STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE SELLERS f/k/a MICHELLE GOLDAPPER and THE ESTATE OF DAVID L. GOLDAPPER,

Plaintiffs-Appellees,

v

JOYCE GOLDAPPER,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 196914
Oakland Circuit Court
LC No. 95-508943-CZ

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying her motion to set aside default, as well as a default judgment canceling defendant's mortgage interest in certain real property. We affirm.

Defendant held a mortgage on a home that had been owned by plaintiff Sellers and her ex-husband David Goldapper, defendant's son. When defendant scheduled a foreclosure sale for December 12, 1995, plaintiffs filed a complaint for equitable and declaratory relief, seeking to have the mortgage declared void for lack of consideration. Plaintiffs' complaint was filed on November 28, 1995. The foreclosure sale was subsequently adjourned.

Defendant failed to file an answer to plaintiffs' complaint until May 20, 1996, three days after a default was entered, but before defendant was served with a copy. While defense counsel admitted that his office received April 5, 1996, correspondence from plaintiffs' counsel requesting that responsive pleadings to the complaint be filed by April 15, 1996, he claimed that the correspondence did not come to his attention until over a month later, on May 6, 1996. The reasons given for this month delay have ranged from "mistake and inadvertence or excusable neglect," to an assertion that the correspondence was placed in the file prior to defendant's counsel reading it. Defendant did not explain the fourteen-day delay between his discovery of plaintiffs' April 5, 1996, correspondence and the filing of the answer. As previously noted, a default judgment was eventually entered declaring defendant's mortgage interest cancelled.

On appeal, defendant argues that the default and default judgment should be set aside because she has shown a meritorious defense and good cause for her failure to respond to the complaint, and manifest injustice will occur if the default is not set aside. We disagree.

Whether a default or a default judgment should be set aside is within the sound discretion of the trial court. This Court will not reverse on appeal absent a clear abuse of that discretion. *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1996); *Harvey Cadillac Co v Rahain*, 204 Mich App 355; 514 NW2d 257 (1994). MCR 2.603(D)(1) provides that a motion to set aside a default or default judgment "shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." Good cause sufficient to warrant setting aside a default or a default judgment includes (1) a substantial degree of irregularity in the proceedings on which the default was based; (2) a reasonable excuse for the failure to comply with the requirements which created the default; or (3) some other reason showing that manifest injustice would result if the default and default judgment were allowed to stand. *Gavulic v Boyer*, 195 Mich App 20, 24-25; 489 NW2d 124 (1992).

A lawyer's negligence is attributable to the client and normally does not constitute a ground for setting aside a default. *Park, supra,* p 67. The inadvertent misfiling of a complaint does not constitute good cause for purposes of setting aside a default judgment. *Poling v Secretary of State*, 142 Mich App 54, 61; 369 NW2d 261 (1985). Therefore, we find that no reasonable excuse has been provided for defendant's failure to timely file an answer.

However, the mere existence of negligence does not preclude a finding of good cause. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). A showing of a meritorious defense and factual issues for trial can establish manifest injustice if the default is allowed to stand. *Park, supra,* p 67. Defendant in this case attempted to file an affidavit to show a meritorious defense. However, defendant was a New York resident and her affidavit was a nullity under MCL 600.2102(4); MSA 27A.2102(4) for lack of certification of the notary's signature. See *In re Alston's Estate*, 229 Mich 478, 482; 201 NW 460 (1924). Although it was brought to defense counsel's attention that the affidavit did not comply with MCL 600.2102(4); MSA 27A.2102(4) and defendant had an opportunity to submit an affidavit that comported with the statute, she did not avail herself of that opportunity. Without a valid affidavit showing a meritorious defense, defendant's motion to set aside the default was properly denied and the default judgment was properly entered. MCR 2.603(D)(1).

Defendant asserts that the default judgment should be set aside because plaintiffs' complaint does not state a cause of action. See *Lindsley v Burke*, 189 Mich App 700, 703; 474 NW2d 158 (1991). We disagree. To assert a theory of liability, MCR 2.111(B)(1) specifies that an allegation must "state[ ] . . . the facts, without repetition, on which pleader relies," and state "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims.

Here, plaintiffs' complaint put defendant on notice that one of their theories of liability was that the second mortgage was not binding due to lack of consideration. Plaintiffs asserted the facts on which they relied and stated the allegations necessary to reasonably inform defendant of their claims. Therefore, the complaint sufficiently stated a valid cause of action against defendant.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff