STATE OF MICHIGAN

COURT OF APPEALS

CAROL S. NABOZNY,

Plaintiff-Appellee,

v

MARK A. NABOZNY,

Defendant-Appellant.

UNPUBLISHED
June 12, 2001

No. 221591
Washtenaw Circuit Court
LC No. 98-012034-DO

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right the denial of his motion to set aside the default judgment of divorce and plaintiff's award of attorney fees. We reverse and remand.

I. Basic Facts and Procedural History

Plaintiff filed for divorce after thirteen years of marriage. According to defendant, plaintiff instructed him not to consult with an attorney as she would ensure that his interests would be adequately protected and the resulting judgment fair and equitable. Relying on plaintiff's representations, defendant did not procure counsel, file an answer, or otherwise appear in the proceedings. Accordingly, a default was entered against defendant. After the default was entered, plaintiff continuously reiterated to defendant that any resulting judgment would be fair and equitable thus obviating defendant's need to procure the advice of independent counsel. Believing in plaintiff's representations, defendant did nothing and remained in default. A hearing was held on April 6, 1999 and plaintiff put the requisite proofs on the record. The trial judge immediately signed the default judgment of divorce submitted by plaintiff's counsel. This default judgment of divorce disproportionately benefited plaintiff in the distribution of the marital estate.

Upon receipt of the default judgment, defendant filed a motion to set it aside for fraud and misrepresentation. Defendant further contended that he did not receive notice of the hearing or a copy of the proposed judgment until one day *after* the hearing where proofs were taken and the judgment entered. The trial court denied the motion. Defendant filed an appeal as of right.

II. The Default Judgment of Divorce

A. Notice of Hearing

First, defendant argues that the motion to set aside the default judgment of divorce was improperly denied because he did not receive the requisite notice pursuant to MCR 2.603(B)(1)(b)[1]. We review a trial court's denial of a motion to set aside a default judgment of divorce for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219; 600 NW2d 638 (1999).

The purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted. *Perry v Perry*, 176 Mich App 762; 440 NW2d 93 (1989). Lack of notice will establish the good cause required to set aside a default judgment. *Id.* at 770; *Petroff v Petroff*, 88 Mich App 18, 21; 276 NW2d 503 (1979).

Here, the record contains a proof of service establishing the defendant was mailed the notice of hearing and the proposed default judgment of divorce. Although this proof of service indicates that opposing counsel's office mailed the documents on March 29, 1999[2], the document was not signed until the day of the hearing. Of critical importance, however, is the proof of service stamp, signed and dated by plaintiff's counsel. This proof of service stamp states unequivocally that the notice of hearing and default judgment of divorce were not mailed until the actual date of the hearing. Thus, the record supports defendant's claim that he was not provided notice.

The notice provision of the MCR 2.603 is mandatory. The "failure of plaintiff to give the required notice invalidates the judgment and requires it to be vacated." *Petroff*, supra at 21; citing *Harrison v VMC Building Corp*, 71 Mich App 458, 461; 248 NW2d 584 (1976). Accordingly, we hold that the trial court abused its discretion by denying defendant's motion to set aside the default judgment.

B. Property Distribution

Next, defendant argues that the trial court erred by not setting aside the default judgment of divorce because of fraud and misrepresentation[3]. Defendant contends that plaintiff encouraged him not to seek the advice of independent counsel or otherwise file an appearance in the action, by impressing upon him that she would ensure that the resulting property distribution was fair and equitable. Defendant claims that the trial court should have granted his motion because he relied on plaintiff's statements to his ultimate detriment. We agree. This court reviews a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

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[1] MCR 2.603(B)(1)(b) states: "The notice required by this subrule must be served at least 7 days before entry of the requested judgment."

[2] This would have provided defendant with the appropriate seven day notice.

[3] MCR 2.612(C)(1)(c)

In *Heugel*, *supra*, we were called upon to address a similar circumstance. In that case, defendant, laboring under her husband's promise that the parties would remarry and against the advice of her attorney, agreed not to contest the divorce filed against her by her husband. The settlement reached in that case disproportionately benefited the plaintiff prompting the defendant to have the judgment set aside in accordance with MCR 2.612(C)(1)(f). *Id.* In that case, we recognized that the defendant was represented by counsel, but noted further that "she did not benefit from his services because plaintiff induced her to ignore his advice." *Id.* at 480. We recognized that the "plaintiff 'abused the unique nature of the husband-wife relationship' to lead defendant to believe that the entry of the divorce judgment was an irrelevant formality." *Id.* at 481. Accordingly, we held that "[p]laintiff had the right to an equitable distribution of the marital estate in light of all of the circumstances" and found the property settlement and spousal support provisions were "unconscionable." *Id.* at 482.

In this case, much like the resultant property distribution in the divorce judgment at issue in *Heugel*, we similarly find that the default judgment disproportionately inured to plaintiff's benefit. Plaintiff's salary was at least twice the amount of defendant's salary, yet the default judgment awarded plaintiff one hundred percent of the marital home, half of defendant's pension, "by reason of any past, present or future employment," as well as attorney fees. Antithetically, the default judgment did not award defendant any interest in plaintiff's pension, it obligated defendant to pay half of the marital debt, and it required defendant to assume responsibility for the entire amount of the outstanding loan used by the parties' to purchase their boat.[4] Moreover, unlike the defendant in *Heugel*, defendant in this case was not represented by counsel. On these facts, we hold that given the disproportionate property distribution contained in the default judgment, the trial court abused its discretion by denying defendant's motion to set it aside. See *Petroff v Petroff*, 88 Mich App 18, 20; 276 NW2d 503 (1979) (noting that "a default judgment is a particularly unsatisfactory method of resolving disputes as to property divisions.").

III. The Attorney Fee Award

Next, defendant contends that the trial court erred by awarding plaintiff attorney fees. This court will not disturb a trial court's decision to award attorney fees absent an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346; 592 NW2d 434 (1999).

MCR 3.206(C) provides that:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay. [See also MCL 552.13; MSA 25.93.]

[4] At the time that the default judgment of default entered, the loan for the boat was in default status.

According to the applicable court rule, a party unable to "bear the expense of attorney fees may recover reasonable attorney fees if the other party is able to pay." *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). In addition, "[a]ttorney fees also may be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation." *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). With regard to this issue, we revisit our previous decision in *Stackhouse v Stackhouse*, 193 Mich App 437; 484 NW2d 723 (1992) wherein we directed trial courts to make specific findings of fact justifying a fee award and further placed upon counsel the responsibility to establish those proposed findings and "to call to the trial court's attention the need for such findings." *Id*. at 446.

In this case, the default judgment required defendant to pay $2,000 "as his portion of attorney fees." This was error. First, there is no indication on the record that counsel for plaintiff was also acting in a representative capacity as counsel for defendant. The parties did not negotiate a consent judgment of divorce. To the contrary, the judgment of divorce was entered by default. Additionally, by including an award of attorney fees within the default judgment of divorce, plaintiff's counsel circumvented the proceeding wherein the trial court makes specific findings of fact indicating that plaintiff could not otherwise maintain the divorce action if those fees were not awarded. Indeed, a review of the record suggests that plaintiff earned $90,000 a year, or twice the amount of defendant's salary. Moreover, plaintiff alleged in her complaint[5] that both plaintiff and defendant were capable of providing for themselves during the pendency of the divorce action which is wholly inconsistent, on its face, with an award of attorney fees in divorce cases generally. See MCR 3.206(C)(2).

Finally, a review of the record reveals that the trial court made no specific finding that awarding plaintiff attorney fees was appropriate on the grounds that defendant's "unreasonable conduct" during the course of the litigation caused her to incur additional expenses. To establish the threshold "unreasonable conduct," plaintiff submits that defendant's misconduct was evident considering that both of the divorce cases that she instituted previously were dismissed for lack of progress. Plaintiff argues that the no progress dismissals were due to defendant's failure to file an appearance or an answer. We disagree with plaintiff's reasoning and find that plaintiff and her attorney were responsible for the progress, or lack thereof, in those cases. The record is devoid of any evidence indicating that defendant engaged in unreasonable conduct sufficient to justify the attorney fee award included in the default judgment. Accordingly, we hold that the trial court abused its discretion by awarding $2,000 in attorney fees in the default judgment of divorce.

III. Conclusion

As a result of the foregoing, the default judgment of divorce is hereby set aside and this matter is remanded for further proceedings consistent with this opinion. On remand, the trial court shall conduct an evidentiary hearing to determine an equitable division of the parties'

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[5] Paragraph seven of plaintiff's complaint for divorce states that "[b]oth parties are able-bodied individuals fully capable of providing for themselves throughout this action and thereafter."

marital estate and should plaintiff wish to resubmit her request for attorney fees, plaintiff shall file a new motion requesting those fees and further allege all facts required to justify the award in accordance with MCR 3.206(C)(2)[6].

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

[6] See also *Kruger v Martin*, 96 Mich App 660, 663; 293 NW2d 667 (1980) (wherein the court set aside an award of attorney fees but permitted the party requesting the fees to file a motion seeking reinstatement of the award upon a showing of all required factors.)