STATE OF MICHIGAN

COURT OF APPEALS

SHARON FAMBRO,

Plaintiff-Appellee,

v

ANDRE FAMBRO,

Defendant-Appellant.

UNPUBLISHED
August 18, 2000

No. 212688
Wayne Circuit Court
Family Division
LC No. 97-733564-DM

Before: Owens, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

The trial court granted plaintiff a default judgment of divorce and denied defendant's subsequent motion to set aside the judgment. Defendant now appeals as of right. We vacate the judgment and remand for further proceedings.

Plaintiff filed a complaint for divorce, personally serving defendant on October 27, 1997, with a copy of the summons and complaint. Defendant did not file an answer and a default was entered on December 19, 1997. The trial court subsequently entered a default judgment on May 1, 1998, awarding plaintiff relief different in kind, and greater in amount, than that requested in the complaint.[1] Defendant filed a motion to set aside the default judgment on May 19, 1998, alleging that he did not receive notice of the entry of default, and that he was informed about the request for entry of the default

[1] In her complaint, plaintiff requested dissolution of the marriage, and asked: (1) to be awarded full custody of the minor children, (2) to be awarded the household furniture and other goods, (3) to be awarded the marital home, (4) that defendant be ordered to pay child support, and maintain dental, optical, and medical insurance on the minor children, (5) that defendant be ordered to pay alimony, and (6) that defendant be ordered to pay his share of the marital debts. These requests were all granted in the judgment of divorce; however, plaintiff was also awarded forty-five percent of defendant's deferred pay plan, fifty percent of any pension plan, and attorney fees in the amount of $1,200. In addition, defendant was ordered to pay the full premium for continuation of health care coverage on plaintiff.

judgment just one day before it was entered. Notwithstanding the alleged absence of notice, the trial court denied defendant's motion to set aside the default judgment.

Defendant argues that the trial court abused its discretion in denying his motion to set aside the default judgment of divorce. *Alken-Ziegler v Waterbury Headers*, 461 Mich 219, 227; 600 NW2d 638 (1999). We agree.

Although "the policy of this state is generally against setting aside defaults and default judgments that have been properly entered," *id.* at 229, the lesson of *Alken-Ziegler* is that a default may only be entered in accordance with the court rules. A motion to set aside a default or a 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);[2] *Alken-Ziegler, supra* at 223. Defendant argues that these requirements are satisfied because he did not receive notice of the entry of the default, as required by MCR 2.603(A)(2),[3] or of the request for judgment, as required by MCR 2.603(B).[4]

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[2] MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

[3] MCR 2.603(A)(2) provides that in relevant part:

> Notice of the entry [of the default] must be sent [by the party seeking the default] to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

[4] MCR 2.603(B) provides, in relevant part:

> (a) A party seeking a default judgment must give notice of the request for judgment to the defaulted party
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> * * *
>
> (ii) if the request for entry of judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or
>
> (iii) if the pleadings do not state a specific amount demanded.
>
> (b) The notice required by this subrule must be served at least 7 days before entry of the requested judgment.

In *Perry v Perry*, 176 Mich App 762, 770; 440 NW2d 93 (1989), this Court held that a defaulting party need not comply with the requirements of MCR 2.603(D) when the party seeking a default judgment fails to comply with the notice provisions of MCR 2.603(B). "Failure to give the required notice invalidates the judgment and requires that it be vacated." *Perry, supra* at 770. The holding in *Perry* flows logically from the use by the court rules of the mandatory term "must" in detailing the requirement that the party seeking to obtain a default judgment give notice to the defaulted party. MCR 2.603(1)(a). Where a party has not received proper notice of the taking of a default judgment, it seems beyond dispute that any default judgment that is entered should be set aside because the absence of notice would provide good cause for the party's failure to answer, and the party would have a meritorious defense to the action; that is, that under *Perry, supra*, non-compliance with the notice requirements of the court rule mandates that the default be set aside.

Here, the record shows that plaintiff did not comply with MCR 2.603(B)(1)(a)(ii) or (iii), because she did not provide notice of the request for entry of the default judgment even though she sought relief different in kind, and greater in amount, than that sought in the complaint for divorce, and because she did not specify the amount demanded. Accordingly, the default judgment of divorce is vacated, and the case is remanded for further proceedings consistent with this opinion. *Perry, supra*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald