STATE OF MICHIGAN

COURT OF APPEALS

MARY ZAITER,

Plaintiff-Appellee,

v

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

Defendant-Appellants.

UNPUBLISHED
January 25, 2000

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

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

KELLY, J. (dissenting).

I respectfully dissent.

Defense counsel presented an affidavit which established a change of office address in April, 1996, and pin pointed this change of address and ensuing post office mix-up as cause for not receiving mail from the court and opposing counsel. The trial court mentioned defendants' reliance on *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699 (1991), modified 441 Mich 851 (1992), but swept aside the mail delivery mix-up and relied instead on a perceived duty on the part of defense counsel to contact plaintiff's counsel and/or the court itself because of a "five-month" period of time during which defense counsel received no communication about the pending law suit. The five-month period apparently dates from a facsimile defense counsel received from plaintiff's counsel on May 9, 1997, to the date of the hearing conducted on plaintiff's motion for default judgment of September 8, 1997. If I have the right period, it is four months not five. The court stated:

> "It had been five months since defense counsel last made contact with plaintiff. Defense counsel stated that the lack of mail failed to give her notice of events or [sic] her need to contact plaintiff's counsel. However, plaintiff sent all mail and notices to the Edwards Rd. address which defendants claim is counsel's correct address.
>
> It was exactly this long period of time <u>without contact</u> itself which the court felt should have at least put defense counsel on notice of a need to update itself with the status of the case, either through placing a phone call to plaintiff's counsel or to this court. The

> court in its oral ruling at the bench also mentioned the fact that an attorney has an ethical duty to act with reasonable diligence and promptness in representing a client pursuant to Michigan Rules of Professional Conduct, Rule 1.3.
>
> Defendants' attorney allowed five months to pass without an attempt to contact plaintiff or this court. Defense counsel offered as an explanation for her lack of contact and control over this case the non-receipt of mail. She asserted that this amounted to good cause and that a meritorious defense existed. However, this court was 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 trial court then relied on this lack of activity, lack of diligence, on the part of defense counsel for granting plaintiff's motion for entry of default. Without some specific information or record support of docket management procedures, local rules and prevailing time frames in the Genesee Circuit, I would say that the lack of contact between an attorney and the opposite side or the court for a period of four or five months is not sufficient ground for entry of a default against the attorney for failure "to diligently pursue and defend a case." I believe it was an abuse of discretion for the trial court to refuse to set aside the default and more egregiously to enter a default judgment for $50,000 damages against defendants without giving any notice of such entry and in defiance of defendants' constitutional right to a jury trial on the question of damages.

The majority says that "defendants' properly preserved right to a jury determination of the issue of damages must be recognized." The majority then states that defendants' failure to raise the issue of their entitlement to a jury trial on damages in their motion to set aside the default judgment, and raising it for the first time in their motion for reconsideration, is somehow tantamount to or consists of a waiver. I believe the issue of constitutional magnitude should be addressed as constitutional issues are reviewed de novo on appeal and failure to consider the issue would result in manifest injustice. *Herald Company, Inc v City of Kalamazoo,* 229 Mich App 376; 581 NW2d 295 (1998). In its opinion/order denying defendants' motion for reconsideration, the trial court reiterated that the amount of the default judgment entered on September 22, 1997, was the amount of the mediation award. Since, as the majority points out there was no mediation, there was no predicate for the damage award. This was a rabbit from a hat.

Furthermore, I believe defendants' claim is compelling under the authority of *Wood v Detroit Automobile Insurance Exchange,* 413 Mich 573; 321 NW2d 653 (1982). In *Wood,* under factual circumstances very similar to the present case, the court held that the defendant's constitutional right to a jury trial was improperly denied when the trial court decided to hold a proceeding subsequent to entry of default on the question of damages. That is exactly what the court did here. If a hearing on damages was to be held following its entry of default, the trial court

was obliged to accord defendants notice and their properly preserved right to a jury determination of that issue.

I would reverse.

/s/ Michael J. Kelly