IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION PANEL AT NASHVILLE
JUNE 2001 SESSION

WILLIS LEE MELTON v. BUTCH BOWMAN, d/b/a Bowman's Trailer Transport and Repair

Direct Appeal from the Circuit Court of Overton County
No. 3108, Hon. John J. Maddux Jr., Judge

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No. M2000-02960-WC-R3-CV - Mailed - July 17, 2001
Filed - August 20, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with the Tenn. Code Ann. §50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The issue on appeal presented by employer/appellant is whether the trial court abused its discretion in refusing to grant the appellant's motion pursuant to Rule 60.02(1)(5) of the Tenn. R. Civ. P. The panel has concluded that the judgment of the trial court should be reversed because the notice requirement of due process was not satisfied.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Reversed.

Frank G. Clement, Jr., Sp.J., delivered the opinion of the court, in which Frank F. Drowota, III, J., and Ben H. Cantrell, Sp.J., joined.

Daryl A. Colson, Livingston, Tennessee, for the appellant/employer Butch Bowman, d/b/a Bowman's Trailer Transport and Repair.

Randy S. Chaffin, Cameron & Chaffin, Cookeville, Tennessee, for the appellee/employee Willis Lee Melton.

Opinion

The issue on appeal is whether the defendant is entitled to relief, pursuant to Tenn. R. Civ. P. 60.02, from a default judgment which was granted at trial when the defendant-appellant did not appear.

Rule 60 affords relief from a judgment due to mistake, inadvertence, surprise, or excusable neglect. See Campbell v. Archer, 555 S.W.2d 110, 112 (Tenn. 1977); Henson v. Diehl Machines, Inc., 674 S.W.2d 307, 310 (Tenn. Ct. App. 1984). Also, subsection 5 of Rule 60.02 provides that a party may seek relief "for any other reason justifying relief from the operation of the judgment." Tenn. R. Civ. P. 60.02(5). Since a Rule 60 motion to set aside a judgment addresses itself to the sound discretion of the trial court, our scope of review is limited to whether the trial court abused its discretion in denying the defendant's motion. Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 97 (Tenn. 1993).

Facts which are critical to the determination of the issues on appeal include: (1) the appellant repeatedly failed to comply with discovery[1], (2) three different attorneys, one of whom was suspended from the practice of law during the pendency of the case, have represented the defendant-appellant in this matter, and (3) the defendant-appellant did not receive notice of the trial, though the Clerk sent notice to the plaintiff-appellee.

In December of 1995, the plaintiff-appellee, Willis Melton (Melton), filed suit under the Tennessee Workers' Compensation Act (Act) against the defendant-appellant, Butch Bowman, d/b/a Bowman's Trailer Transport and Repair (Bowman) for the injury sustained by Melton while performing work for Bowman on October 12, 1995.

Bowman timely answered the complaint denying liability, asserting affirmative defenses, including: (1) that Melton was an independent contractor, not an employee; and (2) that Bowman did not regularly employ five (5) or more persons and never agreed to be bound by the Act.

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[1]Though no motions for sanctions were sought by the plaintiff-appellee.

In March 1997, Melton issued his first set of interrogatories. Bowman, who was then represented by William E. Halfacre III (Halfacre), admitted receiving but never responding to the interrogatories.[2] In October 1998, Melton sent requests for admissions to Bowman. Bowman, who was then represented by his second attorney A. F. Officer III (Officer), admitted receiving the requests for admissions but did not respond to them, claiming that he relied on Officer and alleges that Officer assured him that his case would be resolved.

In 1999, Officer was suspended from the practice of law. On September 2, 1999, the Clerk of the Court sent notices to all litigants who were then represented by Officer advising that Officer was no longer engaged in the practice of law and instructing Officer's now former clients to obtain new counsel. The certificate of service on the Clerk's notice stated that "a true and correct copy of the . . . order has been forwarded to the party in this cause formally represented by A. F. Officer, III, at the address shown for such person in the file . . ."[3]

The case was originally set for trial on September 3, 1998. Bowman appeared in court with his attorney on that date, however, the trial was continued indefinitely. In April 2000, after Officer was suspended from the practice of law, the Clerk sent a notice of the new trial date, being September 5, 2000, to Melton's attorney but not to Bowman. Bowman was not represented by an attorney when the notice was mailed.

The scheduling of cases for trial in Overton County is governed by

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[2]Halfacre, who originally represented Bowman, filed a motion in September 1997 to withdraw as a counsel for Bowman, stating in his affidavit that his requests to Bowman to respond to Melton's interrogatories went unanswered. The Trial Court granted Halfacre leave to withdraw.

[3] Bowman later testified that he never received the notice and further claimed that he did not know that Officer no longer represented him. Moreover, Bowman's testimony, which was only contradicted by the evidentiary inference that a letter properly mailed is received by the addressee, was that he was not aware of the September 5, 2000 trial date.

Local Rule 17.01, which provides in pertinent part that when circuit judges "call and set the trial docket for cases assigned to that Judge . . . except in cases where all parties or their attorneys are present before the Court, or a case is set by agreement of the parties, the clerk shall notify all parties or their attorneys of the time and place where the matter will be heard." (Emphasis added). Thus, according to Local Rules, notice of the September 2000 trial date should have been mailed by the Clerk to Bowman. The record however affirmatively reveals that the Clerk mailed it to Melton's attorney, but not to Bowman. Thus, Bowman did not receive notice of the new trial date and did not appear for trial on September 5, 2000.

The Trial Court granted a default against Bowman on September 5, 2000 and entered a final judgment against Bowman for $47,205.33 plus future medical expenses on September 26, 2000.

Bowman subsequently learned of the default judgment and promptly retained Daryl A. Colson (Colson). On October 10, 2000, Colson filed a motion to set aside the default judgement on the basis of excusable neglect under Rule 60.02(1) and extraordinary circumstances under Rule 60.02(5). The Rule 60 motion was supported by the affidavit of the defendant. Bowman asserted that he was not notified of the September 5, 2000 trial date, specifically stating: "I received no notice of the trial date in this matter. Had I received notice of the trial date, I would have been present. I have defenses to assert at the trial of this matter."

A hearing on Bowman's motion to set the judgment aside was held on November 6, 2000. The trial court denied Bowman's motion, finding that the requirements of Rule 60.02 were not met.

Where the failure to appear for the trial "lies in the manner in which the case was set for trial, the clerk's failure to notify defense counsel that the case was set and in defense counsel's office which failed to notice that the trial was set when plaintiff's counsel informed it of this fact . . . [s]uch lapses have been held to be excusable neglect by Tennessee Courts." Tenn. Dep't of Human Services v. Barbee, 689 S.W.2d 863, 868 (Tenn. Ct.

App. 1985). See also Campbell v. Archer, supra; Jerkins v. McKinney, 533 S.W.2d 275 (Tenn. 1976); Tate v. County of Monroe, 578 S.W.2d 642 (Tenn. Ct. App. 1979). The court in Barbee set the judgment aside because there was no proof in the record that the defendant's non-appearance in court was willful. Id. Moreover, they had a meritorious defense to the plaintiff's claim, they did not receive a notice of the trial date, and their failure to appear was at most "excusable neglect". Id.

In Campbell, the defendant's counsel withdrew, but the order permitting him to withdraw was not signed by the judge. Id. at 111. The defendant did not appear at trial because he was not aware of the trial date. Id. The court set the final judgment aside holding that defendant personally was not at fault because he had no actual notice of the trial date. Id.

Due process requires that all parties to litigation receive notice of hearings. Bryant v. Edwards, 707 S.W.2d 868, 870 (Tenn. 1986). Pursuant to Local Rule 17.01, Bowman should have been sent notice from the Clerk. Therefore, we find that this record "makes out a case of mistake, inadvertence, or excusable neglect, rather than one of willful failure to appear." Campbell, at 110.

Rule 60 has an additional requirement Bowman must satisfy, the showing of a "meritorious defense." The defense asserted in the Rule 60 motion of, "I have defenses to assert at the trial of this matter," is by itself insufficient to establish a meritorious defense. However, Bowman had previously set forth specific defenses, claiming that the plaintiff-appellee was an independent contractor instead of an employee, and that Bowman did not regularly employ five or more employees. We find that these specific defenses, combined with Bowman's renewed protestations that he is not liable under the Act, satisfy the requirement of showing a meritorious defense.

Furthermore, "where a showing of a meritorious defense is made, the court will ordinarily vacate a default judgment unless there are other circumstances present mitigating against such action." Patterson v. Rockwell Int'l, 665 S.W.2d 96, 100-01 (Tenn. 1984). Obviously, Bowman's

failure to inquire as to the status of the suit, his carelessness in not staying in touch with his attorney, and passive reliance on alleged assurances by Officer are mitigating factors against setting the judgment aside; however, "where there is a reasonable doubt as to whether a [final] judgment should be set aside . . . the court should exercise its discretion in favor of granting the application so as to permit a determination of the cause upon the merits." Keck v. Nationwide Sys., Inc., 499 S.W.2d 266, 267 (Tenn. Ct. App. 1973). Furthermore, denying Bowman an opportunity to present his defenses at trial would cause him extreme hardship due to the $47,205.33 judgment plus Melton's future medical expenses.

Rule 60.02(5) provides relief in cases where there exist extraordinary circumstances and extreme hardship. Duncan v. Duncan, 789 S.W.2d 557 (Tenn. Ct. App. 1980). Accordingly, we hold that the trial court erred in refusing to set aside the "final" order.[4]

Thus, the order of the trial court entered September 26, 2000, is hereby vacated and the matter is remanded to the trial court.

The costs on appeal are taxed equally to the parties.

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Frank G. Clement, Jr., Special Judge

[4]Our opinion should not be read as ignoring the fact that Bowman had failed to comply with discovery and was careless in not keeping in touch with his lawyer and that Bowman failed to take affirmative steps to resolve the conflict. However, Bowman tried to resolve the situation by retaining services of three attorneys. Recognizing Bowman's less than diligent action, we are nevertheless constrained by the basic requirements of due process to afford everyone, even Bowman, an opportunity to defend themselves in court.

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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 equally by the parties, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM