Cite as 2012 Ark. App. 663

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-364

	Opinion Delivered November 14, 2012
SHANNON D. WOODSON APPELLANT	APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT, [NO. DR-09-203-2]
V.	
SANDRA GAIL WOODSON APPELLEE	HONORABLE ADAM HARKEY, JUDGE
	AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Shannon Woodson appeals the denial of his motion to set aside the May 19, 2011 order of the Cleburne County Circuit Court, granting appellee Sandra Woodson all of the stock in a marital business, Makar, Inc., and requiring her to pay appellant $31,839.00 for his interest.[1] A hearing concerning the parties' interest in Makar took place on May 19, 2011. Neither appellant nor his counsel were present at the hearing. Appellant subsequently received and cashed a check from appellee in the amount of appellant's interest in Makar. On August 23, 2011, appellant filed a motion to set aside the order. A hearing on appellant's motion took place on December 12, 2011. The trial court denied appellant's motion in an

[1]Makar, Inc., owned the local H&R Block Franchise and the parties were the sole stock owners of Makar. The parties were divorced by an order entered on April 18, 2011.

order filed on January 20, 2012. Appellant contends that the court erred in denying his motion to set aside the May 19, 2011 order. We find no error and affirm.

The parties were married on September 16, 1988, and lived together as husband and wife until July 2009. In 1998, they formed Makar, Inc., in Cleburne County. On July 21, 2009, appellee filed a complaint for separate maintenance. She amended her complaint to one for divorce on December 4, 2009. In a hearing held on October 27, 2010, appellee presented testimony through Robert McLean, owner of McLean & Associates, that Makar, Inc., had a value of $63,678.00. Appellant disagreed with the value and testified that Makar was worth $350,000.00. The court ultimately concluded that Makar was worth $63,678.00 as testified to by McLean. On January 13, 2011, appellant filed a motion for the sale of Makar or in the alternative, for him to be allowed to keep the business and pay appellee $31,839.00 for her interest in Makar. Appellee filed a response on January 18, 2011, stating that the business should not be sold and asking the court to specifically state the amount to be paid to appellant.

A hearing took place on April 18, 2011. At the conclusion of that hearing, the parties' divorce was filed of record. While at the hearing, the parties notified the court that they had reached an agreement on all of the issues except the division of Makar. The court reserved its ruling and announced that the matter would be taken up on May 19, 2011. On April 18, 2011, appellant's attorney filed a motion to be relieved as counsel and the court granted the motion that same day. The court informed appellant that if he wished to acquire new counsel, he would have to do it before the next hearing. Appellant acknowledged the May 19, 2011 hearing date, and the hearing concluded.

On May 11, 2011, appellant's new attorney faxed an entry of appearance and motion for continuance to the court. The entry stated that a copy of the pleading had been served upon appellee's attorney in Jonesboro, Arkansas. The hearing took place as scheduled on May 19, 2011. Appellee's attorney informed the court that he had been contacted by an attorney from Searcy the prior week, but that the attorney had not entered an appearance. The court noted appellant's absence, and proceeded with the hearing. The court entered an order on May 19, 2011, granting appellee Makar and directing her to pay appellant $31,839.00 for his interest. A cashier's check was mailed to appellant on July 7, 2011; he cashed the check on July 18, 2011.

Appellant's attorney filed a motion to set aside the order on August 23, 2011. In that motion, he stated that the court had entered an order of continuance on May 18, 2011, with the hearing to be set at a later date. Counsel said that it was his good faith belief that the matter had been continued. An order of continuance was filed of record on August 24, 2011, showing a date of May 18, 2011. However, the order only stated that the court had continuing jurisdiction; the language about a new date had been stricken with a pen. Appellee filed a response on August 26, 2011, asking the court to deny the motion because appellant had knowledge of the hearing and there was nothing in the order of continuance to suggest that the matter was to be continued.

A hearing on appellant's motion to set aside the order took place on December 12, 2011. At the hearing, appellant argued that the order should be set aside "in the sake of fairness and justice." Counsel specifically argued that he was unaware that an order had been

entered or that a check had been forwarded to appellant. He stated that he was under the impression that his motion for a continuance had been granted. He also said that due to a clerical error at his office, the motion had been sent to the wrong attorney, not appellee's attorney. The court stated that it would not change its ruling because it based its findings on the proof at trial as it related to the value of the business and who should retain the business. The court denied appellant's motion. The order was entered on January 20, 2012. It stated in pertinent part:

> 4. Prior to the entry of the April 18, 2011 order, the court heard testimony on (a) the fair market value of the corporate stock[,] (b) that the plaintiff operated the business of MAKAR Incorporated[,]©) that the defendant worked in an unrelated business activity[,](d) [t]hat H & R Block was the franchisor of MAKAR, Inc. and (e) that H & R Block had final approval of whether the franchise would continue if the business were operated by a person other than the plaintiff.
>
> 5. Defendant's counsel was permitted by the court to withdraw on April 18, 2011.
>
> . . . .
>
> 7. Due to the withdrawal of defendant's counsel, the hiring of new counsel, and administrative error, notice of the entry of new counsel and a request for continuance was not received by counsel for the plaintiff prior to the scheduled May 19, 2011 hearing. Neither the defendant nor his counsel appeared at the May 19, 2011 hearing.
>
> 8. On May 19, 2011, this court entered an order finding that Sandra Gail Woodson shall receive all the common stock of MAKAR, Inc. and she shall pay Shannon D. Woodson the sum of thirty one thousand eight hundred and thirty nine dollars ($31,839.00) for his interest.
>
> . . . .
>
> 11. A trial court may only modify or set aside its order beyond the ninety (90) day limitation contained in A.R.C.P. 60 if specifically enumerated conditions listed in the rule exist. *Slayton vs. Slayton* 330 Ark. 287, 956 S.W. 2[d]150 (1997). One of the conditions for the granting of relief under Rule 60 is that the party must plead and make a *prima faci[e]* showing of a valid ground for relief.

> 12. In this case, evidence of the fair market value of the corporate stock had been presented in hearings which occurred before May 19, 2011. From the testimony of both parties it is clear that the plaintiff had conducted the business, and the defendant had no role in the operation of the business. Further, the franchisor's consent was necessary for the continuation of the H & R Block franchise, and H & R Block had the right of approval or disapproval of the operator of the franchise. Absent the franchise, the value of the business, and consequently of the stock, would have been substantially reduced. Without regard to any procedural or time issues, these factors preclude the defendant from establishing a *prima faci[e]* meritorious claim for relief.

Appellant filed a timely notice of appeal on February 17, 2012. This appeal followed.

Appellant argues that the court erred by denying his motion to set aside the May 19, 2011 order. He acknowledges that his motion was filed beyond the ninety-day period; however, he contends that he had a valid defense for the order to be set aside: (a) the valuation of the business and (b) which party was entitled to ownership of the stock. According to appellant, the valuation of the business was not fully addressed at the October 27, 2010 hearing. Appellant also questions the method used by the expert at the hearing to arrive at his figure. Additionally, appellant contends that appellee's attorney made a misrepresentation to the court concerning appellant's counsel's entry of appearance.

As an initial matter, appellee argues that appellant has already accepted the benefit of the court's decision and that his appeal should be dismissed. Acceptance of benefits of a decree or judgment which are inconsistent with the relief sought on appeal, and detrimental to the rights of others, bars appeal and requires its dismissal.[2] The acceptance of an amount less than appellant contends is due him is an estoppel against his appeal only when, by seeking

[2] *Wilson v. Fullerton*, 332 Ark. 111, 964 S.W.2d 208 (1998).

to gain more by the appeal, he risks a smaller recovery on reversal.[3] There is nothing in the facts to suggest that appellant's acceptance of the benefit of the court's decision is detrimental to others. Additionally, if this case is reversed, appellant does not risk recovering something smaller than the benefit he secured under the order. Thus, the facts of this case do not require dismissal.

Appellant filed a motion to set aside the order more than ninety days after the order was entered. The only authority the circuit judge has to set aside a judgment after the expiration of ninety days is found in Ark. R. Civ. P. 60(c), which states:

> (c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> > (1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59(b), upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.
> >
> > (2) By a new trial granted in proceedings against defendants constructively summoned, and who did not appear, upon a motion filed within two years after the filing of the judgment with the clerk of the court, or within one year after a certified copy of the judgment has been served upon the defendant, whichever shall be the earlier, upon security for costs being given; provided notice of the filing of said motion has been served upon the adverse party within the time limitations for filing the motion.

[3] *Id.*

> (3) For misprisions of the clerk.
>
> (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.
>
> (5) For erroneous proceedings against an infant or person of unsound mind where the condition of such defendant does not appear in the record, nor the error in the proceedings.
>
> (6) For the death of one of the parties before the judgment in the action.
>
> (7) For errors in a judgment shown by an infant within twelve (12) months after reaching the age of eighteen (18) years, upon a showing of cause.

After showing entitlement to relief under one of these enumerated grounds, a defendant must assert a valid defense to the action in his motion and, upon hearing, make a prima facie showing of such defense.[4] The mere allegation of a meritorious defense is not sufficient.[5] A meritorious defense is evidence, not allegations, sufficient to justify the refusal to grant a directed verdict against the party required to show a meritorious defense.[6] In other words, it is not necessary to prove a defense, but merely to present sufficient evidence of a defense to justify a determination of the issue by a trier of fact.[7] Our question on appeal is whether the trial court abused its discretion by refusing to set aside the judgment.[8]

---

[4]Ark. R. Civ. P. 60(d).

[5]*Jetton v. Fawcett*, 264 Ark. 69, 568 S.W.2d 42 (1978).

[6]*Goston v. Craig*, 34 Ark. App. 23, 805 S.W.2d 92 (1991).

[7]*Farmers Union Mut. Ins. Co. v. Mockbee*, 21 Ark. App. 252, 731 S.W.2d 239 (1987).

[8]*See Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008).

In his motion to set aside the order, appellant's attorney alleged that he and appellant were under the assumption that the case had been continued to a later date, and were unaware that the hearing had taken place on May 19, 2011. Counsel contended that the order awarding Makar to appellee should be set aside for the sake of fairness and justice. The trial court denied appellant's motion to set aside the order because he failed to establish a meritorious defense. Appellant places much reliance on the fact that he and his attorney were unaware that the hearing took place as scheduled on May 19, 2011. However, the burden of diligence is on all parties to stay informed about the status of a case as a matter of Arkansas case law.[9] We hold that appellant failed to establish a meritorious defense, and we cannot say that the trial court abused its discretion in denying relief under Rule 60. Accordingly, we affirm.

On appeal appellant attempts to argue misrepresentation or fraud by the adverse party as his basis for relief from the judgment. However, appellant did not allege misrepresentation or fraud as a defense to his motion to set aside the order to the trial court. Therefore, it is not preserved for our review.

Affirmed.

VAUGHT, C.J., and WYNNE, J., agree.

Worsham Law Firm, P.A., by: *Richard E. Worsham* and *Brooke F. Steen*, for appellant.

Tilley, Thomas & Prince, by: *R. Bryan Tilley*, for appellee.

---

[9] *See Arnold v. Camden News Publ'g Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003) (stating that a lawyer and litigant must exercise reasonable diligence in keeping up with the docket).