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**IN THE
COURT OF APPEALS OF INDIANA**

SHORT ON CASH.NET OF NEW CASTLE,)
INC., HENRY COUNTY ONLINE, LLC, and)
KEVIN SHORT,)
Appellants-Defendants,)

vs.)

DEPARTMENT OF FINANCIAL)
INSTITUTIONS and STEVE CARTER,)
ATTORNEY GENERAL OF INDIANA,)
Appellees-Plaintiffs.)

No. 33A01-0606-CV-269

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0310-PL-33

February 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendants Short on Cash.net of New Castle, Inc. (“SOC”), Henry County Online, LLC (“HCO”), and Kevin Short (“Short”) appeal the trial court’s grant of default judgment against all three defendants, awarding \$140,000 to Appellees-Plaintiffs Department of Financial Institutions (“DFI”) and Steve Carter, Attorney General (“AG”). We affirm in part and reverse in part.

Issues

The Appellants-Defendants (“defendants”) raise three issues, which we restate as follows:

- 1) Whether the trial court abused its discretion in denying defendants’ Motion for a Change of Judge;
- 2) Whether the trial court abused its discretion in granting default judgment against SOC for its failure to comply with a trial court order regarding discovery; and
- 3) Whether the trial court abused its discretion in granting default judgments against Short and HCO for their failure to file responsive pleadings.

Facts and Procedural History

DFI and the AG (“the State”) filed their Complaint for Preliminary and Permanent Injunction against SOC in 2003, alleging that SOC was violating Indiana consumer lending laws. Specifically, the State claimed that SOC was providing \$100 rebates and internet access to members for their agreement to pay twenty dollars every two weeks for a year. Members could receive an unlimited number of accounts. The State further alleged that SOC’s conduct constituted disguised loans, that SOC was not licensed to make loans, and

that SOC's interest charges were unlawful. The State then amended its Complaint, certifying that service had been sent to SOC in care of Short. SOC answered, denying the allegations.

On January 6, 2004, the trial court issued a Preliminary Injunction, and weeks later denied SOC's Motion to Stay Pending Appeal. In its Preliminary Injunction, the trial court found:

8. Kevin Short is the President of Short on Cash.net, New Castle.”
9. Kevin Short formerly operated an entity known as Short on Cash, New Castle at the same location as Short on Cash.Net at 1819 S. Memorial Drive, New Castle, Indiana. The same telephone number has been retained by Short on Cash.Net.
10. Short on Cash New Castle operated as a “Payday loan” company and was licensed by the Indiana Department of Financial Institutions.
11. On August 16, 2001, the Supreme Court of Indiana issued its opinion in Livingston v. Fast Cash USA, 753 N.E.2d 572 (Ind. 2001). This case held that “Payday loans” were limited to a 36 per cent interest rate (APR) for loans up to \$300. Id. at 577. On November 27, 2001, Kevin Short informed [DFI] that Short on Cash, Inc. would no longer provide a loan service.

Appellants' Appendix at 34, 35. The Preliminary Injunction ordered SOC to cease and desist its loan activities.

On May 7, 2004, while SOC was appealing the Preliminary Injunction, Short incorporated HCO. This Court affirmed issuance of the Preliminary Injunction on June 29, 2004. Short on Cash.net, Inc. v. Indiana Dep't of Fin. Inst., 811 N.E.2d 819 (Ind. Ct. App. 2004).

On February 7, 2005, the State filed its Verified Motion for Rule to Show Cause as to Why Defendant Should Not be Held in Contempt. The State asserted that Short was an

owner and officer of SOC, that he formed HCO, and that he was operating HCO to violate the Preliminary Injunction. The State attached to its Motion the affidavits of three DFI employees regarding the assertions. The trial court ordered SOC and its owner, Short, to appear at a hearing on April 15, 2005, for purposes of determining “why it should not be punished for contempt of court for failure to comply with this Court’s Preliminary Injunction Order.” App. at 69. Meanwhile, SOC served its Response to Second Request for Production on March 3, 2005, asserting that SOC was not in possession of its contracts, customer names, customer contact information, customer payment records, employee files, paycheck stubs, e-mails, marketing tools, correspondence, or training materials.

Short did not appear at the April 15 hearing. Accordingly, the trial court ordered SOC to “full[y] comply with the outstanding Request for Production filed by the Plaintiff within 15 days of this date,” ordered the State “to file a written Motion to Add any Necessary Party or Successor Party in Interest within 15 days and the Defendant is directed to file any objection within 15 days thereafter,” and ordered Short to appear for a hearing on May 25, 2005 “or be subject to contempt of court and arrest for failure to appear at which time all pending matters shall be heard.” *Id.* at 73 (emphasis added). The State then filed its Motion for Leave to Add Necessary Parties, seeking the joinder of Short and HCO as defendants. In substance, the State argued in the motion that HCO was formed to “perform the same illegal function,” and that SOC and HCO shared the same single owner and agent, Short, and the same building. *Id.* at 74, 75. In support, the State attached Articles of Incorporation for SOC and HCO, indicating that Short was the registered agent for both.

On April 27, 2005, the trial court granted the State’s motion to add Short and HCO as defendants and “set the [contempt] petition for hearing” on May 25, 2005. Id. at 81. An employee of the Henry County clerk’s office later reviewed the CCS entry¹ for April 27 and testified that she sent, by certified mail, the complaint, summons, and order to Short and HCO. She further testified that she probably sent copies of both the original and the amended complaints. Neither referenced Short or HCO in the caption, or contained allegations against Short or HCO.² Upon the request of at least one defendant, the trial court reset the contempt hearing to June 9, 2005. By May 5, 2005, both Short and HCO had been served.

On June 3, 2005, SOC’s attorney, Edward Hall (“Hall”), filed an Appearance on behalf of Short and HCO. Simultaneously, all three defendants moved for a change of judge. The State objected to the defendants’ Motion for a Change of Judge and moved for default judgments against all the defendants. The trial court denied the defendants’ Motion for a Change of Judge. On August 11, 2005, the trial court found that Short and HCO had not filed responsive pleadings, found that SOC had failed to comply with three discovery orders, and entered default judgments as to all three defendants. After hearing evidence of damages, the trial court ordered the defendants to pay the State \$140,000. The defendants now appeal.

¹ The CCS entry reads, “Complaint, Order and Summons issued certified mail to Kevin Short and Henry County Online. Copies to counsel. [initials of clerk employee]” Appellants’ Appendix at 6.

² As noted above, the amended complaint was sent to SOC in care of “KP Short.” Id. at 29.

Discussion and Decision

I. Change of Judge

We begin our analysis by addressing whether the trial court had and continues to have jurisdiction in this case. We review a trial court's order on a motion for change of judge for an abuse of discretion. Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989, 1006 (Ind. Ct. App. 1983). A party is entitled to one change of judge "without specifically stating the ground therefor," provided it so moves within prescribed time limits. Ind. Trial Rule 76(B), (C). A party's motion for change of judge must be filed no later than ten days "after the issues are first closed on the merits." T.R. 76(C). "[W]here the plaintiff files an amended complaint adding a defendant, this 'second-generation' defendant is entitled to an automatic change of venue under T.R. 76." AFSCME v. City of Gary, 578 N.E.2d 365, 367 (Ind. Ct. App. 1991). Where no responsive pleading has been filed, even when the time for such has passed, the issues are not closed on the merits until default judgment is entered. State ex rel. Hohlt v. Marion County Superior Court, 256 Ind. 544, 270 N.E.2d 761, 763 (1971). In this case, the second-generation defendants' Motion for a Change of Judge was filed more than a month prior to entry of default judgment, and therefore prior to the closing of the issues on the merits. See id.

Regardless of whether the issues are closed on the merits, however, Indiana's procedural rules have long constrained parties from filing motions for change of venue where the party has received notice of a trial setting without objecting promptly. State ex rel. Gatewood v. Hamilton County Circuit Court, 248 Ind. 248, 225 N.E.2d 826, 827 (1967).

Currently, T.R. 76(C)(5) provides as follows:

[W]here a party has appeared at or received advance notice of a hearing prior to the expiration of the date within which a party may ask for a change of judge or county, and also where at said hearing a trial date is set which setting is promptly entered on the Chronological Case Summary, a party shall be deemed to have waived a request for change of judge or county unless within three days of the oral setting the party files a written objection to the trial setting and a written motion for change of judge or county.

On appeal, the defendants argue that the contempt hearing was not a “trial” for purposes of T.R. 76(C)(5). Indiana Courts have not addressed whether contempt hearings so qualify.³ In interpreting an earlier version of the rule, our Supreme Court noted its competing policy considerations: ensuring impartiality while avoiding protracted litigation. State ex rel. Yockey v. Marion County Superior Court, 261 Ind. 504, 307 N.E.2d 70, 71 (1974), limited on other grounds by State ex rel. Travelers Ins. Co. v. Madison Superior Court, 265 Ind. 287, 354 N.E.2d 188 (1976). The Yockey Court cautioned that, “[i]n weighing the competing considerations, we shall not endorse an interpretation of T.R. 76 which sanctions dilatory tactics.” Yockey, 307 N.E.2d at 72.

³ See School City of Gary v. Continental Elec. Co., 149 Ind. App. 416, 273 N.E.2d 293, 300 (1971) (holding that hearing on “complaint requesting a Preliminary Injunction and other relief” constituted a trial for purposes of this rule); Gulf Oil Corp. v. McManus, 173 Ind. App. 147, 363 N.E.2d 223, 227 (1977) (holding that hearing on class action determination constituted a trial), abrogated on other grounds by Martin v. Amoco Oil Co., 679 N.E.2d 139 (Ind. Ct. App. 1997); State ex rel. Victory Lanes, Inc. v. Blackford Circuit Court, 249 Ind. 178, 231 N.E.2d 140 (1967) (holding that hearing on appointment of receiver constituted a trial). But see City of Fort Wayne v. State ex rel. Hoagland, 168 Ind. App. 262, 342 N.E.2d 865 (1976) (holding that hearing on a preliminary injunction did not constitute a trial because its function is to preserve the status quo); McAllister v. State ex rel. Bryant, 258 Ind. 238, 280 N.E.2d 311 (1972) (holding that hearing on motion for summary judgment did not constitute a trial).

Here, the State accused the defendants of subverting a court order.⁴ By definition, that Preliminary Injunction prohibited the same alleged conduct that was the basis of the underlying complaint. Accordingly, the trial court's determination of contempt would require fact-finding. Indeed, the State's Verified Motion for Rule to Show Cause attached affidavits of three DFI employees, making assertions relevant to both the issue of contempt and the underlying claims. The trial court's consideration of alleged contempt would address facts potentially relevant to the ultimate claims of the case. This suggests that the contempt hearing should be considered a "trial."

The defendants rely on City of Fort Wayne v. Hoagland, 168 Ind. App. 262, 342 N.E.2d 865 (1976) to argue that the contempt hearing in this case did not constitute a trial for purposes of T.R. 76(C)(5). However, we consider Hoagland distinguishable from the facts of this case. The Hoagland Court based its holding on the fact that the hearing was limited to consideration of the preliminary injunction, the function of which is "to preserve the status quo pending the final determination of the case on the merits." Id. at 869. The Hoagland Court went on to explain that if the hearing had been on the preliminary injunction and the merits, it "would have no difficulty upholding the trial court's grant of the motion to strike the motion for change of venue." Id. Here, the trial court scheduled a hearing to find whether the defendants were in contempt.

It would not serve judicial efficiency to reverse the trial court's denial of the defendants' Motion for a Change of Judge. None of the defendants contests having received

⁴ We note the gravity of the State's allegations, namely that Short formed a new corporation to continue the

notice of the re-scheduled June 9, 2005 contempt hearing, noted in a CCS entry on May 3, 2005. Yet they waited until June 3 to move for a change of judge, clearly delaying more than the three days permitted by T.R. 76(C)(5). Granting defendants' motion would be to interpret T.R. 76 in a way that would "sanction[] dilatory tactics." See Yockey, 307 N.E.2d at 71-72.

Furthermore, this Court has held that "change of venue is not mandatory in a contempt proceeding." Linton v. Linton, 166 Ind. App. 409, 336 N.E.2d 687, 692 (1975) (citing State ex rel. Grile v. Allen Circuit Court, 249 Ind. 173, 231 N.E.2d 138 (1967)), superseded by statute on other grounds. The Linton Court reasoned that "a civil contempt proceeding is not a civil action, and T.R. 76 therefore is inapplicable." Id. While this was not filed as a contempt action, the policy of allowing a trial court to enforce its own orders nonetheless applies to the facts of this case.

Appellants Short and HCO also argue that their Motion for a Change of Judge should have been granted because the State's complaint was never amended to make any specific allegations against them. They assert, "[t]he only reason that [Short and HCO] were even represented in this action was the Rule to Show Cause filed against them and the order to appear issued for allegedly violating the specifics of the preliminary injunction issued against [SOC]." Appellants' Br. at 11. We disagree.

As noted above, the purpose of a preliminary injunction is "to preserve the status quo pending the final determination of the case on the merits." Hoagland, 342 N.E.2d at 869.

very conduct that had been enjoined, even while appealing the Preliminary Injunction to this Court.

Pursuant to T.R. 65(D), every temporary injunction “is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” Here, the trial court found in its Preliminary Injunction that “Short is the President of [SOC].” App. at 34. The trial court later noted Short as being the owner of both entities. Short signed the Articles of Incorporation of both entities, listing him as the registered agent. In its Verified Motion for Rule to Show Cause as to Why Defendant Should Not be Held in Contempt, the State alleged that Short was continuing the same conduct from the same location under a new name, HCO. In effect, the State is alleging that Short, SOC, and HCO were in active concert.

Short does not contest actual notice. The amended complaint was sent to SOC in care of Short, and SOC’s first and second attorneys had knowledge of the Preliminary Injunction. Meanwhile, Short himself was on the trial court’s distribution lists for its orders of April 15, 2005 (ordering him to appear on May 25, 2005) and April 27, 2005 (reiterating his duty to appear on May 25, 2005). Finally, Short received a summons, by certified mail, of the complaint and the order to appear on May 25, 2005. Accordingly, it appears that Short had actual notice of the Preliminary Injunction. See Reed Sign Service, Inc. v. Reid, 755 N.E.2d 690, 695 (Ind. Ct. App. 2001) (concluding that Reed Sign had actual notice of temporary restraining order). This knowledge can be imputed to Short’s company, HCO, as Short served as its registered agent. See AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc., 816 N.E.2d 40, 51 (Ind. Ct. App. 2004) (holding that the agent’s knowledge is imputed to the

principal). Therefore, regardless of the lack of specific allegations made against them in the complaint, Short and HCO were bound by the Preliminary Injunction and the timeframe prescribed for a change of judge under these circumstances. For these reasons, we conclude that the trial court did not abuse its discretion in denying defendants' Motion for a Change of Judge.

II. Default Judgment as to SOC

If a party fails to obey an order to provide discovery, the trial court may render a default judgment against the disobedient party. Ind. Trial Rule 37(B)(2)(C). On appeal, this Court will reverse the granting of default judgment only in the event of an abuse of discretion. Ross v. Bachkurinskiy, 770 N.E.2d 389, 392 (Ind. Ct. App. 2002). The appropriate sanction for failing to comply with a discovery order is a matter committed to the sound discretion of the trial court. Id. A trial court is not required to impose lesser sanctions before applying the ultimate sanction of default judgment. Id. (citing Nesses v. Specialty Connectors Co., 564 N.E.2d 322, 327 (Ind. Ct. App. 1990)).

Here, the State requested production of certain documents fundamental to the conduct of a business. In response, SOC asserted that it was not in possession of contracts, customer names, customer contact information, customer payment records, employee files, paycheck stubs, e-mails, marketing tools, correspondence, or training materials. Such a response strains credulity. The trial court ordered SOC to provide the documents by May 2, 2005. SOC did not comply. On appeal, SOC argues that "documents of old customers lists from Short on Cash.net simply did not exist, other than those previously provided to the DFI."

Appellants' Br. at 15. SOC, however, fails to even address several of the documents ordered to be disclosed. We conclude that the trial court did not abuse its discretion in granting default judgment against SOC.

III. Default Judgment as to Short and HCO

Short and HCO argue that the trial court abused its discretion in granting the State's Motion for Default Judgment against them because the State did not amend its complaint to make any specific allegations against them. We review the trial court's entry of default judgment for an abuse of discretion. Professional Laminate & Millwork, Inc. v. B & R Enterprises, 651 N.E.2d 1153, 1156 (Ind. Ct. App. 1995).

Due process requires that the defendant must understand that an action has been instituted against him. "The fundamental requisite of due process of law is the opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)). "The notice must be of such nature as reasonably to convey the required information." Id. Due process requires notice of the allegations and the opportunity to address those allegations. In re: Contempt of Wabash Valley Hosp., Inc., 827 N.E.2d 50, 64 (Ind. Ct. App. 2005).

Here, Short and HCO were served with one or both of the complaints filed in 2003. Neither, however, contained Short or HCO in the caption, and neither made any specific allegations against either defendant. While the summonses noted that the State had sued Short and HCO, that did not advise either second-generation defendant of the specific allegations against them. Accordingly, we conclude that the trial court abused its discretion

in granting the State's Motion for Default Judgment against Short and HCO.

Conclusion

Short and HCO were bound by the Preliminary Injunction and had notice of the hearing on contempt, but failed to timely file for a change of judge under the circumstances of this case. Furthermore, the trial court did not abuse its discretion in granting the State's Motion for Default Judgment against SOC. And, although the Motion for Leave to Add Necessary Parties made specific allegations against the second-generation defendants, the Amended Complaint did not include these allegations. Thus, the trial court abused its discretion in granting Default Judgment against Short and HCO.

Affirmed in part and reversed in part.

VAIDIK, J., and BARNES, J., concur.