STATE OF MICHIGAN

COURT OF APPEALS

ALKEN-ZIEGLER, INC., a Michigan Corporation,

Plaintiff-Appellee,

v

WATERBURY HEADERS CORPORATION, a New York Corporation,

Defendant-Appellant,

and

WATERBURY HEADERS, INC., n/k/a/ WATERHEAD, INC., a Connecticut Corporation,

Defendant.

UNPUBLISHED
March 3, 1998

No. 200042
Kalkaska Circuit
LC No. 94-005075-CK

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's orders refusing to set aside a default, and entering default judgment, in favor of plaintiff, Alken-Ziegler, Inc. We reverse and remand.

I

Plaintiff, a Michigan corporation, manufactures cold-formed steel products for use in various industries. In 1991, plaintiff paid defendant Waterbury Headers, Inc. (Waterbury I), a Connecticut corporation, $120,000 for conversion of a machine owned by plaintiff. Waterbury I shipped parts and instructions for installation by plaintiff's personnel. However, plaintiff complained that, in the course of one year, after investing thousands of employee hours and initiating many conversations with Waterbury I, the conversion of plaintiff's machine never worked satisfactorily. Plaintiff commenced legal action against Waterbury I in May 1994, alleging breach of contract and implied warranty.

Waterbury I challenged the jurisdiction of the Michigan circuit court, citing a lack of minimum contacts with the state. Because Waterbury I had sent a representative to Livonia as part of the negotiations with plaintiff, and because the case would call for the application of Michigan's Uniform Commercial Code, the court denied the motion and exercised jurisdiction. Waterbury I sought leave from this Court to appeal the jurisdictional ruling, but this Court denied leave, on July 29, 1996, for failure to persuade this Court of the need for immediate appellate review.

II

Defendant Waterbury Headers Corporation (defendant), a New York corporation, purchased some or all of the assets of Waterbury I in 1993; the purchase agreement stated that defendant was purchasing assets only, and not assuming responsibility for any liabilities of Waterbury I. The agreement further provided that Waterbury I would provide defendant with legal defense and indemnification over matters stemming from the assets or prior business of Waterbury I.

Plaintiff filed an amended complaint in March 1996 adding defendant to the cause of action, referring to defendant as "the successor in interest" to Waterbury I. Upon being served with the summons and complaint, on April 3, 1996, defendant referred the matter to Waterbury I and requested that the latter provide defense and indemnification pursuant to their purchase agreement. The chairperson of the board of Waterbury I assured defendant that Waterbury I would provide legal counsel for defendant. However, no timely response to the complaint and summons was filed on behalf of defendant. The officer for Waterbury I stated that he had expected counsel to respond automatically on behalf of Waterbury I, and that he was traveling at the time and failed to advise counsel to assume the defense of defendant. Because defendant failed to respond, at plaintiff's request the clerk of the court entered a default on May 23, 1996.

At the July 1, 1996, hearing to determine damages, plaintiff's president and chief operating officer testified that plaintiff's losses from the defendants' alleged breach of contract totaled $337,453.93. The circuit court accepted that figure and declared judgment in that amount. Neither defendant nor Waterbury I appeared at the hearing. Defendant claims never to have received notice of this hearing.

Defendant subsequently filed a motion to set aside the default. At a September 9, 1996, hearing on the motion, defendant argued that it had acted reasonably in response to the complaint, and that defendant did not have successor liability concerning Waterbury I and the present cause of action. Counsel for Waterbury I stated on the record that Waterbury I did not oppose defendant's motion. The court denied the motion to set aside the default.

The parties agreed to dismiss Waterbury I from this cause of action, and the circuit court issued an order to that effect dated November 17, 1996. Over defendant's objection, default judgment was entered on December 2, 1996. Defendant now argues that the circuit court abused its discretion in declining to set aside the default, and that the court erred in failing to consider defendant's objections to the court's exercise of jurisdiction over it.

III

This Court will not disturb a trial court's decision regarding whether to set aside a default absent an abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default or a default judgment may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. *Id.*; MCR 2.603(D)(1).

> For purposes of MCR 2.603(D), "good cause" includes: (1) a substantial irregularity or defect in the proceeding upon which the default is based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result if the default is not set aside. [*Reed v Walsh*, 170 Mich App 61, 64; 427 NW2d 588 (1988).]

Defendant alleges no irregularity in the proceeding below. At issue, then, is whether defendant presented a reasonable excuse for the default, or whether manifest injustice would result from enforcing the default judgment.

A

Defendant lacks a satisfactory explanation for its failure to answer the complaint and summons. Defendant's claim that its president acted diligently and reasonably is without merit. Defendant's president simply turned the matter over to an officer of Waterbury I and obtained that officer's assurances that Waterbury I would provide legal counsel and indemnification in the matter, as required by the terms of the agreement under which defendant acquired the assets of Waterbury I.

A party is responsible to the court for any action or inaction by the party or the party's agent alike, and the circuit court was properly unmoved by the excuse that counsel for Waterbury I neglected to respond on behalf of defendant. See *Levitt v Kacy Mfg Co*, 142 Mich App 603, 609; 370 NW2d 4 (1985). Regarding the apparent failure of counsel for Waterbury I to act on behalf of defendant, "the neglect of an attorney is not good cause and may be imputed to a party against whom default is entered . . . ." *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699, 703; 468 NW2d 533 (1991), rev'd in part on other grounds 441 Mich 851; 489 NW2d 468 (1992). Defendant acted neither diligently nor reasonably in referring the complaint and summons to Waterbury I and then disregarding the matter until after the default was entered.

B

However, despite defendant's failure to respond properly to the complaint and summons, defendant can nonetheless establish good cause if defendant can show that manifest injustice would result if the default judgment were allowed to stand. *Park, supra* at 67. A defendant can demonstrate that manifest injustice would result if there is no evidence that the defendant intentionally delayed the proceedings, if plaintiff had not been prejudiced by the defendant's default, if the period of inactivity was

not unreasonable, and if the defendant presented evidence that, if proved, would establish a meritorious defense. *Reed, supra* at 66.

Plaintiff does not allege that defendant intentionally delayed the proceedings. Further, plaintiff does not argue that the delay prejudiced either its ability to prove its case or its ability to gain the benefits of the relief sought. Further, neither the circuit court in the proceedings below, nor plaintiff in responding to the present appeal, complain that defendant's periods of inaction were unreasonable. This Court has observed that "[d]efault procedures serve to keep the court dockets current and to prevent dilatory defendants from impeding the plaintiff in establishing his claim," and that a delay of "little more than a month" did not offend these principles. *Levitt, supra* at 609. In the instant case, defendant's answer to the summons and complaint was due on May 1, 1996, and defendant was served with notice of the entry of default later that month. Defendant appeared and filed its motion to set aside default on July 18, 1996, well before the default judgment was entered on December 5. Because this sequence of events does not suggest that defendant delayed acting for an unreasonable length of time, and because neither the court below nor plaintiff has suggested otherwise, defendant's period of inaction does not defeat its claim that manifest injustice will result from allowing the default to stand. See *Komejan v Suburban Softball, Inc*, 179 Mich App 24; 445 NW2d 469 (1989) (excusing a fourteen-month period of inactivity in light of a meritorious defense). Thus, defendant can establish manifest injustice from its having to pay plaintiff more than $300,000 if defendant can establish a meritorious defense.

The affidavit of defendant's president lists four bases of defense: That the circuit court lacked personal or subject-matter jurisdiction over the controversy, that defendant was not a party to the contract at issue, that Waterbury I expressly agreed to defend and indemnify defendant as regards such controversies as the present one, and that defendant was not the successor corporation to Waterbury I.

That a party is entitled to indemnification from another entity is not by itself a meritorious defense to a default judgment. See *Hartman v Roberts-Walby Enterprises, Inc*, 17 Mich App 724, 727; 170 NW2d 292 (1969). Defendant's remaining defenses all flow from defendant's insistence that it is not the successor corporation to Waterbury I.

Generally, where one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the seller. *Shue & Voeks, Inc v Amenity Design and Mfg, Inc*, 203 Mich App 124, 127; 511 NW2d 700 (1993). Several exceptions to this general rule exist, however, including where the transaction amounts to a consolidation or merger, and where the transferee corporation was a mere continuation or reincarnation of the old corporation. *Turner v Bituminous Casualty Co*, 397 Mich 406, 419-424; 244 NW2d 873 (1976). To ascertain whether a merger has taken place, the following considerations are applicable: 1) whether there is a continuity of management, personnel, location, assets, and operations, 2) whether the selling corporation promptly ceases its normal operations and dissolves, and 3) whether the purchasing corporation assumes the liabilities of the seller that are ordinarily necessary for the continuation of normal operations of the seller. *Id.* at 420.

There exists a factual dispute regarding whether defendant purchased all or merely some of the assets of Waterbury I, and whether Waterbury I remains a going concern. Further, while the similarity in name between the two corporations implies continuity, their locations in different states weigh in the other direction. Whether defendant is a successor corporation to Waterbury I remains an issue of fact, which, if resolved in defendant's favor would provide defendant with an absolute defense to plaintiff's claims. For this reason, defendant has put forward a meritorious defense to this cause of action. MCR 2.603(D)(1). Under these circumstances, defendant would suffer manifest injustice if forced to pay more than $300,000 in contract damages to a party to whom defendant in fact has no contractual obligation. Accordingly, we find that the trial court abused its discretion by denying defendant's motion to set aside the default judgment.

IV

Whether the circuit court has jurisdiction over defendant depends on whether defendant is found to be the successor corporation to Waterbury I. The latter unsuccessfully contested the jurisdiction of the court in the proceedings below, and defendant has not appealed the propriety of the court's exercise of jurisdiction over Waterbury I. Instead defendant simply asserts that the circuit court lacks jurisdiction, failing to specify whether it is personal or subject-matter jurisdiction that is under attack. Further, defendant's scant mention of jurisdictional objections in its first motion filed only minimally preserved the issue before the trial court. Because defendant failed to develop any further argument in the proceedings below, either orally or in writing, we find that defendant waived any objections to personal jurisdiction for purposes of this appeal. See *Dundee v Puerto Rico Marine Management, Inc*, 147 Mich App 254, 257; 383 NW2d 176 (1985).

Despite defendant's waiver of objections to personal jurisdiction in the proceedings below, defendant's objection to subject-matter jurisdiction may be raised at any time. *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 541 (1997). However, the three short paragraphs of argument in defendant's brief on the jurisdictional issue consist of little more than the bare assertion that jurisdiction is lacking, and that the circuit court erred in failing to develop this issue on its own initiative. Defendant fails to explain why the subject matter of a contract involving a Michigan corporation, allegedly to be performed substantially in Michigan, and negotiations of which included a visit to Michigan by an agent of defendant's alleged predecessor corporation, does not come under the jurisdiction of the circuit court. This Court will not search for authority to sustain a party's position. *Lionel Trains, Inc v Chesterfield Twp*, 224 Mich App 350, 354; 568 NW2d 685 (1997). Defendant has failed to offer this Court any basis upon which to question the circuit court's exercise of jurisdiction over it.

V

If defendant is not a successor corporation to Waterbury I, then, particularly in light of the corporations' contract language disclaiming defendant's responsibility for the liabilities of Waterbury I, defendant is not liable to plaintiff under plaintiff's contract with Waterbury I. However, if defendant is a successor corporation to Waterbury I, then defendant is subject to the circuit court's jurisdiction over the present matter, as the court found, and which defendant does not dispute on appeal.

We reverse and remand this case to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff