STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,	UNPUBLISHED October 7, 2008
Plaintiff-Appellee,	
v	No. 277300 Wayne Circuit Court
SYLVESTER HUDSON,	LC No. 06-612812-AV
Defendant-Appellant.	

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order affirming the district court's denial of his motion to set aside default and default judgment. We affirm.

Defendant argues that he has demonstrated good cause and a meritorious defense to justify setting aside his default and default judgment and the lower courts erred in concluding otherwise. We disagree.

In order to set aside a default, a court must determine that a party has shown both good cause and a meritorious defense. MCR 2.603(D)(1); *Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 229, 234; 600 NW2d 638 (1999). Good cause may be established by showing, "a substantial procedural irregularity or defect, a reasonable excuse for failure to comply with the requirements that created the default, or some other reason why a manifest injustice would result if the default judgment were not set aside." *Alken-Ziegler*, *supra* at 229-230. A meritorious defense must be established separately from the procedural irregularity underlying the "good cause" element. *Id*. at 230. Further, the meritorious defense must be established by an affidavit of facts. MCR 2.603(D)(1). Finally, "[t]he policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler*, *supra* at 229.

Defendant first argues that there is good cause to set aside the default because he was not properly served with the summons and complaint. Because this issue is preserved, we review the lower court's ruling for an abuse of discretion. *Alken-Ziegler*, *supra* at 227. "The construction and interpretation of court rules is a question of law that [this Court] review[s] de novo." *Barclay v Crown Bldg & Dev*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

MCR 2.105(I)(1) provides:

> On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.

Because plaintiff failed initially to locate and serve defendant, the district court ordered alternative service of process by posting, pursuant to MCR 2.106(E). Defendant contends plaintiff failed to demonstrate, in accordance with MCR 2.105(I)(1) "that service of process cannot reasonably be made." As such, defendant argues that the district court should not have permitted alternative service.

On appeal in the circuit court, the judge queried plaintiff's counsel regarding its efforts to procure service on defendant. Plaintiff indicated it initially attempted to serve defendant by mail at the address contained in the police report for defendant's brother as the driver of the vehicle involved and on the address designated on the copy of the registration for the vehicle that was available. When service was not obtained, plaintiff sought alternative service, pursuant to MCR 2.105(I), at the home of defendant's brother. Plaintiff asserted this address was used because defendant's brother was also a party to the action and based on the belief that service at this address was "reasonably calculated to give the defendant actual notice . . . and an opportunity to be heard." MCR 2.105(I)(1). Although the circuit court opined that "plaintiff could have done more to ascertain the true address of [defendant]," the court ruled that it could not "find and do not find that it was improper for the district court to allow substituted service in the manner and form that service was effectuated." Further, service was made to a relative of defendant's who was also involved in the litigation. Defendant has not demonstrated why this would not constitute reasonable alternate service. As the district court noted, "[I]t makes no sense to this court why [the brother] would not say anything to [defendant] at all." Thus, defendant's argument regarding defective service is without merit.

Defendant next argues that grounds exist for relief from judgment based on good cause and the presence of a meritorious defense. To constitute good cause, the grounds cited by defendant to set aside the judgment must demonstrate the existence of "(1) a substantial procedural irregularity or defect, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that a manifest injustice would result from permitting the default to stand." *Alken-Ziegler*, *supra* at 230. Because defendant did not properly preserve this issue, we review for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Defendant first argues that "[m]istake, inadvertence, surprise, or excusable neglect" provide good cause because the judgment against him would have been dealt with as part of his intervening bankruptcy had defendant known of it. The possibility of bankruptcy does not evidence a procedural irregularity or provide an excuse for defendant's failure to comply with the requirements that created the default. *Alken-Ziegler*, *supra* at 230.

"'[M]anifest injustice' is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of the court rule." *Alken-Ziegler*, *supra* at 233. We do not find that the possibility that defendant could have erased the debt incurred by this judgment constitutes

manifest injustice. Defendant does not actually claim that the outcome of the lawsuit was incorrect; rather, he argues that if he had known about it earlier, he could have avoided the debt through bankruptcy. The only question in the instant appeal is whether the failure to set aside the default itself was appropriate, not the subsequent difficulties encountered by defendant because of the judgment. It was not plain error for the lower courts to decline to set aside the default and default judgment because defendant would have been better positioned to deal with the judgment debt if he had participated in the case at an earlier time.

Defendant next argues that plaintiff committed intrinsic fraud because it knew that it did not have defendant's personal address but served him at another address anyway. Defendant has not presented any evidence that plaintiff acted in bad faith. Plaintiff filed and attempted to serve defendant and, when it was initially unsuccessful, refiled in district court and sought permission to pursue alternate means of service. Thus, there is nothing to indicate that plaintiff was fraudulently trying to obtain a default and default judgment against defendant. Alternatively, defendant argues that plaintiff committed fraud by knowingly filing after the statute of limitations period.

Defendant asserts that plaintiff brought its case after the three-year statute of limitations period prescribed for this case. MCL 600.5805(10). Plaintiff originally filed its case with the circuit court within the period but the case was dismissed without prejudice for failure to locate and serve defendant. Plaintiff then filed its case with the district court more than three-years after the accident. The lower courts ruled that the limitations period was tolled during the time plaintiff's case was pending in circuit court, in accordance with the rule in effect at that time as set forth in *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971)[1], which tolled the limitations period upon mere filing. In *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), the Court overruled *Buscaino* and determined that both filing and service were necessary to toll the statute of limitations. However, *Gladych* was given prospective application with retroactive application only to cases in which this specific issue had been raised and preserved at the time the rule was announced. *Gladych*, *supra* at 607-608. Because defendant did not raise this issue in the district court until 2005, two years after *Gladych*, the altered rule regarding tolling is not applicable and defendant's assertions pertaining to violation of the statute of limitations must fail.

Finally, defendant argues that he has established the meritorious defense that he was not an owner of the vehicle at the time of the accident, thus relieving him from liability. Plaintiff presented an expired vehicle registration containing defendant's name as one of the owners of the car. Defendant argues that he transferred title in the vehicle prior to the accident. Although defendant was given the opportunity to provide evidence regarding transfer of ownership, the only evidence he presented was a self-serving affidavit stating that he transferred title in the car without any other form of documentation for verification. We review a lower court's findings of fact for clear error. MCR 2.613(C); *Smith v Smith*, 278 Mich App 198, 204; 748 NW2d 258 (2008). It was not clear error for the lower courts to conclude that defendant owned the car at the

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[1] Overruled by *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003).

time of the accident because the only available registration information for the car listed defendant as an owner. Thus, defendant has also not demonstrated a meritorious defense.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot