

STATE OF MICHIGAN
COURT OF APPEALS

LINDSAY & LINDSAY, LLP,

Plaintiff/Counter-Defendant-
Appellee,

v

SCOTT R. RAUSCH,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED
December 6, 2007

No. 268703
Saginaw Circuit Court
LC No. 05-056093-CK

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant/counter-plaintiff appeals as of right from the default judgment entered in favor of plaintiff/counter-defendant. We affirm.

I Basic Facts and Proceedings

This action arose out of defendant's alleged failure to pay plaintiff for legal services rendered. In its initial complaint, plaintiff sued defendant for breach of contract and, alternatively, an account stated claim. Defendant answered and counterclaimed that he overpaid plaintiff. After filing a first amended complaint as of right, which, in part, contained an additional alternative theory of fraud, plaintiff later moved under MCR 2.118(A)(2) for leave to again amend its complaint. At a December 12, 2005 motion hearing, the trial court granted plaintiff's motion from the bench. On December 14, 2005, plaintiff served the proposed order by a seven-day notice of presentment under MCR 2.602(B)(3). After defendant did not object to the order within the requisite timeframe, plaintiff served defendant with its second amended complaint, and on December 27, 2005, plaintiff filed its second amended complaint. On December 29, 2005, the order granting plaintiff's motion to amend its first amended complaint was entered.

On January 20, 2006, plaintiff faxed an affidavit for entry of default, and the court clerk entered the default at 10:00 a.m. that day. Defense counsel claimed that the court clerk told him sometime that day that his answer was overdue. Defense counsel stated that as of that day, he was contemplating whether to bring a motion to strike the second amended complaint on the basis that plaintiff misled him and the court about the nature of its requested amendment. Defendant filed his answer to the second amended complaint at 4:30 p.m. that day. On January

24, 2006, the clerk entered a default judgment in favor of plaintiff for \$28,441.89, which included \$28,244.89 in damages and \$197 in costs.

Defendant moved to set aside the default and the default judgment, but the trial court denied the motion, reasoning that defendant failed to show good cause as required under MCR 2.603(D)(1). The trial court later denied defendant's motion for reconsideration under MCR 2.119(F)(3).

II Error in Granting Default

Defendant takes the position that no response to the second amended complaint was required because it was filed without the trial court's written permission. To that end, defendant claims the trial court abused its discretion in granting the default judgment based on defendant's failure to respond to the second amended complaint.

A. Standard of Review

The trial court's decision to enter a default is reviewed for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Resolution of this issue involves interpretation of the court rules, which is reviewed de novo on appeal. *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 142; 662 NW2d 94 (2003),

B. Analysis

MCR 2.118(A)(2) provides that, "Except as provided in subrule (A)(1) [not relevant here], a party may amend a pleading only by leave of the court or by written consent of the adverse party." MCR 2.118(A)(2) does not indicate whether the court must in writing grant a motion to amend. Defendant notes that courts generally speak only through written orders and not through oral decisions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Hall v Fortino*, 158 Mich App 663, 667; 405 NW2d 106 (1986); see also MCR 2.602(A)(1) (generally requiring all judgments and orders to be in writing and signed and dated by the trial court).

Here, defendant argues that no response to plaintiff's second amended complaint was required because the second amended complaint was served on defendant and filed with the court before the trial court had entered an order granting leave to amend. However, even assuming that the second amended complaint was not effective until the trial court entered the written order granting leave to amend, we find no support for defendant's position that the second amended complaint remains ineffective after the trial court entered a written order granting leave to amend. Once the trial court entered the written order granting leave to amend, there was no dispute that plaintiff's second amended complaint was filed "by leave of the court." MCR 2.118(A)(2). Further, allowing defendant to simply ignore plaintiff's second amended complaint while the trial court record clearly indicates that the trial court intended to grant leave to file it contravenes the "presumption of the validity of pleadings." See *Saffian v Simmons*, 477 Mich 8, 14-15; 727 NW2d 132 (2007).

Here, defendant failed to respond to plaintiff's second amended complaint within 21 days, MCR 2.108(C)(3), of the trial court's December 29, 2005 order granting leave, and the clerk properly entered a default judgment. MCR 2.603(B)(2). Accordingly, defendant fails to establish an abuse of discretion. Further, defendant has not established fundamental unfairness in regard to the handling of the default judgment. See *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) ("The principle of fundamental fairness is the essence of due process.").

III Failure to Set Aside Default

Defendant next argues that the trial court abused its discretion by failing to set aside the default judgment because good cause existed to do so.

A. Standard of Review

A trial court's decision regarding a motion to set aside a default or a default judgment is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

B. Analysis

Under MCR 2.603(D)(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 is filed." For purposes of applying MCR 2.603(D)(1), good cause sufficient to warrant the setting aside of a default judgment may be demonstrated by (1) the presence of a substantial irregularity or defect in the proceeding on which the default is based, or (2) the existence of a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, supra* at 223. Ultimately, when allowing the default to stand would result in manifest injustice, it should be set aside. *Id.* at 233. Manifest injustice is not a third alternative for good cause that excuses a failure to comply with the court rules, but is the result that would occur if a default were not set aside where a party has satisfied the good cause and meritorious defense requirements of the court rule. *Id.*

Here, defendant first claims that a substantial irregularity in the proceedings occurred when plaintiff served its second amended complaint on December 22, 2005 and filed it on December 27, 2005, before the order granting plaintiff's motion to amend its complaint was entered on December 29, 2005. However, as indicated above, defendant failed to respond to the second amended complaint within 21 days after the trial court entered an order allowing plaintiff to file the second amended complaint. Further, defense counsel knew the second amended complaint had been filed and that the trial court had stated on the bench it would grant the motion. Defendant cannot claim a substantial irregularity in the proceedings knowing that the trial court intended to enter an order allowing plaintiff to amend its complaint.

Defendant next argues that good cause existed because the second amended complaint was dramatically changed beyond the scope of the changes requested in plaintiff's motion to amend. In that regard, he argues that plaintiff misled the trial court and defendant into believing that an amendment was needed to correct certain mathematical errors in the prior pleadings

when, in fact, plaintiff actually substantively amended the complaint to add certain allegations that had nothing to do with the purported mathematical errors. After a careful comparison of the first amended complaint with the second amended complaint, it is plain that the second amended complaint has not been altered dramatically beyond the changes sought in the motion to amend as defendant suggests. But even if those changes went beyond the changes allowed pursuant to order granting leave to amend, the trial court noted that those changes may have been stricken if defendant had moved to do so as allowed by court rules. Instead, defendant did not respond to the second amended complaint within the time period required under MCR 2.108.

Defendant next argues that the default judgment should have been set aside because the fraud claim was defective. The entry of a default judgment has the legal effect of admitting all well-pleaded allegations. *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). However, “the entry of a default does not operate as an admission that the complaint states a cause of action. If the complaint fails to state a cause of action, it will not support a judgment.” *State ex rel Saginaw Prosecuting Attorney v Bobenal Investments, Inc*, 111 Mich App 16, 22; 314 NW2d 512 (1981), citing *Hofweber v Detroit Trust Co*, 295 Mich 96; 294 NW 108 (1940).

Here, the second amended complaint contained three alternative theories for recovering \$28,244.89 owed for legal services rendered, including breach of contract, an account stated, and fraud, as well as an alternative theory for unjust enrichment of an unspecified dollar amount if an express contract was not found. The fraud theory and the breach of contract theory were ultimately premised on defendant’s failure to pay for services rendered. While we agree that the default judgment could not have been sustained under the tort theory of fraud because the failure to perform under a contract gives rise only to a suit for breach a contract, see *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 530; 534 NW2d 181 (1995), defendant fails to argue that the default judgment could not have been sustained under either the breach of contract or account stated theory. As to the former, the elements of a breach of contract cause of action are that a contract existed between the parties and that a breach of one or more of the contractual terms occurred. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). “The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (citation omitted). By operation of the default, defendant effectively admitted that he agreed to pay plaintiff \$140 an hour, plus expenses and reimbursements, for services rendered and that he failed to pay plaintiff \$28,244.89, the outstanding balance owed. Accordingly, no abuse of discretion occurred because plaintiff stated a cause of action for breach of contract, and defendant admitted to the breach as a consequence of his default. As a result, defendant’s argument that he presented a meritorious defense need not be reviewed because defendant failed to establish the first requirement of showing that the trial court abused its discretion in failing to find that good cause existed to set aside the default judgment. See *Zaiter v Riverfront Complex Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001).

IV Claim not Sum Certain

Defendant next argues that the clerk was not allowed to enter a default judgment because the claim against him was not for a sum certain. Under MCR 2.603(B)(2), a party can seek default judgment from the clerk where the amount requested is supported by an affidavit, and 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.” All other default judgment entries must be made by application to the court. MCR 2.603(B)(3).

In support of his argument, defendant points to plaintiff’s request for relief where he added boilerplate language to his breach of contract and account stated claims requesting any further relief that that trial court may determine appropriate in the interest of justice. Also in regard to the account stated claim, defendant relies on the fact that plaintiff sought “an award of \$140.00 per hour spent by Stephen E. Lindsay [a partner in plaintiff’s firm] pursuing and defending this claim.” As to the boilerplate language requesting additional relief, defendant’s argument is unpersuasive because this does not negate the fact that the specific request of \$28,244.89 was for a sum certain. Such language is commonly used in requests for relief and should generally not be even considered for purposes of determining whether a claim is for a sum certain. Likewise, the request in the account stated claim for additional attorney fees expended “pursuing and defending this claim” presents no impediment to plaintiff’s default judgment. The judgment entered was in the amount of \$28,244.89, the sum certain on the account stated claim. The trial court did not award to plaintiff in the default judgment additional attorney fees “pursuing and defending” this cause of action. Accordingly, defendant’s argument lacks legal merit.

V Counterclaim

Defendant next argues that remand is necessary because the trial court failed to directly dispose of his counterclaim for overpayment of attorney fees. As to the counterclaim, defendant alleged that he overpaid plaintiff \$9,105.79. However, by operation of the default, the counterclaim was effectively disposed of because defendant agreed that he owed plaintiff \$28,244.89. See *Wood, supra* at 578.

VI Motion for Reconsideration

Defendant finally argues that the trial court abused its discretion by denying his motion for reconsideration. However, defendant merely reiterated the arguments made in support of his motion to set aside the default and default judgment. He neither alleged nor offered evidence of a palpable error by which the trial court and the parties were misled with respect to his prior motion. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion for reconsideration. MCR 2.119(F)(3); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000) (concluding that a trial court does not abuse its discretion in denying a motion for reconsideration when the motion merely presents the same issues previously argued).

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens