STATE OF MICHIGAN

COURT OF APPEALS

YANOUCHKA M. PREZEAU, f/k/a YANOUCHKA M. ADESANYA,	UNPUBLISHED May 25, 1999
Plaintiff-Appellee,	
v	No. 213795 Kalamazoo Circuit Court
CHRISTOPHER F. ADESANYA,	LC No. 97-1747 DM
Defendant-Appellant.	

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant Christopher F. Adesanya appeals from a default judgment of divorce. We affirm.

Plaintiff filed for divorce from defendant on June 25, 1997. At the time, defendant was either residing in or visiting in Great Britain. He was personally served in London on October 1, 1997. On October 31, 1997, a default was entered. Defendant was sent notice of this default by first-class mail to both his last known address in Kalamazoo and the address in London at which he had been served. He filed an answer in pro per on December 3, 1997. On January 5, 1998, a pro confesso hearing was held. Defendant, who was present at the hearing, objected to various aspects of the proposed judgment of divorce. The trial court declined to sign the judgment of divorce and referred the case to the Kalamazoo County Friend of the Court to resolve issues concerning custody, visitation, and other issues. The court also advised defendant to obtain counsel, saying, "If you're going to hire a lawyer, Mr. Adesanya, you'd better do it immediately."

The trial court held a hearing on plaintiff's motion for child support on February 9, 1998. At this hearing, counsel for plaintiff informed the court that defendant had been at the courthouse before the hearing; however, he was not present at the hearing. The court ordered defendant to pay child support in the amount of $210 per week.

Counsel for defendant entered an appearance on March 16, 1998. On the same date, defendant filed an objection to the entry of child support. Plaintiff filed a motion to compel answers to interrogatories nine days later. A hearing was held on both motions on April 20, 1998. Although

counsel for defendant was present, defendant was not. Counsel for defendant told the court that he had advised defendant to be present at the hearing; however, defendant told him that he was not comfortable being in the same room as plaintiff. Following the hearing, the court overruled the objections to child support and granted the motion to compel, telling counsel for defendant that they had to be served on counsel for plaintiff within fourteen days. The interrogatories were answered and served within this period.

A hearing was set for June 3, 1998 before a friend of the court referee. Neither defendant nor counsel appeared at this hearing. On June 4, 1998, plaintiff filed a motion for entry of default and default judgment. The court heard the motion and took testimony on June 15, 1998. The default and default judgment of divorce were signed on the same date. On June 25, 1998, counsel for defendant filed an objection to child custody and motion to set aside the default judgment. In the affidavit supporting the motion to set aside, defendant said he had no notice of the referee hearing. On June 30, 1998, counsel for defendant filed an objection to the default and default judgment, saying that he had not received proper notice "of any hearing," and specifically, had not received notice of the default and default judgment until the date of the hearing, and at the same time the hearing was being held.

A hearing was held on defendant's motion to set aside default and objection to the default on July 27, 1998. Counsel for defendant told the court that its scheduling office had an address for him that he had not been at for approximately four years. He admitted to receiving documents from plaintiff. Plaintiff told the court that the court file showed that defendant had been notified of each hearing by first-class mail to his current address. Further, the June 3 hearing before the referee had been discussed with counsel for defendant at a status conference held before the referee. When counsel failed to appear, the referee tried calling his office, but had to leave a message on an answering machine. Counsel for defendant admitted to receiving the message, but said that when he called back, he reached the referee's answering machine and left a message that he had not received notice of the hearing.

Following arguments of counsel, the trial court said it would rely on the proofs of service in the file to resolve the issue of whether defendant had received notice of hearings. The court went on to say that it was "not impressed by the claim that [defendant] didn't have notice, because this is an individual who even when he has notice and appears, . . . chooses to leave before the hearing is held, and then comes back later and says, Well, I didn't like what happened in that hearing." The court also found that the affidavit in support of the motion to set aside did not show a meritorious defense. Accordingly, the court denied the motion to set aside, overruled the objection to the default, and granted the motion to enter default and default judgment.

Defendant claims the trial court abused its discretion in denying his motion to set aside the default and default judgment. We disagree. A motion to set aside a default or default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998). Good cause to set aside a default includes: (1) a substantial defect or irregularity in the proceeding on which the default was based; (2) a reasonable excuse for failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default were allowed to stand. *Id.*; *Gavulic v Boyer*, 195 Mich App 20, 24-25; 489

NW2d 124 (1992). The policy of this state generally favors the meritorious determination of issues, and thus encourages setting aside defaults upon timely motion. *Id*., 24. However, this Court will not reverse the trial court's decision to grant or deny a motion to set aside a default absent an abuse of discretion. *Id.*

Defendant challenges only the "good cause" prong of the requirements for setting aside a default judgment. He claims there was a defect or irregularity in the proceeding in that plaintiff did not comply with the notice requirements of MCR 2.603(B). However, the record contains a proof of service, signed and dated June 4, 1998. Service may be made on an attorney by mailing to the attorney at his last known address; service is complete at the time of mailing. MCR 2.107(C). Mailing creates a presumption that the documents were received. See *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). While this presumption may be rebutted, the question of whether it was rebutted is for the trier of fact. *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969). The court concluded in this case that it would rely on the proofs of service to resolve the issue of notice. We conclude that plaintiff did all that was required under the rules to provide notice.

Defendant contends that a reasonable excuse exists for the failure to appear because counsel did not receive notice of the June 15 hearing on the motion for default and default judgment until the date and time of the hearing. While this allegation appeared in defendant's objection to the default, counsel made no mention of it at the hearing. Given that the court said it was relying on the proofs of service, it would appear that it did not find defendant's unsupported averments to be credible.

Defendant argues that he did not receive proper notice of a default. In this, he is relying on the June 15 default, arguing that he had to receive the notice of default *before* the default judgment could be obtained. We note that defendant received notice of the October 31, 1997 default. Even if we were to accept defendant's argument that the default judgment cannot be sought until after the default is obtained, and that they cannot be entered in the same proceeding, the record shows that defendant received his notice of the first default several months before the default judgment was obtained.

Defendant also claims that he did not receive the seven days' notice required by MCR 2.603(B)(1)(b) before a default judgment was entered. However, the proof of service contained in the court's file shows that the notice was sent by first-class mail on June 4, 1998, eleven days before the hearing. We reject defendant's argument that the file stamp, dated June 8, 1998 shows the date the notice was mailed. Counsel for plaintiff told the court, "Those were filed and dated June 4th. They went to [counsel for defendant]'s address." We do not take counsel's statement to necessarily mean that they were filed and sent on the same date.

Finally, defendant claims that manifest injustice would result from not setting aside the default because he appeared and had a right to participate in the proceedings. In support, he cites *Perry v Perry*, 176 Mich App 762, 769-770; 440 NW2d 93 (1989). However, *Perry* was overruled by *Draggoo v Draggoo*, 223 Mich App 415, 427; 566 NW2d 642 (1997). The right to participate in a trial after a default does not apply in an equitable action, such as a divorce. *Id*. Given the court's conclusion on defendant's delaying tactics and failure to appear, we conclude that, just as in *Draggoo*, defendant forfeited his right to participate further in the proceedings.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins