STATE OF MICHIGAN

COURT OF APPEALS

INTERCONTINENTAL ELECTRONICS, S.P.A.,

Plaintiff/Counterdefendant-Appellant,

v

AMERICAN KEYBOARD PRODUCTS, INC., ROBERT C. KOTZ and GREGORY WYSOCKI,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
March 18, 2004

No. 242455
Oakland Circuit Court
LC No. 00-024354-CK

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff/counterdefendant (plaintiff) appeals as of right from the default judgment entered in favor of defendants/counterplaintiffs (defendants) in this contract action. We affirm in part and reverse in part.

Plaintiff first argues that it was denied its rights to due process because it never received notice of the pretrial conference, at which it failed to appear, triggering the entry of the default against it. We find no basis for relief.

The determination whether a party has been afforded due process is a question of law that we review de novo. *In re Carey*, 241 Mich App 222, 225-226; 615 NW2d 742 (2000). "Underlying the right to due process are the principles of fair play and fundamental fairness." *Building Owners Ass'n v PSC*, 131 Mich App 504, 513; 346 NW2d 581 (1984). Due process generally requires notice and an opportunity to be heard. *Dusenbery v US*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002); *In re Adams Est*, 257 Mich App 230, 234; 667 NW2d 904 (2003). Notice must be reasonably calculated to apprise interested parties of the pending action and must afford them an opportunity to present objections. *Dusenbery, supra* at 168; *Vincencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

There is a presumption of receipt by the addressee of mail addressed, stamped, and entrusted to the United States postal service for delivery. *Crawford v State of Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). This presumption can be overcome by direct and positive testimony regarding nonreceipt. See *Merchants' Nat Bank v Detroit Trust Co*, 258 Mich 526, 535; 242 NW 739 (1932).

At the hearing on plaintiff's counsel's motion to withdraw, the trial court granted the motion and set a pretrial conference date, stating that plaintiff's failure to appear at the conference would result in a dismissal of plaintiff's complaint and a default on defendants' countercomplaint. A copy of this order was served on plaintiff on the same day, by the placement of it in the United States mail addressed to plaintiff's business. The order was mailed more than a month before the hearing that resulted in the default against plaintiff.

Plaintiff asserts that statements in an affidavit by one of its officers rebutted the presumption that plaintiff received a copy of the order setting the pretrial conference date. However, the statements did not constitute the type of positive, detailed, and direct testimony necessary to overcome the presumption that a document properly mailed was received. See *Antonowich v Home Life Ins Co*, 179 SE 601, 602 (W Va, 1935). Indeed, the affiant in question did not directly state that plaintiff never received notice of the pretrial conference date. Moreover, although the affiant stated that plaintiff received no correspondence within a certain period from its attorney or its attorney's law firm, he failed to state that he was the person who regularly receives the mail for the company or to provide some other basis for his knowledge. Therefore, the general presumption of receipt by plaintiff of the July 18, 2001 order, which was properly addressed, postage paid, and entrusted to the United States postal service for delivery, applies. Plaintiff was appropriately served with the order setting the pretrial conference date and was not denied its rights to due process.

Next, plaintiff argues that it was denied its rights to due process because it did not receive notice of defendants' motion to enter a default judgment until one day before the hearing on the motion. We note, however, that this issue was not preserved for appellate review because plaintiff did not raise it in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Michigan Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995). Assuming the issue had been preserved, however, we find no basis for relief. First, the motion for an entry of judgment was served on plaintiff fourteen days before the hearing in a manner in conformance with MCR 2.107(C)(3). Second, notwithstanding that plaintiff received actual notice of the court hearing on the motion for an entry of judgment the day before the hearing, there is no evidence that plaintiff, or counsel for plaintiff, contacted the court to ask for an adjournment to enable plaintiff to attend the hearing. Finally, plaintiff received a copy of the entry of the default months before the entry of the default judgment. Plaintiff was thus on notice regarding the probable entry of a default judgment, and yet the record reveals no effort by plaintiff to contact the court or defendants to obtain information concerning the default or the possible entry of a judgment. Because it was properly served under the court rules, received actual notice of the hearing, and knew that a default had been entered against it, plaintiff's due process rights were not violated.

In a related argument, plaintiff contends that it did not receive the seven-day notice required under MCR 2.603 with respect to the default judgment hearing. Plaintiff failed to preserve this issue for our review. *Fast Air, supra* at 549. At any rate, we find no basis for relief. Indeed, service is complete at the time of mailing under MCR 2.107(C)(3). The record indicates that plaintiff had the requisite seven-day notice because the motion to enter a judgment was mailed fourteen days before the motion hearing.

Next, plaintiff argues that the service of the order allowing plaintiff's counsel to withdraw, setting a pretrial conference date, and providing that a default would be entered

against plaintiff for failure to appear was not conducted in accordance with the Hague Convention. Once again, plaintiff failed to preserve this issue for review, *Fast Air, supra* at 549, and we once again find no basis for relief.

Whether service comports with the Hague Convention is an issue of law. We review issues of law de novo. *In re Estate of Cummin*, 258 Mich App 402, 406; 671 NW2d 165 (2003). Because this case involved the transmittal of judicial documents abroad, the Hague Convention applies. *Frankenmuth Ins v ACO, Inc*, 193 Mich App 389, 392; 484 NW2d 718 (1992). Article 10 of the Hague Convention states:

> Provided the State of destination does not object, the present Convention shall not interfere with-
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . .

Italy, a signatory of the convention, did not object to Article 10 of the convention, and so this provision applies to service between the United States and Italy. *Eli Lilly and Company v Roussel Corp*, 23 F Supp 2d 460, 470 (D NJ, 1998). While the United States Courts of Appeal are split over whether Article 10(a) applies to service of *process*, there is no dispute that Article 10(a) provides a method of sending subsequent documents after service of process has been obtained by means of the central authority. *Id.* at 471; *Frankenmuth, supra* at 395. We conclude that a subsequent legal document was involved here. Plaintiff was treated in conformance with Article 10(a) of the convention when a copy of the order setting the pretrial conference date was mailed to plaintiff at its business address by United States mail.

Next, plaintiff argues that it was not subject to the trial court's personal jurisdiction because it was not the real party in interest. Plaintiff claims that its insurer filed suit in plaintiff's name and that the insurer was the party responsible for the pursuit of the legal action. We find this claim to be without merit.

The determination regarding whether a court has personal jurisdiction over a party is a question of law that is reviewed de novo on appeal. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001). "The defense of lack of personal jurisdiction is waived unless it is properly raised in a party's first responsive pleading." *Dundee v Puerto Rico Marine Management, Inc*, 147 Mich App 254, 257; 383 NW2d 176 (1985). Plaintiff did not raise the issue of lack of personal jurisdiction either in its answer to the countercomplaint or in its list of affirmative defenses. While plaintiff alleges that it was not "advised in any meaningful form that defendants had filed a counterclaim," the proof of service indicated that the counterclaim was properly served on plaintiff's attorney, and the affidavit by one of plaintiff's officers indicates that plaintiff received notice on March 31, 2001, that defendant was considering filing a counterclaim. If plaintiff's attorney of record improperly represented himself as the attorney for plaintiff, plaintiff's remedy lies in a suit against its counsel.

Next, plaintiff argues that the trial court erred in failing to set aside the default judgment because plaintiff established good cause for its failure to appear at the pretrial conference.[1] A ruling on a motion to set aside a default judgment is entrusted to the trial court's discretion. *Alken-Ziegler v Waterbury Headers*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion occurs if the result so violates fact and logic that it evidences a perversity of will, defiance of judgment, or passion or bias. *Id.*

MCR 2.603(D) governs motions to set aside a default or a default judgment and provides, in pertinent part:

> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over defendant, shall be granted only if good cause is shown and an affidavit of meritorious defense is filed.

Good cause means a substantial irregularity in the proceedings on which the default is based or a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, supra* at 233. Manifest injustice is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently, but is the result that would occur if a default were to be allowed to stand when a party has satisfied the meritorious defense and good cause requirements of the court rule. *Id.* at 233-234. "Although the law favors a determination of a claim on the basis of its merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *ISB Sales Co v Dave's Cake*, 258 Mich App 520, 526; 672 NW2d 181 (2003). The failure to notify a party entitled to notice of the entry of a default constitutes a substantial defect in the proceedings and thus is good cause to set aside the default. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 359; 514 NW2d 257 (1994).

Plaintiff was properly served under MCR 2.107(C)(3) with a copy of the order providing that plaintiff would be defaulted if it should fail to appear at the pretrial conference. Further, plaintiff failed to present evidence sufficient to overcome the presumption that the order, properly mailed, was received. Therefore, plaintiff failed to establish good cause for its failure to appear at the hearing. The trial court did not abuse its discretion in denying plaintiff's motion to set aside the default judgment.

Next, plaintiff asserts that the trial court erred in awarding $2,352,012.97 in damages.[2] Defendants had the burden of proving their damages with reasonable certainty. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Id.* (citation omitted). It is sufficient if there exists a reasonable basis for computation, even if the result is only proximate. *Id.* "In order to recover

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[1] Plaintiff's failure to appear at this conference resulted in the entry of the default.

[2] Although plaintiff did not raise an argument below with regard to the award of damages, we conclude that we may nonetheless review this issue on appeal under MCR 2.517(A)(7), which states that "[n]o exception need be taken to a finding or decision" by the trial court."

prospective profits, a plaintiff must establish proof of lost profits with a reasonable degree of certainty." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167; 568 NW2d 365 (1997). In general, we review a trial court's award of damages for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

While there was sufficient evidence to support the trial court's award of money damages for an outstanding line of credit, lost inventory, and exemplary damages,[3] we conclude that there was insufficient evidence to support the award of $1,000,000 in lost profits. An officer of defendant stated that the figure of $1,000,000 was an "extrapolation of a lot of facts based upon scenarios[.]" He further stated during his testimony that plaintiff's fraud and bad faith were "worth some kind of damage to us." We conclude that the evidence regarding lost profits was simply too amorphous and therefore vacate this portion of the award of damages.

Finally, plaintiff asserts that the case should be assigned to a different judge on remand. Because this Court affirms the default judgment with the exception of the award of $1,000,000 in lost profits, we need not address the issue.

Affirmed in part and reversed in part.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

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[3] Contrary to plaintiff's argument, *Birkenshaw v Detroit*, 110 Mich App 500, 511; 313 NW2d 334 (1981), does not state that explicit evidence of damaged feelings or some other indignity or humiliation must be present before a court can make an award of exemplary damages. The Court in *Birkenshaw* simply found that the "exemplary" damages awarded by the trial court in that case were, in actuality, disallowed "punitive" damages because of the wording of the trial court's findings and because there was no evidence in the case of hurt feelings or another indignity or humiliation. *Id.* Here, the trial court mentioned the fraud perpetrated by plaintiff. It further mentioned that plaintiff "solicited a large order from [defendants] knowing it would be out of business shortly thereafter." The court stated that it would award exemplary damages because of the "willful[,] wanton and outrageous conduct[]" by plaintiff. In their motion for entry of judgment, defendants Kotz and Wysocki, in seeking exemplary damages, claimed that plaintiff's conduct resulted in "humiliation, outrage, business defamation and indignation." Under the totality of the circumstances of this case, including the reasonable inferences that can be made based on plaintiff's conduct, we find no grounds on which to vacate the trial court's award of exemplary damages. We acknowledge that in *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 351; 480 NW2d 623 (1991), the Court stated that "[i]n Michigan, the general rule is that exemplary damages are not available in an action for breach of a commercial contract." The Court then stated that "[a]n exception exists where there is proof of toritous conduct independent of the breach." *Id.* Here, the fraud alleged in the countercomplaint and mentioned by the trial court was sufficiently independent of the breach of contract such that exemplary damages were appropriate. We further note that plaintiff's attempt to challenge some of defendants' evidence based on a lack of foundation is untenable because the issue is unpreserved (plaintiff did not attend the hearing and therefore did not object to the evidence in question). We conclude that an evidentiary challenge such as this is the type of alleged error that requires preservation in order to be reviewed on appeal.