STATE OF MICHIGAN

COURT OF APPEALS

PRODUCE PALACE INTERNATIONAL, INC., Plaintiff-Appellant,	UNPUBLISHED November 29, 2005
v	No. 256774 Macomb Circuit Court
L. J. ROLLS REFRIGERATION COMPANY, Defendant -Appellee.	LC No. 2002-004822-CK

Before: Whitbeck, C.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff Produce Palace International, Inc. (Produce Palace) appeals as of right from a judgment of no cause of action in favor of defendant L. J. Rolls Refrigeration Company (Rolls Refrigeration), following a jury trial. We affirm.

I. Basic Facts And Procedural History

Produce Palace purchased refrigerated cases from Rolls Refrigeration in order to stock meat, fish, poultry, and delicatessen items for its grocery store. Produce Palace alleged that after the cases were installed, it experienced problems with ill-fitting components and improper temperatures, resulting in spoilage to its food products. Produce Palace sued Rolls Refrigeration for breach of contract and warranty. Rolls Refrigeration claimed that the problems were primarily attributed to Produce Palace's employees improperly or inappropriately using the cases. The jury determined that Rolls Refrigeration did not breach its contract with Produce Palace.

II. Default Judgment

A. Standard Of Review

Produce Palace argues that the trial court erred by denying its motion for a default judgment and by granting Rolls Refrigeration's motion to set aside its default. According to Rolls Refrigeration, due to an administrative or clerical oversight, its insurance company failed to timely turn over Produce Palace's complaint to counsel. Consequently, an answer was not timely filed and Produce Palace obtained a default a few days after the answer was due. Rolls Refrigeration's counsel attempted to contact Produce Palace to request that it stipulate to allow Refrigeration to file a late response, but Produce Palace did not respond to the request.

A trial court's ruling on a motion to set aside a default or a default judgment is entrusted to the trial court's discretion.[1] Where there has been a valid exercise of discretion, an appellate court's "review is sharply limited."[2] "Unless there has been a clear abuse of discretion, a trial court's ruling will not be set aside."[3]

B. MCR 2.603(D)

MCR 2.603(D) governs motions to set aside a default or default judgment. Unless there is a lack of jurisdiction, such a motion shall only be granted on a showing of good cause and if an affidavit of facts demonstrating that there is a meritorious defense is filed.[4] Here, Rolls Refrigeration clearly satisfied the "meritorious defense" requirement. Rolls Refrigeration submitted an affidavit that contained the same factual matters that it presented at trial, for example, that temperature problems were primarily caused by Produce Palace's employees leaving doors to the cases open, leaving meat too long in the cases, and tampering with the settings. And the jury's verdict in favor of Rolls Refrigeration demonstrates, if after the fact, that Rolls Refrigeration had a meritorious defense in this case.

The primary issue, therefore, is whether Rolls Refrigeration made a sufficient showing of good cause for not timely filing its answer to Produce Palace's complaint. To show "good cause" a party must establish "(1) a substantial irregularity or defect in the proceeding upon which the default is based," or "(2) a reasonable excuse for failure to comply with the requirements that created the default."[5]

"A party is responsible for any action or inaction by the party or the party's agent."[6] Therefore, where a party's insurer or attorney fails to timely respond to a complaint, that is generally not good cause and such conduct is imputed to the party against whom a default has been entered.[7] The misfiling of a complaint by an insurer also does not ordinarily constitute good cause.[8]

However, a party in default has a lesser burden to satisfy to show good cause if the evidence of a meritorious defense is strong. "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were

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[1] *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

[2] *Id*.

[3] *Id*.

[4] MCR 2.603(D)(1); *Alken-Ziegler, supra* at 233.

[5] *Alken-Ziegler, supra* at 233.

[6] *Id.* at 224.

[7] *Id*. at 224-225; *Asmus v Barrett*, 30 Mich App 570, 574-575; 186 NW2d 819 (1971).

[8] *Poling v Secretary of State*, 142 Mich App 54, 60-61; 369 NW2d 261 (1985).

weaker, in order to prevent a manifest injustice."[9] Where a party has satisfied both the "good cause" and "meritorious defense" requirements of the court rule, the court may consider if manifest injustice would result if the default were allowed to stand.[10]

In this case, Rolls Refrigeration's insurer failed to timely forward Produce Palace's complaint to counsel so that a response could be filed. Although Rolls Refrigeration failed to make a particularly strong showing of good cause, its delay in filing an answer was minimal, at most only a few days. Additionally, Rolls Refrigeration promptly contacted Produce Palace's attorney to attempt to obtain a brief extension of time. There is no basis for concluding that Produce Palace was prejudiced by the brief delay. More importantly, as discussed in *Alken-Ziegler*, any weakness in Rolls Refrigeration's case of good cause was offset by the strength of its defense.[11] Although Rolls Refrigeration presented a minimally reasonable excuse for not timely filing an answer to Produce Palace's complaint, manifest injustice would result if the default was not set aside. For these reasons, we affirm the trial court's decision to set aside the default.

III. Exclusion Of Exhibit Nine

A. Standard Of Review

Produce Palace argues that the trial court erred by excluding its proposed exhibit nine. Exhibit nine is a log that Dale Parratto, Produce Palace's meat department manager, created by dictating to another employee his observations about Rolls Refrigeration's visits to Produce Palace's store when responding to problems with the refrigerated cases. At trial, Produce Palace sought to admit the log under MRE 803(5) as a past recorded recollection. The trial court allowed Produce Palace's counsel to question Parratto about the events recorded in the log, and to use the log to refresh Parratto's recollection, but did not allow the log to be admitted as an exhibit.

On appeal, Produce Palace argues that the log was admissible under MRE 803(1) as a present sense impression. Because Produce Palace did not offer exhibit nine under this rule at trial, this issue is not preserved for appellate review.[12] Therefore, reversal is only required if plain error affecting Produce Palace's substantial rights occurred.[13] Further:

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[9] *Alken-Ziegler*, *supra* at 233-234.

[10] *Id*. at 233.

[11] *Id*. at 233-234.

[12] *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

[13] MRE 103(d); see also *In re Egbert Estate*, 105 Mich App 395, 399; 306 NW2d 525 (1981).

> "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[14]

B. MRE 803(1)

Limiting our review to plain error, we are not persuaded that the log was admissible under MRE 803(1). That rule provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

This exception exists because the substantially contemporaneous nature of a statement with the underlying event establishes the trustworthiness of the statement.[15]

> The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be "substantially contemporaneous" with the event.[16]

It is not apparent from the record when Parratto dictated his notes for the log. Because it is not clear that they were made substantially contemporaneously with each day's events, Produce Palace has not shown that its proposed exhibit nine was admissible under MRE 803(1).

Produce Palace also argues that the trial court should not have entertained Rolls Refrigeration's objection to proposed exhibit nine because Rolls Refrigeration did not object to the exhibit in a motion in limine in advance of trial, contrary to the trial court's scheduling order. We disagree. The trial court could not determine until trial whether an appropriate foundation could be established for admission of the document. Furthermore, because Produce Palace was allowed to use the log to refresh Parratto's recollection about the events recorded in the exhibit, we conclude that Produce Palace was not prejudiced and that reversal is not required.

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[14] *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[15] *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

[16] *Id*. at 236.

IV. Exclusion Of Exhibit Three

A. Standard Of Review

Produce Palace argues that the trial court erred in sustaining Rolls Refrigeration's hearsay objection to Produce Palace's proposed exhibit three, a letter from Jarad Philp. At trial, Produce Palace argued that the letter was not hearsay, but now concedes on appeal that it was hearsay. Nonetheless, Produce Palace argues that the letter was admissible under MRE 803(24), the catchall exception to the hearsay rule. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court."[17] Because Produce Palace did not rely on that rule of evidence at trial, reversal is only required if plain error affecting its substantial rights occurred.[18]

B. MRE 803(24)

We conclude that Produce Palace has failed to show that the letter was admissible under MRE 803(24). One requirement of MRE 803(24) is that the statement be more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts.[19] Here, the letter summarized Philp's findings after inspecting the refrigerated cases. But Philp was called as a witness at trial and testified about his findings. Because Philp was available to testify at trial concerning the same subject matter as his letter, the letter was not more probative on the point for which it was offered than any other evidence that Produce Palace could procure through reasonable efforts. Thus, the letter was not admissible under MRE 803(24).

Further, Rolls Refrigeration was not precluded by the trial court's pretrial scheduling order from objecting to Philp's letter at trial. Not all evidentiary objections are capable of being resolved by a motion in limine, and Produce Palace's purpose for offering the letter at trial was not apparent before trial.

V. Testimony Of Gary Nayh

A. Standard Of Review

Produce Palace argues that the trial court erred by allowing Rolls Refrigeration to call Gary Nayh as a witness at trial. Produce Palace essentially argues that the trial court should have barred Nayh from testifying as a discovery sanction. We review for an abuse of discretion a trial

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[17] *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

[18] MRE 103(d); see also *In re Egbert Estate*, *supra* at 399.

[19] *People v Katt*, 468 Mich 272, 293; 662 NW2d 12 (2003).

court's decisions regarding whether to impose discovery sanctions and regarding whether to exclude expert testimony.[20]

B. Witness List

Produce Palace relies on *Kalamazoo Oil Co v Boerman*,[21] to argue that the trial court should have barred Rolls Refrigeration from calling Nayh as a witness because he was not disclosed as a witness before trial. We disagree. The record discloses that Nayh's name was included on Rolls Refrigeration's witness list and he was substituted as a witness because of the unexpected death of another witness who Rolls Refrigeration planned to call at trial.

Produce Palace also appears to argue that Rolls Refrigeration failed to identify the subject matter of Nayh's or its previous expert witness' testimony in its answers to Produce Palace's interrogatories and, therefore, the trial court should have barred the testimony as a discovery sanction. In deciding whether to sanction a party for failing to provide discovery, the trial court must consider the circumstances of any violation.

> Before imposing a sanction, such as barring a witness, several factors should be considered, including whether the violation was wilful or accidental; the party's history of refusing to comply with discovery requests or disclosure of witnesses; the prejudice to the party; the actual notice to the opposite party of the witness; and the attempt to make a timely cure.[22]

Here, we are not persuaded that the facts of this case supported barring Nayh from testifying. Produce Palace was aware that Rolls Refrigeration had listed Nayh on its witness list; thus Produce Palace could have deposed Nayh before trial. Although Rolls Refrigeration may have been lax in responding to Produce Palace's discovery requests, it does not appear that it intentionally refused to provide discovery. Moreover, Nayh's testimony primarily relied on Produce Palace's own figures and evidence. It does not appear that Nayh offered any new information, but simply explained why certain damages that Produce Palace requested were not associated with this incident or were excessive. Therefore, Produce Palace has not established that it was prejudiced. We conclude that the trial court did not abuse its discretion in refusing to strike Nayh as a witness.[23]

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[20] *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005); *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 214; 457 NW2d 42 (1990).

[21] *Kalamazoo Oil Co v Boerman*, 242 Mich App 75; 618 NW2d 66 (2000).

[22] *Colovos v Dep't of Transportation*, 205 Mich App 524, 528; 517 NW2d 803 (1994), aff'd 450 Mich 861 (1995).

[23] See *Linsell, supra* at 21-22.

C. Nayh's Charts

Produce Palace also argues that the trial court erred in allowing Rolls Refrigeration to admit three charts prepared by Nayh that he used as a visual aide during his testimony. Produce Palace objected because the charts were not provided until the day of Nayh's testimony. Because the charts were only used to accompany and summarize Nayh's own testimony, and they utilized Produce Palace's own figures, the trial court did not abuse its discretion by allowing them.[24]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood

[24] *Id*. at 21.