STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellee,

and

CHARTER TOWNSHIP OF WATERFORD,

Intervening Plaintiff,

v

OAKLAND DISPOSAL, INC.,

Defendant/Cross-Defendant/Third Party Plaintiff,

and

WATERFORD SANITARY LANDFILL, LTD. and GENE HIRS,

Defendants/Cross-Plaintiffs-Appellants,

and

JAMES KING, ROBERT RUNCO, JOHN RUNCO, ROBERT RYAN, BESTWAY RECYCLING NO. 1, INC., SPECIAL WASTE SYSTEMS, INC., and RUNCO LAND CORPORATION,

Defendants,

and

UNPUBLISHED
September 1, 2000

No. 211591
Oakland Circuit Court
LC No. 91-409629-CZ

BESTWAY RECYCLING, INC. AARO DISPOSAL, INC., and OAKLAND DISPOSAL NO. 1,

Defendants-Third-Party Plaintiffs,

and

TAYLOR CHRYSLER PLYMOUTH, CHARTER TOWNSHIP OF WHITE LAKE, CHARTER TOWNSHIP OF COMMERCE and CHARTER TOWNSHIP OF WATERFORD,

Third-Party Defendants.

ATTORNEY GENERAL,

Plaintiff-Appellee,

v

WATERFORD SAND & GRAVEL COMPANY,

Defendant,

and

WATERFORD SANITARY LANDFILL, LTD.,

Defendant-Appellant,

and

OAKLAND DISPOSAL, INC.,

Third-Party Plaintiff.

No. 212022
Oakland Circuit Court
LC No. 92-445442-CZ

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Defendants Gene Hirs and Waterford Sanitary Landfill, Ltd. ("defendants") appeal as of right, challenging the entry of the default judgment against them in favor of the Attorney General ("plaintiff").[1] We affirm.

The default judgment arose from a 1991 civil action brought by plaintiff on behalf of the Department of Natural Resources and Natural Resources Commission and Water Resources Commission, against Oakland Disposal, Inc. and other defendants, including defendants Hirs and Waterford Sanitary Landfill, Ltd., for the recovery of damages arising from the operation of a landfill located in Waterford Township. Hirs was a general partner of Waterford Sanitary Landfill, Ltd., which operated the landfill before 1987. As a result of unlawful discharges at the landfill, the State of Michigan incurred remediation costs in the amount of $16,034,457.81.

Except when grounded on lack of jurisdiction over the defendant, 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); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223; 600 NW2d 638 (1999). Whether a party has made a sufficient showing of good cause and a meritorious defense are discrete inquiries, but the strength of a proffered meritorious defense can affect the necessary showing of good cause. *Id.* at 233-234. "Good cause" sufficient to warrant setting aside a default or a default judgment may be shown by: (1) a procedural defect or irregularity; or (2) a reasonable excuse for failure to comply with requirements which created the default. *Id*. at 233. A substantial defect or irregularity 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). Failure to give the required notice of entry of a default or default judgment may satisfy the good cause requirement. *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993). Whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Alken-Ziegler, supra*; *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

Defendants first argue that they were denied due process because a default was entered against them for failure to appear for trial when they never received notice of the adjourned trial date. While the record does not indicate that defendants received notice of the adjourned trial date of June 23, 1997, we need not determine whether entry of a default in the absence of formal notice of the adjourned trial constituted good cause sufficient to set aside the default judgments under the circumstances of this case. We agree with defendants that the failure to timely notify them of the entry of the default on June 23, 1997, in accordance with MCR 2.603(A)(2), was a procedural defect or irregularity constituting good

[1] Originally, defendants challenged entry of two default judgments, one in favor of plaintiff and one in favor of Charter Township of Waterford ("intervening plaintiff"). Subsequently, defendants and intervening plaintiff stipulated to dismiss the appeal as it pertained to intervening plaintiff; thus, this appeal now involves only the default judgment entered in favor of plaintiff.

cause. However, because defendants have failed to show a meritorious defense, we conclude that the trial court did not abuse its discretion in denying defendants' motion to set aside the default judgments.

Defendants specifically claim that they did not discover the entry of the default until after intervening plaintiff moved for entry of a default judgment on November 10, 1997. According to defendants, had they received timely notice of the entry of default, they could have immediately moved to set aside the default and could have participated in the four-week trial. We conclude, therefore, that the failure to notify defendants about the entry of the default was a procedural defect or irregularity constituting good cause to set aside the default judgments. *Bradley, supra* at 158-159.

Nevertheless, in order to warrant setting aside the default judgments, defendants were also required to show a meritorious defense. The affidavit filed by Hirs alleges that a meritorious defense exists because defendants would be able to show that they did not own or operate the landfill after December 1986 and that the illegal discharges "occurred from February 26, 1987 through November 25, 1990." For purposes of determining defendants' liability under the Michigan Environmental Response Act (MERA), MCL 299.612 *et seq*.; MSA 13.32(12) *et seq.*,[2] however, it was immaterial that defendants did not own or operate the landfill during the specific time period in which the unlawful discharges of contaminants occurred. Liability in this case was predicated on defendants' ownership and operation of the landfill at the time disposal of the contaminants occurred, which is a sufficient basis for invoking liability. See MCL 299.612(1)(b); MSA 13.32(12)(1)(b)[3]; *Farm Bureau v Porter & Heckman*, 220 Mich App 627, 642-643, n 11; 560 NW2d 367 (1996). Defendants do not deny that they formerly owned or operated the landfill in question, nor have they disputed that the disposal of the contaminants occurred during their ownership or operation of the landfill. Because defendants may be

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[2] The MERA has been repealed, 1994 PA 451, and has been recodified as Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, MSA 13A.20101 *et seq.*, effective March 30, 1995. *Farm Bureau v Porter & Heckman*, 220 Mich App 627, 629 n 1; 560 NW2d 367 (1996).

[3] MCL 299.612(1); MSA 13.32(12)(1) provided as follows:

> (1) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in sections 12a and 12b, if there is a release or threatened release from a facility that causes the incurrence of response activity costs, the following persons shall be liable under this section:
>
> (a) The owner or operator of the facility.
>
> (b) *The owner or operator of the facility at the time of disposal of a hazardous substance.*
>
> (c) The owner or operator of the facility since the time of disposal of a hazardous substance not included in subdivision (a) or (b). [Emphasis added.]

liable as "former owners," *Farm Bureau, supra,* Hirs' affidavit denying ownership or operation of the landfill at the time the discharges allegedly occurred fails to establish a meritorious defense so as to justify setting aside the default judgments. Accordingly, the trial court did not abuse its discretion in denying defendants' motion to set aside the defaults and default judgments. *Alken-Ziegler, supra.*

Finally, the trial court did not abuse its discretion in concluding that it was not necessary to conduct a hearing on damages where the plaintiff had already established the remediation costs and defendants were jointly and severally liable for those costs. MCL 299.612 *et seq.*; MSA 13.32(12) *et seq.*; MCR 2.603(B)(3); *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 648-649; 419 NW2d 439 (1988).

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens