

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 16, 2009 Session

DUE HUE NGUYEN v. RASHIDA A. WATSON

**Appeal from the Circuit Court for Knox County
No. 3-328-98 Wheeler A. Rosenbalm, Judge**

No. E2008-02690-COA-R3-CV - FILED JUNE 25, 2009

In general sessions court, the plaintiff Due Hue Nguyen was awarded a judgment in 1998 for \$6,881.84 against Rashida A. Watson. The defendant appealed to the trial court. The plaintiff moved to dismiss the appeal. The trial court declined to do so. The court ultimately dismissed the plaintiff's civil warrant "for failure to prosecute." The plaintiff appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Andrew J. Evans, Jr., Knoxville, Tennessee, for the appellant, Due Hue Nguyen.

Ursula Bailey, Knoxville, Tennessee, for the appellee, Rashida A. Watson.

OPINION

I.

In the trial court, the plaintiff challenged the validity of the appeal. He argues that it "was not perfected within the time-limit prescribed by law" and that it was "not supported by an Appeal Bond or a Pauper's Oath." When the matter was called in the trial court on March 19, 2008 – almost ten years after the date of the general sessions court judgment – the defendant failed to appear. As a consequence of the defendant's absence, the trial court, on March 26, 2008, entered an order affirming the judgment of the general sessions court.

On April 11, 2008, the defendant filed a motion to set aside the judgment of March 26, 2008. By order entered June 6, 2008, the court ruled that the defendant's appeal had been properly perfected; it also decreed that "justice would be served" by setting aside its previous order of March 26, 2008.

The matter was again set for trial on August 26, 2008. When it was called, neither party was present but each was represented by counsel. Plaintiff's attorney told the Court that the plaintiff had no proof to present. The trial court opined that it "considered the age of the case as a possible reason for the plaintiff's absence." The court then proceeded to dismiss the plaintiff's suit for, as previously noted, "failure to prosecute." Plaintiff appeals.

II.

On appeal, the plaintiff raises two issues: First, he contends that the defendant did not timely perfect her appeal and, as a consequence, the trial court did not have subject matter jurisdiction; and, second, he argues that, when the defendant failed to appear in court when the matter was first before the trial court on March 19, 2008, the court erred in failing to award him a "judgment final," referring to language found in Tenn. Code Ann. § 27-5-106(a) (2000).¹

III.

With respect to his first issue, the plaintiff relies upon two statutory provisions, Tenn. Code Ann. §§ 27-5-103 (2000) and 27-5-108 (2000). These provisions, as they existed when this matter was appealed in 1998,² are as follows:

§ 27-5-103

- (a) Before the appeal is granted, the person appealing shall give bond with good security, as hereinafter provided, for the costs of the appeal, or take the oath for poor persons.
- (b) An appeal bond filed by a plaintiff or defendant pursuant to this chapter shall be considered sufficient if it secures the cost of the cause on appeal.

¹ Tenn. Code Ann. § 27-5-106(a) provides as follows:

If the clerk fails to return the papers within the time prescribed, but returns them during the term to which the same are returnable, and the appellant fails to appear and prosecute the appeal, if such appellant is the original defendant, the plaintiff shall have judgment final, by default, for the amount of the judgment of the court of general sessions, against the appellant for the debt and the appellant and the appellant's sureties for the cost.

² Tenn. Code Ann. § 27-5-108 was amended in 2002 and 2008. Since the judgment of the general sessions court was entered in 1998, we have ignored the subsequent amendments.

(a) Any party may appeal from an adverse decision of the general sessions court to the circuit court of the county within a period of ten (10) days on complying with the provisions of this chapter.

* * *

(c) Any appeal shall be heard de novo in the circuit court.

* * *

The plaintiff argues that the defendant did not properly perfect her appeal within the ten-day period specified in Tenn. Code Ann. § 27-5-108. He relies upon our decision in *Discover Bank v. McCullough*, M2006-01272-COA-R3-CV, 2008 WL 245976 (Tenn. Ct. App. M.S., filed January 29, 2008) wherein we said, reversing the trial court, that “[a] de novo appeal to circuit court is perfected only after both the notice of appeal and the appeal bond or affidavit of indigency has been filed.” *Id.* at *7 (citations omitted). In *Discover*, the parties seeking to appeal failed to file *anything* that could be construed as an attempt to appeal and did not even claim to have filed an appeal bond or affidavit of indigency. *Id.*

Neither of the statutes relied upon by the plaintiff expressly uses the language “notice of appeal.” Tenn. Code Ann. § 27-5-103 simply states that “[b]efore the appeal is granted” it is necessary that the appealing party “give bond . . . or take the oath for poor persons.” Tenn. Code Ann. § 27-5-108 recites that one “may appeal . . . within a period of ten (10) days on complying with the provisions of this chapter.”

In the instant case – directly above the general sessions court judge’s signature – the following is found:

From the judgment on the reverse [side], the Deft prayed an appeal to the Circuit Court which is granted upon Pauper’s Oath or Appeal Bond.

The signature is dated May 6, 1998 – the ninth day following the entry of the judgment on April 27, 1998. This clearly reflects that, within ten days of the judgment, the defendant appealed the judgment. The notation on the judgment, signed and dated by the general sessions judge, is sufficient to show the defendant appealed. An undated appeal bond signed by counsel on behalf of the defendant, as principal, and the signature of counsel, as surety, appears in the record immediately following the civil warrant. We hold that the appeal was properly perfected in this case in full compliance with the aforesaid statutory provisions.

IV.

The plaintiff's second issue posits that the first order of the trial court – the one entered March 26, 2008 – was “final” and could not be altered by the trial court even during the 30 days following its entry. We disagree with the latter conclusion.

The trial court's order of March 26, 2008, states that “[n]either the Defendant-Appellant nor her attorney were present” at the hearing on March 19, 2008. As a result, the trial court entered its order in which it “affirmed the Money Judgment of \$6,881.84.” The plaintiff argues that the trial court's decree, in the words used by the court, was in error. He claims that the relief should have been, in the words of Tenn. Code Ann. § 27-5-106(a), “judgment final, by default” which, according to the plaintiff, means the legislature intended, because of its use of the word “final,” that the judgment “ha[d] the effect of fixing the default judgment in judicial cement and not subject to being set-aside or vacated as was done by the trial judge in this case,” to quote language from the plaintiff's brief.

We hold that there is no real difference between the trial court's words – “affirm[ing] the Money Judgment of \$6,881.84” – and the legislature's directive that “the plaintiff shall have judgment final, by default.” This is a distinction within a different. However, even if we are wrong in this, we disagree with the plaintiff's assertion that the legislature, in enacting Tenn. Code Ann. § 27-5-106(a), intended to prevent the trial court from exercising set aside or vacation discretion during the 30-day period immediately following the entry of the court's judgment. Tenn. R. Civ. P. 59 clearly vests a trial court with this authority and there is no expressed or implied intention on the part of the legislature in Tenn. Code Ann. § 27-5-106(a) to carve out an exception to the trial court's Rule 59 discretion. Plaintiff's second issue is without merit.

V.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for the collection of costs assessed below. Costs on appeal are taxed to the appellant, Due Hue Nguyen.

CHARLES D. SUSANO, JR., JUDGE