

IN THE COURT OF APPEALS

7/29/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00182 COA

ALPHA-OMEGA, INC. APPELLANT

v.

STEWART SMITH D/B/A ROFFLER

BARBER & COSMETOLOGY DESIGN

COLLEGES APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. KEITH STARRETT

COURT FROM WHICH APPEALED: PIKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: T. PATRICK WELCH

ATTORNEY FOR APPELLEE: ROBERT W. BRUMFIELD

NATURE OF THE CASE: CIVIL: ACTION ON OPEN ACCOUNT

TRIAL COURT DISPOSITION: DENIAL OF MOTION TO REINSTATE

MANDATE ISSUED: 8/19/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

KING, J., FOR THE COURT: The Circuit Court of Pike County dismissed Alpha-Omega's action against Smith pursuant to Rule 41 of the Mississippi Rules of Civil Procedure, and Alpha-Omega moved to have the action reinstated. After a hearing, the court denied Alpha-Omega's motion to reinstate the action. Aggrieved, Alpha-Omega appeals and contends that it was error for the court to deny reinstatement of the action because the action was mistakenly and improperly dismissed as a stale case. In addition, Alpha-Omega contends that the order of dismissal was void because the case was not eligible for dismissal pursuant to Rule 41. We find no error and affirm the court's judgment.

FACTS

Alpha-Omega sued Smith in the Circuit Court of Pike County seeking payment of \$199,407.55 due upon an open account. The sums due represented commissions due Alpha-Omega for recruiting students to attend various schools of barber and cosmetology operated by Smith. Smith responded to the complaint and denied owing Alpha-Omega. The court suggested that Alpha-Omega prepare and submit to Smith an itemized account of the charges. Alpha-Omega submitted the itemized account to Smith, and on January 21, 1992, Smith responded to the accounting filed by Alpha-Omega.

Despite Smith's filing of the response on January 21, 1992, on December 2, 1992, the clerk prepared and forwarded to the parties' attorneys notices advising the attorneys that the cause would be dismissed pursuant to Rule 41(d)(2) of the Mississippi Rules of Civil Procedure unless action of record was taken within thirty days or an application in writing was filed showing good cause why the case should continue as pending. For reasons unknown, neither attorney responded to the clerk's notice of dismissal, and on January 5, 1993, the court ordered dismissal of the case for want of prosecution.

Almost three years after the court had ordered dismissal of the case, Alpha-Omega filed a motion requesting reinstatement of the case. In the motion, Alpha-Omega argued that the cause should be reinstated because: (1) action of record had occurred within the twelve months preceding the clerk's notice; therefore, the dismissal was a mistake and (2) the case was improperly dismissed because the clerk failed to mail the notice of dismissal and present the case to the court for action within the period designated by Rule 41(d)(2). In addition, Alpha-Omega alleged that it did not become aware of the dismissal until December 12, 1995, during a bar complaint investigation because counsel refused to return calls or reply to correspondence concerning the status of the case.

After a hearing, the court found that the case was dismissed in error; however, reinstatement was

denied because Alpha-Omega had failed to request relief from the judgment within six months pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

ANALYSIS OF THE ISSUES AND DISCUSSION OF LAW

Because the record is clear and there is no dispute that the court's order of dismissal was in error, we need only consider whether the court erred by denying Alpha-Omega's motion to reinstate. The Mississippi Rules of Civil Procedure provide that a party may be relieved of a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation or other misconduct of an adverse party; (2) accident or mistake; (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the judgment. M.R.C.P. 60(b). Motions for relief shall be made within a reasonable time and for reasons (1), (2), and (3) not more than six months after the judgment, order, or proceeding was entered or taken. *Id.*

Without question, the order of dismissal was mistakenly entered. Pursuant to the rule, relief from a judgment entered by mistake must be requested within six months of the judgment. For the purpose of circumventing the six month limitations period, Alpha-Omega argues that the judgment was void because the case was not eligible for dismissal, and the clerk failed to mail the notices of dismissal and present the case to the court for action within the time frame designated by Mississippi Rule of Civil Procedure 41(d)(2). We do not agree.

A judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law. *Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990). Rule 41(d)(2) authorizes courts to dismiss stale cases upon the mailing of notice to the interested parties. Although in error, the court complied with this procedure prior to dismissing the case; therefore, it had jurisdiction over the subject matter and the parties. In addition, because the parties were provided with an opportunity to respond to the clerk's notice of dismissal, we find that the court acted in a manner consistent with due process. Thus, the judgment was not void, but voidable because the case was not eligible for dismissal.

Finally, Alpha-Omega suggests that relief from the judgment should be accorded it pursuant to the rule's sixth provision--any other reason justifying relief from the judgment. In certain circumstances, a party's lack of knowledge regarding a dismissal might justify according the party relief; however, the circumstances in the instant case do not provide such a justification.

In its motion to reinstate the action, Alpha-Omega stated that the statute of limitations had not yet run on the subject matter of its action, but stated that it desired to avoid the expense of filing a subsequent action. Assuming Alpha-Omega was not aware of the dismissal until December 12, 1995, it could have avoided the consequences of today by simply filing another action. The fact that additional expenses might have been incurred by the filing of another action does not justify according Alpha-Omega relief from the judgment. For the reasons aforementioned, we affirm the court's order denying reinstatement of the action.

THE JUDGMENT OF THE CIRCUIT COURT OF PIKE COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.