STATE OF MICHIGAN

COURT OF APPEALS

MASSIMO GIORGI and ROSE GIORGI,

Plaintiffs-Appellees,

V

STRUCTURAL LANDSCAPES CORPORATION and SCOTT A. LEWIS,

Defendants-Appellants.

UNPUBLISHED
August 28, 2001

No. 220487
Oakland Circuit Court
LC No. 98-009860-CK

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's orders denying their motions to set aside a default judgment and to quash service of process. Plaintiffs had alleged that defendants' failure to complete landscaping work at their home constituted a breach of contract. Because defendants failed to respond to plaintiffs' pleadings, a default judgment of $161,918.67 was entered. We affirm.

Plaintiffs contracted with defendant Structural Landscapes Corporation ("defendant SLC") to do landscaping work at plaintiffs' home. Plaintiffs' complaint alleged that defendant SLC failed to complete the work required under the contract. Plaintiffs attempted to serve defendants at the address on defendant SLC's letterhead—a townhouse located at 18259 Farmington Road in Livonia. The process server reported by affidavit that he made five unsuccessful attempts on three different dates at this address. The process server attested that the trash outside the home suggested that no one had been to the house between his attempts at service. Thus, plaintiffs filed a motion requesting alternative service. The trial court issued an order permitting service on both defendants by first class mail to, and posting on the door of, the Livonia address. When defendants did not respond to the alternative service, plaintiffs moved for a default judgment, which was granted on January 20, 1999.

Defendants moved to set aside the default judgment on February 10, 1999, arguing that they were never served with process, and that plaintiffs had not demonstrated due diligence in attempting to locate them. Defendant Lewis asserted that he had moved from the Livonia address in January 1998, and that defendant SLC had also moved, but failed to change its registered address with the state. The trial court held a hearing on the motion but an order was not entered. Subsequently, represented by new counsel, defendants filed a motion to quash

service of process. Following a hearing, the trial court denied both the motion to quash service and the motion to set aside the default judgment.

On appeal, defendants contend that the trial court erred by denying their motion to set aside the default judgment.[1] We review a trial court's decision on a motion to set aside a default or a default judgment for an abuse of discretion.[2] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Although "the law favors the determination of claims on the merits . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Id.*, at 229. In fact, 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." MCR 2.603(D)(1). Our Supreme Court has explained that the "good cause" and "meritorious defense" requirements of MCR 2.603(D)(1) are distinct elements that a party must show to prevail on a motion to set aside a default judgment. *Alken-Ziegler, supra* at 233. "Good cause" sufficient to warrant setting aside a default judgment arises from either a "procedural irregularity or defect," or "a reasonable excuse for failure to comply with the requirements that created the default." *Id.*

Defendants argue that the "good cause" necessary to set aside the default judgment was the failure of service of process. Thus, defendants contend that the trial court erred by denying their motion to quash service of process. Essentially, defendants contend that that the trial court erred by allowing plaintiffs to use alternative service. MCR 2.105(I)(1) states that "[o]n a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." In addition, MCR 2.105(I)(2) states in pertinent part:

> The motion [requesting alternate service] must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it.

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[1] Although plaintiffs argue that defendants abandoned the motion to set aside the default judgment by filing a motion to quash service while the motion to set aside the default judgment was still pending, the trial court signed an order denying both motions. Moreover, "[w]here service of process is alleged to be improper, even though a default has been entered, the defect is properly attacked by a motion to quash." *Hayden v Gokenbach*, 179 Mich App 594, 597; 446 NW2d 332 (1989), modified on other grounds 435 Mich 856 (1990).

[2] An abuse of discretion occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-285; 94 NW2d 810 (1959).

Defendants contend that alternate service should not have been permitted because plaintiffs failed to set forth facts demonstrating a diligent inquiry to ascertain their address. The process server submitted an affidavit attesting that he made five attempts to serve defendants at the Livonia address. The affidavit indicates that these attempts occurred at different times of day, and on three different days over the course of approximately one week. In addition, he attested that he checked an address with a similar street number to rule out the possibility of a typographical error. The process server noted that the trash had not been picked up, but he did not attest that the address appeared vacant. Rather, the affidavit indicated the possibility that no one had been there since his last visit. In other words, we are not persuaded that it was clear, at the time the request for alternate service was made, that defendants had even relocated. Accordingly, plaintiffs had no reason to think that defendants' address was "unknown," which was necessary to trigger plaintiff's obligation to make a diligent attempt to locate defendants' "new" address. MCR 2.105(I)(2).

Instead, plaintiffs' burden was simply to show that service of process could not reasonably be made. MCR 2.105(I)(1). This burden logically includes the possibility that a party may be avoiding service of process, and perhaps even the mere futility of numerous unsuccessful attempts. Indeed, in the instant matter, several attempts at defendants' purported address were unsuccessful. It is not disputed that messages were left on defendants' answering machine. Consequently, we do not believe that the trial court erred by concluding that sufficient facts were set forth to justify the use of alternate service.

Nevertheless, as noted above, the alternate service of process must be "reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1). Here, the trial court ordered alternate service by two methods—posting on the door and first-class mail to the Livonia address. If defendants had not relocated, the posting on the door at the Livonia address would certainly have provided sufficient notice of the proceedings. Even if defendants had moved and properly requested the forwarding of mail, as they claim they did, the service of process by first-class mail would have provided notice of the proceedings. Thus, we are not persuaded that the actual alternate service of process was deficient. Therefore, we do not believe that the trial court erred by denying defendants' motion to quash service. Consequently, we do not believe that defendants have demonstrated sufficient "good cause" to justify a conclusion that the trial court abused its discretion by denying defendants' motion to set aside the default judgment.

Finally, defendants contend that they were deprived of their constitutional right to due process. However, this issue was not raised below. Generally, we need not consider an issue that is raised for the first time on appeal. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000). Nevertheless, we note that in a civil case, due process requires "notice of the nature of the proceedings" and an opportunity to be heard. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). In the instant matter, the alternate service of process was reasonably calculated to provide defendants notice, as well as an opportunity to be heard. Consequently, we are not persuaded that defendants were deprived of their constitutional due process rights.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens