IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00746 COA

CHOCTAW MAID FARMS, INC.

APPELLANT

v.

BILL H. MURPHY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEPHEN J. CARMODY

ATTORNEY FOR APPELLEE:

CHRISTOPHER A. TABB

NATURE OF THE CASE: BREACH OF CONTRACT

TRIAL COURT DISPOSITION: GRANTED DEFAULT JUDGMENT TO PLAINTIFF

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

COLEMAN, J., FOR THE COURT:

The Rankin County Circuit Court granted a default judgment in the amount of $1,769.60 plus court

costs in the amount of $82.00 to Bill H. Murphy (Murphy) against Choctaw Maid Farms, Inc. (Choctaw Maid). Choctaw Maid moved to quash the service of process, to set aside the county court clerk's entry of default, to vacate the default judgment, and to dismiss the case, all of which the county court denied. Choctaw Maid then appealed the default judgment to the Rankin County Circuit Court. The Rankin County Circuit Court entered its judgment by which it affirmed the default judgment of the Rankin County Circuit Court and awarded Murphy "interest and the 15% statutory damages pursuant to §11-3-23 . . . ." The circuit court assessed all costs to Choctaw Maid. Now Choctaw Maid appeals from the Rankin County Circuit Court judgment. We reverse and remand.

I. Facts

On or about February 28, 1992, Landmark Foods (Landmark), a broker in Texas, contracted with B.E.T., Inc, (BET), a trucking company, to transport chicken leg quarters from Choctaw Maid to Mercede, California. BET transported the chicken leg quarters to California per the contract, but Landmark refused to pay BET. BET assigned its "right, title, and interest to [its] claim against Landmark to Murphy." Murphy as BET's assignee then filed a complaint in the county court against Choctaw Maid -- not Landmark -- for the transportation bill in the amount of $1,769.60 which Landmark had refused to pay. Murphy attached no copy of the contract between BET and Landmark as an exhibit to his complaint; neither did he attach a copy of BET's assignment of its claim to him as an exhibit to his complaint.

II. Litigation

After Murphy filed his complaint against Choctaw Maid on July 23, 1992, he filed a Motion and Affidavit for Entry of Default on August 27, 1992, pursuant to which the county court clerk filed a "Docket of Entry of Default" on the same day. On September 1, 1992, the Rankin County Circuit Court entered a default judgment against Choctaw Maid as we previously noted. On January 19, 1993, Choctaw Maid filed a Motion to Vacate Default Judgment, Motion to Set Aside Entry of Default, and Motion to Dismiss. To that composite motion, Choctaw Maid attached as Exhibit A the affidavit of T. H. Etheridge, in which the affiant swore (1) that he was the president, chief executive officer, and registered agent for service of process of Choctaw Maid; (2) that he "was not personally served with a copy of the Summons and Complaint in this cause of action"; and (3) that he "first became aware of this lawsuit on or about October 2, 1992, when Choctaw Maid's attorneys . . . informed me that a title search of the Rankin County Court records showed a Default Judgment against Choctaw Maid entered in this cause of action." In this same affidavit, Etheridge added that he had met Deputy Sheriff Jimmy Lewis (Lewis had served the summons issued by the clerk in this case) and that Lewis confirmed "that he did not serve the Summons and Complaint pertaining to this matter upon me." The following paragraph then concluded Etheridge's affidavit:

> 7. Choctaw Maid as not a party to the transportation contract between B.E.T. and Land Mark [sic] Foods for which Plaintiff [Murphy] seeks recovery. The contract for which Plaintiff seeks recovery is collection for a shipment that was late in arriving at its destination and subsequently rejected by Land Mark [sic] Foods because part of the shipment had spoiled while being transported by B.E.T.

To that same composite motion, Choctaw Maid attached as Exhibit B the affidavit of Jimmy Lewis, in which the affiant swore that he had been a deputy sheriff of Leake County for two years and that:

> 3. On July 27, 1992, I went to Choctaw Maid Farms, Inc.'s home office in Carthage, Mississippi, and served a copy of the Summons and Complaint in this action. It was my understanding that the person I served was T. H. Etheridge.
>
> 4. I have since had the opportunity to meet Mr. Etheridge and he is not the person I delivered copies of the Summons and Complaint.
>
> 5. I therefore recant my statement in the Sheriff's Return filed with the Summons in this cause of action.

Later, on January 25, 1993, Choctaw Maid filed a separate composite Motion to Quash Service, Motion to Vacate Default Judgment, Motion to Set Aside Entry of Default, and Motion to Dismiss. This separate composite motion also relied on the averments contained in Etheridge's and Lewis' affidavits which were Exhibits A and B to Choctaw Maid's earlier composite motion. In this second composite motion, Choctaw Maid argued:

> 5. Pursuant to Rule 4 of the Mississippi Rule of Civil Procedure, because of the mistaken identity, there has been no actual service of the Summons and Complaint, and thus the default judgment is void and should be vacated pursuant to Rule 60(b). Likewise, pursuant to Rule 55, the entry of default by the clerk of the court should also be set aside.

. . . .

> 7. In support of these motions, Choctaw Maid relies on the pleadings, the affidavits filed with this court (copies of which are attached as Exhibits A and B), and the memorandum brief submitted in conjunction with these motions.

The summons with Deputy Sheriff Jimmy Lewis' return endorsed on it is conspicuously absent from the record. A review of the copy of general docket sheet which Mississippi Rule of Appellate Procedure 10(d)(1)(A) requires to be included in the clerk's papers reveals only that the "Summons to Leake [illegible]" was issued on July 23, 1992, the date that Murphy filed his complaint against Choctaw Maid. Immediately beneath that entry is the following notation: "7-29-92 Per Ser T. H. Etheridge 7-27-92."

On January 22, 1993, the county court judge initiated a hearing on Choctaw Maid's various motions, but apparently because of Murphy's insistence on his right to cross-examine Deputy Sheriff Lewis

about his now nonexistent return, the hearing was continued until February 12, 1993. When the hearing resumed on February 12, Etheridge was apparently in Australia, so the deputy sheriff was the only witness to testify from the stand at the hearing. Before Choctaw Maid's attorney began to question deputy sheriff Lewis, Murphy's attorney moved orally for:

> A motion in limine to prohibit this officer from violating Section 13-3-87 of the Code which says the officer himself shall not be permitted to question the truth of the return of any service of process, and for this witness to testify anything different than the return of the service of process violates state law."

The county court judge denied Murphy's motion in limine, and then Deputy Sheriff Lewis testified. His direct testimony was consistent with his affidavit, which was Exhibit B to Choctaw Maid's motions. On cross-examination, Deputy Lewis elaborated that he served the summons "[a]t Choctaw Maid on Franklin Street in Carthage." He explained that he entered Choctaw Maid's building and asked a lady at the desk to see Mr. Etheridge. The lady told him that Mr. Etheridge was in a meeting and asked him to have a seat. Deputy Lewis testified that he waited for what seemed "like an hour or longer," when

> This guy came out of the door, side door, and he asked me what I had, and I showed him those papers, and he said, "I'll take this. This is me."

Lewis said that he "tore the paper off and left." Lewis testified that he did not ask this man if he was T. H. Etheridge.

The county court judge entered its order dismissing Choctaw Maid's motions to vacate default judgment, to set aside entry of default and motion to dismiss. The county court judge made no findings of fact to support this order. Instead, he merely recited in the order:

> The court having heard testimony from the deputy sheriff who served process, argument of counsel and having considered statutory law and case law, finds [Choctaw Maid's] motions not to be well taken . . . .
>
> IT IS THEREFORE ORDERED AND ADJUDGED that the defendant's motion to vacate default judgment, motion to set aside entry of default and motion to dismiss be and the same are hereby dismissed.

Choctaw Maid appealed the county court's order to the circuit court, and it entered its judgment which affirmed the county court's default judgment for Murphy, awarded Murphy interest and the fifteen percent statutory damages pursuant to Section 11-3-23. Choctaw Maid then appealed to the Mississippi Supreme Court, which assigned this case to this Court.

III. Discussion of Choctaw Maid's Issues

In its brief, the Appellant, Choctaw Maid, presents this Court with these two issues:

> A. The circuit court abused its discretion in not reversing the county court's denial of Choctaw Maid's motion to vacate default judgment/motion to set aside entry of default.
>
> B. The circuit court abused its discretion in not reversing the county court's entry of default judgment because the county court lacked jurisdiction over Choctaw Maid.

A. General Discussion

Rule 55 of the Mississippi Rules of Civil Procedure governs default judgments. Rule 55(c), which allows the court to set aside a default judgment, provides:

> For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

M.R.C.P. 55(c). We previously noted that the summons for Choctaw Maid, on which Deputy Sheriff Lewis would have endorsed his return, was not included in the clerk's papers and that Choctaw Maid had moved the court to set aside the clerk's entry of default pursuant to Rule 55. We note that the record in the case *sub judice* does not support the clerk's entry of default, Murphy's Motion and Affidavit for Entry of Default notwithstanding, because of the omission from the record of the summons with the deputy's return endorsed on it. The only hint of any service of process in this case is the docket entry, "7-29-92 Per Ser T. H. ETHERIDGE 7-27-92." The text of that entry does not indicate whether a summons was served *personally* on T. H. Etheridge or whether it was served on him as Choctaw Maid's agent for the service of process. While we reverse and remand this case to the Rankin County Court for a more compelling reason which we shall adduce later in this opinion, we could rest our reversal and remand of this case on Rule 55(c) since apparently the clerk entered Choctaw Maid's default in the absence of any evidence of the service of process on Choctaw Maid as required by Rule 4(d)(4).

As we earlier noted, Rule 55(c) authorizes the court to set aside a default judgment in accordance with Rule 60(b). In *Guaranty National Insurance Co. v. Pittman*, 501 So. 2d 377, 387-88 (Miss. 1987), the Mississippi Supreme Court confronted the same question that we are considering in this case, whether the trial court erred when it declined to set aside a default judgment. In its opinion, the supreme court wrote:

> [T]he charge on this appeal is that the Circuit Court erred in refusing to set aside the judgment. Here two rules must be considered. Rule 55(c) authorizes the trial court to vacate a judgment entered by default "for good cause shown." Rule 60(b), Miss.R.Civ.P., provides that, within six months of the judgment under consideration, and upon motion

and such terms as are just,

> the court may relieve a party . . . from a final judgment . . . [if] (5) . . . it is no longer equitable that the judgment should have prospective application; [and] (6) any other reason justifying relief from the judgment.

To be sure, default judgments are not favored and trial courts should not be grudging in the granting of orders vacating such judgment where showings within the rules have arguably been made. Yet seldom may it be said that a party seeking relief from a default judgment is entitled to that relief as a matter of right. Rather, an application for vacation of such a judgment is addressed to the sound discretion of the trial court. That discretion must be exercised in accordance with the provisions of Rules 55(c) and 60(b) as well as the supplementary criteria given validity in the decisions of this Court. So measured, the trial court's exercise of its discretion may not be disturbed of right. Rather, an application for vacation of such a judgment is addressed to the sound discretion of the trial court. *Bryant, Inc. v. Walters*, 493 So.2d 933, 936-37 (Miss.1986). That discretion must be exercised in accordance with the provisions of Rules 55(c) and 60(b) as well as the supplementary criteria given validity in the decisions of this Court. So measured, the trial court's exercise of its discretion may be disturbed only where it has been abused.

Id. at 387-88. *Guaranty National Insurance Co.* establishes the maxim that "the trial court's exercise of its discretion [in the matter of whether to set aside a default judgment] may be disturbed only where it has been abused." *Id.* Thus, we now consider whether the county court's denial of Choctaw Maid's motion to set aside the default judgment was an abuse of its discretion. If it was, we must reverse the circuit court's affirmance of the county court's refusal to set the default judgment aside; if it was not, we must affirm the circuit court's affirmance of the county court's decision.

In *King v. King*, 556 So. 2d 716, 718-19 (Miss. 1990), the Mississippi Supreme Court confronted the problem of deciding whether the chancellor had erred when he denied the husband's motion to set aside a default judgment in a divorce case. In its opinion, the supreme court quoted from its earlier opinion in *H & W Transfer & Cartage Service, Inc. v. Griffin*, 511 So. 2d 895, 898 (Miss. 1987), in which it had recited the following three-phased balancing test to assess the merits of a motion under Rule 60(b):

> The factors to be considered are:
>
> > (1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default,
> >
> > (2) whether defendant in fact has a colorable defense to the merits of the claim, and
> >
> > (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default judgment is set aside.

King, 556 So. 2d at 719 (quoting *H & W Transfer*, 511 So. 2d at 898). From its application of these three factors in *King*, the supreme court found that:

> (1) defendant resides in Georgia and required notice to travel to Mississippi, he requested a continuance on September 29, and informed plaintiff he could not be in Mississippi on October 6; (2) his answer asserts a colorable defense to the merits of the claim; (3) at the time of defendant's motion, plaintiff would have suffered no appreciable prejudice had the court recognized its error in setting the trial. In view of these facts, we are of the opinion that the Chancellor below erred in denying defendant's motion under Miss.R.Civ.P. 60(b). The judgment should have been set aside.

Id.

B. Application of the three Rule 60(b) factors to Choctaw Maid's first issue

First, we restate Choctaw Maid's first issue:

> The circuit court abused its discretion in not reversing the county court's denial of Choctaw Maid's motion to vacate default judgment/motion to set aside entry of default.

We now apply these three factors in the balancing test to this first issue to decide whether the county court abused its discretion in denying Choctaw Maid's motion to set aside the default judgment.

1. Whether Choctaw Maid had good cause for default

Choctaw Maid argues that Deputy Sheriff Lewis' affidavit and testimony, which we previously related, demonstrate that there was a sufficient showing of mistake to justify the conclusion that it had good cause for default. The county court made no finding of fact adverse to Choctaw Maid's stance on this issue, so we are not obligated to defer to the county court in our consideration of this issue.

In *Taylor v. F. & C. Contracting Co.*, 362 So. 2d 625, 627 (Miss. 1978), the Mississippi Supreme Court dealt with the question of "whether or not the trial court should have permitted appellants to amend the return to show that it was executed personally on F. & C. Contracting Company, Inc. by delivering a true copy of same to Sue Heard, agent for service of process." The supreme court concluded that the testimony of the deputy sheriff who served the summons on Sue Heard was competent to show that he had served it on her as the agent for the service of process for the appellee, F. & C. Contracting Company, Inc., rather than on her personally. *Id.* Thus, we find that Deputy Sheriff Lewis' testimony that he had not served T. H. Etheridge, but rather another man whose identity remained unknown to him, supports Choctaw Maid's position on this first factor. We

conclude that Choctaw Maid had good cause for default, which was Lewis' failure to serve T. H. Etheridge, its agent for the service of process, with the summons in this case.

2. Whether Choctaw Maid has a colorable defense to the merits of the claim

Choctaw Maid argues that the record in the case *sub judice* clearly shows that it was not a party to the contract on which Murphy filed his complaint and that its only involvement in the contract was to have provided the product which BET, assignor to Murphy, shipped to Landmark. It contends that there is nothing in the pleadings nor in the brief record of the county court's hearing on Choctaw Maid's motions to set aside the default judgment to evidence any responsibility concerning the transportation of the frozen chicken parts to Landmark. Choctaw Maid further argues:

> The most important factor into Rule 60(b) analysis is whether the defaulting party has a colorable defense to the Plaintiff's claims. "This is a factor which should often be sufficient to justify vacation of a judgment entered by default."

Murphy responds to Choctaw Maid's argument on this second factor by asserting that:

> The three prong test cited in King v. King, 556 So. 2d 716, 719 (Miss. 1990) are [sic] simply factors to be considered in granting or denying a Rule 60(b) motion and are to be taken under a showing of good cause. The County Court and the Circuit Court both found that Choctaw Maid Farms, Inc., didn't show good cause sufficient to warrant relief from judgment. Choctaw Maid has not met the three pronged test as set our in King and therefore there was no abuse of discretion by the trial court in denying Choctaw Maid's motion to set aside default.

In *Guaranty National Ins. Co. v. Pittman*, the Mississippi Supreme Court observed the following:

> To be sure, Hardin made a substantial showing at the hearing below that he did in fact have a colorable defense on the merits of Pittman's claim. This is a factor which should often be sufficient to justify vacation of a judgment entered by default. *Bryant, Inc. v. Walters*, 493 So. 2d 933, 937 (Miss.1986); *International Paper Co. v. Basila*, 460 So.2d 1202, 1204 (Miss.1984).

Guaranty National Insurance Company, 501 So. 2d at 388.

Again, we find that Choctaw Maid has carried the day on this second factor. It clearly has a colorable defense to the merits of the Murphy's claim, which is the fact that it was not a party to the contract

on which Murphy filed his complaint. Indeed, other than what we quoted from Murphy's brief, Murphy offers neither argument nor citation of authority that Choctaw Maid was a party to the contract between BET and Landmark.

3. The nature and extent of prejudice which may be suffered by Murphy as Plaintiff if the default judgment is set aside.

Choctaw Maid argues that if the default judgment was set aside, Murphy could still perfect proper service of process on T. H. Etheridge as agent for service of process on Choctaw Maid, after which it could fully prosecute whatever claims he has against Choctaw Maid. It notes that only about three months passed between the county court's grant of default judgment against Choctaw Maid and that this brief period would not affect Murphy or the legal issues of which Murphy's claim against Choctaw Maid are made. Indeed, Murphy's brief is tomb-silent on this third factor of the manner in which the setting aside of the default judgment would prejudice him. We can conceive of no way in which setting aside this default judgment would prejudice Murphy, and in the vacuum of Murphy's silence on this factor, we resolve it favorably to Choctaw Maid.

C. Choctaw Maid's second issue

> The circuit court abused its discretion in not reversing the county court's entry of default judgment because the county court lacked jurisdiction over Choctaw Maid.

Choctaw Maid correctly contends that before the trial court can enter a default judgment against a defendant, it must first have obtained jurisdiction over that defendant by the proper service of a summons on that defendant pursuant to Rule 4 of the Mississippi Rules of Civil Procedure. *See* M.R.C.P. 55 comt.. It then argues that the evidence which it adduced at the hearing to set aside the default judgment demonstrates that Deputy Sheriff Lewis served some person other than T. H. Etheridge, Choctaw Maid's agent for the service of process.

Murphy counters this argument as follows:

> Under Rule 4(d)(4) of the Mississippi Rules of Civil Procedure service of process may be had on a corporation by serving "an officer, a managing or general partner, or any other agent authorized by appointment or by law to receive service of process." Even if Mr. Etheridge was not personally served, the person who presented himself to Deputy Lewis did indicate that he was a proper person who was authorized to accept service of process on behalf of the corporation. When handed the summons, this person, be it Mr. Etheridge or someone else, said, "[t]his is me, I'll take this." This process was not handed to a secretary or some other person without the apparent authority to receive the same. Mr. Etheridge never testified that he did not receive the summons, in fact on the date of the hearing, he was in Australia.

We note that Murphy never identified the person who volunteered to accept the summons and complaint from Deputy Sheriff Lewis; neither can we determine from the state of the record whether this person was so related to Choctaw Maid as an officer or otherwise that Rule 4(d)(4) would have rendered Deputy Sheriff Lewis' delivery of the summons and complaint to him service on Choctaw Maid.

This issue presents but a third ground on which this Court might rest its reversal of the circuit court's affirmance of the county court's refusal to set aside the default judgment. The county court's failure to make any findings of fact, to which we would otherwise have been bound to bestow much deference, leaves this third ground available for reversing the circuit court. Nevertheless, we elect to base our reversal and remand of this case on the application of the three Rule 60(b) factors to what we have found to be in the record of this case.

IV. Summary

Our fundamental inquiry is whether the county court abused its discretion when it denied Choctaw Maid's motion to set aside the default judgment which it granted Murphy. Choctaw Maid presented two issues on which it based its argument that the county court did abuse its discretion when it failed to set aside the default judgment. The first was that the three factors relevant to a Rule 60(b) motion to set the default judgment aside favored setting it aside, and the second issue was that because the deputy sheriff did not serve its agent for service of process, the county court lacked jurisdiction to render any judgment, whether or not default, against it. This latter issue relates to the first factor in the first issue, which is whether Choctaw Maid had good cause for default, because Choctaw Maid contends that the deputy sheriff's failure to serve T. H. Etheridge, its agent for service of process, explains its apparent default in filing a responsive pleading to Murphy's complaint. The failure to serve process not only denied the county court jurisdiction of Murphy's claim against Choctaw Maid but also denied Choctaw Maid notice that the claim had been filed at all.

Interwoven with the arguments about the sufficiency of the service of process are auxiliary issues about the effect of Section 13-3-87 of the Mississippi Code of 1972 on challenging the accuracy of the return on the summons in so far as the server may modify or explain it and whether the court clerk properly entered Choctaw Maid's default in the apparent absence of any summons in the court file on which the return would have been made. The most significant aspect of this case remains the second of the Rule 60(b) factors, which is whether Choctaw Maid has a colorable defense to the merits of Murphy's claim. It is this factor that carries the day for Choctaw Maid because it appears that Choctaw Maid has a colorable defense to Murphy's claim. Choctaw Maid's colorable defense is that it was in no way a party to the contract for hauling the chicken leg quarters to Landmark. Murphy factually argues that Choctaw Maid as the producer of the chicken leg quarters had an interest in having these chicken leg quarters transported to Landmark so that Landmark could pay Choctaw Maid for them; but Murphy cites no case nor other precedent to support his position on this issue.

Default judgments are not favored, and trial courts should not be grudging in the granting of orders vacating such judgment where showings within the rules have arguably been made. We therefore conclude that the application of the three Rule 60(b) factors which the Mississippi Supreme Court

discussed in *King v. King* to the record and evidence in this case compel us to find that the county court abused its discretion when it denied Choctaw Maid's motion to set aside the default judgment. The county court abused its discretion because: (1) Choctaw Maid demonstrated good cause for its failure to file a responsive pleading to Murphy's complaint, *i.e.*, failure to serve its agent for the service of process with the summons and a copy of the complaint, (2) Choctaw Maid had a colorable defense to Murphy's claim, *i.e.*, it was not a party to the contract on which Murphy had sued it, and (3) no prejudice would result to Murphy from setting aside the default judgment. Therefore, we reverse both the judgment of the circuit court which affirmed the county court's order denying Choctaw Maid's motion to set aside the default judgment and the county court's order denying Choctaw Maid's motion to set aside the default judgment. We then remand this case to the County Court of Rankin County.

BOTH THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY WHICH AFFIRMED THE RANKIN COUNTY COUNTY COURT'S ORDER DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT AND THE RANKIN COUNTY COUNTY COURT'S ORDER DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT ARE REVERSED; AND THIS CASE IS REMANDED TO THE COUNTY COURT OF RANKIN COUNTY. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J., THOMAS, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., NOT PARTICIPATING.