IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00259 COA

W. DEWAYNE GRIFFIN

APPELLANT

v.

FOAMEX, A LIMITED PARTNERSHIP

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: CHICKASAW COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN P. FOX

ATTORNEY FOR APPELLEE:

H. J. DAVIDSON, JR.

NATURE OF THE CASE: CONTRACTS

TRIAL COURT DISPOSITION: ENTRY OF DEFAULT JUDGMENT AGAINST GRIFFIN PERSONALLY

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

This appeal arises from a suit on an open account filed by the Plaintiff, Foamex (Foamex), a Pennsylvania limited partnership, against United Industries, Inc. (United), a Mississippi corporation, and W. DeWayne Griffin (Griffin), individually. The complaint was filed against United and Griffin on November 2, 1993, but no formal answer was made by either Defendant. Foamex applied for an entry of default against both Defendants on May 6, 1994, and a default judgment was granted on June 3, 1994. On December 16, 1994, Griffin and United moved to have the default judgment set aside. The circuit judge denied the motion to set aside default judgment against Griffin and held him personally liable for the debt. The circuit judge, apparently considering the merits of the case held that United was not liable, set aside the default judgment against the corporation, and rendered judgment in its favor. Griffin presents the following issues on appeal:

> I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO VACATE A DEFAULT JUDGMENT OBTAINED WITHOUT THE NOTICE REQUIRED BY MISSISSIPPI RULE OF CIVIL PROCEDURE 55(b), WHEN A PARTY HAS ENTERED AN APPEARANCE IN AN ACTION BUT DELAYED, BY AGREEMENT OF THE PARTIES, TO FORMALLY FILE AN ANSWER.
>
> II. WHETHER THE TRIAL COURT ERRED IN FAILING TO VACATE A DEFAULT JUDGMENT AGAINST A CORPORATE OFFICER WHICH HELD HIM PERSONALLY LIABLE WHEN THE GOODS WERE PURCHASED BY THE CORPORATION AFTER IT HAD BEEN ADMINISTRATIVELY DISSOLVED AND BEFORE THE CORPORATION WAS REINSTATED, BUT THE DEFAULT JUDGMENT AGAINST THE INDIVIDUAL WAS ENTERED AFTER THE CORPORATION HAD BEEN REINSTATED.

Essentially, the issue can be addressed simply as this: Whether the trial judge abused his discretion in failing to set aside the default judgment against Griffin and holding him personally liable for the debt. Foamex did not file a cross appeal on the issue of the trial court's handling of its claim against United, therefore we do not consider the trial court's actions vacating the default judgment against United.

FACTS

During 1991, United purchased $34, 949.77 worth of goods from Foamex. Griffin was the president of United. Unbeknownst to Foamex until after the debt was incurred, United had been administratively dissolved by the Secretary of State on February 16, 1990, for failure to file annual reports. Prior to filing its complaint in November 1993, Foamex sent a letter to United demanding payment on the account. For more than a year after the first letter was sent, counsel for Foamex and Griffin engaged in conversations on the phone, by letter and facsimile in an attempt to eradicate United's debt. The only payments received by Foamex were three $500.00 checks sent in early 1993. Foamex finally filed its complaint against United and Griffin on November 2, 1993. Griffin contacted Foamex's counsel and complained that the suit would seriously jeopardize his line of credit. In a final attempt to cooperate, Foamex's counsel agreed to hold off legal action for sixty days, but no longer.

Six months passed, and Foamex received no response from United or Griffin. At that point, Foamex went ahead with the default proceedings. At no time did United or Griffin file anything of record with the Chickasaw County Circuit Court; they did not retain counsel to represent them and make appearance on their behalf. They did not raise any defenses or protest Foamex's right to proceed. A default judgment in the amount of $46,588.04 was entered against Griffin and United. In response to their motions to set aside the default judgment, the circuit judge affirmed the judgment against Griffin, but granted United relief. The default judgment against United was set aside and found to be invalid and of no force and effect.

> I. WHETHER THE CIRCUIT JUDGE ABUSED HIS DISCRETION IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST GRIFFIN AND HOLDING HIM PERSONALLY LIABLE FOR THE DEBT.

A default judgment may be set aside under Rule 60(b) of the Mississippi Rules of Civil Procedure. Rule 60(b) allows relief from final judgment in the case of mistakes, inadvertence, newly discovered evidence, fraud, or "any other reason justifying relief." M.R.C.P. 60 (b). Case law speaks more specifically to acceptable reasons for setting aside a default judgment:

> In determining whether the trial court has abused its discretion, we consider three factors: "whether the defendant has good cause for default. . . whether the defendant in fact has a colorable defense to the merits of the claim, and . . . the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside."

King v. Sigrest, 641 So. 2d 1158, 1162 (Miss. 1994) (citations omitted) (quoting *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992)).

The circuit judge, venturing into the merits of the case, held Griffin personally liable for the debt owed to Foamex, but absolved United of any responsibility. The circuit judge was misled by outdated statutory and case law and abused his discretion in coming to the conclusion that Griffin should be personally liable for the debt. Foamex contends that Griffin should be personally liable because the debt incurred by United was done so while the corporation was administratively dissolved. The circuit judge concluded that United had no power to order the goods from Foamex during the time it was dissolved.

Foamex and the circuit judge rely on the 1977 case of *Carolina Transformer Co. Inc. v. Anderson*, 341 So. 2d 1327 (Miss. 1977). The supreme court held that "where owner had assumed to act as corporation after corporation was suspended from doing business for failure to file its annual report, owner would be liable for debts arising as a result thereof." *Id.* at 1329. The *Carolina Transformer* court based its decision on section 79-3-285 of the Code:

> All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

Miss. Code Ann. § 79-3-285 (1972). However, the Business Corporations section of the code, in which section 79-3-285 was located, was repealed in 1987. The Business Corporations section was replaced by the Mississippi Business Corporation Act (MBCA) which became effective January 1, 1988. Section 79-3-285 of the Business Corporations section, which imposed individual liability upon officers and directors of a dissolved corporation, was not reproduced in the MBCA. In fact, there is no section in the MBCA replicating the intent of section 79-3-285. The legislature instead chose to limit the liability of the individual and impose greater responsibility on the corporate entity. *Carolina Transformer* relies on no other authority besides section 79-3-285 for its decision to impose personal liability. The supreme court understood that some other states had adopted similar statutes. "The liability *imposed by these statutes* on directors or officers who do not comply therewith is direct and primary and absolute. . . ." *Carolina Transformer*, 341 So. 2d 1327, 1330 (Miss. 1977) (emphasis added) (quoting 19 C.J.S. *Corporations* § 895 (1940)). Without such a statute there is no personal liability.

After a dissolved corporation is reinstated, it is as if the corporation was never dissolved in the first place. This is evidenced by Miss. Code Ann. section 79-4-14.22(c):

> When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

Miss. Code Ann. § 79-4-14.22(c) (Supp. 1995). United was dissolved February 16, 1990, and reinstated May 4, 1994. All actions taken between those dates relate back to February 16, 1990 and become the actions of the corporation, United. *See Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 535 (4th Cir. 1988) (In construing Virginia corporate law, the court stated, "Virginia statutes differ from those dealing with dissolution in a majority of the states. Many states preserve a de facto corporate entity during liquidation or absolve the directors from liability if the corporation is reinstated and ratifies what the directors did during liquidation."). While section 79-4-14.22(c) has not been construed by the supreme court, the statute plainly states that once reinstatement is effective, it is as if dissolution never occurred. The circuit judge stated:

> Therefore I am of the opinion that United had no power to order the goods from Plaintiff. Now the question arises, who is liable?
>
> There is a division of authority. But I am of the opinion the better, if not the majority, makes those officers or directors who know of the dissolution or suspension but continue to operate as a corporation, personally liable.
>
> To hold otherwise would appear to make it possible that no one would be liable for the debt. The Corporation not being in existence and the individual not being liable.

The circuit judge erred in concluding that no one would be liable for the debt. The statute consciously and conspicuously avoids any mention of personal liability and instead clearly makes the

corporation liable for debts incurred during administrative dissolution. It was United, not Griffin personally, that ordered the products from Foamex. Foamex dealt with Griffin as the President and Chief Executive Officer of United, not with Griffin individually. It may appear that Foamex is seeking a windfall by demanding judgment against Griffin personally when Foamex never sought to get a personal guaranty from Griffin during its dealings with United.

We must again examine our three prong standard for determining whether the circuit judge abused his discretion in failing to set aside a default judgment:

1). Good Cause

2). Colorable Defense to the Merits of the Claim

3). Nature and Extent of Prejudice Suffered by the Plaintiff.

King, 641 So. 2d at 1162. As to good cause, Griffin erred in not attending his rights and failing to make an appearance before a default judgment was entered. However, this error is outweighed by the other two factors. In light of the nature of the corporate statute, it is clear that Griffin in fact had a colorable defense to the merits of the claim. Regarding prejudice, Foamex did not demonstrate what, if any, prejudice it would have suffered as a result of procedings on the merits.

In light of our standard of review, the circuit judge abused his discretion in refusing to set aside the default judgment against Griffin. We reverse the judgment and remand the cause for proceedings on the merits. Because Foamex did not perfect a cross appeal, this Court cannot address the issue of United's absolution for the debt. Therefore, on the issue of Griffin's personal liability, we reverse and remand for further proceedings not inconsistent with this opinion.

THE JUDGMENT OF THE CHICKASAW COUNTY CIRCUIT COURT DENYING GRIFFIN'S MOTION TO SET ASIDE DEFAULT JUDGMENT IS REVERSED. THE DECISION OF THE CIRCUIT COURT HOLDING GRIFFIN PERSONALLY LIABLE FOR THE DEBT IS REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.