant was present at the time of entry of this order and recited the defendant had been duly notified to be present. There is attached a certificate of service on defendant's counsel signed by plaintiffs' attorney which is undated.

Discussion

Despite the lack of order in the record to memorialize proceedings in the matter on May 10, 2001 and May 25, 2001, we can fairly determine by the motions and affidavits, which the defendant filed on October 1, 2001 to have the default judgment set aside, that the defendant appeared in court on May 10, 2001 without counsel and the case was reset until May 25, 2001 so the defendant could obtain counsel. Further, this motion avers the defendant did not appear on May 25, 2001 in the trial court. The motion avers the defendant did not appear because he "simply, by inadvertence and neglect, had forgotten the trial date."

In the affidavit filed with the motion the defendant averred he had meritorious defenses to the case against him. These being: the plaintiff's husband was an independent contractor and the defendant employed less than five people and was not subject to the provisions of the Workers' Compensation Act. These defenses were raised by the defendant in his motion for summary judgment which he filed on September 24, 1994 and which was over-ruled by the trial court on January 6, 1995 on the basis that there was a material dispute of fact on whether these defenses were viable or not.

The significant orders in the record for determination of the issues before us are the Order of September 7, 2001 granting the default judgment against the defendant and the Order of October 25, 2002, which overruled the defendant's motion to have the default judgment set aside. These are the only orders shown in the record from the time the order overruling the motion for summary judgment was entered on January 6, 1995.

The defendant seeks relief from the judgment entered against him by reason of mistake, inadvertence and excusable neglect as set out in Rule 60.02 of the Tenn. R. Civ. P. In ***Tate v. County of Monroe***, 578 S.W.2d 642 (Tenn. Ct. App. 1978) the court held that negligence was "precisely the type of error" Rule 60 is designed to relieve. The setting aside of a default judgment rests within the sound discretion of the trial judge. ***In re: Estate of Mayes***, 843 S.W.2d 418 (Tenn. Ct. App. 1992).

The courts should construe Rule 60 liberally when a party seeks relief from a default judgment and should examine the moving party's proof to determine whether the default was willful. ***Nelson v. Simpson***, 826 S.W.2d 483 (Tenn. Ct. App. 1991).

In considering whether to set aside a default judgment, the matter of whether the defendant

has a meritorious defense to the claim of a plaintiff is relevant. In this case, if the defendant can show that the plaintiff's husband was an independent contractor or that he did not employ five or more employees, he would not be liable under the Workers' Compensation Act.

There is a further matter touching this enquiry, which is whether the requirement for the entry of a default judgment provided for in Rule 55 Tennessee Rules Civil Procedure have been met. The pertinent part of this rule is as follows:

> 55.01 Entry. – When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default may be entered as follows:
>
> The party entitled to a judgment by default shall apply to the court. All parties against whom a default judgment is sought shall be served with a written notice of the application for judgment as least five days before the hearing on the application, regardless of whether the party has made an appearance in the action. . . .

There is nothing in the record to show the plaintiff gave the defendant written notice that she intended to move for a default judgment against the defendant on September 7, 2001. For that matter, there is nothing in the record to show the case would be set for hearing on that date.

Rule 60 should be construed liberally when a party is seeking relief from a default judgment. The court should also consider whether the conduct of the defaulting party has prejudiced the non-defaulting party. ***Nelson v. Simpson***, 826 S.W.2d 488 (Tenn. Ct. App. 1991).

We conclude that in this case, the default judgment should be set aside. We are led to this conclusion based upon the scarcity of the record in revealing what proceedings were had in the trial court on May 10, 2001 and May 25, 2001 and on the lack of the record to show notice of the proceeding of September 7, 2001, and on the lack of written notice that the plaintiff intended to seek a default judgment against the defendant before the entry of such judgment as required by Rule 50 Tenn. R. Civ. P.

Further, we find there is no significant, if any, prejudice to the plaintiff by reason of the defendant's default. If the defendant can show he is not liable in this case the plaintiffs have suffered no loss because they were not entitled to recover. On the other hand if the plaintiffs can show they are entitled to recover from the defendant, they will do so. The result will be that one or the other parties to this case will prevail on the merits of the case, which is the purpose of the litigation.

We therefore reverse the judgment of the trial court and remand this case for further proceedings in accordance with this opinion.

The costs of the appeal is taxed to the defendant, Robert B. Richardson.

PER CURIAM

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the defendant, Robert B. Richardson, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM