

STATE OF MICHIGAN
COURT OF APPEALS

SUN COMPANY, INC. (R & M),

Plaintiff-Appellee,

v

THOMAS D. CARTER,

Defendant-Appellant.

UNPUBLISHED

February 3, 1998

No. 191835

Wayne Circuit Court

LC No. 95-510420 CK

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order denying his motion to set aside a default and default judgment in the amount of \$95,497.40. We affirm.

Defendant has not briefed any issue on whether his motion to set aside the default and default judgment pursuant to the standards in MCR 2.603(D) and MCR 2.612 should have been granted following the December 8, 1995, hearing on this motion. A trial court's decision on this type of motion is reviewed on appeal for an abuse of discretion. *Dollar Rent-A-Car Systems v Nodel Construction*, 172 Mich App 738, 741; 432 NW2d 423 (1988). Instead, the narrow issue briefed by defendant concerns whether the entry of the default judgment following the October 25, 1995, hearing violated his right to a jury trial on the issue of damages. We review this legal question de novo. See *Schroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997).

We do not agree with defendant's contention that the trial court held a hearing on damages for which the right to a trial by jury attached. In this regard, we note that defendant had a right to participate in the proceedings on the entry of the default judgment and that he exercised that right. *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 513-514; 303 NW2d 234 (1981). However, it is only if the trial court determines that further proceedings are necessary to determine the amount of damages that the court is obligated to accord a defendant his properly preserved right to a jury trial. MCR 2.603(B)(3)(b); *Wood v DAIIE*, 413 Mich 573, 583-585; 321 NW2d 653 (1982). The holding of further proceedings on the issue of damages is within the discretion of the trial court. *Id.* at 585.

In the case at bar, the trial court did not determine that further proceedings were necessary to determine the amount of damages. Having been presented with affidavits setting forth a specific amount of damages and an explanation thereof, and having heard defense counsel present an argument regarding the default judgment at the October 25, 1995, hearing, without contesting the amount of damages claimed or otherwise requesting an evidentiary hearing thereon, the record shows that the trial court then entered a default judgment based on the affidavits.

Juries decide disputed factual issues in actions wherein the parties have a right to a jury trial. See *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993); *Draggoo v Draggoo*, 223 Mich App 415, 427; 566 NW2d 642 (1997). Before a jury is ever reached, a preliminary decision must always be made on whether or not there is anything to go to a jury. *Moll, supra*. There can be no infringement upon the constitutional right to jury when there is no issue of fact to go to the jury. *Kroes v Harryman*, 352 Mich 642, 646; 90 NW2d 444 (1958). Because no issue regarding damages that required a factfinder was identified at the October 25, 1995, hearing, we hold that the trial court's decision to enter the default judgment based on the affidavits did not infringe upon defendant's right to a jury trial.

Affirmed.

/s/ Stephen J. Markman

/s/ Gary R. McDonald

/s/ Mark J. Cavanagh