STATE OF MICHIGAN

COURT OF APPEALS

RUSSELL AMUSEMENT COMPANY, d/b/a AMERICAN AMUSEMENT AND VENDING COMPANY,

Plaintiff-Appellant,

v

AMBROSE J. OWCZARZAK and MARY JANE OWCZARZAK, Individually and d/b/a AMBROSE "OLE TYME BROADWAY" and "OLE TYME BROADWAY" and A.J.O., INC.,

Defendants-Appellees.

UNPUBLISHED
July 25, 1997

No. 193682
Bay Circuit Court
LC No. 95-003379-CK

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

By leave granted, plaintiff contends that the Bay Circuit Court abused its discretion in granting defendants' motion to set aside their default, regularly entered. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court's review of a trial court's decision granting or denying a motion to set aside a default or default judgment is for abuse of discretion. *Alycekay Co v Hasko Construction Co, Inc*, 180 Mich App 502; 448 NW2d 43 (1989). Good cause and a meritorious defense, or in the alternative manifest injustice, must be shown to justify setting aside a default.

As to Ambrose Owczarzak, the record supports his contention that he signed the contract in question only as a witness. Without respect to good cause, therefore, allowing his default to stand would be manifestly unjust. *H & L Heating Co v Bryn Mawr Apts of Ypsilanti, Ltd*, 97 Mich App 496; 296 NW2d 354 (1980).

---

* Circuit judge, sitting on the Court of Appeals by assignment.

As to defendant Mary Jane Owczarzak, her affidavit establishes good cause. Failure of an insurance company to carry out an undertaking to respond to a complaint is considered good cause for setting aside a default. *Federspiel v Bourassa*, 151 Mich App 656; 391 NW2d 431 (1986); *Levitt v Kacy Mfg Co*, 142 Mich App 603; 370 NW2d 4 (1985).

As to a meritorious defense, her claim that the coin operated pool table does not "compete" with plaintiff's devices but increased patronage of both the juke box and dart board, is an issue of contract construction, which is informed by the principle that any ambiguity in the agreement is to be construed against plaintiff, its drafter. *Lichnovsky v Ziebart International Corp*, 414 Mich 228; 324 NW2d 732 (1982). Covenants not to compete are disfavored and the judiciary is inclined to find that the particular act complained of does not constitute a breach of contract. *Stoya v Miskinis*, 298 Mich 105, 118; 298 NW 469 (1941). There is sufficient ambiguity in the contract for reasonable minds to differ over whether, given the claim that the pool table increased use of plaintiff's coin operated devices, the pool table "competes" with the juke box or the dart board. *Ogden v General Printing Ink Corp*, 37 F Supp 572, 577 (Md, 1941).

Additionally, even if the pool table does "compete" the liquidated damages clause is plainly unenforceable. Plaintiff is not entitled, as liquidated damages, to a windfall, particularly if patronage of its devices increased as defendant contends. *Nichols v Seaks*, 296 Mich 154, 161-162; 295 NW 596 (1941). The trial court therefore did not abuse its discretion in setting aside this default.

Affirmed.

/s/ Kathleen Jansen
/s/ Myron H. Wahls
/s/ Patrick R. Joslyn