STATE OF MICHIGAN

COURT OF APPEALS

AMCO BUILDERS & DEVELOPERS, INC.,

Plaintiff/Counterdefendant-Appellee,

V

TEAM ACE JOINT VENTURE,

Defendant/Counterplaintiff/Cross-Defendant,

and

HARTFORD FIRE INSURANCE COMPANY,

Defendant/Cross-Defendant,

and

TEAM CONTRACTING, INC., AMERICAN CONSTRUCTION & ENERGY, AND JARVIS PAINTING, INC.,

Defendants,

and

ACME DEMOLITION/INTERVALE JOINT VENTURE,

Defendant-Appellant,

and

INTERVALE EXCAVATING & DEMOLITION, INC.,

Defendant/Cross-Defendant-Appellant,

UNPUBLISHED
November 2, 2001

No. 221513
Wayne Circuit Court
LC No. 97-709362-CK

and

LEROY LOVE, d/b/a ACME DEMOLITION COMPANY,

Defendant/Counterplaintiff/Cross-Plaintiff.

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. I conclude the level of deference that must be afforded the trial court's decisions with respect to the default and default judgment[1] precludes reversal in this case.

As stated by the majority, this Court reviews a trial court's decision to enter a default or default judgment, as well as a trial court's ruling on a motion to set aside a default or default judgment, for an abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Barclay v Crown Building & Development, Inc*, 241 Mich App 639, 642, 651; 617 NW2d 373 (2000). "Where there has been a valid exercise of discretion, appellate review is sharply limited." *Alken-Ziegler, supra*. A trial court's ruling will not be set aside unless there has been a clear abuse of discretion. *Id*. "An abuse of discretion involves far more than a difference in judicial opinion." *Id*. Such an abuse occurs only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, the defiance of judgment, or the exercise of passion or bias. *Id*.

Defendants argue that "good cause" to set aside the default and default judgment exists because Carson was not given sufficient notice of the status of the case. Defendants specifically claim that Carson was not given notice of the court order to appear for deposition. Defendants assert that Carson's lack of notice of the relevant aspects of the case was directly attributable to Miller's neglect or abandonment of his duties as counsel. In an affidavit dated April 22, 1999, Carson stated, in part, that at no time prior to April 14, 1999 was he advised that any party was attempting to take his deposition, the court had entered an order compelling him to appear for deposition, defaults had been entered, or a default judgment had been entered.

There is significant record evidence supporting the conclusion that Carson was, in fact, on notice of the relevant aspects of the case. On February 3, 1999, Carson signed an affidavit entitled "Affidavit of Intervale Excavating & Demolition, Inc, in Support of Motion to Set Aside

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[1] As mentioned by the majority, the default judgment was entered in the amount of $595,606.15, less any setoff for amounts recovered by plaintiff from defendant Team Ace Joint Venture. Plaintiff indicates in its brief on appeal that the setoff amount from Team Ace totaled $300,000. Thus, the amount of the judgment would be reduced to $295,606, plus interest.

Default Entry." Given the purpose for which that affidavit was submitted, Carson's statement in the April 22, 1999 affidavit that he was not informed prior to April 14, 1999 that defaults had been entered is patently untrue.[2] Moreover, in response to defendants' argument below that Carson lacked knowledge of significant aspects of the case, the trial court stated that it recalled being told by Miller that he was in communication with his clients.[3]

Given the evidence that Carson had at least some knowledge of the proceedings leading up to entry of the default judgment, I cannot conclude that the trial court's denial of defendant's motion to set aside the default and default judgment was palpably and grossly violative of fact and logic. Accordingly, the trial court's determination that defendants did not show "good cause" does not constitute a clear abuse of discretion. *Alken-Ziegler, supra*. For these reasons, I would affirm the trial court's ruling.[4]

/s/ Brian K. Zahra

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[2] Carson plainly stated: "8. That at no time prior to April 14, 1999, did Alex Miller or anyone ever tell me that Defaults had been entered against Intervale and the Joint Venture in this matter." Contrary to defendants' suggestion in their reply brief on appeal, that statement cannot reasonably be construed to have the added meaning that Carson claimed he was first informed on April 14, 1999 that a default was entered *as a result of his failure to appear for deposition*.

[3] There is no evidence directly disputing Carson's claim that he was not aware of the court order to appear for deposition. However, given the record evidence disputing Carson's claim that he was never apprised of the relevant events leading up to entry of the default judgment, I cannot conclude as the majority does that Miller wholly abandoned his representation with respect to defendants.

[4] Our Supreme Court has recognized that "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." *Alken-Ziegler, supra* at 229 (citations and footnote omitted).