

STATE OF MICHIGAN
COURT OF APPEALS

EMMANUEL FORD, JANICE MARSHALL,
MARVIN BRANTLEY, LARRY REDFEARN and
ARTHUR WARREN,

UNPUBLISHED
August 18, 2000

Plaintiffs-Appellees,

v

No. 209140
Wayne Circuit Court
LC No. 96-639529-CK

STANLEY WYRE,

Defendant-Appellant,

and

DETROIT PUBLIC SCHOOL DISTRICT and
PERCY L. CASH,

Defendants.

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant, Stanley Wyre,¹ appeals as of right the trial court's denial of his motions for relief from judgment pursuant to MCR 2.612(C)(1), following entry of a \$1,745,000 default judgment against defendant for alleged violations of the Whistle-Blowers' Protection Act (WPA), MCL 15.361 *et seq.*; MSA 17.428(1) *et seq.*, defamation, retaliatory conduct, tortious interference with contractual relations, and intentional infliction of emotional distress. We affirm.

I

¹ For purposes of this opinion, we will use "defendant" to refer to defendant Wyre.

Plaintiffs, employees of defendant Detroit Public School District's building maintenance and repair department, worked under the direction of defendant, an attorney employed by the district as assistant superintendent for the physical plant. In 1996, plaintiffs filed the instant lawsuit,² claiming that they had been subjected to retaliatory treatment at work following their allegations of wrongdoing against defendant. Plaintiffs sought damages for wage loss, mental and emotional distress, and attorney fees. Plaintiff Ford alleged that defendant instructed him to misappropriate Detroit Public School funds and resources for the personal benefit of defendant and others. Ford claimed that, after reporting the activity to federal authorities, he was demoted and transferred to a lower paying job and that defendant lodged a series of unsubstantiated allegations of wrongdoing against Ford. The other plaintiffs' claims were based on similar allegations.

Plaintiffs' complaint also set forth a defamation claim based on an internal memorandum issued by defendant Cash³ and signed by defendant, stating that it appeared plaintiffs had received excessive overtime pay that could be considered fraudulent. According to the memorandum, at defendant's direction, Cash and another employee conducted an eight-month investigation into billing irregularities in building repair and maintenance. The memorandum was circulated among various school personnel. In the memorandum, all plaintiffs were identified by name as having received the fraudulent overtime pay.

A

Plaintiffs personally served defendant's counsel at his law office on September 18, 1996. On September 26, 1996, defendant's counsel wrote to plaintiffs' counsel, stating that he was not authorized to accept service on behalf of defendant. After failed attempts at personal service of process, the trial court issued its order for substitute service on defendant by first-class and certified mail, and by posting. The record shows that the summons and complaint were mailed in accordance with the trial court's order on November 26, 1996. Copies of the summons and complaint were posted at defendant's residence on December 5, 1996. The summons was set to expire on December 6, 1996.

On December 30, 1996, plaintiffs filed a petition for entry of default. On the same date, defendant filed a motion titled "motion for summary disposition and for consolidation."⁴ Defendant

² This case has an extensive, and at times, convoluted, procedural history. The case was filed in 1994 and subsequently dismissed and refiled. The parties stipulated to dismissal of a prior action, which raised essentially the same claims raised in the present action. However, the entry of a dismissal order was delayed because the school district and defendant disagreed over the order's reference to their settlement agreement. Plaintiffs filed a proposed order of dismissal under the seven-day rule, MCR, 2.602(B)(3). The trial court entered that order on September 3, 1996. Plaintiffs filed the instant action on September 6, 1996.

³ Defendant Cash was employed as the director of architectural services and building/site repair for the school district.

⁴ It appears that defendant's pleading was filed outside the time limits of MCR 2.108(A) and (B).

argued that the parties' prior case was still pending because he had not agreed to dismissal of that action, and he therefore sought consolidation of the claims in the two cases. Plaintiffs responded that defendant's motion was frivolous because all parties had agreed to the prior dismissal.⁵

Defendant apparently filed an answer and counterclaim in late April or May 1997, but used pre-printed labels from the prior dismissed action. The lower court docket sheet does not reflect a filing, and there is no copy of an answer in the lower court record. Despite the fact that defendant was in default for having failed to timely file a responsive pleading, plaintiffs answered the counterclaim on May 19, 1997. Plaintiffs also filed a notice to take defendant's deposition on June 24, 1997, and attempted to contact defendant's counsel to confirm defendant's attendance.

Defendant and his counsel failed to appear for the deposition. Plaintiffs' counsel placed a statement on the record noting, among other things, defendant's and his counsel's continuing disregard for the trial court's orders and the rules of procedure, and defendant's failure to allow discovery. Plaintiffs' counsel noted that the lack of cooperation was "endemic to this litigation," and filed a motion for entry of default judgment on June 27, 1997.

At a subsequent hearing, defendant's counsel's law partner appeared on behalf of defendant. After the law partner's assurance that a motion to set aside default was forthcoming, the court adjourned the hearing on plaintiff's motion to a later date. At the next scheduled hearing, plaintiffs argued for entry of a default judgment, recounting the protracted history of the case, the difficulties encountered in serving the complaint, and defendant's failure to appear for his scheduled deposition, and noting that defendant is himself an attorney. Defendant's counsel admitted that a motion to set aside default had not yet been filed and asserted that he was not informed of the hearing until the previous afternoon. He also claimed to have been suffering from a serious illness, which caused him to be out of work. He argued that default was too harsh a sanction for defendant's failure to appear at his deposition and that a proper remedy would be a motion to compel discovery and for costs.

The trial court ruled that the default would stand, granted plaintiffs' motion for entry of default judgment, and informed counsel that it would take testimony on the issue of damages after addressing other matters pending in the courtroom. During the thirty-six minute recess, defendant filed his motion to set aside default. Although there were several exhibits filed with the motion, which evidenced defendant's notice of the lawsuit and the default, no affidavit of facts stating a meritorious defense was included as required by MCR 2.603(D)(1). When court reconvened, defendant and his counsel were nowhere to be found. The court heard plaintiffs' testimony on damages and entered judgment accordingly.

⁵ This assertion was supported by documentary evidence filed by defendant in support of his later motion to set aside default.

B

Defendant subsequently filed a motion to set aside default. At the hearing on the motion, the court noted that an extensive record had already been made at the earlier hearing, which defendant and his counsel chose to leave. Defendant claimed that he had not been timely served with the summons and complaint and that he was not in default. The court treated defendant's motion as a motion for reconsideration and noted for the record that the court had "cut [defendant] every break in the book" and that defendant's actions left plaintiffs no choice but to seek the default judgment. The trial court denied defendant's motion and his request for an evidentiary hearing.

Defendant thereafter retained new counsel who filed a motion for relief from judgment, alleging several errors: (1) defendant was never served with a notice of entry of default; (2) the summons had expired prior to service; (3) defendant's motion for summary disposition was a timely responsive pleading; (4) the default judgment was erroneously entered as a discovery sanction; and (5) the trial court erred by holding a hearing rather than a jury trial on damages. Defendant argued that he had established a meritorious defense and that plaintiffs would not be prejudiced by the requested relief.

At the hearing on defendant's motion, following oral argument, defendant sought a protective order for defendant's former counsel to undergo a psychological examination, which would be submitted to the court under seal. Contrary to his earlier position, defendant claimed that his former counsel was "having some problems," and that the court should have the benefit of the psychologist's report for review. The court denied the oral motion for protective order and the motion for relief from judgment.

Defendant then filed a second motion for relief from judgment, on the basis of a psychological evaluation of his former counsel, which defendant claimed was newly discovered evidence of his former counsel's incapacity due to mental illness. Plaintiffs responded by noting that, upon information and belief, defendant shared office space with his former counsel, and that defendant was fully apprised of his counsel's actions in this case. Plaintiffs also noted that defendant's former counsel continued to act in other cases and, allegedly, continued to handle another matter involving the Detroit Public School District, on behalf of defendant. Further, on the day of the hearing on plaintiffs' motion for entry of default, defendant himself was present and chose to leave the courtroom. Plaintiffs argued that attorney negligence was insufficient grounds for setting aside a default judgment.

At the hearing on the motion, the trial court stated that it had read the social worker's report and that the court was "firmly convinced" that there was "insufficient basis to set aside the default." The court found that the social worker's report did not reflect that defendant's former counsel was suffering from mental incapacity. The court also opined that, had the defendant believed that his former counsel's actions were as egregious as claimed, then he could have retained other counsel. The court denied defendant's motion.

II

Defendant argues that the trial court abused its discretion by denying his first motion for relief from default judgment because there were alleged mistakes and procedural errors warranting relief. We disagree. We review the trial court's decision to deny relief from judgment for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 354; 554 NW2d 43 (1996).

A

"Default procedures serve to keep the court's dockets current and to prevent dilatory defendants from impeding the plaintiff in establishing his claim." *Levitt v Kacy Mfg Co*, 142 Mich App 603, 609; 370 NW2d 4 (1985), citing *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974). A motion to set aside a default 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); *Alken-Ziegler, supra* at 229-234. Good cause sufficient to warrant setting aside a default includes: (1) a substantial defect or irregularity in the proceeding on which the default was based, or (2) a reasonable excuse for failure to comply with requirements that created the default. *Id.* at 233-234. The strength of the defense asserted will affect the good cause showing that is required. *Id.* A weaker defense requires a greater showing of good cause. *Id.*

B

First, defendant argues that the trial court abused its discretion by denying his motion for relief from default judgment when he was never properly served with the summons and complaint. We note that the lower court record shows that defendant was served with the summons and complaint, in accordance with the court's order for substitute service, by first-class mail and by certified mail, return receipt requested, on November 26, 1996. He was also served by posting on December 5, 1996.

We are not persuaded by defendant's argument that service was defective simply because he never signed for the certified mail. Defendant had actual notice of this litigation. His sole argument is with the manner of service. The trial court did not abuse its discretion in denying defendant's first motion for relief from judgment on the basis of defective service of process.

C

Second, defendant argues that the trial court abused its discretion by denying his motion to set aside default because the default was entered prior to the time for filing an answer or responsive pleading. Service by mail is complete at the time of mailing. MCR 2.107(C)(3). Pursuant to MCR 2.108(A)(2), defendant had twenty-eight days from the time service was made by mail on November 26, 1996, to file and serve an answer or a motion for summary disposition.

The lower court record shows that defendant's motion was not filed until December 30, 1996. Therefore, the trial court did not abuse its discretion by denying defendant's first motion for relief from judgment on the basis that a timely responsive pleading had been filed.

D

Next, defendant argues that the trial court abused its discretion by denying his motion for relief from default judgment because he was never served with notice of entry of the default. We find nothing in the lower court file documenting that defendant was served with notice. However, plaintiffs asserted below that defendant was served, and, on appeal, have attached a copy of the affidavit of the process server to their brief, which affidavit shows that defendant apparently was personally served with a copy of the notice on January 7, 1997.

This Court has ruled that failure to notify a party of an entry of a default, in violation of MCR 2.603(A)(2), is sufficient to show a substantial defect in the proceedings constituting good cause to set aside a default judgment. *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), overruled on other grounds, *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 289; 602 NW2d 572 (1999). In *Gavulic*, *supra* at 22, 25, the plaintiff admitted that she failed to notify the defendant of the default, nor did she attempt service. However, where, as here, it appears that defendant was served with a notice of default and a motion for entry of default judgment, yet failed to respond, we decline to find good cause for setting aside the default. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358-359; 514 NW2d 257 (1994). Moreover, defendant had actual notice that a default judgment was imminent and had actually been given additional time to file a motion to set aside the default, which he failed to do. *Alycekay Co v Hasko Const Co, Inc*, 180 Mich App 502, 506; 448 NW2d 43 (1989). Consequently, the trial court did not abuse its discretion in denying defendant's first motion for relief from judgment on the basis that defendant was not served with notice of entry of the default.

E

Defendant also argues that the trial court failed to properly consider the basis and merits of his motion for relief from judgment, which resulted in manifest injustice and requires reversal. We disagree. The default judgment was not entered simply for defendant's failure to timely answer the complaint, but, rather, was entered also as a sanction for defendant's persistent failure to respond to the litigation and abide by the court rules and the trial court's instruction.⁶ Because defendant has not shown good cause for failing to properly participate in this litigation, the fact that he may have had a meritorious defense does not warrant setting aside the default judgment. A showing of a meritorious defense, without more, is generally insufficient to warrant setting aside a default. *Alken-Ziegler*, *supra* at 234, n 7. We find no circumstances that would warrant relief on the basis of a claim of manifest injustice. *Id.* The trial court did not abuse its discretion in denying defendant's first motion for relief from judgment.

⁶ A review of the record shows that the default judgment also was not entered solely as a discovery sanction. Therefore, defendant's argument that default was an overly harsh sanction for his failure to appear at his deposition is unpersuasive.

III

Defendant based his second motion for relief from default judgment on the argument that his former counsel was incapacitated by mental illness and, therefore, the negligence of his counsel should not be imputed to him. Although in some situations an attorney's mental incapacity may constitute extraordinary circumstances warranting relief from a default judgment, we agree with the trial court that defendant has not presented persuasive evidence that such is the case here.

"An attorney's negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment." *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996), citing *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995). Defendant argues that his former counsel's mental illness caused his former counsel to abandon his case. He claims the mental illness was not discovered until the social worker submitted a psychological evaluation of defendant's former counsel. Defendant argues that his former counsel's alleged incapacity due to mental illness constitutes extraordinary circumstances, and that relief from judgment under these circumstances may be grounded on either MCR 2.612(C)(1)(a) or (C)(1)(f).

Under MCR 2.612(C)(1)(a), relief may be grounded on mistake, inadvertence, surprise, or excusable neglect. Allegedly, defendant's former counsel's neglect was excusable because of his supposed mental illness. Defendant acknowledges that no Michigan case has held that an attorney's negligence attributable to incapacity due to mental illness constitutes excusable neglect.

In any event, we find that defendant has failed to present sufficient evidence that his former counsel's tactical errors and failure to diligently represent defendant were caused by a mental disorder.⁷ Defendant's former counsel was not seeing a mental health professional. He did not completely abandon this case, or mislead defendant into thinking that timely pleadings were being filed and served. Moreover, although this Court has not been provided with a complete copy of the social worker's report, it appears that its conclusion was based primarily on the worker's impression that defendant's former counsel suffered from bipolar disorder, which generally affected his occupational functioning. However, there is no indication that this conclusion was based on anything beyond an interview with defendant's former counsel. Thus, we agree with the trial court that the report does not evidence that counsel's egregious conduct was caused by a mental disorder.

Under MCR 2.612(C)(1)(f), relief from a judgment may also be grounded on any other reason justifying relief. For relief under MCR 2.612(C)(1)(f), three requirements must be met:

- (1) The reason for setting aside the judgment may not fall under subsections (a)-(e), absent a showing that injustice would result were the judgment to stand;

⁷ It appears that counsel's delay tactics were motivated in part by concerns over the payment of defendant's attorney fees pursuant to the previous agreement with the school district and whether the agreement would cover fees incurred in the instant lawsuit.

(2) The substantial rights of the opposing party must not be detrimentally affected; and

(3) Extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice.

Heugel v Heugel, 237 Mich App 471, 478-481; 603 NW2d 121 (1999); *McNeil v Caro Community Hosp*, 167 Mich App 492, 497; 423 NW2d 241 (1988). “In general, relief is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered.” *Id.*

The sole basis for defendant’s second motion for relief from judgment was his own counsel’s improper conduct. The same basis was proffered in *McNeil*, *id.* at 498, where this Court held that, although the plaintiff may have had a claim for malpractice against her attorney, the facts did not demonstrate extraordinary circumstances warranting relief under MCR 2.612(C)(1)(f). The same reasoning is applicable here. Consequently, the trial court did not err in denying defendant’s second motion for relief from judgment.

IV

Defendant further argues that the court erred in failing to conduct a trial on the issue of damages. We conclude that defendant waived this right.

Defendant’s right to a jury trial on the issue of damages was preserved, despite the entry of a default judgment against him. “A default does not constitute a waiver of a jury trial in a civil action.” *Mink v Masters*, 204 Mich App 242, 245-246; 514 Mich 235 (1994), citing *Wood v DAIIE*, 413 Mich 573, 583-584; 321 NW2d 653 (1982). Once a plaintiff files a demand for a jury, the *defendant need do nothing further to preserve his right* to a trial by jury, and any future waiver of a jury trial *by the plaintiff* can only be done with the defendant’s consent. *Mink*, *supra* at 247; emphasis added. Nevertheless, such a situation does not preclude a defendant’s *own* waiver of the right to a jury trial. *Id.*; emphasis added.

“[W]aiver is the ‘intentional relinquishment or abandonment of a known right.’” *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). In a civil trial, a defendant may waive the right to a jury trial by failing to appear, refusing to participate, or failing to object to an issue being tried by the court without a jury. Michigan Pleading and Practice, Jury, §17, 15-16, citing *Peters v Sturmer*, 263 Mich 494; 248 NW 875 (1933); *Roberts v Tremayne*, 61 Mich 264; 28 NW 113 (1886); *Lymburner v Jenkinson*, 50 Mich 488; 15 NW 562 (1883). Moreover, error warranting reversal may not be one to which an aggrieved party contributed by plan or neglectful action. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

In this case, defendant (1) failed to object to the trial court’s decision to proceed with the damages hearing, and (2) left before the proceedings commenced without addressing the court and with

the knowledge that the court intended to take evidence on the issue of damages. Defendant's actions constituted an explicit waiver of his right to a jury trial on damages. This is not a case in which the defendant asserted a right to trial by jury, which the court denied or failed to acknowledge. See *Boatz v Berg*, 51 Mich 8; 16 NW 184 (1883). Here, defendant was present when the court announced that it would proceed with testimony on the issue of damages following a recess, and defendant voiced no objection. Defendant then left without explanation. Under these circumstances, we find no error in the court proceeding with the hearing on damages.

V

Defendant argues that the trial court abused its discretion by refusing to grant relief from the judgment of \$1,745,000, which is excessive and manifestly unjust. We find no abuse of discretion.

The trial court awarded damages to plaintiffs on an individual basis as follows: plaintiff Janice Marshall, \$185,000; plaintiff Arthur Warren, \$250,000; plaintiff Emmanuel Ford, \$750,000; plaintiff Larry Redfearn, \$350,000; and plaintiff Marvin Brantley, \$210,000. All plaintiffs alleged various intentional tort claims, including defamation, intentional infliction of emotional distress, and tortious interference with contractual relationships. Additionally, plaintiff Ford set forth a claim under the WPA, and plaintiff Redfearn set forth a retaliation claim. A default operates as an admission by the defaulting party that there are no issues of liability. *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 93 (1989). In entering a default judgment, the court has discretion to conduct a hearing to determine the amount of damages. MCR 2.203(B)(3)(b); *Wood, supra* at 585.

"Generally in tort cases actual damages include compensation for mental distress and anguish." *Phinney, supra* at 532. In particular, damages for tortious interference, alleged by all plaintiffs against defendant, include:

- (a) the pecuniary loss of the benefits of the contract or the prospective relation;
- (b) consequential losses for which the interference is a legal cause; and
- (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference. [*Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777, 785; 399 NW2d 408 (1986), quoting 4 Restatement Torts, 2d, § 774A(1), pp 54-55.]

The Michigan Supreme Court has held that exemplary damages are a class of compensatory damages that provide compensation for injury to feelings and are available in intentional tort actions. *Veselenak v Smith*, 414 Mich 567, 573-575; 327 NW2d 261 (1982); *McPeak v McPeak (On Remand)*, 233 Mich App 483, 487-488; 593 NW2d 180 (1999). Under *Veselenak, supra* at 576-577, a plaintiff claiming damages for mental and emotional distress is not entitled to exemplary damages if mental and emotional distress damages are included as part of compensatory damages. The court did not indicate that it was awarding mental anguish damages above and beyond those included as part of the compensatory damages for the various intentional torts, and we find no evidence that it did so.

Applying these considerations to the damages awarded in this case, we do not find the individual plaintiffs' awards excessive in light of the nature of each individual plaintiff's harm. Consequently, the trial court did not abuse its discretion by denying defendant's motion for relief from default judgment on the basis that the damages were excessive.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff