STATE OF MICHIGAN

COURT OF APPEALS

MARY ZAITER,

Plaintiff-Appellee,

v

RIVERFRONT COMPLEX, LTD., and VIRGIL D. RILEY,

Defendants-Appellants.

UNPUBLISHED
January 25, 2000

No. 209212
Genesee Circuit Court
LC No. 96-051397 CL

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

In this employment discrimination case, defendants appeal as of right from a default judgment entered in plaintiff's favor in the amount of $50,000 for defendants' failure to comply with court orders compelling discovery. We affirm.

I

Defendants first argue that the circuit court erred in denying their motion to set aside the default and default judgment because they showed good cause and established a meritorious defense. We disagree.

We review a circuit court's ruling on a motion to set aside a default judgment for abuse of discretion. *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1996). MCR 2.313(B)(2)(c) authorizes a default judgment as a sanction for discovery abuses, "but it is a drastic measure and should be used with caution." *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994). Before imposing the sanction of default judgment, a court should consider whether the failure to respond to discovery requests extends over a substantial period, whether there was a court order directing discovery that was not complied with, the amount of time that elapsed between the violation and the motion for default judgment, and whether willfulness has been shown. *Id.* at 244. "The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Id.* Where the circuit court validly exercises its discretion in ruling on a motion to set aside

a default judgment, appellate review is sharply limited. *Alken-Ziegler, Inc v Waterbury Headers Corp*, __ Mich __ ; 600 NW2d 638, 642 (1999).

Under MCR 2.603(D), except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default should be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed[1].

At the hearing on defendants' motion to set aside the default judgment, the circuit court went through the record in painstaking fashion, noting that the discovery requests were filed with plaintiff's complaint in October 1996, plaintiff's first motion to compel was filed in April 1997, the court's first order compelling discovery was entered on April 14, 1997, and that defendants did not thereafter provide the discovery requested. Plaintiff's motion for default or in the alternative, sanctions, was filed on June 24, 1997 and noted that plaintiff had communicated with defense counsel several times regarding the outstanding discovery requests, but had not received responses, and that defense counsel did not produce two persons for deposition at a pre-arranged date and time. The circuit court noted that it signed the second order compelling defendants compliance on July 15, 1997. The court further noted that plaintiff filed her motion for default on July 25, 1997, and noticed the hearing for August 25, and again for September 8, 1997, that neither defense counsel nor defendants appeared at the September 8 hearing, and that it granted a judgment of $50,000 but that "in fairness to everybody" asked counsel to file the judgment under the seven-day rule. No objection was received and the court entered the default judgment on September 22, 1997. Although the circuit court diplomatically avoided a ruling on the question whether defense counsel's inaction had been willful, we conclude that the court properly and sufficiently considered the *Mink* factors.

Defendants argued below that the circuit court sent several documents to a former address of defense counsel, that defense counsel received no correspondence from plaintiff's counsel after May 9, 1997, and that defense counsel was unaware that default proceedings had been taken against defendants until plaintiff's counsel faxed her a copy of the default judgment on or about September 24, 1997. Defendants argued that their counsel "was actively defending this matter prior to entry of the Default, and in fact had communicated with Plaintiff's counsel regarding discovery." Defendants alleged that they had established good cause and that based on mistake, surprise, inadvertence, and excusable neglect, the circuit court was empowered to set aside the default.

The record does not support defendants' claims that they failed to receive the court's orders compelling discovery and did not learn of the default proceedings until late September 1997.[2] However, assuming that defendants did not receive the motions, notices of hearing and the many letters that the record indicates plaintiff's counsel mailed to defense counsel's proper address, defense counsel admitted receiving by fax a letter from plaintiff's counsel dated May 9, 1997. Plaintiff's counsel referred in that letter to, and enclosed a copy of, the circuit court's first order compelling that defendants produce discovery within ten days, i.e., no later than April 24, 1997, and also stated in the letter that the order had been previously provided to defense counsel.[3] There is thus no dispute that defense counsel knew in early May of 1997 that defendants were required to comply with a court order compelling discovery and had already missed the due date.

At the October 27, 1997 hearing on defendants' motion to set aside the default judgment, defense counsel stated that she thought she had answered the interrogatories and complied with the circuit court's discovery order by mailing the responses to plaintiff on May 12, 1997. Defense counsel stated that she did not have the portion of the file containing the interrogatory answers with her in court, but that she was unaware that plaintiff had not received the answers, and she could provide proof that she answered the interrogatories upon returning to her office.

Upon returning to court on October 29, defense counsel explained that when she reviewed the file, she discovered that the responses to plaintiff's discovery were erroneously sent to the wrong court and the wrong opposing counsel:

> I searched my records when I returned to the office on Monday [October 27, 1997] and did in fact discover some new information that I wanted to bring to the Court's attention.
>
> It was my position Monday that in fact I had prepared and filed Answers to Interrogatories. What I discovered were the completed Answers to Interrogatories. However, the proof and the cover letter revealed information to me that I suppose in many senses increases my culpability in this matter.
>
> The cover letter and the proof of service in fact indicated service upon the – the proof of service upon the 68th Judicial District Court at 630 South Saginaw. The proof of service indicates service of the answers upon Stewart J. Rice at –on Telegraph Road in Bingham Farms. That name is one that is recognized to me as being the attorney of record for a plaintiff in a case that was pending in the 68th Judicial District Court, also involving this very same defendant. It's my belief, your Honor, that the proof and the answers were filed in the wrong case. If they were returned to my office, they were not brought to my attention.
>
> I do recognize the initials of the person who prepared the cover letter and proof of service. However, it apparently never got to Mr. Lenhoff's [plaintiff's counsel] attention. The answers are dated May 12, as is the cover letter and the proof of service. They are completed answers and, in addition, the complete personnel file of the plaintiff was produced at that time. It's with a great deal of dismay, however, that I would indicate to the Court that they apparently were produced to an attorney unrelated to this case.[4]

We conclude that defendants failed to establish the first prong of the "good cause" inquiry: a substantial defect or irregularity in the proceeding on which the default was based. A substantial defect or irregularity in procedure must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989). The actual irregularities in the instant case were insubstantial. The fact that the circuit court mistakenly sent a scheduling order and trial date, and notice of mediation hearing to defense counsel's former business address did not prejudice defendants. Defense counsel admits that both were forwarded to her and the

record is clear that mediation was not held in the instant case. Plaintiff concedes that her June 23, 1997 motion for default or for attorney fees, set for hearing June 30, should have been hand-delivered to defense counsel under MCR 2.119(C)(1)(b), in order to reach defense counsel seven days before the hearing, but was instead mailed first-class on June 23. This deviation from the court rule is irrelevant to the issues before us as defense counsel asserts that she never received the motion, not that she received it with inadequate time to respond.

Defendants also argue that it would have been impossible to comply with the circuit court's second discovery order, entered as a result of the June 30 hearing, even if they had received notice of it because the court signed the order on July 15, 1997 and the order required compliance on or before July 11. The circuit court's July 15 order requiring that the interrogatories be answered by July 11, and providing that a default judgment will be entered if the answers are not provided, was entered pursuant to MCR 2.602(B)(3). The record indicates that plaintiff served a proposed order under the seven-day rule on June 30, 1997, setting forth defense counsel's proper address, the court received no objection, the order was submitted to the court for signature on July 11, 1997, the court signed the order on July 15, 1997, and the order was entered on July 16, 1997. Defendants never responded to the order at all and cannot now challenge the default on the basis that the date for providing answers preceded the date the order was actually entered, although the compliance date was after the hearing and after the date the proposed order was sent to defense counsel. Thus, we conclude that defendants did not show a substantial defect or irregularity in the proceedings upon which the default was based.

Nor did defendants offer a reasonable excuse for failure to comply with the requirements that created the default. Defense counsel answered plaintiff's complaint in November 1996 and undisputedly was contacted by telephone and by fax between that time and May 9, 1997. Defense counsel admits that her former law firm forwarded the scheduling order and trial date to her in January 1997. The scheduling order provided that discovery had to be completed by May 1, 1997, and witness lists and detailed damage specification filed by February 15, 1997, and that mediation would be held after June 1, 1997, and trial on December 2, 1997. Defense counsel stated at the hearing on defendants' motion to set aside the default judgment that she received plaintiff's counsel's letters of February 4, 1997 and March 7, 1997, she believed by fax. In the former, plaintiff's counsel stated that she had not received defendants' responses to plaintiff's first interrogatories and requests for production of documents that had been served with the complaint, that the responses were long overdue, and that if she did not receive them by February 14, 1997, she would file a motion to compel. Plaintiff's counsel's March 7, 1997 letter reiterated not having received defendants' responses and stated that defense counsel had said in a phone conversation on March 6, 1997, that she would produce them no later than March 14, 1997. Plaintiff's counsel indicated that if she did not receive the responses by that date, she would have no choice but to file a motion to compel. The motion was filed and an order was entered. Plaintiff's May 9 letter referring to the order and the need to provide answers was received by defense counsel. Although defense counsel asserts that she believed she filed the answers in compliance with the court's order, and that she did not receive the motions and orders filed and entered from May through the entry of judgment in September, the circuit court was not obliged to either accept defense counsel's assertions or conclude that the assertions constituted excusable neglect.

Under these circumstances we conclude that the circuit court did not abuse its discretion in finding that defense counsel unjustifiably neglected the instant case when she failed over a five-month period to make contact with plaintiff's counsel of any kind, or otherwise investigate the status of the case.[5] Defendants did not establish good cause existed to set aside the default judgment. See *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358-359; 514 NW2d 257 (1994).

Defendants also argued that they showed a meritorious defense, and that the court could set aside the default even absent good cause. Defendants filed two affidavits below, one of the individually named defendant, in which he attested that he was the owner and sole shareholder of defendant, that employment decision-making was handled by the staff at defendant company and not by him, and that he had no knowledge of plaintiff's pregnancy at the time she was terminated and had never met plaintiff. The second affidavit was of defendant's general manager, Vallorie Battin, in which she stated that plaintiff had been employed as an x-ray technician at defendant company from June 22, 1994 until May 21, 1996, and that in early 1996 a "management decision was made to eliminate the full time position in favor of a part time position" because it became apparent that the level of x-ray billings did not justify the maintenance of a full-time position. The general manager averred that plaintiff was offered a part-time position but declined it, and that plaintiff's pregnancy was not a factor in the decision to terminate her.

Plaintiff's brief in opposition to defendants' motion to set aside the default judgment argued that defendants had failed to state a meritorious defense because they presented no facts regarding why plaintiff's position needed to be eliminated other than a conclusory statement.

Assuming that defendants' affidavits showed a meritorious defense, defendants failed to establish good cause and they were thus not entitled to have the default judgment set aside. See *Alken-Ziegler, supra* at 600 NW2d 644-645 (noting that the "meritorious defense" and "good cause" requirements are separate and should not be blurred.)[6] The circuit court did not abuse its discretion in denying defendants' motion to set aside the default judgment.

II

Defendants next argue that the circuit court erred in denying their motion for reconsideration because they filed a reliance on demand for jury trial, did not waive the right to a jury trial, and were thus entitled to a jury trial on the issue of damages.

MCR 2.508(D)(3) provides:

> A demand for trial by jury may not be withdrawn without the consent, expressed in writing or on the record, of the parties or their attorneys.

A default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue. *Wood v DAIIE*, 413 Mich 573, 578; NW2d (1982). A defaulting party who has properly invoked his right to jury trial retains the right to a jury trial on the issue of damages *if* a hearing is held to determine the amount of recovery. *Id.* at 583-584. The holding of further

proceedings on the question of damages is within the trial court's discretion. *Id.* at 585; MCR 2.603(B)(3)(b).[7]

Defendants in the instant case filed a reliance on plaintiff's jury demand, preserving their right to a jury trial, *Wood*, *supra* at 582-583, and did not thereafter waive that right. The circuit court's opinion and order denying reconsideration stated in pertinent part:

> Defendants offer the case of *Wood v. DAIIE,* 413 Mich 573; 321 N.W.2d 653 (1982)[,] as a basis for Reconsideration. In that case, Plaintiff brought an action against an insurer for personal injury protection benefits due him as a result of injuries incurred in an accident with the defendant's insured and demanded a jury trial. Defendant answered and also demanded a jury trial. *Id.* at 576. A default judgment was entered after defendant failed to answer interrogatories and comply with two orders of the court compelling responses. Plaintiff notified defendant of a hearing on the default judgment and defendant did not respond. Defense counsel answered interrogatories one day before the hearing, attended the hearing, but was denied participation in the hearing itself. *Id.*
>
> The case was appealed and the Supreme Court of Michigan reviewed the case in order to definitely decide if when a defaulting party has a right to participate in further proceedings in order to determine the amount of damages whether the party also has a right to a jury trial on the damages issue. *Id.* at 578.
>
> The court stated that it is within the trial court's discretion whether to hold further proceedings on the question of damages. *Id.* However, should the court so decide, then so long as the party has properly invoked his right to a jury trial, then the party has a right to have a jury determine the issue of damages. *Id.* 589.
>
> In the case at bar, it was within the court's discretion to determine whether a hearing was necessary to determine damages. Defendant did not attend the default proceedings, the court did not find a hearing necessary and based damages on the mediation award amount. Therefore, because the court did not find a hearing necessary, pursuant to *Wood, supra,* a jury trial as to damages is not warranted. Further, pursuant to the standards for a Motion for Reconsideration, an error which the party seeks to correct must have been committed pursuant to an issue previously before the court. Defendants have never raised the issue of a right to a jury trial prior to this Motion for Reconsideration. Additionally, this court has concerns whether it has jurisdiction to further decide this matter as Defendants have filed an appeal with the Court of Appeals.
>
> **CONCLUSION**
>
> The Plaintiff's [sic defendants'] cited authority of *Wood, supra,* does not change the basis upon which the court made its decision regarding the Motion to Set Aside the

> Default Judgment. As such, the court finds that the Plaintiff has failed to demonstrate a palpable error by which the court and parties have bene misled and can show that a different disposition of the motion would result from correction of this error as required by MCR 2.119(F). . . .

Although in ruling on defendants' motion for reconsideration, the circuit court erroneously stated that a hearing on damages had not been held and that it had awarded plaintiff an amount based on mediation, we find no error in the court's denial of the motion. No mediation was held in the instant case. At the September 8, 1997 hearing on plaintiff's motion for default judgment, defendants and defense counsel did not appear and plaintiff's counsel stated that plaintiff was present if the court wished to take testimony regarding damages. The circuit court called plaintiff, who testified that she had suffered approximately $18,000 in economic loss and suffered emotional distress as a result of her termination. Plaintiff testified that since her termination she had been diagnosed with depression and that the depression nearly caused her to miscarry. Plaintiff's counsel then requested judgment in the amount of $50,000, which the court granted. Under *Wood*, because the court heard evidence regarding damages, defendants' properly preserved right to a jury determination of the issue of damages must be recognized. However, defendants were not present at the hearing, and did not assert the right to a jury trial when the hearing was held. Further, defendants did not raise the issue of their entitlement to a jury trial on damages in their motion to set aside the default judgment. Because defendants raised the jury trial issue for the first time in their motion for reconsideration, we cannot conclude that the circuit court abused its discretion in denying the motion for reconsideration. See *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Affirmed.

/s/ Kathleen Jansen
/s/ Helene N. White

[1] The "good cause" and "meritorious defense" requirements under MCR 2.603(D)(1) are separate and should not be blurred:

> We are persuaded that the analytical difficulty that has arisen in this case and prior cases is due, in large part, to rote recitation of the "good cause" inquiry that was articulated by Honigman & Hawkins [Authors' Comments to 2 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed), p 662 of GCR 1963, 520.4] to include (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 that created the default, or (3) some other reason showing that manifest injustice would result if the default is not set aside. . . MCR 2.603(D)(1) and its predecessor state only that a party seeking to set aside a default or a default judgment must both file an affidavit of meritorious defense and show good cause.

> The first two prongs of the Honigman & Hawkins "good cause" test are unremarkable and accurately reflect our decisions. It is the third factor, "manifest injustice," that has been problematic. The difficulty has arisen because, properly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent manifest injustice. [*Alken-Ziegler, Inc v Waterbury Headers Corp, supra.*]

[2] Plaintiff's complaint, which was served on defendants at their Flint address, was served on October 9, 1996, together with the interrogatories and requests to produce at issue. Defense counsel filed defendants' answer and affirmative defenses on November 4, 1996, setting forth defense counsel's address on Edward Avenue in Madison Heights. Although in early 1997 the circuit court sent a scheduling order and trial date of December 2, 1997 to defense counsel at her previous work address on Long Lake Road, defense counsel acknowledged receiving it in January 1997, as it was forwarded to her by her former law firm. Plaintiff filed her witness list on February 13, 1997 and a motion to compel answers to interrogatories on April 2, 1997, both of which state defense counsel's proper address. The lower court record contains the notice of hearing pertinent to plaintiff's motion to compel, stating that it was served on defense counsel at the Madison Heights address by first-class mail on March 26, 1997. The circuit court's order compelling defendants to answer interrogatories, entered on April 14, 1997, also properly states defense counsel's address in Madison Heights. The record also contains a notice of hearing for June 30, 1997 for plaintiff's motion for default or in the alternative $2,500 in attorney fees, stating that defendant had failed to comply with the court's order entered on April 14, 1997 and had failed to produce its agents for deposition. The notice states it was sent first-class mail to defense counsel on June 23, 1997 at the Madison Heights address. A proposed order submitted under the seven-day rule, filed July 2, 1997, also properly states defense counsel's Madison Heights address. The circuit court's order compelling defendants to respond to plaintiff's interrogatories and requests to produce by July 11, 1997 to avoid entry of a default judgment, entered on July 16, 1997, properly states defense counsel's address in Madison Heights. Plaintiff's motion for default judgment, filed on July 25, 1997, states defense counsel's address in Madison Heights, as does the notice of hearing, which states that it was sent by first-class mail to defense counsel at the Madison Heights address. The order plaintiff served under the seven-day rule on September 10, 1997 and the default judgment entered on September 22, 1997 do as well.

[3] Plaintiff's counsel's May 9, 1997 letter, sent via facsimile and regular mail to defense counsel's Madison Heights address, stated in pertinent part:

> Pursuant to your request, I have adjourned the depositions set for Valerie [sic] Battin and Trina McDaniel for today's date. Also, it is my understanding that you have adjourned the deposition of my client, Marcy Zaiter [,] on today's date at 2:00 p.m. You informed me during our telephone conversation on Thursday, May 8, 1997, that you would be unable to produce one of the deponents on Friday for the depositions. More importantly, *you informed me that you would not be providing me with Defendant's* [sic] *Answers to Plaintiff's First Set of Documents and Plaintiff's First Request for Production of Documents before the depositions.* Accordingly, the depositions of Trina McDaniel and Valerie [sic] Battin have been canceled . . . .
>
> Also, during our telephone conversation, you reassured me that you would provide me Defendant's [sic] Responses to Plaintiff's First Set of Interrogatories and Document Requests, no later than Monday, May 12, 1997. *As you know, on April 14, 1997, Judge Beagle entered an Order in this case compelling Defendant* [sic] *to respond to Plaintiff's First Set of Interrogatories and Request to Produce within ten days of the Order. I enclose herein a copy of the Order, which was provided to you, compelling Defendant* [sic] *to respond* . . . In other words, Defendant [sic] was required under Court Order to provide these said discovery responses no later than Thursday, April 24, 1997. As such, Defendant's [sic] responses are long over due [sic]. Thus, if Plaintiff is not in receipt of Defendant's [sic] responses by Friday, May 23, 1997, I will have no other choice but to file a Motion under MCR 2.313(B) for Defendant's [sic] failure to comply with the Court Order to respond to Plaintiff's discovery requests.

[4] The completed answers are not in the lower court record and there is no indication that they were presented to the circuit court at the October 29 hearing.

[5] The circuit court stated from the bench:

> Now, it has been five months since defense counsel last made contact with the plaintiff, and they have stated that the lack of mail failed to give them notice of events or her need to contact plaintiff's counsel. However, as the Court has gone through the file and received oral argument Monday, plaintiff appears to have sent all the mail to the Edwards Road address, which defendant [sic] claims is counsel's correct address. It's exactly this long period of time without contact which should have at least put defendant's [sic] counsel on notice of a need to update itself with the status of the case, even – or – either through placing a phone call to plaintiff's counsel or to this court.
>
> An attorney certainly has an ethical duty to act with reasonable diligence and promptness in representing a client according to Michigan Rules of Professional

Conduct. Defendant's attorney allowed five months to pass without an attempt to contact plaintiff or this court.

Defendant [sic defense counsel] offers as an explanation for her lack of contact that control over this case, as nonreceipt of mail. She asserts that this is good cause and that a meritorious defense exists. However, this Court is convinced that the receipt of mail should not be the only method whereby an attorney should be prompted to keep abreast of the progress and status of a case. The purpose of a default judgment is to discourage attorneys from failing to represent their clients in a reasonably diligent and prompt manner. Unfortunately, it has the effect of adjudicating matters not on the merits alone. However, it is appropriate in specific circumstances and, unfortunately, the Court believes that this is one of them.

This Court makes – takes no pleasure in denying a motion to set aside a default judgment, and counsel has appeared here today and she has been candid enough to indicate that the interrogatories appear to have been prepared and they may have inadvertently been sent to another court and they may very well have been sent to another attorney. Now, why those things didn't come back to her office, or this court, or the other attorney, I am not sure. It's an unfortunate situation, and counsel has been respectful each time she has appeared here.

It's a difficult measure to be taken, but it is the ruling of the Court that the Motion to Set Aside the Default Judgment should be denied.

[6] See note 1, *supra*.

[7] MCR 2.603(B)(3)(b) provides:

If, in order for the court to enter judgment or to carry it into effect it is necessary to

* * *

(ii) determine the amount of damages,

* * *

the court may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution.