9-13-2017

Kirby v. Scotton Appellant's Brief Dckt. 44925

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN S. KIRBY and VICKI L. KIRBY, husband and wife,

Plaintiffs-Respondents,

vs.

MARK SCOTTON and DAWN SCOTTON, husband and wife,

Defendants-Appellants.

Supreme Court No. 44925

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth Judicial District in and for Ada County

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The Honorable Lynn G. Norton, District Judge, Presiding

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STATEMENT OF THE CASE

A. Nature of the Case

This is a dispute over flood irrigation use and drainage between neighboring landowners ("Kirbys" and "Scottons") living in rural Ada County. The gravamen of the dispute is whether Scottons have wrongfully allowed their flood irrigation runoff to escape their property and enter Kirbys' property and, if so, whether such facts are actionable in damages or give rise to equitable relief.

B. Course of Proceedings and Disposition

Kirbys' Complaint against Scottons alleges causes of action for trespass, nuisance, negligence, and injunctive relief. The matter has not been decided on the merits but was disposed of by entry of default. After the trial court denied Scottons' motion to set aside the order of default and struck their Answer, a default judgment was entered. It is from these adverse orders and judgment which the Scottons appeal.

C. Statement of Facts

Counsel for Kirbys first contacted counsel for Scottons regarding this irrigation dispute in May 2016, before the Complaint was filed. R. Vol. I, p. 82. By letter dated May 26, 2016 to Kirbys' counsel, Scottons advised Kirbys that they were represented by counsel, they disputed Kirbys' claims, they also had claims against Kirbys and they believed the matter could be resolved without litigation. *Id.* at pp. 34, 38-39.

On July 13, 2016, counsel for Kirbys and Scottons spoke on the telephone. *Id.* at p. 34, ¶ 3. Scottons' counsel informed Kirbys' attorney that Scottons had taken affirmative steps to resolve Kirbys' concerns and believed the matter was concluded. *Id.* Kirbys' attorney replied that Summons

and Complaint had already been filed, that she was about to leave on vacation but would visit with Kirbys upon her return (to see if the matter had been resolved), would get back to counsel for Scottons with Kirbys' response, would not require an answer at that time, and would not take further action in the litigation without giving Scottons' counsel notice. *Id.* at p. 34, ¶¶ 3-5; p. 57. Copies of Summons and Complaint, along with an acceptance of service, were sent to Scottons' counsel on July 14, 2016. *Id.* at p. 82.

Counsel for Kirbys did not contact counsel for Scottons upon her return from vacation. Instead, she had Scottons personally served with Summons and Complaint on or about August 31, 2016. *Id*. at p. 54. Counsel for Scottons was unaware of that service and had no knowledge that the case had proceeded until after Kirbys applied for an order of default and Kirbys filed and served Scottons with an Application for Default Judgment on or about October 24, 2016. *Id.* at p. 34, ¶ 4.

Counsel for Scottons contacted Kirbys' attorney on October 27, 2016 to inquire why she had not acted as promised but had instead taken default. *Id.* at p. 34 ¶5; p. 57. Kirbys' attorney acknowledged her error and by e-mail that same morning, told the Court to "withdraw our Motion for Entry of Default" against Scottons and that if an Answer were not filed in the near future, Kirbys would "refile their Motion for Default." *Id.* at p. 41.

Again, however, Scottons' attorney did not do as promised. She did not contact Scottons' attorney with an update or response from Kirbys, she did not give notice of intent to take default, and she did not re-file a motion for default or default judgment. Instead, on November 4, 2017 Kirbys' attorney e-mailed the court clerk ex-parte and asked that the Court "move forward on the default judgment." *Id.* at p. 60. The court then entered default on or about November 17, 2016 and set the matter for hearing on damages. Scottons filed an answer on December 1, 2016. In addition to

denying most of the material facts in Kirbys' Complaint, the Answer contains eight separate affirmative defenses, including estoppel, waiver, failure to mitigate damages, release, unclean hands, and a right of offset resulting from Kirbys' "wrongful conduct, including trespass, nuisance, and intentional infliction of emotional distress, caused by [Kirbys'] discharging their firearms in the direction of [Scottons'] home." *Id.* at pp. 21-29.

On or about December 6, 2016, Scottons filed a motion to set aside the default. By order dated February 1, 2017, the trial court denied Scottons' motion, on grounds Scottons did not show "good cause for failing to appear" and did not plead "particularly a meritorious defense." The court then struck Scottons' Answer and subsequently entered a default judgment in favor of Kirbys for the amount of $11,230.73. It is from that order and judgment which Scottons appeal.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Scottons' Motion To Set Aside Default without considering whether the default was willful?

2. Did the district court err in denying Scottons' Motion To Set Aside Default without considering whether setting aside the default would cause substantial prejudice to Kirbys and instead ruled solely on the basis of delay?

3. Did the district court err in concluding that Scottons did not present a meritorious defense when they filed an Answer which enumerated eight separate affirmative defenses and when the district court later declined to award most of the damages sought by Kirbys?

ARGUMENT

The District Court Committed Reversible Error By Failing To Consider Factors And Apply Standards Established By Idaho Appellate Courts.

I.R.C.P. 55(c) governs setting aside the entry of default. Idaho Courts have adopted the standards set by federal courts in interpreting Fed.R.Civ.P. 55. *E.g., McFarland v. Curtis*, 123 Idaho

931, 936, 854 P.2d 274, 279 (Ct. App. 1993) (*citing Traguth v. Zuck,* 710 F.2d 90 (2d Cir.1983)). The decision of a trial court to grant or deny relief under Rule 55(c) is discretionary. *AgStar Fin. Servs., ACA v. Gordon Paving Co.*, Inc., 161 Idaho 817, 819, 391 P.3d 1287, 1289 (2017), *reh'g denied* (Apr. 14, 2017) (citing *McGloon v. Gwynn*, 140 Idaho 727, 729, 100 P.3d 621, 623 (2004)). *See also Keegel v. Key West & Caribbean Trading Co.,* 627 F.2d 372, 373 (D.C.Cir.1980). While such decisions are reviewed for abuse of discretion, "[a]n abuse of discretion need not be glaring to justify reversal." *Id*. at 373–74. Indeed, only "slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order." *Bridoux v. E. Air Lines*, 214 F.2d 207, 210 (D.C. Cir. 1954) *cert. denied,* 348 U.S. 821, 75 S.Ct. 33, 99 L.Ed. 647 (1954) (quoting *Madson v. Petrie Tractor & Equipment Co.*, 77 P.2d 1038, 1040 (Mont. 1938). This narrow scope of discretion stems from "strong policies favoring the resolution of genuine disputes on their merits." *Traguth v. Zuck*, 710 F.2d at 94 (*quoting Jackson v. Beech*, 636 F.2d 831, 835 (D.C.Cir.1980). *See also Jonsson v. Oxborrow*, 141 Idaho 635, 638, 115 P.3d 726, 729 (2005)).

To exercise its discretion properly, the trial court "makes factual findings that are not clearly erroneous, applies correct criteria pursuant to the applicable legal standards to those facts, and makes a logical conclusion, while keeping in mind the policy favoring relief in doubtful cases and resolution on the merits . . . ." *Dorion v. Keane*, 153 Idaho 371, 373–74, 283 P.3d 118, 120–21 (Ct. App. 2012) (holding that the district court abused its discretion by not "giving full regard to the . . . factors [enumerated by Idaho appellate courts] and the general policy favoring a decision on the merits").

The standard for setting aside a default is found in I.R.C.P. 55(c): "The court may set aside an entry of default for good cause . . . ." This "good cause" showing under Rule 55(c) is "lower or

more lenient than that required to set aside a default judgment" under Rule 60(b). *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 2681–2702 (1983)). Idaho courts have adopted the standard set by federal courts when interpreting Fed. R. Civ. P. 55. *E.g., McFarland v. Curtis,* 123 Idaho at 936, 854 P.2d at 279 (Ct. App. 1993) (*citing Traguth v. Zuck,* 710 F.2d 90 (2d Cir.1983)).

Under that standard, the trial court is to consider the following factors: "whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented." *Id. See also Dorion v. Keane*, 153 Idaho at 374, 283 P.3d at 121. It is reversible error for the trial court to consider and apply the Rule 55(c) standard for setting aside the entry of a default. *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981).

Another factor which can be considered is the adequacy or lack of notice to the defendant. *E.g., Johnson v. State*, 112 Idaho 1112, 739 P.2d 411 (Ct. App. 1987) (affirming a district court's denial of an application for default where there is a question over the adequacy of notice and "the net result" of the parties' communication — or lack thereof — "was confusion over the pendency of th[e] proceedings").

1. Scottons are not guilty of a willful default and the trial court erred in not considering that factor.

In the context of Rule 55, a willful default is one that is "more than merely negligent or careless." *SEC v. McNulty,* 137 F.3d 732, 738 (2d Cir.1998). Where a defendant completely ignores a complaint without any action, a default is deemed willful. *E.g.*, *United Bank of Kuwait PLC v. Enventure Energy Enhanced Oil Recovery Assocs.—Charco Redondo Butane,* 755 F.Supp. 1195, 1205 (S . D.N.Y.1989). However, "mere tardiness in meeting a court deadline does not establish a

willful default." *Gov't Emps. Ins. Co. v. Right Solution Med. Supply, Inc.,* No. 12 Civ 0908, 2012 WL 6617422, at *3 (E.D.N.Y. Dec. 19, 2012).

A party's default is not willful where he obtains counsel and moves to set aside a default shortly after default is entered without his knowledge. *E.g.*, *AIP Asset Mgmt. Inc. v. Ascension Tech. Grp. Ltd.*, No. 16 CIV. 9181 (LLS), 2017 WL 448963, at *1 (S.D.N.Y. Jan. 19, 2017) (where Defendants moved to set aside default a week or so after it was entered, "It is hard to see how defendants' conduct demonstrates such willful conduct or prejudice to the plaintiff that its motion to set aside the Clerk's Certificate of Default should be denied"). A party's default is not willful where "there is no basis to believe that he was deliberately avoiding appearing before the Court." *Moreno-Godoy v. Gallet Dreyer & Berkey, LLP*, No. 14 CIV. 7082 PAE, 2015 WL 5737565, at *9 (S.D.N.Y. Sept. 30, 2015).

Here, the Scottons' default was not willful. They obtained counsel to represent them in this action and their counsel contacted Kirby's attorney on multiple occasions, both before and after the Complaint was filed, in an attempt to resolve the matter. Scottons waited for responses from Kirbys' attorney which never came. They filed an answer shortly after they became aware that default had been entered. The default was due to miscommunication between counsel, not a deliberate attempt to avoid appearing in court. Given the conflicting affidavits of counsel in the record, there is at least a question of fact on this issue, which question must be resolved in Scottons' favor. *E.g., Haywood v. City of New York*, No. 12 CIV. 6566 PAC KNF, 2014 WL 241078, at *2 (S.D.N.Y. Jan. 21, 2014) ("Even if there were a doubt, any such doubt is to be resolved in Defendant's favor") (citing *Traguth v. Zuck*).

The trial court did not consider willfulness in denying Scottons' motion. Rather, it ruled that

Scottons' mere tardiness created a lack of good cause to set aside the default. Because the trial court did not consider the issue of willfulness, because its decision was based upon the tardiness of Scottons' Answer, and because the trial court did not resolve questions of fact in Scottons' favor, it abused its discretion and committed reversible error in denying Scottons' motion.

2. Kirbys would not be prejudiced by setting aside the default. The trial court erred in not factoring the issue of prejudice into its decision.

In the context of Rule 55, prejudice refers to delay that will "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure Civil,* § 2693 at 477–93 (1983)). Although some delay is inevitable when granting a motion to vacate a default, "delay alone is not a sufficient basis for establishing prejudice." *New York v. Green,* 420 F.3d 99, 110 (2d Cir.2005). See also *Dorion v. Keane*, in which the Supreme Court of Idaho held that mere delay does not constitute prejudice and suggested the burden of showing prejudice rests with the nonmoving party:

> ***Dorion*** has not articulated any harm beyond the ordinary expenses of continued litigation. As explained by the Ninth Circuit Court of Appeals:
>
> > It should be obvious why merely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment. For had there been no default, the plaintiff would of course have had to litigate the merits of the case, incurring the costs of doing so. A default judgment gives the plaintiff something of a windfall by sparing her from litigating the merits of her claim because of her opponent's failure to respond; vacating the default judgment merely restores the parties to an even footing in the litigation.

The Keanes filed a motion to set aside the entry of default

> approximately one week after default was entered. ***Dorion*** has not demonstrated any prejudice caused by this short delay.

153 Idaho at 375, 283 P.3d at 122 (citing *TCI Group Life Ins. Plan v. Knoebber,* 244 F.3d 691, 701 (9th Cir.2001) (emphasis supplied).

Here, the trial court did not consider the issue of prejudice and Kirbys did not demonstrate any harm caused by a short delay in the filing of Scottons' answer. As in *Dorion v. Keane,* the trial court here committed reversible error by failing to consider this factor in denying Scottons' motion.

3. Scottons pleaded meritorious defenses. The trial court committed reversible error in not considering them.

The meritorious defense requirement is a pleading requirement, not a burden of proof. *E.g.*, *Reinwald v. Eveland,* 119 Idaho 111, 114, 803 P.2d 1017, 1020 (Ct.App.1991) (rejecting an argument that defendant failed to tender a meritorious defense when the defendant's "answer to the complaint already was on file, it contained her defenses and it had not been stricken."). Accordingly, a party moving to set aside a default judgment is not required to present evidence in order to have the default (or a default judgment) set aside. *Cuevas v. Barraza,* 146 Idaho 511, 518, 198 P.3d 740, 747 (Ct.App.2008). Where the defaulted party presents "plausible defenses, which, if established, would have entitled them to various forms of relief," they are sufficient to the meritorious defense requirement. *Dorion v. Keane*, 153 Idaho at 374–75, 283 P.3d at 121–22.

Indeed, it is not even necessary that the defaulting party file an Answer before default is set aside. *See, e.g., AIP Asset Mgmt. Inc. v. Ascension Tech. Grp. Ltd.*, 2017 WL 448963, at *1 (allowing the defendants thirty days from the date of the order setting aside default to answer or otherwise respond to the complaint). In any event, the defendant need only meet a "low threshold" in presenting a meritorious defense. *Holford USA Ltd., Inc. v. Harvey*, 169 F.R.D. 41, 44 (S.D.N.Y.

1996) (where "Defendants deny all material allegations and stand ready to assert several affirmative defenses, they satisfy the low threshold necessary to establish a meritorious defense") (*citing Meehan v. Snow*, 652 F.2d at 276); *Moldwood Corp. v. Stutts*, 410 F.2d 351, 352 (5th Cir. 1969) (noting that the Court of Appeals "would be quickly persuaded to give Stutts relief if . . . he had given the District Court ***even a hint of a suggestion*** that he had a meritorious defense") (emphasis supplied). *See also Rooks v. Am. Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (reversing an order of default and default judgment):

> The answer denies that defendant is indebted to plaintiff in the amount of $60,000, or in any sum of money whatsoever. The answer includes various affirmative defenses, one of which is that defendant was induced to sign the guaranty by fraudulent representations of plaintiff. ***If any one of these defenses states a defense good at law, then a meritorious defense was presented in answer***.

Id. (emphasis supplied).

The trial court did not apply the Rule 55(c) standard to Scottons. Instead, it disposed of the Answer in one sentence: "The Answer is more of a general denial and does not plead with particularity and detail the defenses." *Id.* at 2. Respectfully, here again the trial court erred. In addition to denying most of the material averments in the Complaint, Scottons asserted eight affirmative defenses. Scottons asserted, for example, that Kirbys caused their own damages and failed to mitigate. Scottons also asserted a right of offset and pleaded specific facts in support of that right. R. Vol. I, pp. 22-23.

Curiously, the court later denied approximately 80 percent of the damages sought by Kirbys in default judgment affidavit. See R. Vol. I, pp. 52, 70-72. In other words, even without considering Scottons' Answer, it is clear Scottons actually had meritorious defenses to much of the Kirbys'

damage claims. Regardless, Scottons stated defenses in their Answer which are good at law. The trial court committed reversible error by not applying the correct standard and determining that Scottons did not present a meritorious defense.

CONCLUSION

The trial court committed reversible by not applying or misapplying the standards established by Idaho appellate courts and federal courts for setting aside a default under Rule 55(c). Accordingly, Scottons ask the Court to reverse the district court's entry of default and default judgment and to remand the case to be litigated on the merits.

Respectfully submitted this 13th day of September 2017.

PERRY LAW, P.C.

By: Trevor L. Hart - Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of September 2017, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

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Trevor L. Hart