

STATE OF MICHIGAN
COURT OF APPEALS

KRISTEN E. HUMPHRES,
Plaintiff-Appellee,

UNPUBLISHED
February 1, 2002

v

ELLIS O. HUMPHRES, JR.,
Defendant-Appellant.

No. 226990
Lenawee Circuit Court
LC No. 98-020841-DZ

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right a default judgment of separate maintenance. We vacate the judgment and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed a complaint for separate maintenance. She requested a "proper" division of the parties' joint property, an order enjoining the parties from disposing of personal property, and any other proper relief. Defendant was personally served with the summons and complaint, but did not file an answer. Eventually the trial court entered a default.

On January 24, 2000 plaintiff filed a notice of hearing for entry of a default judgment of separate maintenance. The hearing, scheduled for February 7, 2000, was cancelled. On February 18, 2000 plaintiff filed a notice of hearing for February 28, 2000. The proof of service indicates that the notice of hearing was sent to defendant by first class mail at 927 Treat Street in Adrian. Defendant did not attend the hearing held on February 28, 2000. Plaintiff testified that defendant had no objections to the judgment's contents.

Defendant moved to set aside the default judgment. He contended that he did not receive notice of the February 28, 2000 hearing, that he had a meritorious defense to the action, and that he was entitled to relief from judgment. At a hearing, defendant testified that while he lived at 219 Oneida in Tecumseh, he still received mail at 927 Treat Street in Adrian. He maintained that he did not receive notice of the February 28, 2000 hearing at the Treat Street address. Plaintiff and her daughter testified that defendant was aware that a hearing was scheduled for February 28, 2000. The trial court denied defendant's motion to set aside the default judgment, finding that notice of the hearing was mailed to defendant on January 24, 2000, and reasoning that if defendant periodically checked his mail deliveries at 927 Treat Street, he would have received the notice well in advance of the hearing date.

A motion to set aside a default or a default judgment is generally to be granted only if the movant shows good cause and files an affidavit of meritorious defense. MCR 2.603(D)(1). Good cause consists of: (1) a procedural defect or irregularity; or (2) a reasonable excuse for the failure to comply with requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). We review a trial court's decision on a motion to set aside a default or a default judgment for an abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

A party seeking entry of a default judgment must give notice of the request to the defaulted party if: (1) the party against whom the default was entered has appeared in the action; (2) the request for entry of default judgment seeks relief that is different in kind from, or is greater in amount than, that stated in the pleadings; or (3) the pleadings do not state a specific amount demanded. MCR 2.603(B)(1)(a).

We vacate the default judgment of separate maintenance, and remand for further proceedings. Because the request for entry of a default judgment of separate maintenance sought relief that was different in kind from and greater than the relief requested in the complaint for separate maintenance,¹ defendant was entitled to notice of the request. The trial court found that if notice was mailed to defendant at 927 Treat Street on January 24, 2000, then it was reasonable to conclude that defendant received the notice, even if he did not retrieve his mail every day. However, the notice mailed to defendant on January 24, 2000 was mailed to 555 French Street in Adrian. Neither party maintained that defendant ever lived or received mail at that address. Moreover, the notice mailed on January 24, 2000 pertained to the hearing scheduled for February 7, 2000. The notice of hearing for February 28, 2000 was mailed to defendant at 927 Treat Street on February 18, 2000. Defendant testified that he did not receive that notice. The trial court did not find that defendant received that particular notice. The trial court cited the testimony given by plaintiff and her daughter in support of its finding that defendant had notice of the hearing; however, it is not clear that that reliance was not based on the erroneous assumption that the notice mailed on January 24, 2000 pertained to the February 28, 2000 hearing. The trial court's finding that defendant was aware of the February 28, 2000 hearing was clearly erroneous. MCR 2.613(C). Lack of the required notice of request for entry of the default judgment constitutes good cause to set aside the judgment.² The trial court abused its discretion by denying defendant's motion to set aside the default judgment.

Vacated and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

¹ For example, the request for entry of a default judgment of separate maintenance sought payment of a specific amount of spousal support and a specific percentage of defendant's pension. This form of relief was not requested in the complaint.

² An affidavit of meritorious defense is not required under the circumstances. *Perry v Perry*, 176 Mich App 762, 770; 440 NW2d 93 (1989).