

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 23, 2013

**ASHLEY HAYES v. BARRIE CUNNINGHAM**

**Appeal from the Chancery Court for Davidson County  
No. 1112271 Claudia Bonnyman, Judge**

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**No. M2012-02582-COA-R3-CV - Filed November 19, 2013**

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Singer brought action for breach of contract against musical tribute show Producer. Producer did not attend trial and his counsel moved to withdraw immediately prior to trial. The court heard Singer's evidence and entered judgment in Singer's favor. Producer retained new counsel and moved for a new trial on the basis of excusable neglect. The trial court denied the motion for a new trial and Producer appealed. Discerning no error, we affirm.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Jeffrey O. Powell, Goodlettsville, Tennessee, for the appellant, Barrie Cunningham.

Harold Frederick Humbracht, Jr., Nashville, Tennessee, for the appellee, Ashley Hayes.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

In May 2010, appellee Ashley Hayes ("Ms. Hayes"<sup>1</sup>) entered into a written contract with appellant Barrie Cunningham ("Mr. Cunningham") to perform in the "Superstars Live in Concert" musical tribute show that Mr. Cunningham was producing in Branson, Missouri. The contract's terms specified that Ms. Hayes would be paid \$1,600 weekly to perform in the show and that the show would run from May 27, 2010 until August 29, 2010. The

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<sup>1</sup> Also known as "Shania Twang."

show's start date was extended by agreement until July 15, 2010 and, before Ms. Hayes moved to Branson, she and Mr. Cunningham agreed to extend her performance dates to December 31, 2010. Ms. Hayes performed from July 15, 2010 until Mr. Cunningham canceled the show on August 15, 2010. During this time she was paid \$3,066. On September 7, 2011, Ms. Hayes, pro se, sued Mr. Cunningham for breach of contract. In his pro se answer, Mr. Cunningham alleged that Ms. Hayes misrepresented herself as a Shania Twain impersonator and that the contract was between Ms. Hayes and Superstars Live in Concert, LLC.

Both parties subsequently hired counsel.<sup>2</sup> Mr. Cunningham moved to dismiss asserting *inter alia* that the parties to the contract were Ms. Hayes and Superstars Live in Concert, LLC, and that Mr. Cunningham "acted only as the agent for the LLC, never in his individual capacity." Finding that Mr. Cunningham's argument was based on disputed facts, the trial court denied the motion to dismiss by order entered April 19, 2012.

On May 25, 2012, Mr. Bowhan moved to withdraw from the case and later submitted a proposed order to allow Mr. Cunningham thirty days to obtain new counsel. However, during a July 2, 2012 case management conference, Mr. Bowhan announced that he would remain on the case. The court set trial for July 16, 2012.

Though he was apprised of the date, Mr. Cunningham was not present for the July 16, 2012 trial. At trial, Mr. Bowhan announced that Mr. Cunningham would not appear and again moved to withdraw. The court took the motion to withdraw under advisement.<sup>3</sup> After a trial<sup>4</sup> and by judgment entered July 19, 2012, the court concluded as follows:

[Ms. Hayes] contracted with Barrie Cunningham, individually, to perform in a show titled Superstars Live in Concert to be produced by Mr. Cunningham in Branson, Missouri. Although Mr. Cunningham contended in his answer that the contract was with a limited liability company, Superstars Live in Concert, LLC, the evidence does not support that contention. The electronic mail communications between the parties do not support the contention that the

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<sup>2</sup> Attorney Brian Bowhan initially represented Mr. Cunningham. Mr. Cunningham did not reside in Tennessee during the course of the representation, so he and Mr. Bowhan primarily communicated through e-mail.

<sup>3</sup> The trial court issued an order on July 24, 2012 granting Mr. Bowhan's motion to withdraw.

<sup>4</sup> The record does not contain a transcript of the July 16, 2012 proceedings. Mr. Bowhan did not cross-examine Ms. Hayes or make an offer of proof. In its July 24, 2012 order, the trial court noted that "proof was put on by [Ms. Hayes] essentially in the form of a default hearing."

parties intended to contract with a limited liability company. [Ms. Hayes] sustained her burden of proof proving by a preponderance of the evidence that the contract was between [Ms. Hayes] and Mr. Cunningham, individually. Accordingly, Mr. Cunningham may not use the shield of the limited liability company as he asserted in his answer and he is personally liable under the contract.

Finding that Mr. Cunningham breached the contract by failing to pay Ms. Hayes for work actually performed and by terminating the show early, the trial court awarded Ms. Hayes judgment in the amount of \$36,968.12 plus 10% per annum post-judgment interest.

After Mr. Bowhan informed Mr. Cunningham that a judgment had been entered against him, Mr. Cunningham hired new counsel and moved for a new trial on August 20, 2012, arguing that “his failure to appear is a direct result of his poor relationship and communication with Attorney Bowhan and, thus, amounts to excusable neglect.”<sup>5</sup>

Following a hearing and by final order entered October 22, 2012, the trial court denied Mr. Cunningham’s motion for a new trial. After noting that “[t]he bar for obtaining relief from a judgment on grounds of excusable neglect is set very high,” the court concluded that “the decision not to attend the trial cannot be shown to be excusable neglect because that decision was a deliberate choice. [Mr. Cunningham] cannot show excusable neglect as that term is defined and set out in *Discover Bank v. Morgan*.”<sup>6</sup>

Mr. Cunningham appeals and asks this Court to determine whether the trial court erred in finding that there was no excusable neglect and in denying his motion for a new trial.

#### ANALYSIS

On appeal, Mr. Cunningham requests that we set aside the October 22, 2012 order denying his Tenn. R. Civ. P. 59 motion for a new trial and remand this case for trial, on the basis of excusable neglect. In *Discover Bank*, our Supreme Court “held that regardless of whether the motion to set aside is being made pursuant to Rule 54.02, Rule 59, or Rule 60, the standard of review is the same.” *Byrnes v. Byrnes*, 390 S.W.3d 269, 278 (Tenn. Ct. App. 2012) (citing *Discover Bank*, 363 S.W.3d at [487])). “A trial court has a wide range of

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<sup>5</sup> In his motion, Mr. Cunningham also asserted, for the first time, that the closing of the show’s venue was not his fault and that he “believes that he can successfully defend himself against the complaint filed by [Ms. Hayes].”

<sup>6</sup> 363 S.W.3d 479 (Tenn. 2012).

discretion in all such rulings, therefore appellate courts review the trial court's order denying a motion to set aside under the abuse of discretion standard." *Byrnes*, 390 S.W.3d at 278. Under the abuse of discretion standard, a reviewing court cannot substitute its judgment for the trial court's judgment. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011). Rather, a reviewing court will find an abuse of discretion only if the trial court "applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

*Discover Bank* further guides us in our evaluation of motions seeking relief from judgments on the basis of excusable neglect:

[W]hen a party seeks relief from a default judgment due to "excusable neglect," whether pursuant to Rule 54.02 (for interlocutory judgments), Rule 59.04 (for final judgments within thirty days of entry<sup>7</sup>), or Rule 60.02 (for final judgments more than thirty days after entry), a reviewing court must first determine whether the conduct precipitating the default was willful. If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on "excusable neglect" grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief.

*Discover Bank*, 363 S.W.3d at 493-94 (Tenn. 2012) (footnote omitted).

Mr. Cunningham cannot obtain relief from the trial court's judgment for Ms. Hayes due to excusable neglect because his conduct was willful. The trial court found that Mr. Cunningham and Mr. Bowhan *jointly* decided how to proceed with the case. Specifically, the court found that Mr. Cunningham and Mr. Bowhan "tried to figure out how to go forward without [Mr. Cunningham's] presence" and that "[t]hey did the best they could, but while that turned out to be wrong, it was a deliberate and willful act."

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<sup>7</sup> Mr. Cunningham filed his Rule 59 motion for a new trial on August 20, 2012, within thirty days of the July 19, 2012 filing of the trial court's judgment in Ms. Hayes's favor. *See* Tenn. R. Civ. P. 6.01.

The evidence that Mr. Cunningham and Mr. Bowhan offered through their affidavits<sup>8</sup> fully supports the trial court's findings. Undisputedly, Mr. Cunningham decided not to attend trial though Mr. Bowhan advised him that the court denied his request for a continuance and that he needed to be present for trial on July 16, 2012. Attempting to characterize this decision as excusable neglect, Mr. Cunningham stated, "Mr. Bowhan told me that he did not think that my presence for trial was absolutely necessary because the entire case would turn on Missouri law. Because of this assertion, I did not make arrangements to be in Nashville for trial." In response, Mr. Bowhan explained that Mr. Cunningham informed him that the trial date coincided with one of Mr. Cunningham's show dates and that he would be "ruined" if he missed the show date. Faced with a dilemma in which trial could not be continued<sup>9</sup> and his client would be "ruined" if he attended trial, Mr. Bowhan "fell back into the only strategy possible and emailed Mr. Cunningham that his presence would not be absolutely necessary, with the qualification that [he] needed to have evidence which addressed the assertion that once the LLC had become viable he acted as an agent of the LLC only." Unfortunately, Mr. Cunningham did not present his attorney with the evidence necessary to his defense and eventually refused to return his calls or e-mails. Mr. Bowhan explained that he willfully withdrew from the case because he lacked "any evidence to impeach [Ms. Hayes's] case" but, if he "would have had the needed evidence, [he] would have used it during cross-examination, in spite of the fact that [he] had not been paid."

The evidence does not make out a case of excusable neglect and the trial court did not illogically conclude that the decision to miss trial was willful and based on a strategy of how to present Mr. Cunningham's case in his absence. Accordingly, we hold that the trial court did not abuse its discretion in denying Mr. Cunningham's motion for a new trial. We need not consider whether Mr. Cunningham has a meritorious defense<sup>10</sup> and whether Ms. Hayes would be prejudiced if a new trial were granted. *Discover Bank*, 363 S.W.3d at 494.

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<sup>8</sup> Mr. Cunningham filed his affidavit in support of his motion for a new trial. In opposition to that motion, Ms. Hayes offered Mr. Bowhan's declaration.

<sup>9</sup> The trial court had previously granted a motion to continue.

<sup>10</sup> We note, however, that the trial court specifically rejected Mr. Cunningham's defense that the parties to the contract were Ms. Hayes and the LLC. Furthermore, Mr. Cunningham admittedly failed to assert his impossibility of performance defense (that the show's venue closed through no fault of his own) in any pleading prior to trial and does not argue that this belated defense is based on newly discovered evidence sufficient to justify a new trial. *See Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. Ct. App. 1983).

CONCLUSION

We affirm the trial court's order. Costs of appeal are assessed against the appellant, Barrie Cunningham, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE