

STATE OF MICHIGAN
COURT OF APPEALS

JAMES M. ALLMENDINGER,

Plaintiff-Appellant,

v

SOUTHEASTERN MICHIGAN ICE SERVICES,

Defendant/Cross-Defendant-
Appellee,

and

GEOFFREY G. LEWANDOWSKI and STEPHEN
N. KNOWLTON,

Defendants.

UNPUBLISHED

April 23, 2002

No. 228372

Washtenaw Circuit Court

LC No. 98-004719-NO

Before: Gage, P.J. and Griffin and Buth*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting motions filed by defendant Southeastern Michigan Ice Services (Southeastern) to set aside a default and for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On August 18, 1995 plaintiff sustained injuries when he slipped in a pool of water on the premises of a gasoline station owned by nonparticipating defendant-cross-plaintiff Wacker Oil, Inc. The water was located next to an ice machine. A truck bearing the logo "Party Time Ice" was parked on the premises. Plaintiff's original complaint filed on July 8, 1998 named Wacker and Party Time Ice as defendants. Subsequently, plaintiff determined that Southeastern distributed Party Time Ice to the premises. The trial court granted plaintiff permission to file an amended complaint adding Southeastern as a party, and dismissed Party Time Ice.

Plaintiff filed an amended complaint and served Southeastern on May 28, 1999. Southeastern did not answer the complaint and was defaulted. In October 1999 plaintiff moved for entry of judgment. Southeastern moved to set aside the default, claiming that the complaint

* Circuit judge, sitting on the Court of Appeals by assignment.

was lost in the mail between its insurance agent and its insurance company, and that it did not receive notice of entry of default as required by MCR 2.603(A)(2). Southeastern asserted that these circumstances, as well as the potential for manifest injustice, constituted good cause to set aside the default, and that it had a meritorious defense in that plaintiff's claim was barred by the applicable statute of limitations. The trial court granted the motion, finding the existence of good cause consisting of excusable neglect and a meritorious defense.

Southeastern moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's cause of action was barred by the applicable three-year statute of limitations. The trial court granted the motion, finding that plaintiff could not rely on the relation-back doctrine to bring his claims against Southeastern within the statute of limitations, and that Southeastern did not engage in any affirmative act of identity concealment or make any misrepresentation that would prevent it from asserting the statute of limitations as a defense.¹

A motion to set aside a default or a default judgment is 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 the requirements that created the default. Manifest injustice is not a discrete occurrence that can be assessed independently. It is the result that would occur if a default were allowed to stand after a party has demonstrated good cause and a meritorious defense. If a party puts forth a meritorious defense and then attempts to establish good cause by showing a procedural defect or a reasonable excuse for failure to comply with the requirements that led to the default, the strength of the defense will affect the showing of good cause that is necessary. If a party states a meritorious defense that would be absolute if proven, a lesser showing of good cause is required to prevent manifest injustice. *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 for an abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

Plaintiff argues that the trial court abused its discretion by granting Southeastern's motion to set aside the default. We disagree. Plaintiff's assertion that Southeastern did not follow the progress of the case after it turned over the complaint to its agent was uncontradicted. However, the existence of negligence does not preclude a finding of good cause. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 87; 578 NW2d 326 (1998). Southeastern asserted a meritorious defense, the running of the statute of limitations, which would be absolute if proven. The establishment of a strong meritorious defense allows for a lesser showing of good cause. The trial court did not abuse its discretion by granting Southeastern's motion to set aside the default based on a finding of excusable neglect and a meritorious defense. *Alken-Ziegler, supra*.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

¹ The trial court also granted Wacker's motion for summary disposition. Plaintiff appealed that decision as well; however, in an order entered on February 23, 2001 this Court dismissed the appeal as to Wacker only pursuant to stipulation.

Under certain circumstances, a party can be precluded from asserting the statute of limitations as a defense. If a person who might be liable for a claim fraudulently conceals the existence of the claim or the identity of anyone who is liable for the claim the statutory limitations period on the claim is tolled. MCL 600.5855. The fraud must be manifested by an affirmative act or misrepresentation. Silence alone is insufficient. *Bradley v The Gleason Works*, 175 Mich App 459, 462-463; 438 NW2d 330 (1989). There must be employment of artifice designed to prevent inquiry or to escape investigation, and to mislead or hinder the acquisition of information disclosing a right of action. *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991). The doctrine of equitable estoppel may prevent a defendant from raising the statute of limitations as a defense if the plaintiff establishes that the defendant made a false representation or concealed a material fact while having knowledge of the actual facts and with the expectation that the plaintiff would rely on the misrepresentation. *Lothian v Detroit*, 414 Mich 160, 176-177; 324 NW2d 9 (1982).

Plaintiff argues that the trial court erred by granting Southeastern's motion for summary disposition. We disagree. Southeastern operated as a distributor for Party Time Ice, and displayed the Party Time logo on its trucks, bags, and invoices. Southeastern operated in this manner prior to the occurrence of plaintiff's injury. The invoices used by Southeastern displayed the same address listed on Southeastern's certificate of co-partnership filed with the Washtenaw County Clerk. A plaintiff has the obligation to exercise ordinary diligence to seek out the appropriate parties. *Eschenbacher v Hier*, 363 Mich 676, 681-682; 110 NW2d 731 (1961). No evidence showed that Southeastern took affirmative steps to conceal its identity from plaintiff or made knowing misrepresentations on which it expected plaintiff to act. *McCluskey, supra*; *Lothian, supra*. The trial court correctly determined that the doctrines of fraudulent concealment and equitable estoppel were inapplicable and that Southeastern was entitled to summary disposition on the ground that the statute of limitations barred plaintiff's claim.

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth