

NOT DESIGNATED FOR PUBLICATION

No. 125,163

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

PLEX CAPITAL, LLC,  
*Appellee,*

v.

CALAMAR CONSTRUCTION MW, LLC,  
*Appellant,*

and

RGA PAINTING & CONSTRUCTION, LLC, f/k/a RGA PAINTING, LLC,  
d/b/a RGA PAINTING, INC., and RAUL ARREOLA, *Defendants.*

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed March 3, 2023.  
Affirmed.

*Thomas Hiatt and Douglas M. Weems*, of Spencer Fane LLP, of Kansas City, Missouri, for  
appellant.

*James A. Breckenridge and Paul A. Overbee*, of Levy Craig Law Firm, of Kansas City, Missouri,  
for appellee.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

PER CURIAM: A party is in default in a lawsuit when the party "has failed to plead  
or otherwise defend." K.S.A. 2022 Supp. 60-255(a).

Plex Capital, LLC, (Plex) filed suit against Calamar Construction MW, LLC, (Calamar) and RGA Painting (RGA) to collect on accounts receivable. Calamar did not file an answer and a default judgment was issued by the district court. Calamar appeals. Because we find that the district court did not abuse its discretion in denying Calamar's motion to set aside the default judgment, we affirm.

#### FACTUAL AND PROCEDURAL HISTORY

Calamar is a foreign entity doing business in Kansas. Calamar contracted with RGA for work to be done on two projects in Shawnee, Kansas. RGA assigned Plex the account receivable for the work performed under its contract with Calamar. After RGA's work was complete, Calamar did not make payments to RGA because of allegations of defective work. Plex tried to collect on the account receivable, but Calamar did not make payments to Plex either. Plex then filed action against Calamar and RGA to collect on the debt.

Plex served Calamar with the summons and petition for damages. Calamar failed to submit an answer or file for extension of time. Plex moved for default judgment with the Johnson County District Court 21 days after the deadline for filing an answer had passed. Calamar contacted Plex and exchanged communication through Plex's attorney to try to resolve the matter. Calamar requested from Plex an extension of time to file an answer via email communication, which was 27 days after the statutory deadline had passed. Plex declined the request, notified Calamar of its intent to pursue a default judgment, and asked that Calamar contact Plex through its local counsel once Calamar obtained local counsel. Calamar did not contact Plex through a local counsel, and as promised Plex pursued the default judgment with the district court.

A default judgment hearing was held in Johnson County District Court 22 days after the email communication between Calamar and Plex—now 49 days after the answer

was due. Calamar did not appear through local counsel because of a conflict. At the hearing, the district court stated it would grant Plex's motion for default judgment. Eleven days after the default judgment hearing, and two months after the answer was due, Calamar obtained local counsel. The district court filed a journal entry 20 days after the hearing, granting Plex a sum of \$162,332.95, plus \$11,126.95 in interest, and \$11,887.80 in attorney fees and costs.

Just shy of a month later, now three months after the answer was due, Calamar moved to set aside the default judgment and for leave to answer out of time. The district court held a hearing on this matter where both parties appeared. After hearing arguments from the parties, the district court denied both motions filed by Calamar because Calamar failed to show excusable neglect for failing to defend against litigation and its untimely response.

Calamar timely appeals the district court's decision.

#### ANALYSIS

#### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO SET ASIDE THE DEFAULT JUDGMENT

Calamar argues that the district court erred by denying its motion to set aside the default judgment. Calamar asserts that the district court should have set aside the default judgment under K.S.A. 2022 Supp. 60-260(b), because Calamar showed that Plex would not be prejudiced, Calamar has a meritorious defense, and excusable neglect has been shown for the failure to answer or appear for the default judgment hearing. On the other hand, Plex argues that the district court was correct in its decision because Calamar failed to establish that its failure to answer timely or appear was because of excusable neglect.

*Our standard of review is abuse of discretion.*

"The granting of relief from a default judgment rests in the sound discretion of the district court and will not be disturbed on appeal absent a showing of an abuse of discretion." *Garcia v. Ball*, 303 Kan. 560, 565-66, 363 P.3d 399 (2015). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). As the party asserting the district court abused its discretion, Calamar bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017). Calamar does not challenge the legal or factual basis for the district court's ruling, only its reasonableness. "If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said the trial court abused its discretion." *State v. Ballou*, 310 Kan. 591, 616, 448 P.3d 479 (2019). We do not substitute our judgment for that of the district court.

*Reasonable minds could differ on whether Calamar established excusable neglect to support setting aside the default judgment.*

The district court made a discretionary decision based on the facts before it to deny Calamar's motion to set aside the default judgment that the court entered against it. The facts are straightforward and undisputed. Calamar was aware of the lawsuit, did not provide an answer, and failed to send a representative to the default hearing.

Under K.S.A. 2022 Supp. 60-255(a), a party is in default when

"a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . . On request and a showing that a party is entitled to a default judgment, the court must render judgment against the party in default for the remedy to which the requesting party is entitled."

Simply put, if a party wants to defend, then it must take some sort of action. Although default judgments are generally not favored in law, they become necessary when the inaction of a party "frustrates the administration of justice." *First Management v. Topeka Investment Group*, 47 Kan. App. 2d 233, 239, 277 P.3d 1150 (2012). Thus, the district court had a factual basis for the decision.

Once a default judgment has been entered, a court may grant relief and reinstate the case if it finds that the defendant's failure to appear or answer the lawsuit was due to "[m]istake, inadvertence, surprise or excusable neglect." K.S.A. 2022 Supp. 60-260(b)(1). Calamar relies solely on this provision to contend that the district court should have set aside the default judgment entered against it. The court centered its analysis around this provision and whether Calamar had established excusable neglect, thus there was no error of law.

So we turn to the reasonableness of the district court's conclusion. Neglect implies "something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind," and is akin to reckless indifference. *Jenkins v. Arnold*, 223 Kan. 298, 299, 573 P.2d 1013 (1978). Determining what constitutes excusable neglect is fact sensitive and must be made "on a case by case basis under the facts presented." *Jenkins*, 223 Kan. at 299.

Calamar argues that it did attempt to resolve the issues outside of litigation and its inadvertent delay in finding adequate local counsel should not be seen as a reckless indifference to the litigation. Calamar further argues that its proposal to Plex to seek payment directly from the owner of the building was its effort to resolve the case outside the courts because it would be faster and more efficient. According to Calamar, these efforts contradict the district court's finding of reckless indifference. Calamar also asserts that any potential inexcusable neglect would have been remedied when Calamar's out-of-

state counsel contacted Plex via email to request an extension of time for filing an answer.

Sometimes errors in litigation may constitute excusable neglect. See *Jenkins*, 223 Kan. at 300 (finding that filing an answer a week out of time and one day after default was entered was excusable neglect); *Montez v. Tonkawa Village Apartments*, 215 Kan. 59, 65, 523 P.2d 351 (1974) (finding excusable neglect when the defendant corporation lacked knowledge of suit due to misplacing of the petition and summons by a distant apartment manager, but acted within 12 days of notice of default judgment); *Boyce v. Boyce*, 206 Kan. 53, 54-56, 476 P.2d 625 (1970) (finding excusable neglect when bank failed to answer timely because the bank's officer in charge of garnishment orders was on medical leave and the receiving officer in his absence misplaced the order, but promptly responded once the officer in charge was notified of the motion for judgment).

But excusable neglect has seldom been found to be warranted if the party was aware of the pending legal action and failed to act accordingly. See *In re Tax Appeal of American Restaurant Operations*, 264 Kan. 518, 532, 957 P.2d 473 (1998) (holding that taxpayer's reliance on its tax preparer "does not constitute excusable neglect for its failure to accurately file its personal property tax renditions and cannot be used to abate the taxpayer's penalties"); *Tyler v. Cowen Construction, Inc.*, 216 Kan. 401, 406-07, 532 P.2d 1276 (1975) (holding defendant's failure to answer timely did not constitute excusable neglect because it was properly served and acknowledged receipt of pending lawsuit).

Calamar fails to assert on appeal or show in the record its specific reasoning for not filing an answer with the court or requesting an extension of time before the deadline. A reasonable person could conclude that it was aware of the lawsuit and knowingly chose not to take legal action.

Nor did Calamar provide any support as to why it failed to notice the conflict with its local counsel until the last minute, rendering it impossible for Calamar to be present at the default judgment hearing. Calamar had precisely 28 days after Plex filed the motion for default judgment to prepare for the default judgment hearing. As the district court stated in its ruling:

"But there are several thousand lawyers in the Kansas City metropolitan area, several large law firms. If they feel like they have to be going to a large law firm, there are several. If they have got a conflict with every one of them, they could still communicate with the Court. We have a lot of corporate entities that communicate with the Court and are told, hey, you have to appear by counsel and then the Court gives them a set number of days to get a lawyer."

There is no reason to believe Calamar was oblivious to the legal procedures of Kansas courts or a stranger to the customary practice of answering a petition. As the district court noted, Calamar has been in business for 30 years and had been involved in at least 19 cases in Kansas. Counsel properly practicing law in any state—regardless of some rules that may be unique to each—is aware of the statutory requirements of civil procedure and the consequences of indifference to the prescribed deadlines. Calamar claims it did not have local counsel to file documents in Kansas courts but provided no explanation as to what caused this lack of counsel. Reasonable minds could conclude that Calamar had ample time to obtain local counsel—even temporarily—to file for an extension.

Also, despite Calamar's argument that it had moved "expeditiously and quickly" after receiving service and the default judgment, the record is without any evidence supporting such claim. Inversely, the record only shows communication between the parties confirming acknowledgment of the pending lawsuit and default judgment, met with continued inaction from Calamar. A reasonable attorney would not consider communication between parties justification to disregard the statutorily required filing

deadline. Calamar did not even ask the court for a clerk's extension to file an answer, which would have been customary if filed as stated by Calamar's counsel. It is hard to deduce from the record that Calamar was diligently pursuing litigation in this case. Although the district court's conclusion that Calamar was "just sitting back and doing nothing" may have been unsupported by the record, its decision that Calamar's actions do not warrant excusable neglect is still correct. Calamar did not show a reasonable excuse for failing to answer Plex's petition.

To avoid this result, Calamar incorrectly conflates excusable neglect with "intent to defend," citing *Hood v. Haynes*, 7 Kan. App. 2d 591, 593, 644 P.2d 1371 (1982). There, this court considered whether an informal communication from a party to the court constituted an appearance and showed an intent to defend, precluding a default judgment *without notice*. 7 Kan. App. 2d at 597-98. Calamar claims that the communication with Plex and its effort in locating a local counsel is sufficient to show an intent to defend against the lawsuit, and therefore somehow shows excusable neglect. But the facts in *Hood* are significantly different. Unlike *Hood*, Calamar did not have any communication with the *court* before the default judgment. Also, the crux of the appeal is excusable neglect and not an intent to defend. When the district court stated in the motions hearing that there was no indication to the court of any intent to defend by Calamar, it was not pointing to Calamar's failure to enter an appearance. Rather, it related to the fact that Calamar had filed nothing with the court, including an answer or any communications about the default judgment—impending or complete.

The district court, after reviewing the parties' briefs and oral arguments, rejected Calamar's motion to set aside judgment. The district court found that Calamar's actions "appears to be in the nature of reckless. . . . [I]t [is] reckless indifference to the litigation." The district court specifically outlined in the journal entry denying the motions that Calamar demonstrated reckless indifference through its "failure to submit an answer within twenty-one (21) days pursuant to K.S.A. 60-212; a failure to appear at the June 10,



2021 default hearing; a failure to request an extension of time in a timely manner; and a failure to properly assert a defense."

Calamar argues that the district court needed to also consider whether Calamar had a meritorious defense and whether Plex would be prejudiced by setting aside the default judgment because Kansas law strongly prefers resolving cases on the merits. Calamar relies on *First Nat'l Bank in Belleville v. Sankey Motors, Inc.*, 41 Kan. App. 2d 629, 204 P.3d 1167 (2009), to articulate a three-part test in determining whether a default judgment should be set aside with excusable neglect being just one of the three prongs. Calamar asserts that this court should set aside the default judgment based on its arguments for the two other prongs and contends that Plex is incorrect to claim that inexcusable neglect alone should be the determinative prong in denying the set aside order.

In *Sankey Motors, Inc.*, 41 Kan. App. 2d at 634, a panel of this court held that a motion to set aside a default judgment may be granted when the court finds: "(1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a willful act." (Emphasis added.) (quoting *State ex rel. Stovall v. Alivio*, 275 Kan. 169, Syl. ¶ 2, 61 P.3d 687 [2003]). But Calamar conveniently stops there and neglects to acknowledge that this court also stated in its decision that the "appellant's failure to show all *three elements* dooms the appeal." (Emphasis added.) *Sankey Motors, Inc.*, 41 Kan. App. 2d at 634. As stated above, Calamar failed to establish excusable neglect to the court's satisfaction. Consequently, we need not explore the other prongs of the test.

We do agree with Calamar that the interest of justice would be served by granting the enlargement of time. As the district court pointed out, the default judgment could be a windfall for Plex because it does not have to overcome the issue of the agreement

between RGA and Calamar—stating Calamar does not have to pay RGA until payment is received from the building owners. Still reviewing the record as a whole, reasonable minds could conclude that Calamar's actions show a reckless indifference to the legal procedures of the court and this outweighs the interest of justice to grant an extension of time. As our Supreme Court stated, "[O]ur entire judicial process for trial of civil controversies would be destroyed if a court's summons or other process were permitted to be treated with neglectful indifference." *Wilson v. Miller*, 198 Kan. 321, 322, 424 P.2d 271 (1967).

In sum, the question here is not whether we would have set aside the default judgment under the circumstances. The sole question here is whether the district court abused its discretion by finding that Calamar failed to establish excusable neglect under K.S.A. 2022 Supp. 60-260(b)(1). For us to reverse the district court we would have to find that no reasonable person would have come to the same conclusion. We cannot do so; thus, we must affirm.

Because we find no error in denying Calamar's motion to set aside the default judgment, its second argument that the district court erred by denying its motion for leave to answer out of time is moot. Moreover, our standard of review is the same, abuse of discretion, and excusable neglect remains the cornerstone, demanding the same result. See *Boyce*, 206 Kan. at 56 (holding that when a party in default seeks an enlargement of time based on excusable neglect under K.S.A. 60-206[b], the party's request should: [1] be supported by evidence of his good faith, [2] establish a reasonable excuse for his failure, *and* [3] show that the interests of justice can be served by granting the enlargement).

Affirmed.