

STATE OF MICHIGAN
COURT OF APPEALS

RONALD A. SEMAAN and KRISTIN A.
SEMAAN,

UNPUBLISHED
August 11, 2009

Plaintiffs-Appellees,

v

SMITH BUILDING AND DEVELOPMENT
CORPORATION and DAVID J. SMITH,

No. 284284
Oakland Circuit Court
LC No. 2007-086523-CZ

Defendants-Appellants.

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendants appeal as of right an order granting a default judgment in favor of plaintiffs. For the reasons set forth in this opinion, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

This matter arises from damage to two trees and a portion of the driveway on plaintiffs' property as a result of defendants' excavation of the neighboring property. On October 12, 2007, plaintiffs filed a complaint against defendants for damages and injunctive relief with regard to this excavation. Plaintiffs alleged that the extensive excavation, which damaged part of their driveway and two trees, constituted trespass and waste in violation of MCL 600.2919. Plaintiffs contended that they were entitled to recover three times their damages pursuant to the statute and were also entitled to injunctive relief. Plaintiffs also included a second count in which they alleged defendants had breached their duty under MCL 554.251 to furnish sufficient lateral and subjacent support during excavation in order to protect plaintiffs' land and the structures on it, and that injunctive relief was proper as a result. On October 17, 2007, Willard Ducharme filed an appearance on behalf of defendants. Also, on October 17, 2007, the trial court granted a preliminary injunction, ordering no additional excavation or back filling by defendants for the time being, as well as ordering the parties to agree on an engineering professional who could approve the back filling of the adjoining properties. On November 1, 2007, the trial court entered an order modifying the preliminary injunction. It allowed defendants to complete the backfilling and all parties agreed that the maple tree and spruce tree in question would not survive. The parties were also instructed to agree on a forestry expert to determine the value of the trees. On December 22, 2007, a scheduling order was entered and on the same day an order was issued for plaintiffs to show cause why they had failed to request an entry of default against defendants because defendants had never answered plaintiffs' complaint. On January 2, 2008,

and January 3, 2008, defaults were entered against Smith Building and Development Corporation and David Smith, respectively, because defendants had not answered plaintiffs' complaint. On January 16, 2008, plaintiffs filed a motion for entry of default judgment against defendants.

The trial court granted plaintiffs' motion for entry of default judgment, and awarded \$50,430.90 in damages, which was the amount requested by plaintiffs, without any reasoning on the record. The trial court memorialized its ruling in an order entered on January 30, 2008. The trial court also denied defendants' motion to set aside the entry of default without prejudice because the affidavit of meritorious defense was deficient and for the reasons set forth by plaintiffs' counsel. Following the trial court's denial of motions for reconsideration, this appeal ensued.

On appeal, defendants argue a variety of grounds under which the trial court abused its discretion by failing to set aside the entry of the default and default judgment.

Whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Additionally, we review the trial court's findings of fact for clear error. MCR 2.613(C). Furthermore, "although the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (internal citation omitted).

Defendants first argue that the trial court abused its discretion by not setting aside the entry of the default because there was good cause to do so.

A motion to set aside an entry of default may be granted if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Saffian, supra* at 14. As the defaulting party, this burden is on defendants. *Id.* at 15. Whether a party has made a showing of good cause and a meritorious defense are separate questions, but the strength of a meritorious defense can affect the necessary showing of good cause. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 233; 760 NW2d 674 (2008). Good cause sufficient to warrant setting aside a default may be shown by: "(1) a substantial procedural defect or irregularity, or (2) a reasonable excuse for the failure to comply with requirements that created the default." *Saffian v Simmons*, 267 Mich App 297, 301-302; 704 NW2d 722 (2005), *aff'd* 477 Mich 8 (2007). Further, manifest injustice is not an independent factor in establishing good cause. Rather, it is the result that would occur if a default were allowed to stand after a party had demonstrated good cause and a meritorious defense. *Alken-Ziegler, Inc, supra* at 233.

A defendant must respond to a complaint within 21 days after being served. MCR 2.108(A)(1). Although defendants were served on October 12, 2007, with the complaint and an ex parte motion and order to show cause why injunctive relief should not be issued, they never filed a responsive pleading. Defendants' failure to file any responsive pleading properly prompted the clerk to enter a default against each defendant under MCR 2.603(A)(1) on January 2, 2008, and January 3, 2008.

Defendants contend that their trial counsel had a verbal agreement with plaintiffs' counsel in which plaintiffs' counsel agreed to not file an entry of default against defendants. Plaintiffs counter that defendants were given an additional three weeks to file a responsive pleading at a November 1, 2007 status conference. Our review of the record in this matter clearly indicates that it is devoid of any documentary evidence that would lead the trial court to conclude that there was any agreement between the parties that waived defendant's duty to file an answer pursuant to MCR 2.108(A)(1). Defense counsel's assumption that he was not under any obligation to file an answer based on a three-week extension agreed to by the parties in November 2007 is not supported by any record evidence. Therefore we concur with the trial court's conclusion that a three-week verbal extension did not constitute a reasonable excuse to not file an answer in this action. Accordingly because the trial court's conclusion was not outside the range of principled outcomes, we affirm.

Although defendants contend they actively defended the matter by communicating with opposing counsel, consenting to multiple orders, and making court appearances prior to the entry of default, these facts do not demonstrate good cause. These actions may have been in good faith; however, the standard is good cause, not good faith. See *Shawl, supra* at 219. Also, these actions do not show a reasonable excuse for failing to file a responsive pleading at any time between October 12, 2007, and January 2, 2008.

Defendants also argue that there was a substantial procedural defect or irregularity because they were not served with the December 22, 2007, order to show cause why plaintiffs had not requested an entry of default against defendants. Defendants contend that if they had been served with that order then they would have filed an answer. As noted, defense counsel had appeared on behalf of defendants, and thus, was entitled to copies of all pleadings and papers. MCR 2.117; MCR 2.107(A). Assuming defendants did not receive a copy of this order, the trial court did not abuse its discretion by deciding this circumstance did not constitute good cause. Defendants had been served with the complaint and all other motions and orders up to that point. Again, there was nothing prohibiting defendants, who were fully aware of the ongoing litigation, as evidenced by their counsel's court appearances and communications with plaintiffs' counsel, from filing an answer at any time and it was not reasonable without any supporting documentation for defendants to assume they were operating with an infinite extension.

Irrespective of the good faith analysis, defendants fail to argue that they had a meritorious defense to set aside the entry of default. As defendants argue extensively, their motion to set aside the entry of default and their motion to set aside the default judgment are distinct. In regard to the motion to set aside entry of default, defendants failed to file a sufficient affidavit to support a meritorious defense. The affidavit filed with the trial court was signed by defense counsel. He did not have personal knowledge of the prior circumstances that could have resulted in damage to the trees or any personal knowledge of how defendants' excavation affected plaintiffs' driveway. See *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988) (requiring that the affidavit of a meritorious defense be from a witness who, "if sworn . . . can testify competently to the facts stated in the affidavit"). Hence, because their affidavit of a meritorious defense was defective from its inception, defendants failed to show a meritorious defense to warrant setting aside the entry of default.

Next, defendants argue that they did not receive timely notice of plaintiffs' request for entry of default judgment because they were not served until six days before the default judgment was entered.

MCR 2.603(B)(1)(a) provides:

A party requesting a default judgment must give notice of the request to the defaulted party, if

- (i) the party against whom the default judgment is sought has appeared in the action;
- (ii) the request for entry of a default judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or
- (iii) the pleadings do not state a specific amount demanded.

Defendants appeared in this matter and were entitled to notice of the request for a default judgment. The notice required must have been served at least seven days before entry of the requested default judgment. MCR 2.603(B)(1)(b). Defendants were served with plaintiffs' motion for entry of default judgment and their summary of damages on January 16, 2008. Therefore, they had notice of the request well in advance of seven days prior to the entry of default judgment on January 30, 2008. Furthermore, plaintiffs supplementing their motion with an additional affidavit and the re-praecepe six days before the default judgment hearing did nothing to deprive defendants of notice regarding plaintiffs' request for entry of default judgment.

Defendants also argue that the additional affidavit should have been personally served. When a defaulted party has appeared, notice may be given in the manner provided by MCR 2.107. MCR 2.603(B)(1)(c). "However, a pleading that states a new claim for relief against a party in default must be served in the manner provided by MCR 2.105." MCR 2.107(A)(2). MCR 2.105 details the requirements for satisfying personal service.

In the supplemental affidavit from Chris LaFountain, he merely averred that he had quoted a price for removing and replacing the trees in question. There is nothing in his affidavit that states a new claim for relief because plaintiffs included the damage to the trees in their complaint. Furthermore, the figures of LaFountain's quote were included in plaintiffs' summary of damages. Therefore, because this affidavit did not state a new claim for relief, defendants were not entitled to have LaFountain's affidavit personally served.

Next, defendants argue that the trial court abused its discretion by not considering additional affidavits and argument, which supported their showing of a meritorious defense in their motion to set aside the entry of default judgment.

In determining whether there is a meritorious defense and good cause for setting aside a default, a trial court should consider the totality of the circumstances. *Shawl, supra* at 236-237. The determination of which factors are relevant and the weight to afford them is in the discretion of the trial court. *Id.* at 238-239. "[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 weaker, in order to prevent a manifest injustice.” *Alken-Ziegler, supra* at 233-234. However, as *Alken-Ziegler* makes clear, the good cause and meritorious defense elements of MCR 2.603(D)(1) are not to be blurred; they are “separate requirements.” *Id.* at 230-231. Thus, defendants must show a meritorious defense and good cause to have the default set aside under MCR 2.603(D)(1).

Entry of default and entry of default judgment are two different events. *Perry v Perry*, 176 Mich App 762, 767; 440 NW2d 83 (1989), overruled on other grds *Draggoo v Draggoo*, 223 Mich App 415 (1997). Nothing in 2.603(D) makes a denial of a motion to set aside an entry of a default dispositive of a separate motion to set aside a default judgment. In this case, defendants filed separate motions to set aside the entry of default and to set aside the entry of default judgment. Defendants’ motion to set aside the default judgment was based on an additional ground of good cause, which was plaintiffs’ failure to properly notice their motion for entry of default judgment. Defendants also submitted additional affidavits purporting to support meritorious defenses to plaintiffs’ claims. Therefore, contrary to plaintiffs’ argument, a separate motion to set aside the entry of default judgment was properly heard.

However, as noted above, the trial court did not abuse its discretion in concluding that defendants’ additional reason of good cause did not constitute a reasonable excuse or a substantial procedural defect or irregularity. Although the record does not reflect that the trial court considered defendants additional meritorious defenses, it did not abuse its discretion by failing to set aside the default judgment. Because defendants failed to establish good cause, they failed to meet one of the two requirements for setting aside a default judgment. Thus, even if the trial court erred in not considering the additional meritorious defenses, it did not abuse its discretion when it denied defendants’ motion to set aside the default because there was not a showing of good cause.

Defendants also request relief from the award of damages under MCR 2.612(C)(1)(c). In particular, defendants claim that the trial court’s reliance on the tree valuation by the jointly agreed upon forestry expert was in error because the expert acknowledged that his valuation did not take into consideration other mitigating factors. Defendants’ also argue that the report relied on by the trial court was incomplete.¹ Thus, Defendants argue that the trial court abused its discretion by not holding a hearing on damages. In default cases, whether to hold a hearing on damages is within the trial court’s discretion. Pursuant to MCR 2.603(B)(3)(b), if in order for a court to enter a default judgment or carry it into effect, it is necessary to determine the amount of damages, a court may conduct a hearing. *Wood, supra* at 486.

Based on defendants’ claims of error with the trial court’s award of damages, and the parties joint assertion that the report of the expert may not have been complete, the trial court’s decision not to hold a hearing constituted an abuse of discretion. Thus, we find that the trial court acted precipitously when it failed to await the completed report by the forestry expert retained by both parties. The parties are thus entitled to a full hearing to adequately ascertain the

¹ During oral argument, the parties agreed that the expert’s opinion was not fully completed.

extent of the damage to plaintiffs' tress and property and that hearing should be based on a completed analysis of the expert's findings and opinions. We therefore vacate the award of damages and remand the matter to the trial court for a hearing on the issue of damages.

Additionally, we are forced to vacate the damage award by the trial court because it abused its discretion by awarding treble damages for all costs, attorney fees, and damages associated with this case. Defendants correctly contend that, under MCL 600.2919, treble damages are only permitted for damages associated with the trespass.

MCL 600.2919(1), in part, provides:

Any person who:

(a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or

(b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or

(c) cuts down or carries away any grass, hay, or any kind of grain from another's lands without the permission of the owner of the lands, or on the lands or commons of any city, township, village, or other public corporation without license to do so, is liable to the owner of the land or the public corporation for 3 times the amount of actual damages.

Plaintiffs incurred damages to two areas of their property as a result of defendants' excavation. First, defendants' excavation caused damage to plaintiffs' driveway, which plaintiffs alleged involved digging up and carrying away of stone, ore, gravel, clay, sand, turf or other materials. MCL 600.2919(b). Secondly, plaintiffs' alleged that a maple tree and spruce tree were damaged and would not survive as a result of the excavation. MCL 600.2919(a). Based on the nature of the allegations, the actual damages that plaintiffs submitted in their summary were all a result of the trespass and could be trebled. MCL 600.2919(c).

However, the statute does not include any provision that permits attorney fees and costs to be trebled. Actual damages are distinct from attorney fees and costs. See *McManamon v Redford Charter Twp*, 256 Mich App 603, 609; 671 NW2d 56 (2003) (interpreting a statute that specifically differentiated when actual damages could be recovered versus attorney fees and costs). Therefore, on remand, if the trial court finds that defendants' actions constituted a trespass under MCL 600.2919(c), it may treble the damages as a result of the trespass and under MCL 600.2919(a) may treble the damages to the trees, but it may not treble attorney fees and costs. MCL 600.2919(c).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Stephen L. Borrello