STATE OF MICHIGAN

COURT OF APPEALS

JIMMIE SUTTON,

Plaintiff-Appellee,

v

WILLIAM BRAKE, SR.,

Defendant-Appellant.

UNPUBLISHED
December 30, 1997

No. 197854
Wayne Circuit Court
LC No. 95-534943 NO

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

PER CURIAM.

Defendant appeals by right an order of the Wayne Circuit Court denying his motion to set aside default and entering default judgment for plaintiff. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We reverse.

After being notified of suit through substituted service, defendant, who was wintering in Florida, arranged for the complaint and summons to be forwarded to his homeowner's insurer. The insurer negligently misfiled the papers and failed to timely answer the complaint. Ironically, during the period of the insurer's delay in filing an answer, the complaint stood as dismissed on the records of the Wayne Circuit Court for failure to prosecute. The complaint was reinstated on plaintiff's ex parte motion, at which time default was contemporaneously entered. This occurred despite counsel for the insurer's efforts to contact plaintiff's counsel before default was entered.

A default will only be set aside where a defendant can show good cause and a meritorious defense. MCR 2.603(D)(1). However, an insurers' excusable neglect may constitute good cause. *Federspiel v Bourassa*, 151 Mich App 656, 661-664; 391 NW2d 431 (1986). Particularly, neglect may constitute good cause when, as here, upon discovering its error the insurer acts diligently in seeking to set aside the resulting default. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 50-51; 445 NW2d 186 (1989). Even in the absence of good cause, a sufficiently meritorious defense may establish that it would be manifestly unjust to allow a default or default judgment to stand. *Id*. at 51. This will often be the case when the complaint, on its face, fails to state a claim upon which relief may be granted.

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

Reed v Walsh, 170 Mich App 61, 65-67; 427 NW2d 588 (1988); *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987).

Here, the complaint asserts that plaintiff sustained personal injuries when assaulted while a social guest in defendant's home, the assault being perpetrated by another social guest. Defendant attributes the assault to the fact that the guests imbibed alcoholic beverages. The complaint does not assert that any beverages were furnished by defendant, who was not present, or even by his sons, the hosts of the party. In any event, there is no suggestion in the complaint that any of the persons to whom intoxicants were provided were under 21 years of age. As a social guest, plaintiff had the status of a licensee. *Preston v Sleziak*, 383 Mich 442, 451-452; 175 NW2d 759 (1970). Such a relationship imposed no duty on the social host to stop adults from drinking, legally or illegally, in his home, or, particularly when not physically present, to protect one social guest from assaultive conduct by others. Restatement 2d of Torts, §318; *Reinert v Dolezel*, 147 Mich App 149, 156-157; 383 NW2d 148 (1985). Under the facts asserted in plaintiff's complaint, it would be manifestly unjust to allow this default judgment to stand.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Myron H. Wahls
/s/ John R. Weber