

SUPREME COURT OF SOUTH DAKOTA

Blair-Arch v. Arch

2014 SD 94 (2014) · No. #26990 · Decided December 23, 2014

SUMMARY

The South Dakota Supreme Court considered whether a domestic abuse protection order could be entered by default when the respondent did not personally attend the hearing but appeared through authorized counsel. The court held that the circuit court abused its discretion by entering a default because counsel appeared to defend the case; it reversed and remanded for a hearing on the petition.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Konenkamp, Justice; Gilbertson, Chief Justice; Severson, Justice; Portra, Circuit Court Judge, sitting for Zinter, Justice; Smith, Circuit Court Judge, sitting for Wilbur, Justice
JURISDICTION	South Dakota
DECIDED	December 23, 2014
DOCKET	#26990
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Myril Arch appealed a domestic abuse protection order entered against him by default after his attorney appeared at the protection-order hearing but Arch did not personally appear.
STANDARD OF REVIEW	The decision to enter a default judgment is reviewed for abuse of discretion. A circuit court abuses its discretion when it makes an error of law or reaches an arbitrary or unreasonable decision.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	Myril Arch, II v. Cynthia Blair-Arch

TOPICS

- domestic violence
- default judgment
- family law procedure
- civil procedure
- appellate procedure

PRACTICE AREAS

- Family law
- Domestic violence
- Civil procedure
- Appellate procedure
- Remedies

QUESTIONS PRESENTED

1. Whether a circuit court may enter a domestic abuse protection order by default when the respondent's attorney appears at the hearing on the respondent's behalf and is authorized to present a defense.
2. Whether the hearing notices and Sixth Circuit Rule 95-1 permitted entry of a default judgment without a formal application and the written notice required by SDCL 15-6-55(b)(1).

HOLDINGS

1. A domestic abuse protection order may not be entered by default solely because the respondent did not personally attend the hearing when the respondent's attorney appeared on the respondent's behalf and was authorized to present a defense. The court should proceed with the hearing with counsel participating, or, if the respondent's personal presence is essential, require the petitioner to subpoena the respondent.
2. Even if Arch were required to personally appear, the circuit court could not enter a default judgment without the notice required for an application for default judgment. The court should have proceeded ex parte on the petition or required a formal application for default judgment with at least three days' written notice.

KEY QUOTATIONS

“Myril appeared at the protection order hearing by counsel and the hearing should have proceeded with counsel participating on Myril’s behalf.” (¶ 18)

“Even if Cynthia’s notice of hearing required Myril to personally appear for the protection order hearing, the circuit court should have directed Cynthia to proceed with the hearing ex parte in Myril’s absence.” (¶ 18)

FACTUAL BACKGROUND

Cynthia Blair-Arch alleged that her brother, Myril Arch II, threatened her and others, damaged her property with a pickup truck, harassed her, and interfered with access to her residence and restaurant. She sought a five-year domestic abuse protection order, and the circuit court issued a temporary order pending a hearing. At the January 24, 2014 hearing, Arch did not appear personally, but his attorney appeared, stated that he was authorized to present Arch's defenses, and argued that Blair-Arch still had the burden of proving her case.

PROCEDURAL HISTORY

Cynthia Blair-Arch filed a petition for a domestic abuse protection order, and the circuit court issued a temporary order and scheduled multiple hearings. At the final hearing, Arch's counsel appeared and stated that counsel was authorized to defend, but the circuit court entered a five-year protection order by default based on Arch's personal nonappearance. The South Dakota Supreme Court reversed and remanded for a hearing on the petition.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The circuit court must conduct a hearing on Cynthia Blair-Arch's petition for a protection order. The court may proceed with Arch's counsel participating, or otherwise follow the required procedure for an ex parte hearing or a properly noticed application for default judgment. Blair-Arch's motion for appellate attorney's fees was denied.

CASES CITED

- Ladson v. BPM Corp., 2004 S.D. 74, ¶ 23, 681 N.W.2d 863, 869
- Upper Plains Contracting Inc. v. Pepsi Americas, 2003 S.D. 3, ¶ 11, 656 N.W.2d 323, 327
- Gartner v. Temple, 2014 S.D. 74, ¶ 7, ___ N.W.2d ___, ___
- Arneson v. Arneson, 2003 S.D. 125, ¶ 14, 670 N.W.2d 904, 910
- Thurman v. CUNA Mut. Ins. Soc'y, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616
- State v. Lemler, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286
- Hendrickson v. Wagners, Inc., 1999 S.D. 74, ¶ 14, 598 N.W.2d 507, 510-11
- Hanneman v. Nygaard, 784 N.W.2d 117, 123 (N.D. 2010)
- Sjomeling v. Stuber, 2000 S.D. 103, ¶ 11, 615 N.W.2d 613, 616
- In re A.N.D., 883 So. 2d 910, 914 n.3 (Fla. Dist. Ct. App. 2004)
- Smith v. Johnston, 711 N.E.2d 1259, 1264 (Ind. 1999)
- State v. Tselios, 593 A.2d 243, 244 (N.H. 1991)
- Freedman v. Horike, 969 N.Y.S.2d 193, 194 (N.Y. App. Div. 2013)
- Matter of Derek P. v. Doris Q., 939 N.Y.S.2d 151, 153 (N.Y. App. Div. 2012)
- In re C.G., 261 S.W.3d 842, 851 (Tex. App. 2008)
- Baleanu v. Sandulescu, 78 So. 3d 98, 99 (Fla. Dist. Ct. App. 2012)
- Bloch v. Bentfield, 403 P.2d 559, 564 (Ariz. Ct. App. 1965)
- Heidary v. Yadollahi, 121 Cal. Rptr. 2d 695, 699 (Cal. Ct. App. 2002)
- Warden v. Lamb, 277 P. 867, 868 (Cal. Dist. Ct. App. 1929)
- Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n, 502 N.E.2d 599, 603 (Ohio 1986)
- Skinner v. Leyland, 854 N.E.2d 573, 576-77 (Ohio Ct. App. 2006)
- Melvin v. Melvin, 580 A.2d 811, 818 (Pa. Super. Ct. 1990)