STATE OF MICHIGAN

COURT OF APPEALS

EXPRESS LAWSUIT FUNDING, L.L.C.,

Plaintiff-Appellant/Cross-Appellee,

v

RICHARD A. SHORT,

Defendant,

and

BANK ONE,

Garnishee Defendant-Appellee/Cross-Appellant

UNPUBLISHED
February 24, 2004

No. 244377
Oakland Circuit Court
LC No. 02-037800-CZ

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

This garnishment proceeding involves an attempt by plaintiff, Express Lawsuit Funding, L.L.C., to satisfy a judgment it obtained against uncollectable debtor defendant, Richard A. Short, by garnishing garnishee-defendant Bank One. The circuit court ultimately entered an order of summary disposition that awarded plaintiff $13,940.06 in garnishment proceeds, which represented the amount of a Bank One official check to Short, and costs and attorney fees of $695. Plaintiff now appeals as of right, contesting the court's prior order setting aside a default judgment against Bank One in the amount of $174,336.60 plus interest. Bank One cross-appeals, challenging the circuit court's garnishment award to plaintiff. We affirm.

I. Order Setting Aside Default Judgment Against Bank One

Plaintiff first contends that the circuit court erred in setting aside the default judgment against Bank One because plaintiff scrupulously adhered to the necessary procedural requirements in obtaining the default judgment. "While the policy of this state generally favors the meritorious determination of issues and, therefore, encourages the setting aside of defaults, the trial court's decision regarding whether to set aside a default will not be disturbed on appeal absent an abuse of discretion." *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992), overruled in part on other grounds in *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285, 288-289; 602 NW2d 572 (1999). "Unless there has been a clear abuse of discretion, a trial

court's ruling will not be set aside." *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

MCR 2.603 governs the entry of defaults and default judgments, and includes the following relevant procedural requirements:

> (A) Entry; Notice; Effect.
>
> (1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.
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> (2) Notice of the entry must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.
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> * * *
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> (B) Default Judgment.
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> (1) *Notice of Request for Judgment.*
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> (a) A party seeking a default judgment must give notice of the request for judgment to the defaulted party
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> (i) if the party against whom the judgment is sought has appeared in the action;
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> (ii) if the request for entry of judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or
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> (iii) if the pleadings do not state a specific amount demanded.
>
> (b) The notice required by this subrule must be served at least 7 days before entry of the requested judgment.
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> * * *
>
> (2) *Default Judgment Entered by Clerk.* On request of the plaintiff supported by an affidavit as to the amount due, the clerk may sign and enter judgment for that amount and costs against the defendant, if
>
> (a) the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain,

(b) the default was entered because the defendant failed to appear, and

(c) the defaulted defendant is not an infant or incompetent person.

* * *

(4) *Notice of Entry of Judgment.* The court clerk must promptly mail notice of entry of a default judgment to all parties. The notice to the defendant shall be mailed to the defendant's last known address or the address of the place of service. The clerk must keep a record that notice was given.

* * *

(D) Setting Aside Default.

(1) *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 has been filed*.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed

(a) before entry of judgment, or

(b) if judgment has been entered, within 21 days after the default was entered.

(3) In addition, the court may set aside an entry of default and a judgment by default in accordance with MCR 2.612.

(4) An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee. [Emphasis added.]

Applying the good cause and meritorious defense requirements, we conclude that the circuit court did not abuse its discretion in setting aside the default judgment. Although there was evidence that the second writ of garnishment had been served, there was also evidence that the person it was allegedly served upon had not received it. Additionally, there was a question whether Bank One was sent or actually received notice of the entry of the default judgment. Plaintiff did not serve the judgment on defendant. The circuit court's docket sheet does contain an entry suggesting that on April 29, 2002, a notice may have been mailed to Bank One: "Default judgment ntc sent filed Bank One." However, Bank One disputes that it ever received any notice of the default judgment, and the circuit court file contains no document substantiating that the clerk did in fact mail the notice to Bank One at the proper address according to MCR 2.603(B)(4). Further, it appears that Bank One had previously responded promptly to at least

one prior writ from plaintiff.[1] Under the circumstances, we conclude that the court did not abuse its discretion in finding good cause.

Nor did the court abuse its discretion in finding a meritorious defense. MCR 2.603(D)(1). The default judgment in this case obligated Bank One to pay plaintiff $174,336.60 plus statutory interest, which represented the amount of the prior default judgment plaintiff had obtained against Short. Bank One contested that it had indebtedness to Short in this amount, and averred that on the basis of plaintiff's admissions within its pleadings "that at most [Bank One] owed . . . $14,000," which amount Bank One also ultimately disputed that it owed. In support of its defense, Bank One submitted the affidavit of Wallace J. Tatara, Bank One's Deposit Services Manager. Plaintiff does not assert that Bank One owes the entire amount of the judgment on any basis other than that it failed to respond to the garnishment. There is no assertion that the bank owes defendant or has property of the defendant beyond the disputed check.

Because the circuit court properly granted Bank One's motion to set aside the default judgment, the court likewise properly set aside the writ of execution predicated on the vacated default judgment, pursuant to which plaintiff had seized more than $180,000 from Bank One. Plaintiff offers no authority in support of its suggestion that a writ of execution may withstand an order that vacates the judgment constituting the basis for the writ. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002) (explaining that a party may not leave it to this Court to search for authority to sustain or reject its position).

II. Costs and Attorney Fees

Plaintiff next asserts that the circuit court improperly denied the majority of the costs and attorney fees that it incurred in reliance on the default judgment against Bank One. However, plaintiff has improperly presented this issue on appeal because its appellate brief entirely fails to address the merits of its claim of entitlement to more costs and attorney fees than the court awarded. Plaintiff includes only two sentences within its entire brief, on the last page under the "Relief requested" heading, in which it addresses costs and fees. Plaintiff there mentions the court rule pursuant to which it requested an award of costs and attorney fees, MCR 2.603(D)(4), but fails to list any specific costs that the circuit court erroneously neglected to award in its award. Consequently, we conclude that plaintiff has abandoned appellate review of this issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

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[1] We further note that the default and default judgment were requested on April 26 and entered together on April 29, 2002, without prior notice. Although the writ of garnishment states that defendant is indebted to plaintiff in the sum of $174,336.60, and recites that plaintiff knows or with good reason believes that Bank One is indebted to or controls property of defendant, it does not state a specific amount alleged to be owing to or belonging to defendant, only the amount of the total judgment. And while the writ states that a default may be entered for failure to make a timely disclosure, it does not state that the amount may exceed the garnishee's actual indebtedness to the defendant. Under the circumstances, it is arguable that notice was required under MCR 2.603(B)(1)(a)(ii) or (iii).

III. Plaintiff's Garnishment Award Against Bank One

Bank One assets that the circuit court erred by awarding plaintiff garnishment proceeds of $13,940.06, the amount of the Bank One official check to Short. This Court's resolution of this question requires construction of court rule provisions. The interpretation of court rules constitutes a legal question that this Court considers de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). This Court also reviews de novo a circuit court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Bank One contends that because plaintiff sought a writ of garnishment on the basis of the official check to Short, MCR 3.101 protected Bank One from any liability. MCR 3.101 provides:

> (G) *Liability of Garnishee*
>
> (1) Subject to the provisions of the garnishment statute and any setoff permitted by law or these rules, *the garnishee is liable for*
>
> * * *
>
> (d) all debts, whether or not due, owing by the garnishee to the defendant when the writ is served on the garnishee, *except for debts evidenced by negotiable instruments* or representing the earnings of the defendant . . . . [Emphasis added.[2]]

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[2] In Michigan, "garnishment actions are authorized by statute," but "the procedural aspects of the garnishment process are set out in the court rules under MCR 3.101 and 3.102." *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Serv's*, 201 Mich App 301, 305; 506 NW2d 279 (1993). The Michigan garnishment statute explains, in relevant part:

> [T]he court has power by garnishment to apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of this state, or foreign judgment, whether or not the state has jurisdiction over the person against whom the claim is asserted:
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> * * *
>
> (b) An obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state.
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> (2) . . . [T]he court may exercise the jurisdiction granted in this section only in accordance with the Michigan court rules. . . . [MCL 600.4011(1).]

At the time of the garnishment, Bank One had already stopped payment on the official check payable to Short, and the check had clearly been marked so that it was no longer a negotiable instrument.

Further, we reject Bank One's claims of exemption based on the character of the debt as pension proceeds. Once the pensions proceeds were paid out, they lost that character, and as money simply owed to the principal debtor, the amount represented by the stopped check was subject to garnishment.

IV. Bank One's Entitlement to Sanctions

Bank One lastly suggests that the circuit court should have awarded it costs and attorney fees on the basis of plaintiff's unlawful conduct of the garnishment proceedings. We disagree. The court was well within its discretion in its allocation of the costs between the parties. We note that plaintiff bore the costs of the execution and other costs as well.[3]

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski

[3] To the extent that Bank One also suggests that the circuit court erred in awarding plaintiff $695 in costs and attorney fees arising from the setting aside of the default judgment, we decline to address that argument because Bank One did not raise this issue within its counterstatement of questions presented, and provides no reference to applicable court rules or statutory provisions in support of its argument. *Campbell v Sullins*, 257 Mich App 179, 192; 667 NW2d 887 (2003); *Sherman*, *supra* at 57.