STATE OF MICHIGAN

COURT OF APPEALS

BEATRICE M. SQUIRE,

Plaintiff-Appellee,

v

JAMES E. SQUIRE,

Defendant-Appellant.

UNPUBLISHED
October 23, 2007

No. 271697
Ingham Circuit Court
LC No. 06-000370-DO

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

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, entered as the result of default proceedings, and without the trial court's having decided pending motions for change of venue and to set aside the default. We reverse. This case is being decided without oral argument in accordance with MCR 7.214(E).

I

Plaintiff filed a complaint for divorce in February 2006. Defendant was served on March 15, 2006, but did not answer the complaint. He did, however, file a motion for change of venue in June 2006. The motion was noticed for hearing on June 9, 2006, but then adjourned to June 20, then July 28, 2006.

The circuit court, on May 15, 2006, issued a notice of no progress call to take place on June 20, 2006. The day before the hearing, plaintiff filed a default, application, entry, and affidavit, citing defendant's "failure to plead or otherwise defend." At the no progress hearing, which defense counsel did not attend,[1] the circuit court recalled that defendant had filed a motion to change venue. The court granted plaintiff until June 30, 2006 to take the proofs and enter a judgment of divorce, explaining that if the plaintiff failed to do so on that date, the case would be dismissed, because of new parameters from the Supreme Court on time deadlines." Two days later, defendant filed a motion to set aside the default.

[1] Defendant asserts that he received no notice of this hearing.

At the June 30, 2006, hearing, defense counsel informed the court that he had believed that there was an understanding that a default would not be filed until the venue issue was decided, and that the parties had executed a stipulation and order to set aside the default. Plaintiff's attorney explained that he did not agree that there had been such an understanding, but that he had signed a stipulation to set aside the default, while adding that he had alternatively prepared a proposed judgment of divorce. The circuit court responded:

> Well, you can refile this divorce. My interest in this is to see that justice is done and to have my docket control comply with the orders of the Michigan Supreme Court. I don't know why they're in a hurry, but they are. And so those are my goals.
>
> I have no interest in forcing people to settle their disagreements before they're ready to settle their disagreements. So I am going to dismiss this action . . . .

Plaintiff's attorney then protested that the court had agreed to take proofs that day. The court agreed, and took the proofs. At the end of the proceeding, over defense counsel's objection, the court granted the divorce and entered the judgment.

II

We will assume that the default was properly entered.[2] "Review of a trial court's decision on a motion to set aside a default or a default judgment is for a clear abuse of

---

[2] MCR 2.108(A)(1) requires a defendant to "serve and file an answer or take other action permitted by law or these rules within 21 days after being served . . . ." Defendant admits to never having filed an answer, but argues that his motion to change venue constituted an alternative action satisfying the requirement to answer for purposes of this rule. Under the circumstance that defendant's motion to change venue was not filed within 21 days after defendant was served, we disagree. A motion for change of venue must normally be filed before, or with, an answer. MCR 2.221(A). While defendant correctly notes that MCR 2.221(B) gives the court discretion to grant an untimely motion, it does not follow that an untimely motion satisfies the requirements of MCR 2.108(A)(1). Defendant seems to suggest that, as long as there is no answer, a defendant may, with no time constraints, answer a complaint by filing a motion to change venue. This is a strained argument. MCR 2.221(A) ties the timing of a motion to change venue to the answer, thus incorporating the time constraints applicable to answers. MCR 2.221(B) in turn recognizes a motion filed after the answer is filed as untimely, while setting forth a limited basis for excusing that deficiency. Assuming that a timely motion for change of venue may itself substitute for an answer for purposes of avoiding a default under MCR 2.108(A)(1), *Marposs Corp v Autocam Corp*, 183 Mich App 166, 169-170; 454 NW2d 194 (1990), nothing in MCR 2.221 suggests that when such a motion serves as the first response to a complaint, the timing requirements of MCR 2.108(A)(1) are rendered inapplicable. Moreover,

(continued…)

discretion." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.* "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 is filed." MCR 2.603(D)(1).

We conclude that the court abused its discretion in failing to consider and grant defendant's motion to set aside the default, and in proceeding to enter the judgment of divorce. The court entered the default judgment without ever considering defendant's motion to set aside the default.

A trial court's failure to exercise its discretion, when properly asked to do so, is itself an abuse of discretion. See *People v Stafford*, 434 Mich 125, 134, n 4; 450 NW2d 559 (1990). It is uncontested that defense counsel wrote to plaintiff's counsel regarding the venue issue approximately two weeks after defendant was served. There were additional communications between the attorneys, and defendant's motion to change venue was filed two months after defendant was served. While plaintiff correctly observes that defense counsel's asserted understanding that there was an agreement that he would not be filing an answer until the venue issue was resolved is not supported by the letters and faxes exchanged by the attorneys, it is nonetheless clear that, whether justified or not, defense counsel had such an understanding. More important, the parties stipulated to set the default aside. To be sure, a court is not obliged to accept stipulations of the parties; but here, the court gave no reason for declining to do so except that it was required to dispose of the case within a certain time frame.[3]

(…continued)

defendant does not assert that he filed his motion to change venue belatedly because some pertinent fact came to light 14 or fewer days before he filed it, and thus MCR 2.221(B) is inapplicable in any event.

[3]The following transpired at the June 30 hearing:

> THE COURT: Thank you. And this is the time set for a motion to set aside a default?
>
> MR. PEARSON: We have actually two things. The Court scheduled this for a pro con hearing as well as the Motion to Set Aside the Default.
>
> THE COURT: Did we already take proofs, Mr. Pearson?
>
> MR. PEARSON: My client was not here the last time.
>
> THE COURT: Okay. And Mr. Mertens, you wanted to make a motion?
>
> MR. MERTENS: Thank you very much, your Honor. Your Honor, first and foremost, *I would note for the record that Mr. Pearson and myself have executed a stipulation and order to set aside the default, if this Court would be willing to entertain such a stipulation.*
>
> I would – in support of that stipulation I would submit to the Court that I know that this case has been going on for a little while. In fact I think it was filed

(continued…)

(…continued)

in March. And I know that this Court is under some very strict guidelines from the Supreme Court.

I believe that the Court can rectify its concerns in regards to its docket by implementing some sort of strict scheduling conference ensuring that the case is done in the next month or month and-a-half.

I believe that in essence what we have here is a miscommunication, perhaps, between two attorneys, one attorney believing that the answer – no default would be entered if his answer wasn't filed because he had filed a motion for change of venue, and another attorney who says that's not the position.

The only two people damaged are the parties. I would submit to the Court by setting aside the default judgment and putting a strict scheduling order in place that requires the parties to get this done very quickly would rectify those concerns.

Your Honor, I would incorporate the motion that was filed by Mr. Path into my arguments. I believe that he details the transactions and has some attached correspondence for this Court's review.

Your Honor, I have nothing further to add to that. Thank you.

THE COURT: Mr. Pearson.

MR. PEARSON: *I have filed my written response to the motion to make it clear that there was not an agreement or meeting of the minds regarding extension of time to file pleadings. I don't believe there's anything in the attached correspondence that indicates other, nor was there any oral agreement.*

However, having said that, I concur with counsel that my client's position – I did sign a stipulation to set aside default. In the alternative, I have also prepared a proposed Judgment of Divorce, because the Court indicated that last time we were here that we should have that. So we will defer with the Court.

THE COURT: Have the parties settled all the property disputes, Mr. Pearson?

MR. PEARSON: Not to my knowledge. I prepared a judgment doing the best I could with the information available.

THE COURT: Mr. Mertens.

MR. MERTENS: Your Honor, if I may, Mr. Path has advised me, and I've also discussed with Mr. Pearson the likelihood – and I'm sure this Court has heard this a million times in regard to cases, but the likelihood is this case will settle in mediation. There aren't many legal issues. It's relatively straight up DO case where assets are to be divided equally.

Your Honor, If I may just add one more thing – and I would appreciate the Court's indulgence, because I'm kind of getting into this thing at the last minute. I would note for the record, your Honor, that MCR 2.108 states that defendant

(continued…)

(…continued)

must serve and file an answer or take other action permitted by law within 21 days after being served. There is a court rule in regards to the venue statute. It says a motion for a change of venue must be filed before or at the time the defendant files an answer.

I would submit that the motion was filed before the answer was filed. And I believe under the court rules that that is another action that the court rule says should be engaged in before a default is entered.

Thank you, your Honor.

THE COURT: Mr. Pearson, anything else you'd like to say?

MR. PEARSON. Well, counsel is correct on that. I note in my written response that MCR 2.108 provides that these actions must be taken within 21 days after being served with a summons and a copy of the complaint. As shown by the files and records, this defendant was served on March 15th, and the motion was filed on June 14th, so approximately 91 days after that.

Again, I would indicate that we did sign the stip, so.

THE COURT: Well, you can refile this divorce. My interest in this is to see that justice is done and to have my docket control comply with the orders of the Michigan Supreme Court. I don't know why they're in a hurry, but they are. And so those are my goals.

I have no interest in forcing people to settle their disagreements before they're ready to settle their disagreements. So I am going to dismiss this action, and you can – Mr. Pearson.

MR. PEARSON: I'm sorry. The court said – when we were in court last time the Court indicated it would be saved with the understanding that we would take our proofs today.

THE COURT: I'm willing to do that, but not if the --

MR. PEARSON: Okay –

THE COURT: -- you've said –

MR. PEARSON: -- okay –

THE COURT: -- that they haven't settled their disagreements, so I'll not interested in forcing them to.

MR. PEARSON: My client is willing to take the final proofs. I went to some length to prepare the judgment. And the Court the last time we were in court –

THE COURT: But apparently they haven't agreed.

MR. PEARSON: I don't believe that there's been any agreement regarding settlement because there simply hasn't been time to do it. My client shouldn't be penalized.

(continued…)

Under the circumstances that defendant contacted his attorney promptly; his attorney contacted opposing counsel promptly, and had a good-faith, if mistaken, belief that his answer was not expected until the venue issue had been resolved; the parties stipulated to set aside the

(…continued)

THE COURT: There's been since March.

MR. PEARSON: Well, we filed our notice of default, and we're here to take our proofs. And the Court indicated we could proceed today. When we were in court last time the case was on no the progress docket.

THE COURT: But you think he's filed his change of venue motion, and that in effect is an answer in a timely fashion?

MR. PEARSON: No. No. He didn't file it until 91 days after service.

THE COURT: I misunderstood you.

MR. PEARSON: The court rule employs 21 days.

THE COURT: So you believe you have properly defaulted him?

MR. PEARSON: The default is proper, yes, because there was no action within 21 days as require by the court rule MCR 2.108, which I've cited in my response.

THE COURT: All right. I misunderstood you. Mr. Mertens, something else you wanted to say?

MR. MERTENS: Just real quick, and I don't' mean to delay things, but before they proceed, procedural speaking, if I file a complaint and don't default someone for 100 days after, and an answer is filed, I can't go back and ask for a default.

The answer has been filed. And I would submit to the Court that the Motion for a Change of Venue was filed before the request for the default was filed.

THE COURT: All right. Now, let's go over this judgment and see if it's fair and equitable. Mr. Mertens, is your client's interest protected? Is it a fair and equitable judgment?

MR. MERTENS: Your Honor, respectfully, I have not seen a copy of the judgment and –

THE COURT: Well, I would suggest that you have a look at it.

MR. MERTENS: Thank you, your Honor.

THE COURT: In fact, have a look at it and come back in the courtroom. I'm going to do some other business while you're looking at it. [Emphasis added.]

default and proceed with the case expeditiously; and the court gave no reason for not accepting the stipulation other than the time standards, we conclude that the court abused its discretion in failing to honor the stipulation and set aside the default.

Reversed and remanded for proceedings consistent with this opinion. Under the circumstances, although defendant is the prevailing party on appeal, he shall not be entitled to costs. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell