

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD HARTMAN,

Plaintiff-Appellee,

v

DENNIS LANG,

Defendant-Appellant,

and

RICK PARDO, RICK OSBORNE,
CITY OF DEARBORN and
USA, HOCKEY, INC.,

Defendants.

UNPUBLISHED

March 2, 1999

No. 203964

Wayne Circuit Court

LC No. 95-536056 NI

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

This is a personal injury case arising out of a hockey game. Defendant Lang appeals as of right from a \$50,000 default judgment in plaintiff's favor.¹ We reverse.

Defendant first argues that the trial court did not have authority to order an entry of default based on the failure of an agent of defendant's insurance company to appear for a settlement conference.² We agree. This Court reviews the scope of a trial court's powers de novo because that is a question of law. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). However, we review the merits of the trial court's decision to order an entry of default under an abuse of discretion standard. *Schell v Baker Furniture Co*, ___ Mich App ___, ___ NW2d ___, slip op at 2 (Docket Nos 194794, 194795, rel'd 11/6/98); *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

“A trial court’s authority to enter a default or a default judgment against a party must fall within the parameters of the authority conferred under the court rules.” *Henry v Prusak*, 229 Mich App 162, 168; 582 NW2d 193 (1998). The trial court has authority to direct persons with authority to settle the case, including “representatives of insurance carriers,” to attend a settlement conference. MCR 2.401(F)(1); see also *Henry, supra*, 229 Mich App at 168. As to an entry of default for failure to attend, MCR 2.401(G) provides that:

(1) Failure of a party or the party’s attorney to attend a scheduled conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

Similarly, default for failure to obey an order to attend is governed by MCR 2.506(F), which provides that:

If a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend, the court may:

* * * *

(6) enter judgment by default against that party.

The default provisions of MCR 2.401(F) and MCR 2.506(F) are thus explicitly limited to the failure of a party or a party’s attorney to attend a mandatory conference, and do not authorize an entry of default based on the failure of the party’s insurance representative to attend. *Henry, supra*, 229 Mich App at 169-171; see also *McGee v Macambo Lounge, Inc.*, 158 Mich App 282, 286-288; 404 NW2d 242 (1987). The trial court therefore had no power to order an entry of default on that basis.

We also agree that the trial court abused its discretion in denying defendant’s motion to set aside the entry of default because defendant showed good cause (the court’s lack of authority) and filed an affidavit of meritorious defense (assumption of risk). See MCR 2.603(D)(1); *Park v American Cas Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996); see also *Higgins v Pfeiffer*, 215 Mich App 423, 426; 546 NW2d 645 (1996) (baseball); *Overall v Kadella*, 138 Mich App 351, 357-358; 361 NW2d 352 (1984) (hockey).

Lastly, we also agree with defendant that, since he had preserved his right to a jury trial, the court abused its discretion when it determined the amount of damages without a jury and entered a default judgment against him. See *Mink v Masters*, 204 Mich App 242, 246; 514 NW2d 235 (1994); see also MCR 2.603(B)(3). Nevertheless, we note that the trial court lost jurisdiction to grant defendant’s motion to set the default judgment aside once defendant filed a claim of appeal with this Court. *Wilson v General Motors Corp.*, 183 Mich App 21, 41; 454 NW2d 405 (1990); see also MCR 7.208(A).

Reversed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey

¹ Plaintiff's claims against the city of Dearborn and defendant Osborne were dismissed on the basis of governmental immunity. His claim against USA Hockey was dismissed by stipulation. Defendant Pardo was never served.

² Contrary to defendant's argument, it is clear from the record that the this was the reason for the entry of default.