IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00270 COA

CONSOLIDATED WITH

NO. 94-CA-00679

ABBOTT LABORATORIES

APPELLANT

v.

TILGHMAN H. PROSSER A/K/A TILGHMAN M. PROSSER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LUTHER T. MUNFORD

ROSS F. BASS, JR.

ANGELA M. MCCLAIN

ATTORNEY FOR APPELLEE:

CRYMES T. PITTMAN

ROBERT G. GERMANY

C. VICTOR WELSH, III

NATURE OF THE CASE: CIVIL: PRODUCTS LIABILITY

TRIAL COURT DISPOSITION: TRIAL COURT DENIED APPELLANTS MOTION TO SET ASIDE ENTRY OF DEFAULT JUDGMENT

MANDATE ISSUED: 6/5/97

BEFORE THOMAS, P.J., DIAZ, AND PAYNE, JJ.

DIAZ, J., FOR THE COURT:

Tilghman H. Prosser (Prosser) brought a products liability action against Abbott Laboratories (Abbott). After failing to answer the complaint, the trial court entered a default judgment in favor of Prosser for $1,000,000 in actual damages and $5,000,000 in punitive damages. Abbott moved to set aside the default judgment. The trial court denied Abbott's motion, and Abbott appeals citing five issues: (1) whether Prossers' failure to obtain waiver of formal process pursuant to Mississippi Rules of Civil Procedure 4(c)(3) could be construed as completed service by certified mail under Rule 4(c)(5); (2) whether the Hinds County Circuit Clerk erred in entering a default judgment when the only summons presented was to "Jones County, Mississippi"; (3) even if the service and entry of default were valid, whether the circuit court abused its discretion in refusing to set aside the default judgment; (4) whether the damage award should be set aside because it was not supported by necessary evidence; and (5) whether Abbott was denied its right to constitutional due process. Finding merit to one of the issues, we reverse.

FACTS

Abbott Laboratories, Defendant below and Appellant here, is an non-resident corporation. Tilghman Prosser is an adult resident citizen of Hinds County, Mississippi. Prosser was the Plaintiff below and is the Appellee here.

On January 13, 1991, Lewis Ross Prosser (Lewis), husband of Tilghman Prosser, was admitted to the Mississippi Baptist Medical Center (Baptist) for treatment of cancer. Lewis underwent surgery on January 14, 1991, and remained in the hospital to recover. Lewis began experiencing chest pains on January 20, 1991. A cardiac pacemaker was put in place, but Lewis went into cardiac arrest two days later. The physician called a cardiac code. While treating Lewis, the physician ordered an injection of Atrophine which reduces the heart rate. However, Lewis was mistakenly given an injection of Epinephrine which increases the heart rate. Lewis suffered a cardiac rupture and was pronounced dead at 7:20 P.M.

Atrophine and Epinephrine are manufactured by Abbott Laboratories. Both drugs are colorless liquids, packaged in identical clear glass vials. The name of each drug is printed on the vial.

On July 23, 1993, Prosser filed an amended complaint against Mississippi Baptist Medical Center and Abbott Laboratories. Prosser sent to Abbott, by certified mail, a copy of the amended complaint, a summons, and a notice of acknowledgment. Abbott received the complaint on August 2, 1993. Abbott failed to respond within thirty days and Prosser obtained a default judgment on September 2, 1993.

Abbott filed a motion to set aside entry of default on September 9, 1993. A hearing was held on Abbott's motion on November 12, 1993. The trial judge denied Abbott's motion.

DISCUSSION

Service of Process

The primary issue in this case is whether the trial court erred in denying Abbott's motion to set aside the default. However, in order to reach this issue, we must first address Abbott's argument concerning service of process under Rule 4(c)(3) and 4 (c)(5) of the Mississippi Rules of Civil Procedure. Abbott notes initially, that the summons specifically identified Rule 4(c)(3) as the method of service sought. According to Abbott, Prosser attempted only to obtain service of process pursuant to Rule 4(c)(3) which does not justify a default, but instead shifts the cost of compulsory service to the defendant. Prosser argues that she not only attempted to obtain service under Rule 4(c)(3), but also under (c)(5) which allows a default to be entered if the defendant does not file an answer within thirty days. The applicable rule read as follows:

> RULE 4. SUMMONS
>
> (c)(3) *By Mail*.
>
> (A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form B-1 and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(c)(5) *Service by Certified Mail on Person Outside State.*

In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

M.R.C.P. 4(c)(3), (5).

The record reveals that Prosser successfully fulfilled the requirements of service under Rule 4(c)(5) as well as (c)(3). The envelope was sent to Abbott by certified mail, return receipt requested, and contained a copy of the amended complaint, a notice advising that the summons was served pursuant to Rule 4(c)(3) and a summons which advised the Defendant that an answer must be filed within thirty days as provided by the Mississippi Rules of Civil Procedure or a judgment by default may be entered. Abbott claims that service of process in two manners but in one envelope is misleading. We find that, although unconventional, Abbott should have been aware of Prosser's attempt at service of process under both Rule 4(c)(3) and (c)(5). The fact that the complaint was sent certified mail should have alerted Abbott that process was sufficient under both rules. Additionally, there is no rule requiring two methods of service of process to be sent in separate envelopes. Accordingly, we find that service of process pursuant to Rule 4(c)(5) was sufficient, and the Defendant was required to answer the complaint within the time allowed by the rules. Thus, the entering of a default judgment after thirty-two days had elapsed was not improper.

Motion to Set Aside Default

In the case *sub judice*, Abbott points out that Prosser failed to inform the court that the summons and complaint were accompanied by a notice referring to Rule 4(c)(3). However, Rule 4(f) only requires that service of process be proved by the sender's filing with the court the return receipt. It does not require the sender to disclose every attempt made by her to effect service of process. Thus, the failure of Prosser to inform the court of her dual attempt to effect service of process was not improper.

Motion to Set Aside Default Judgment

A motion to set aside a default judgment may be made pursuant to Rule 60(b). The decision to vacate a judgment entered by default is left to the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 181-82 (Miss. 1989). Trial courts are directed by law to use a three-pronged balancing test in considering whether a motion to set aside a default judgment should be granted. Under this test, the trial judge must consider (1) the nature and legitimacy of a defendant's reasons for its default; (2) whether a 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. *Burkett v. Burkett*, 537 So. 2d 443, 445 (Miss. 1989).

The Mississippi Supreme Court has stated that "default judgments are not favored and trial [judges] should not be grudging in the granting of orders vacating such judgment[s] where showings within the rules have arguably been made." *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 387 (Miss. 1987). Abbott argues that the trial court erred in denying its motion to set aside default because it had a legitimate reason for failing to answer and also has a colorable defense to the claims of Prosser. Also, Abbot asserts that Prosser would not be unfairly prejudiced if the default judgment is set aside. A review of the record reveals merit to Abbott's arguments, and we analyze each prong of the three part test below.

A. Is Abbott's Defense for Not

Answering the Complaint Legitimate?

Abbott contends that they were justified in not answering the complaint because of the misleading nature of the notice. Specifically, that the notice referred to service of process under Rule 4(c)(3) which does not require the defendant to file an answer with the court. To support its position, Abbott cites *Metts v. State Deptartment of Public Welfare*, 430 So. 2d 401 (Miss. 1983). In *Metts*, the attorney mistakenly believed that the new Mississippi Rules of Civil Procedure were in effect, giving him thirty days to respond to the complaint. *Id.* at 404. The court held that this was a reasonable explanation and granted his motion to set aside default. *Id.* at 404-05. Here, Abbott further argues that the trial judge agreed that the service was confusing, and the trial judge erred in not granting its motion to set aside the default based on this confusion.

Prosser counters by arguing that Abbott's in house counsel determined immediately upon receiving the complaint that its Mississippi counsel should be contacted concerning the filing of the suit. However, according to Prosser, Abbott's counsel negligently failed to make the contact, resulting in the default judgment at issue here.

The facts of this controversy reveal that Abbott received a notice which was confusing and they believed to be an attempt at service of process under Rule 4(c)(3). The trial court agreed that the notice was confusing, but noted that Abbott should have been cautious and contacted its Mississippi counsel to decide how to proceed. Thus, we do not find that the trial court abused his discretion in failing to find a legitimate excuse to Abbott's failure to respond in a timely fashion.

B. Does Abbott Have a Colorable Defense?

Abbott argues the following as support for its contention that Prosser's death was not due to any fault of Abbott: (1) the drugs Ephinephrine and Atrophine are shipped in color-coded cartons with explicit instructions that the drug is to remain in the carton until use; (2) Abbott was entitled to rely on the hospital as a learned intermediary in administering the drugs; and (3) Abbott has no duty to "police individual operating rooms to determine [that] doctors adequately supervise their surgical teams." *Swayze v. McNeil Laboratories, Inc.*, 807 F.2d 464, 471 (5th Cir. 1987)).

Prosser counters that Abbott did not provide a defense to every aspect of the complaint, but only addressed the "failure to warn" claim. Prosser further argues that the defense asserted by Abbott does not cover the other claims of strict liability, negligent design, negligent packaging, and breach of implied and express warranties. Therefore, the second prong of the balancing test is not met.

The second prong of the balancing test is the most important of the three and deserves the most consideration. *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 182 (Miss. 1989) (citations omitted). The Mississippi Supreme Court has encouraged trial judges to vacate default judgments when the defendant has shown he has a meritorious defense. *Id.* In the case at bar, the trial judge articulated during the hearing that Abbott had proved that it had a meritorious defense. However, since the judge had already determined that Abbott did not have a legitimate excuse for failing to answer, he did not go any further into the analysis. This was error. It is not necessary for the movant to meet each requirement of the balancing test to be entitled to a vacated judgment. We find that Abbott had a colorable defense, and the default judgment should have been vacated on this point.

C. Would the Setting Aside of the Default

Judgment Unfairly Prejudice Prosser?

Abbott contends that no legally cognizable prejudice would result to Prosser by setting aside the default judgment. Specifically, Abbott argues that the postponement of the trial is not prejudicial because the setting aside of the default would not have delayed the commencement of a trial.

Prosser argues in response that there is great prejudice to her if the default is set aside due to her advanced age and medical condition. According to Prosser, the delay which has occurred between the date the default was entered until now has resulted in a deterioration in Prosser's health which will affect her ability to present her case in the future. Additionally, Prosser argues that she would be denied a resolution of her claim for the entire period of time while the default judgment had been in place.

A review of the record reveals that the trial judge determined that, due to the size of the judgment, Abbott would be significantly more prejudiced than Prosser if the default were not set aside. We agree. The prejudice to Prosser by setting aside the default judgment at the trial court level would have been minimal. Prosser pointed out during oral argument that she would be highly prejudiced because she would now have to prove her claim. However, the time involved in actually proving one's claim is not cognizable prejudice under this section of the balancing test. *Bailey*, 543 So. 2d at 183. Additionally, we note that the trial judge conclusively found that the balancing test highly favored the Defendants, but still refused to set aside the default judgment. This was error on behalf of the trial court, and this alone would warrant the granting of the motion to set aside the default.

All things considered, it is our conclusion that the default judgment should be set aside and the case tried on the merits.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS HEREBY REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

THOMAS, P.J., BARBER, KING, MCMILLIN AND PAYNE, JJ., CONCUR.

FRAISER, C.J., CONCURS IN RESULT ONLY.

SOUTHWICK, J., CONCURS WITH SEPARATE OPINION JOINED BY FRAISER, C.J., COLEMAN AND MCMILLIN, JJ.

BRIDGES, P.J., NOT PARTICIPATING.

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SOUTHWICK, J., concurring

The majority's opinion is a well-reasoned explanation of defects in the chancellor's refusal to set aside the default judgment. Remanding for further proceedings is also exactly correct. I write separately because of a disagreement over a non-dispositive element in the majority's opinion, but an element that has significance in the long-term interpretation of one of our rules of civil procedure.

Service of process in this case was by certified mail. The majority relies on that fact to hold that it "in effect" was service under Rule 4(c)(5). I agree that the plaintiff was entitled to use certified mail to effect service under that subpart of Rule 4, but the plaintiff's summons explicitly limited itself to Rule 4(c)(3). Upon such numerical nuances did the trial court turn the decision on whether a $6 million judgment should be left in place by default.

I would hold that establishing clarity in the obligations of a party who receives a summons is the purpose of our service rules. Greater zeal could have been exercised by the initial defense attorney who looked at the summons. Still, an attorney who receives a summons that says that it is being served only under Rule 4(c)(3), should be able to measure his response by the terms of Rule 4(c)(3). To the contrary, the trial court and the majority here finds that the attorney fatally errs to rely on the

rule stated in the summons. The mischief that can be created by such an interpretation is proved in this case, even though I sincerely believe no such intent was in the mind of the plaintiff. We should not create a rule that advantages those who might in the future desire to mislead. All involved, the majority here, even the chancellor below, believed the summons was at least confusing. I would limit the requirements imposed on the recipient to those stated in the rule that the sender decides to cite. There was no proper service of process. For that additional reason the default judgment should have been set aside.

FRAISER, C.J., COLEMAN AND MCMILLIN, JJ., JOIN THIS SEPARATE OPINION.