ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

FEB 17 2023

JOHN D. HADDEN
CLERK

C. CRAIG COLE & ASSOCIATES,

Plaintiff/Appellee,

vs.

W.C.I., L.L.C., a Limited Liability Company,

Defendant/Appellant,

and

Ali Mehdipour

Defendant.

Case No. 119,802

Rec'd (date) 2-17-23
Posted
Mailed
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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CINDY H. TRUONG, TRIAL JUDGE

AFFIRMED

C. Craig Cole
C. CRAIG COLE
Oklahoma City, Oklahoma — For Plaintiff/Appellee

Barry Benefield
Oklahoma City, Oklahoma — For Defendant/Appellant

OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

WCI, LLC, appeals a judgment of the district court finding it in default and imposing liability for a sum certain debt when it failed to obtain counsel after the court ordered it to do so. On review, we affirm the judgment of the district court.

BACKGROUND

In January 2019, Plaintiff C. Craig Cole & Associates (Cole) filed a petition alleging that it had been hired as counsel by appellant WCI and/or Ali Mehdipour in March 2018 and had provided representation until December 2018, when the defendants failed to pay an outstanding bill of $17,895.15. Faramaz Mehdipour, a principal of WCI and Ali's brother, filed a *pro se* answer on behalf of WCI, listing his address at the Department of Corrections facility in Helena, Oklahoma, where he was imprisoned. Faramaz alleged a lack of contract and fraud by Cole. He sought $1,000,000 in counterclaim damages for legal "malfeasance," stating that WCI would likely lose the case for which Cole was hired and that Cole had charged for work that was not requested or required. The answer also contained an affidavit from Ali denying that he had any decision-making authority at WCI or authority to enter into any contract on behalf of WCI, and also denying any personal contract. Ali also filed his own *pro se* answer raising similar arguments and filed a motion to recuse Judge Truong.

Cole moved to strike WCI's response on the grounds that Faramaz was a non-attorney attempting to represent a corporation and requested an order requiring Ali to state the grounds of his claims for fraud with particularity. It also moved to strike all the attached affidavits as improperly executed. In June 2019, a new answer was filed on behalf of WCI by attorney Myong Chung. The new answer was essentially the same as the original and maintained the counterclaim for $1,000,000.

In July 2019, Judge Truong declined to recuse. Ali filed a motion to reconsider this decision. In August 2019, Chief Judge Stallings entered an order denying the recusal of Judge Truong. Cole could not obtain the participation of the defendants in making a journal entry of these recusal decisions. The docket sheet shows that on September 20, 2019, Ali objected to any journal entry on the grounds that he and Faramaz had filed a civil suit, Oklahoma County Case CJ-2019-4250, against Judge Truong and Cole over their handling of the case.[1] In February 2020, Ali filed a third motion to recuse Judge Truong, and in March he filed a motion objecting to further proceedings in this case because the brothers' suit against the court, CJ-2019-4250, had not yet been resolved.

Neither defendant appeared at the August 10, 2020, conference to set a scheduling order. The court set pretrial for November 13, 2020. A series of discovery disputes followed. The pretrial conference was held and the docket entry for this conference notes "all parties present." However, although WCI's counsel was present and signed the pretrial order, WCI did not make any submissions to the pretrial order, but left its sections blank. Ali Mehdipour, even if present at some time, did not make any submissions to his portions of the order or sign it.

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[1] The docket sheet for Faramaz and Ali Mehdipor's first suit against the court, No. CJ-2019-4250, indicates that it was dismissed in October 2019. Eight days before trial was scheduled, the brothers filed a second suit in Oklahoma County, No. CJ-2021-1569, alleging a wide variety of due process violations by the court and by Cole, and apparently asking another court in the same district to grant summary judgment to Ali Mehdipor (and hence to WCI) on the grounds that no contract existed or that Ali was incompetent, even though this argument had been previously rejected by Judge Truong on numerous occasions. Case No. CJ-2021-1569 was finally dismissed in August 2021.

In December 2020, the court granted Cole's request for attorney's fees and costs against WCI and Ali Mehdipour for failure to attend noticed depositions. In January 2021, WCI moved to vacate the award of discovery sanctions arguing that service of the motion for sanctions was defective. Ali Mehdipour also filed a motion alleging improper service and raising a new argument that he was not capable of contracting on his or WCI's behalf because he was a "mentally disabled person." He attached a doctor's letter stating that he suffered from post-traumatic stress and bipolar disorder. In April, the court vacated the discovery sanctions, but left the fee order intact.

The docket sheet shows that, on April 5, 2021, WCI filed a motion to dismiss, again arguing that Ali Mehdipour had no authority to contract on behalf of WCI and echoing his claim that he was incompetent to contract in general. On April 6, Ali filed a motion to delay trial on the grounds that he was incompetent and needed time to find counsel.

On April 12, the day set for trial, counsel Chung filed a motion to withdraw, stating that communications had broken down between her and WCI to the point where she could not provide effective representation.[2] A subsequent journal entry dated April 19 notes that Ali appeared on the day of trial, without counsel, and announced that he could not proceed because he was not mentally competent to represent himself. The journal entry found that Ali had served

[2] The April 19 journal entry memorializing withdrawal notes that Faramaz's behavior in filing suit against the court and attempting to raise case issues with another judge, without Ms. Chung's knowledge, substantially prevented and impaired her further representation of WCI. We take judicial notice that this second suit against the court, Oklahoma County Case CJ-2021-1569, was dismissed on August 9, 2021.

neither preliminary nor final witness and exhibit lists and had failed to participate in the pretrial conference held November 13, 2020. The court granted default judgment on Cole's claim against Ali Mehdipour for $17,895.15, together with additional attorney fees, costs and interest accrued and accruing, to be determined by a subsequent order. The court also entered judgment in favor of Cole on Ali's counterclaim. Ali never appealed this judgment.

In the same journal entry, the court memorialized its prior oral grant of Ms. Chung's motion to withdraw as WCI's counsel and continued the trial between Cole and WCI until December 6, 2021. It further stated that, as a matter of law, WCI was an artificial person that could not proceed to trial without being represented by an attorney. WCI was ordered to obtain a licensed attorney "who shall appear herein within thirty days of the entry of this order." R. 830. The order continued: "In the event Defendant W.C.I., L.L.C. fails to timely comply with this order to obtain substitute counsel, upon written application, judgment shall be entered against Defendant W.C.I., L.L.C. on all claims and counterclaims." *Id.* The court specifically required that this journal entry, alongside other current pleadings, be served on Faramaz Mehdipour as corporate representative at the correctional facility, rather than on WCI's registered agent (the allegedly incompetent Ali), so there would be no question of notice.

Two months later, WCI had not made an appearance through counsel. At that time, Cole filed a motion for default noting that the April 19 journal entry had specifically ordered WCI to a make an appearance within 30 days and had stated that judgment would be entered against WCI on motion if it failed to do

so. In response, Faramaz filed a *pro se* motion to strike Cole's motion, arguing again that no contract existed between WCI and Cole. Faramaz then filed a *pro se* motion to strike the hearing on the motion, arguing that he could represent WCI *pro se* because WCI was an LLC, not a "corporation," and arguing again that no contract existed.

On July 19, 2021, the court held hearing on the motion for default. No counsel appeared for WCI, and the court subsequently entered a journal entry that listed the fractured litigation history of the case and examples of WCI's litigation conduct. The court granted default judgment against WCI for $17,895.15 together with additional attorney fees, costs and interest accrued, to be determined in subsequent proceedings.

The appellate history of the case is no less fraught. In August 2021 Faramaz Mehdipour filed a petition in error on behalf of WCI. Cole moved to strike on the ground that Faramaz could not file pleadings *pro se* on behalf of a corporation. A few days later new counsel for WCI, Barry Benefield, appeared and filed an amended petition in error on behalf of WCI. Although this petition specifically stated that Ali Mehdipor was not an appellant, Cole moved to dismiss for a second time on the grounds that Ali was improperly identified in the caption as a party to the appeal.

WCI filed a third petition specifically characterizing Ali as a "defendant" in the caption. Cole then filed a third motion to dismiss for failure to complete the record within 180 days. The Supreme Court denied all these motions.[3]

STANDARD OF REVIEW

This appeal arises from a judgment made as a sanction pursuant to District Court Rule 5(J). A trial court's ruling on a request for sanctions will not be disturbed absent a demonstrated abuse of discretion. *Payne v. DeWitt,* 1999 OK 93, ¶ 18, 995 P.2d 1088. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Fent v. Oklahoma Nat. Gas Co.*, 2001 OK 35, ¶ 12, 27 P.3d 477, 481.

ANALYSIS

WCI raises the following issues in its initial brief: whether the trial court's decision to enter default judgment was "an inappropriate sanction and a draconian penalty"; whether the trial court erred in failing to make explicit findings of facts and conclusions of law; whether default judgment against WCI provides for an impermissible double recovery; and, whether the court below

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[3] This appeal was not assigned to this Court until August 2022, a year after it was first filed. On August 23, 2022, WCI filed a fourth petition in error, which sought to add to this appeal the trial court's order granting Cole's request for attorney's fees. Per Supreme Court Rule 1.26(d), the new petition in error was ordered to be redocketed as a new case upon WCI's payment of costs. Costs were paid and that appeal is pending as Case No. 120,654, which was made a companion to this appeal by subsequent Supreme Court order.

erred in granting default judgment "because the so-called 'engagement letter' is not a valid contract." *Brief-in-chief, Index* (capitalization modified).[4]

The Basis for and Permissibility of the Default

To review the court's decision, we must first establish what statutory or common-law powers the court relied on for the imposition of a default judgment against WCI. The district court's journal entry of April 19 cites 12 O.S § 2005.2 "and other law" as a basis for its order that "judgment shall be entered" if WCI failed to timely obtain counsel. Cole's motion for default, however, cites district court Rule 5(J) as the basis for default. The court's subsequent journal entry of judgment filed on July 19 does not mention § 2005.2 but cites Rule 5(J) as authority for dismissal.

Case law is not clear whether § 2005.2(C) provides a sufficient independent basis for dismissal. The section provides:

> The order allowing withdrawal shall notify the unrepresented party that an entry of appearance must be filed either by the party pro se or by substitute counsel within thirty (30) days from the date of the order permitting the withdrawal and that a failure of the party to prosecute or defend the case may result in dismissal of the case without prejudice or a default judgment against the party.

12 O.S. § 2005.2(C).

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[4] Additionally, WCI raised several questions in its petitions in error but did not brief them. These include: that the court erred (1) in refusing to recuse on the grounds of bias; (2) by not allowing the president of WCI to appear pro se on behalf of a "single member limited liability company" because it is treated as a "disregarded entity by the Internal Revenue Service" and is "basically a sole proprietorship"; (3) in granting default judgment without considering WCI's counterclaim, and (4) in granting WCI's default judgment without service upon WCI. Issues not briefed "may be deemed waived." Supreme Court Rule 1.11(k)(1). We consider each of these arguments waived and will not address them further.

It is not clear whether § 2005.2(C) states that a failure to make an entry of appearance within the statutory time, standing alone, constitutes a "failure to defend the case" that may result in dismissal or default, or whether additional dilatory conduct is required. We find no example in published or unpublished case law of a dismissal under § 2005.2(C) and find no authority on the question of whether a failure to appear within thirty days after withdrawal of counsel, standing alone, is a viable statutory basis for default.

We need not decide this question here, however, because the court also relied on a clear rule that allows an order of default under these circumstances. The district court's journal entry of July 19 cites District Court Rule 5(J) as a basis for default. That rule provides:

> Default. Failure to prepare and file a scheduling order or pretrial order, failure to appear at a conference, appearance at a conference substantially unprepared, or failure to participate in good faith may result in any of the following sanctions:
>
> * * *
>
> 4. default judgment ....

The trial court would not have been wrong had it found that WCI had failed to prepare and file a scheduling order or pretrial order or failed to appear substantially prepared at a conference or participate in good faith. Although Ms. Chung did appear at the pre-trial conference, she made no submissions whatsoever to the order even though WCI had pled both defenses and $1,000,000 in counterclaims. WCI both appeared at pretrial "substantially unprepared" and "fail[ed] to participate in good faith." Thus, an order or default could have been

entered at pretrial. We cannot find the trial court abused its discretion in permitting WCI *more* time to avoid default than the relevant rule permits.

WCI also argues that, prior to ordering default, *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12, requires a court to make explicit findings on several factors identified in paragraph eight of *Payne v. Dewitt*, 1999 OK 93, 995 P.2d 1088. *Barnett* and *Payne* both concern factors a district court must consider prior to imposing discovery sanctions. We find no case applying these specific factors outside the context of statutory discovery sanctions pursuant to 12 O.S. § 3237. We decline the invitation to expand this rule or to reverse based on lack of "mandatory written findings."[5,6]

WCI next argues that the "ultimate sanction" of default cannot be imposed absent bad faith by the involved litigant. Even assuming (without accepting) that

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[5] Even assuming that a case involving discovery sanctions has any relevance here, we do not read *Barnett* as mandating any explicit findings within a sanctions order. While ¶ 24 of the case does reference "necessary findings," it does so in the context of a trial court that had denied discovery sanctions because the court erroneously believed the statute allowed sanctions *only* in cases where the improper conduct was willful. Thus, the trial court had not considered the question of whether, absent a finding of willfulness, sanctions were appropriate under other relevant factors. We view the Supreme Court's remand in *Barnett* as mandating this inquiry, not any particular magic words in the order itself. Other cases have held that a court must specifically find a litigant engaged in bad faith or oppressive conduct when imposing sanctions on the basis of the court's inherent equitable authority. *See, e.g.*, *Walker v. Ferguson*, 2004 OK 81, 102 P.3d 144. However, the court here did not rely on its inherent authority but upon Rule 5(J), and thus, this line of authority (to which WCI does not cite) is inapplicable.

[6] WCI also references 12 O.S. § 611 in this section of its brief. The statute states: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, *unless one of the parties request it*, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state, in writing, the findings of fact found, separately from the conclusions of law." 12 O.S. § 611 (emphasis supplied). The brief, however, does not indicate in the record precisely *where* WCI requested specific findings of fact and conclusions of law. This implication of error is rejected.

the clear and evidently intentional failure to participate in the pretrial conference proceedings and scheduling order does not demonstrate bad faith sufficient to justify dismissal as a sanction, the record is clear that WCI repeatedly tested and crossed the boundaries of good faith.

The record generally demonstrates that, in almost nineteen months of litigation, WCI participated in this case only when participation might help it to avoid or postpone liability. It attempted to delay the resolution of the case not only by non-participation but also by filing serial motions for recusal and unsupported suits against the court and the opposing party that were subsequently dismissed on 12 O.S. § 2012(b) grounds. It filed a $1,000,000 counterclaim but took no action on it. It filed no witness or exhibit lists and was evidently not ready for trial when Faramaz Mehdipour joined a meritless *pro se* suit against the trial court, forcing his counsel to withdraw on the eve of trial. WCI then failed to obtain new counsel when ordered to do so. This was the conclusion of a pattern of acts that could be considered as abusive litigation practices or abuse of judicial process sufficient to show bad faith. The court had already sanctioned WCI for its refusal to cooperate in discovery. It is difficult to see that any other sanction remained. As such, we find the district court acted within its discretion in defaulting WCI here.

Double Recovery

WCI's next argues that the court's award of $17,895.15 against both WCI and Ali Mehdipour constitutes an impermissible "double recovery." The notice-pleading standard that allows several defendants to be named when seeking the

same recovery does not authorize double recovery for the same cause of action. *Farley v. City of Claremore*, 2020 OK 30, n. 51, 465 P.3d 1213, 1226. The total judgment here is $17,895.15, plus fees, costs, and interest and Cole can collect no more. Cole acknowledges as much in its answer brief. *Answer Brief*, pg. 26.

The Existence of a Contract

WCI finally attempts to argue the merits of its case, returning to its trial court arguments that Ali Mehdipour was incompetent at the time of contracting and had no actual or apparent authority to contract on behalf of WCI. These questions are not before us on appeal. Nor does the question of whether a defendant could have mounted a *prima facie* defense appear relevant to imposition of default as a sanction, as opposed to a default for failure to answer, even under *Payne.* The same is true of WCI's counterclaim, which it made no attempt to pursue after it was filed.

WCI is correct that "[t]rial courts should also consider whether the defaulting party had a valid defense when vacating a default judgment." *St. John Med. Ctr. v. Brown*, 2005 OK CIV APP 101, ¶ 10, 125 P.3d 700, 702 (*citing Burroughs v. Bob Martin Corp.*, 1975 OK 80, ¶ 15, 536 P.2d 339, 341). This rule, however, involves default judgments for failure to answer where there would be little point in vacating the default unless the defendant can raise a colorable defense. In defaults that occur when a case is substantially into litigation, however, we find no indication that the possibility of a viable defense, or a counterclaim, prevents default as a sanction. Indeed, default as sanction would appear to be a practical impossibility under such a rule.

CONCLUSION

For the reasons set forth above, we find that the court was within its discretion to order the default judgment appealed.[7]

AFFIRMED.

HIXON, J. (sitting by designation), concurs, and FISCHER, J., concurs in part and dissents in part.

FISCHER, J., concurring in part, dissenting in part:

I agree with the Majority that the judgment in favor of the Law Firm on its claim for breach of contract and on Defendant's counterclaim entered on the basis of WCI, LLC's default pursuant to Rule 5(J) of the Rules for the District Courts of Oklahoma should be affirmed. As a matter of law, the district court correctly determined that WCI's conduct during the litigation warranted entry of a default judgment, and that Rule 5(J) authorized that sanction.

However, "a default admits the right to recovery, but not the amount of damages." *Payne v. DeWitt*, 1999 OK 93, n.19, 995 P.2d 1088. This is a breach

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[7] The partial dissent would vacate the judgment and remand to the district court for an evidentiary hearing to determine the proper quantum of damages. Even presuming that WCI held a right to such a hearing at one time, it did not press for such a hearing below, does not complain about the lack of such a hearing on appeal, and the error alleged by the partial dissent does not concern the jurisdiction of the court below. While the entry of judgment awarding nonliquidated damages without evidence has been held to be beyond the power trial court, *see, e.g. Graves v. Walters*, 1975 OK CIV APP 20, ¶ 2, 534 P.2d 702, 704, such cases concern a default entered for failure to answer, not a sanction default, as we have here. We find no cases supporting the proposition that a trial court's failure to hold an evidentiary hearing to determine the amount of damages to award as a sanction is a matter implicating the trial court's jurisdiction. Thus, we find no occasion to raise, *sua sponte*, the allegation of error on which the dissent would vacate the judgment and remand the case. *See Reyes v. Reyes*, 2000 OK 72, n. 2, 12 P.3d 470, 472 ("Issues not raised on appeal are deemed waived.").

of contract action. In an unverified petition, the Law Firm alleged that WCI had failed to remit payment pursuant to the terms of an engagement letter in the amount of $17,895.15, "together with additional attorney fees, costs and interest accrued and accruing." Consequently, the "assessment of damages, [was] necessary to enable the court to pronounce judgment . . . after a decision of an issue of law." 12 O.S. § 688. In such cases, "a defaulting party has a statutory right to a hearing on the extent of unliquidated damages." *Payne*, 1999 OK 93, ¶ 12 (original emphasis omitted)(footnotes omitted).[8]

Further, it is clear that WCI has asserted in this appeal that the "trial court committed error in granting default judgment against Appellant in the amount of $17,895.15." The specific reason offered in support of this asserted error is that the amount duplicates the judgment previously entered against an individual on the Law Firm's same breach of contract claim. The Majority declines to address the evidentiary hearing issue because that was not a reason WCI sought to have the amount of the judgment reversed. In my view, the requirement for an evidentiary hearing to determine the amount of damages awarded the Law Firm cannot be ignored. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced

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[8] *Payne v. DeWitt* involved a default judgment entered as a discovery sanction pursuant to 12 O.S. § 3237. However, the Court's holding that an evidentiary hearing is required to determine the amount of unliquidated damages after entry of a default judgment is not limited to defaults imposed as a discovery sanctions. *Payne v. Dewitt*, 1999 OK 93, n.19 (citing cases in which default judgment was entered for reasons other than a discovery sanction and supporting the Court's holding that "it is error to render a default judgment upon a petition claiming damages without hearing evidence upon which to assess damages.").

by the parties, but rather retains the independent power to identify and apply the proper construction of the governing law." *Keota Mills & Elevator v. Gamble*, 2010 OK 12, ¶ 19, 243 P.3d 1156 (footnote omitted). "[W]e cannot ignore applicable, controlling law." *Id.* ¶ 9 (footnote omitted). As to the law applicable in this case, "it is error to render a default judgment upon a petition claiming damages without hearing evidence upon which to assess damages." *State ex rel. Oklahoma Bar Ass'n v. Todd*, 1992 OK 81, ¶ 15, 833 P.2d 260.

This is particularly true in my view, where, as in this case, the basis for the claim is unpaid attorney fees allegedly incurred pursuant to a written contract. Even when an attorney fee is charged pursuant to a contract, the reasonableness of the fees must be determined pursuant to the factors established in *State ex rel. Burk v. Oklahoma City*, 1979 OK 115, 598 P.2d 659. *Robert L. Wheeler, Inc. v. Scott*, 1989 OK 106, ¶¶ 5-6, 21, 777 P.2d 394. *Accord In re Adoption of Baby Boy A.*, 2010 OK 39, ¶ 19, 236 P.3d 116.

I would affirm the judgment in favor of the Law Firm on its claim and on WCI's counterclaim. I would reverse the amount of the judgment and remand for an evidentiary hearing to determine the amount of damages the Law Firm can recover.

February 17, 2023