

STATE OF MICHIGAN
COURT OF APPEALS

DONALD GOODSON, d/b/a PRIVATE SECTOR
INVESTIGATIONS, and HENRY CROSS,

UNPUBLISHED
May 26, 2009

Plaintiffs-Appellees,

v

MANAGEMENT SYSTEMS, INC.,

No. 283316
Wayne Circuit Court
LC No. 06-628578-CK

Defendant-Appellant.

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

PER CURIAM.

Defendant appeals as of right from a default judgment in the amount of \$258,043.50. Because the trial court abused its discretion in denying defendant's motion to set aside the default, we vacate the judgment and default and remand the matter for further proceedings on the merits.

I

Plaintiffs are in the business of providing security services. On October 10, 2006, plaintiffs filed this action against defendant, alleging that defendant failed to pay a balance of \$258,043.50 owed for security services rendered to defendant. Plaintiffs alleged that they entered into a contract with defendant to provide security services, plaintiffs provided those services on open account relying on defendant's promise to pay for services rendered, but defendant failed to pay for the services rendered despite plaintiffs' demands for payment. Plaintiffs alleged that defendants' conduct constituted a breach of contract between the parties. Plaintiffs attached an affidavit of account to the complaint, wherein plaintiff Henry Cross averred that defendant was justly indebted to plaintiffs in the amount of \$258,043.50. He also averred that an attached "Statement of Account [was] true and correct." The attached statement of account constituted five separate invoices issued by plaintiff Private Sector Investigations to Friendship Meadows, Evergreen Estates, Bethel Tower, Bishop G. D. Moore Apartments, and Lake Wood Manor. Only the Lakewood Manor invoice references defendant in the "Bill To:" section, otherwise none of the invoices refer to defendant. Also, the invoices do not show any detail or a history of the account owing; instead, there is only a handwritten number that purports to be the balance due on each of the invoices. Plaintiffs did not append a contract to their complaint.

Instead of answering the complaint, defendant attempted to handle the matter informally. On November 28, 2006, defendant sent a letter to the Wayne Circuit Court indicating that it had received a summons and return of service. In the letter, defendant explained that it should not be named as a defendant because while it had retained the contract with plaintiff Private Sector Investigations, it had done so only as the authorized agent for Friendship Meadows, Evergreen Estates, Bethel Tower, Bishop G. D. Moore Apartments, and Lakewood Manor. Defendant appended its management agreements between itself and each of the properties, but did not attach a contract between it and plaintiff Private Sector Investigations. Defendant requested that it be dismissed from the action. Defendant took no other action.

On January 9, 2007, plaintiffs returned to court and presented the clerk with a SCAO approved form entitled “Default Request, Affidavit, Entry of Judgment (Sum Certain)” and requested that the clerk enter a default against defendant for failing to appear. The clerk entered the default. However, the trial court did not sign the default. The next day, on January 10, 2007, the trial court sent defendant a letter informing it that its November 28, 2006, letter was insufficient, that it had been defaulted, and that plaintiffs were seeking a judgment of \$265,953.26, the amount plaintiff entered on the default. The trial court informed defendant that it would not sign the judgment until on or after January 31, 2007, to permit defendant the opportunity to retain counsel and “take whatever steps are appropriate to enter this case,” but that if defendant did not retain an attorney, the court would have no choice other than to sign plaintiffs’ judgment. The circuit court also sent a copy of the letter to plaintiffs’ attorney. Defendant did not respond to the trial court’s letter, later admitting in its brief on appeal that it was unable to respond at that time due to financial constraints.

The next portion of the procedural history of the case is somewhat cloudy. The circuit court file contains the original copy of the default entered by the clerk on January 9, 2007, and signed by the trial court on February 14, 2007. Also, the lower court docket, entry 13, displays that the trial court entered a default judgment on February 14, 2007. But plaintiffs’ attorney represented that he checked the court file some time after receiving his copy of the court’s letter to defendants and that the signed default was not in the file. And, the trial court and the parties later indicated at a motion hearing that no default judgment was actually entered on February 14, 2007. Thus, neither party received a copy of the signed February 14, 2007 default.

Over ten months later, on November 30, 2007, plaintiffs filed a motion for entry of a default judgment pursuant to MCR 2.603(B)(3). Plaintiffs asserted that a default had been entered by the clerk of the court for defendant’s failure to timely plead or otherwise defend, and that the court had extended the date for entry of a default judgment to January 31, 2007, but defendant had not appeared or taken further action. Plaintiffs’ motion made no mention of the February 14, 2007 default. Instead, plaintiffs attached a copy of a new, incomplete, and unsigned “Default Request, Affidavit, Entry of Judgment (Sum Certain)” form. Plaintiffs noticed a hearing for December 14, 2007.

On December 12, 2007, before a default judgment had been entered, defendant filed a motion to set aside the default pursuant to MCR 2.603(D), which permits such relief on a showing of good cause and a meritorious defense. Defendant submitted the affidavit of its president, Ronald D. Weaver, Jr., in support of its claim that it had a meritorious defense. Weaver averred that defendant was the management company of Friendship Meadows, which was the owner of the properties at issue in the lawsuit. Weaver explained that defendant simply

managed those properties, did not own the properties, never actually contracted with plaintiffs, and simply oversaw contracts between Friendship Meadows and plaintiffs. Weaver stated that Friendship Meadows was the party actually responsible, but was now bankrupt and this lawsuit was merely an attempt by plaintiffs to circumvent the automatic stay provisions of the Bankruptcy Code.

Attached to Weaver's affidavit were management agreements that he claimed showed its relationship with Friendship Meadows. Defendant claimed that two provisions in the agreements indicated that Friendship Meadows is the party responsible for the debt owed to plaintiffs. Specifically, section 12.1 of management agreements covering Evergreen Estates and Eastside Transition Center, two of the properties it managed and for which plaintiffs provided security services, provides:¹

The Agent shall not be obliged to incur any liability or obligation for the account of the Owner without written assurance that the necessary funds for the discharge thereof shall be provided by the Owner.

Additionally, section 5k.2 of those agreements provides:

If the Agent is unable to pay the charges and expenses of the Development in a timely manner due to a lack of available funds, then the Agent will notify the Owner of the deficiency. If the deficiency is ongoing, once the Owner has been notified and is aware of a continuing deficiency, the Agent is not required to send subsequent notices of a lack of funds. If the Owner fails to make funds available in the Operating Account to fund the deficiency after notice by the Agent, or the Owner otherwise consents to the Agent's failure to pay, the Owner assumes responsibility for any charges, fees or interest that may be owed. In no event will the Agent be required to fund any deficiency in the Operating Account. The Agent will not [be] required to make any payments or pay other charges that are the subject of a valid dispute so long as the Owner or Agent is diligently pursuing resolution of the dispute, except for property taxes and other items that must be paid to avoid substantial late fees or penalties.

In its motion, defendant further argued that plaintiffs' failure to properly serve it with the notice of default also provided a basis for relief. Defendant asserted, in sum, that the existence of a meritorious defense, coupled with the existence of factual issues for trial, constituted good cause for setting aside the default.

At the hearing on December 14, 2007, the trial court considered plaintiffs' motion for entry of a default judgment and defendant's motion to set aside the default. The trial court concluded that defendant failed to show good cause for setting aside the default and denied defendant's motion and granted plaintiffs' motion. On January 3, 2008, the trial court entered

¹ Under these agreements, defendant is the Agent.

the orders, one denying defendant's motion and the other granting plaintiffs a default judgment in the amount of \$258,043.50. Defendant now appeals as of right.

II

The decision to set aside a default or default judgment is entrusted to the discretion of the trial court. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008). Unless there has been a clear abuse of discretion, the trial court's decision will not be set aside. *Id.* The abuse of discretion standard is more deferential than de novo review. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *Id.* When the trial court selects one of these principled outcomes, it has not abused its discretion. *Id.* In other words, an abuse of discretion occurs only when the court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *Shawl, supra* at 220-221. We also note that, although the law favors a determination of a claim on the merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered. *Alken-Ziegler, supra* at 229; *Shawl, supra* at 221.

III

Defendant now argues on appeal that the trial court erred in denying its motion to set aside the default, and in entering a default judgment in favor of plaintiffs. Defendant moved to set aside the default pursuant to MCR 2.603(D), which provides:

(D) Setting Aside Default or Default Judgment.

(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.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may be set aside only if the motion is filed

(a) before entry of a default judgment, or

(b) if a default judgment has been entered, within 21 days after the default judgment was entered.

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.

(4) An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

In other words, MCR 2.603(D)(1) provides that a motion to set aside a default or 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. As the defaulting party, defendant had the burden of demonstrating good cause and a meritorious defense. *Saffian v Simmons*, 477 Mich 8, 15; 727 NW2d 132 (2007). The good cause and meritorious defense elements of MCR 2.603(D)(1) are not to be blurred. They are separate requirements. *Shawl, supra* at 233. Nonetheless, there is some interplay between the two requirements, because if 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 weaker, in order to prevent a manifest injustice. *ISB Sales Co v Dave’s Cakes*, 258 Mich 520, 532; 672 NW2d 181 (2003); *Shawl, supra* at 233, 237. The trial court should consider the totality of circumstances in evaluating whether there is good cause and a meritorious defense. *Shawl, supra* at 236-238.

A. Meritorious Defense

The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action against it. *Cramer v Metro Savings Ass’n*, 136 Mich App 387, 398; 357 NW2d 51 (1983). An affidavit filed in support of a motion requires the affiant to have personal knowledge of the facts, to state admissible facts with particularity, and to show that the affiant can testify competently to the facts set forth in the affidavit. *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988). In determining whether a defendant has a meritorious defense, the trial court should consider whether we conclude that the affidavit contains evidence that (1) the plaintiff cannot prove or the defendant can disprove an element of the claim; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (7), or (8); or (3) the plaintiff’s claim rests on inadmissible evidence. *Shawl, supra* at 238.

In this case, defendant submitted the affidavit of its president, Ronald D. Weaver, Jr. According to Weaver, there was no contractual relationship between defendant and plaintiffs, and the contract for the provision of security services was actually between plaintiffs and Friendship Meadows, the owner of the properties at which plaintiffs provided the security services. If defendant was not a party to the alleged contract, plaintiffs’ breach of contract claim necessarily fails. See *Grand Blanc Landfill, Inc v Swanson Environmental, Inc*, 200 Mich App 642, 647; 505 NW2d 46 (1993), rev’d in part on other grds, 448 Mich 859 (1995). After reviewing the record, the affidavit clearly contains sufficient facts to identify a meritorious defense in this case.

B. Good Cause

Good cause includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failing to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. *ISB Sales Co, supra* at 531; *Shawl, supra* at 221.

Here, the trial court concluded that defendant failed to show good cause for setting aside the default, reasoning:

I cannot set aside. I see no meritorious grounds. If you read the rules, it says must have a reason, a meritorious reason why or reason as to why you didn't do something.

* * *

They've got to present this good reason for having failed to file an answer and there's no good reason. I probably would have found one. But after 1 year I can't.

Defendant argues it showed good cause because plaintiffs failed to serve it with notice of entry of the default, as required by MCR 2.603(A)(2). As such, defendant claims that good cause was shown due to a substantial defect or irregularity in the proceedings upon which the default was based.

MCR 2.603(A) provides:

Entry of Default; Notice; Effect.

* * *

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

(a) In the district court, the court clerk shall send the notice.

(b) In all other courts, the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

The purpose of the notice requirement is to enable the defaulted party to choose whether to move to set aside the default. *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), overruled in part on other grounds in *Allied Electrical Supply Co v Tenaglia*, 461 Mich 285; 602 NW2d 572 (1999).

Plaintiffs respond that they complied with MCR 2.603(A) because they submitted a default request form, and the trial court then notified defendant of the default in its January 10, 2007, letter, which stated:

The file at Circuit Court Wayne County reflects your letter of November 28, 2006. However, the letter is not sufficient as you are defaulted and Plaintiff seeks a \$265,953.26 judgment against you.

But MCR 2.603(A)(2) required plaintiffs to send defendant notice that the default was entered, and to file a proof of service and a copy of the notice with the court. It is undisputed that plaintiffs did not send notice to defendant and the trial court's letter did not satisfy the

requirements of MCR 2.603(A)(2). Accordingly, plaintiffs failed to comply with MCR 2.603(A)(2). A failure to comply with MCR 2.603(A) is sufficient to show a substantial defect in the proceedings to justify a finding of good cause pursuant to MCR 2.603(D). *ISB Sales Co, supra* at 533-536; *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993); *Gavulic, supra* at 25.

However, despite the technical defects in plaintiff not satisfying the requirements of MCR 2.603(A)(2) we cannot forget that defendant was actually informed of the default and the amount plaintiffs were requesting. And, defendant had an opportunity to file a motion to set aside the default before a default judgment was entered. The trial court advised defendant that it would not sign a judgment until on or after January 31, 2007, to give defendant an additional opportunity to retain counsel and “take whatever steps are appropriate to enter this case.” In its brief on appeal, defendant explicitly acknowledges receipt of the trial court’s letter and further acknowledges that it was aware that it was under a court-imposed deadline to retain counsel to appear and defend against plaintiffs’ action. But defendant did not take any action before plaintiffs filed their motion for entry of a default judgment on November 30, 2007, over ten months later. Before a default judgment was entered, however, defendant filed a motion to set aside the default. Because defendant received notice of the default and had an opportunity to file a motion to set aside the default before a default judgment was entered, it is questionable whether plaintiff’s failure to comply with MCR 2.603(A)(2) constituted a substantial defect or irregularity in this case.

Further, defendant never offered a reasonable excuse for its failure to appear and defend, which was the basis for the entry of the default in the first instance. In its brief on appeal defendant states only that “[d]ue to financial constraints [it] was unable to retain counsel at that time[.]” referring to the time period immediately after receiving the trial court’s letter. But defendant does not explain the financial hardship it faced at that time. And it does not allege that it made good faith attempts to retain an attorney at that time but was rejected and as such was unable to engage the services of an attorney due to its financial situation. Defendant’s bald assertion regarding “financial constraints” alone is not a reasonable excuse for its failure to appear and defend. For these reasons, defendant’s ability to demonstrate good cause on this record is weak.

C. Manifest Injustice

Defendant asserts that manifest injustice would result from permitting the default to stand. Manifest injustice is the result that would occur if a default were allowed to stand where a party has satisfied both the “meritorious defense” and “good cause” requirements of the court rule. *Alken-Ziegler, supra* at 233-234; *Shawl, supra* at 235. But, if a party states a meritorious defense that would be absolute if proven, a lesser showing of “good cause” is required than if the defense were weaker, in order to prevent a manifest injustice. *ISB Sales Co, supra* at 532; *Shawl, supra* at 233, 237. “Manifest injustice” is not a discrete occurrence that can be assessed independently, the totality of the circumstances must be considered. Here, Weaver’s affidavit contained sufficient facts to identify a meritorious defense that would be absolute if proven. Thus, defendant’s meritorious defense is very strong. And although defendant’s good cause is weaker, there are other substantial defects and irregularities in the record we must consider.

The lack of a contract as part of the record is a substantial defect. When an action is based on a written contract, it is necessary to attach a copy of the contract to the complaint. MCR 2.113(F). Plaintiffs alleged breach of contract in their complaint but did not attach a copy of the contract to their complaint in violation of MCR 2.113(F). When defendant finally did respond by filing its motion to set aside the default, it also did not attach a copy of the contract to its pleading because its defense was that no contract existed between it and plaintiffs. Thus, the trial court, as well as this Court does not have access to the alleged contract that is central to this case.

The written evidence of the alleged indebtedness appears to be irregular. Plaintiffs requested a sum certain, which was supported by an affidavit of account indicating that defendant was indebted for \$258,043.50. That number was supported by five separate invoices related to the different properties, but only one of the invoices made any reference at all to defendant and only in a “care of” capacity. Further, the supporting invoices neither support a statement of an account, nor the amount claimed. Thus, whether defendant or the properties themselves are responsible for the amounts owing is a question that results in a defect in plaintiffs’ affidavit of account. Though Weaver’s affidavit did not challenge the accuracy of the amounts owing, he certainly disputed liability averring that defendant simply managed the properties, did not own them, never actually contracted with plaintiffs, and simply oversaw the contracts between Friendship Meadows and plaintiffs.

The issues surrounding the entry of the February 14, 2007 default judgment are perplexing irregularities in the record. While lower court docket entry 13 displays that the trial court entered a default judgment on February 14, 2007, it appears from the circumstances of this case that no party ever received a copy of this default. In fact, the trial court and the parties even indicated at a motion hearing in December 2007 that no default judgment was actually entered on February 14, 2007. Indeed, a court speaks through its orders and judgments, not its oral pronouncements or written opinions, *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977), but it appears that the court and the parties acted as if the February 14, 2007 default did not exist. This is an irregularity in the record that cannot be denied. The import of this irregularity is crucial to our decision in this case because when plaintiffs filed a brand new motion for entry of default on November 30, 2007, and this time defendant was properly served, defendant promptly responded with a motion to set aside the default on December 12, 2007. Defendant’s response when receiving the benefit of proper service is in direct contrast with its lack of response after improper service or no service.

While there may be other defects or irregularities in this mystifying record, we believe the defects we have set out are serious defects present on this record. When balancing the relative strength of defendant’s meritorious defense with the much lesser showing of good cause defendant displayed, the effect of the obvious defects in the record are more than sufficient to support our ultimate conclusion that manifest injustice would occur if we allowed this default to stand. *ISB Sales Co, supra* at 532; *Alken-Ziegler, supra* at 233-234; *Shawl, supra* at 233, 235, 237. In other words, though defendant’s excuse for failing to comply with the requirements that created the default was weak at best, manifest injustice would result from permitting the default to stand in light of the strength of defendant’s meritorious defense together with the substantial irregularities and defects present in the record. Given these circumstances, the trial court’s decision to deny defendant’s motion to set aside the default is outside the range of principled outcomes and, therefore, constituted an abuse its discretion.

IV

Because of our conclusion in the previous issue, we need not address defendant's arguments that the trial court abused its discretion by entering a default judgment without first conducting an evidentiary hearing to determine the appropriate amount of plaintiffs' damages or considering whether a lesser available sanction would have been more appropriate for the reason that they are moot.

Vacated and remanded. The judgment and default are vacated and the matter remanded for further proceedings on the merits. No costs to either party. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Donald S. Owens

/s/ Pat M. Donofrio