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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-868

PHH MORTGAGE CORPORATION APPELLANT	**Opinion Delivered** APRIL 27, 2011
	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION [NO. CV2009-6116]
V.	HONORABLE JAMES MOODY, JR., JUDGE
LINDA S. YEAGER APPELLEE	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

RAYMOND R. ABRAMSON, Judge

Linda Yeager had two loans, serviced by PHH Mortgage Corporation, which were secured by a mortgage on Yeager's real property located in Little Rock. The first of these loans was for nearly $58,000 and the second loan, a home-equity line of credit, was for just over $63,000. Yeager defaulted on the line of credit, and PHH began foreclosure proceedings against her. PHH ultimately sold Yeager's property for $126,000. Yeager then filed suit against PHH alleging, among other things, a breach of contract. PHH never answered Yeager's complaint, and the circuit court eventually entered a default judgment in favor of Yeager. After a damages hearing, at which PHH was unrepresented, the circuit court awarded Yeager $175,000 in compensatory damages. PHH made an unsuccessful attempt in

the circuit court to set aside the default judgment and now appeals to us. We affirm in part and reverse and remand in part.

PHH first argues that the circuit court erred by refusing to set aside the default judgment pursuant to Arkansas Rule of Civil Procedure 55(c). That rule reads as follows:

> The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

Ark. R. Civ. P. 55(c). We review the circuit court's grant of a default judgment and its subsequent refusal to set aside the default judgment under the abuse-of-discretion standard. *McGraw v. Jones*, 367 Ark. 138, 141, 238 S.W.3d 15, 18 (2006).

PHH argues that its failure to answer Yeager's complaint was due to mistake and excusable neglect. Though default judgments are not favored in the law and may be a harsh and drastic result affecting the substantial rights of a party, "we have declined to set aside default judgments where the neglect or mistake is inexcusable." *Id.* According to PHH, it sent Yeager's complaint to its attorneys at the Memphis, Tennessee, law firm of Shapiro & Kirsch, LLP. The firm later returned the summons and complaint to PHH noting that it did not handle any of PHH's Arkansas litigation. PHH's "non-legal employees," thinking that the Firm's returning the summons and complaint meant that Yeager's property had been sold

and that Yeager's file could therefore be closed, did not then give the returned summons and complaint to their supervisor. Thus, PHH failed to timely answer.

PHH attempts to compare its circumstances to those presented in *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993). In that case, our supreme court upheld the circuit court's decision to set aside its initial entry of default judgment on the basis of excusable neglect. But the circumstances presented in *Hubbard* were much more drastic and relief-worthy when compared to PHH's excuses. In that case, five days before the president of one of the defendant companies was served, he learned that his wife had breast cancer; on the day he was served, the bank called and told him of an overdraft, which led to his discovery that one of his employees was stealing from him; and when the process server handed him the summons and complaint, he saw that the defendant named in the title of the complaint was a different company and did not look below that to see the name of his own company. *Hubbard*, 313 Ark. at 500–01, 855 S.W.2d at 926.

Our supreme court has held in multiple cases that "failure to attend to business is not excusable neglect." *Volunteer Transp., Inc. v. House*, 357 Ark. 95, 102, 162 S.W.3d 456, 460 (2004). A failure to attend to business is exactly what happened here. In short, the circuit court did not abuse its discretion in rejecting PHH's claim that its failure to answer was due to a mistake or excusable neglect.

PHH next argues that the circuit court improperly relied on the alleged appraisal value of Yeager's property in calculating her damages. Thus, according to PHH, the default

judgment should be set aside pursuant to Rule of Civil Procedure 55(c)(4)—the catch-all provision. But this damages issue—whether the damages awarded impermissibly exceeded the scope of relief prayed for in Yeager's complaint—is not a basis to wholly set aside the default judgment under Rule 55(c)(4). *See, e.g.*, *Renault Cent., Inc. v. Int'l Imports of Fayetteville, Inc.*, 266 Ark. 155, 583 S.W.2d 10 (1979); *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974). We therefore see no abuse of discretion here either. And because we are holding that PHH failed to establish one of the grounds in Rule 55(c) for setting aside the default judgment, it does not matter whether PHH has a meritorious defense to Yeager's breach-of-contract action. *McGraw v. Jones*, 367 Ark. 138, 143–44, 238 S.W.3d 15, 19–20 (2006).

PHH attacks the circuit court's damages award from another angle as well, again claiming that the damages awarded exceeded the scope of relief prayed for in Yeager's complaint. Entry of a default judgment establishes the defendant's liability only. *Volunteer Transp.*, 357 Ark. at 103, 162 S.W.3d at 460. A hearing is then required at which the plaintiff must put on evidence to establish her damages. *Id.* at 103, 162 S.W.3d at 461. "A judgment by default must strictly conform to, and be supported by, the allegations of the complaint, and a closer correspondence between the pleading and judgment is required than would be after a contested trial." *Kohlenberger, Inc.*, 256 Ark. at 590, 510 S.W.2d at 560. When the defendant challenges the circuit court's damages award on appeal, we determine whether the

circuit court's findings are clearly erroneous or clearly against the preponderance of the evidence. *McGraw*, 367 Ark. at 146, 238 S.W.3d at 21.

In her petition to set aside the foreclosure sale, Yeager set out the pertinent facts as follows. In fall 2008, Yeager received notice from PHH that her home-equity loan would come due in November 2008. She tried to refinance, but she was denied. In February 2009, PHH filed, with the Pulaski County Clerk, a notice of default indicating its intention to sell Yeager's property at auction on April 27, 2009. PHH postponed the sale, resetting the date for July 30, 2009. In the meantime, Yeager retained the services of Solution Source, which submitted a contract for the sale of Yeager's property in the amount of $135,000. PHH again postponed the auction date, this time until August 28, 2009. Solution Source representatives contacted PHH via email, fax, and telephone in their attempts to finalize the sale of Yeager's property and submitted the sales contract to PHH on August 5, 2009. On August 28, 2009, the morning of the scheduled auction, Solution Source again contacted PHH trying to postpone the sale. PHH contended that it had not received the sales contract, and one of its representatives told Solution Source that if it submitted the contract, then PHH would again postpone the sale. Solution Source resubmitted the contract that day, but PHH proceeded with the auction and ultimately sold Yeager's property for $126,000.

Yeager alleged two breaches of contract. In the first, Yeager contended that she and PHH had an agreement to postpone the August 28, 2009 foreclosure sale. Yeager further stated that PHH's "actions in continuing foreclosure while falsely inducing [her] to believe

the foreclosure sale had been postponed constitutes a breach of their duty of good faith and fair dealing," which is implied in every Arkansas contract. In the second, Yeager alleged that PHH's "failure to approve the contract for the sale of the Property [to Solution Source] constitutes a breach of their duty of good faith and fair dealing."

At the damages hearing, Yeager was the only person to testify, and PHH was unrepresented. Yeager testified that, in her opinion, she could have sold her house for $280,000 if given the time to market it properly. And according to paperwork from the Pulaski County tax assessor, Yeager's home was valued at $283,000. She said that the balance of her mortgage with PHH was around $57,000. Yeager further testified that the only reason she marketed her house as a short sale was because she did not think PHH was going to give her the time to pursue any other alternatives. It was based on this testimony that the circuit court awarded Yeager $175,000 in compensatory damages.

We agree with PHH's argument on this point: the judgment, awarding Yeager $175,000 in compensatory damages, does not strictly conform to, and is not supported by, the allegations of the complaint. *Kohlenberger, Inc.*, 256 Ark. at 590, 510 S.W.2d at 560. The essence of Yeager's complaint was that PHH had thwarted her ability to close on her property-sale contract with Solution Source, that PHH had breached one or more of its agreements with Yeager in the process, and that Yeager had been damaged as a result. What Yeager's house might sell for on the open market under no time constraints is irrelevant. Indeed, Yeager's breach-of-contract claims centered on her inability, at the hands of PHH,

to close on her property-sale contract with Solution Source. Thus, the circuit court's compensatory-damages award of $175,000 was clearly erroneous. We reverse and remand for a new damages hearing. *McGraw*, 367 Ark. at 148, 238 S.W.3d at 22; *Renault*, 266 Ark. at 161, 583 S.W.2d at 13–14; *Kohlenberger*, 256 Ark. at 568, 510 S.W.2d at 602–03.

Affirmed in part; reversed and remanded in part.

WYNNE and BROWN, JJ., agree.