STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE M. CLARKE, INC., Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 285567 Monroe Circuit Court
RICHCO CONSTRUCTION INC., RONALD J. RICHARDS, JR., and THOMAS RICHARDS, Defendants-Appellants.	LC No. 2007-022716-CZ

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendants appeal by leave granted[1] an order denying their motion to set aside a default judgment. We affirm.

I. Basic Facts

The underlying facts of this litigation involve defendants' alleged breach of contract and acts of fraud. In the summer of 2003, plaintiff entered into an oral contract with defendant Richco Construction Inc. (Richco), of which defendants Ronald and Thomas Richards are the only shareholders. Richco was to serve as a subcontractor and provide labor for the construction of water and storm drainage systems in Carelton, Michigan, which is located in Monroe County. Richco, however, allegedly failed to construct the system according to the village's specifications and made representations to plaintiff that it would fix the problem, but never did.

In July 2006, plaintiff filed a lawsuit against defendants. In August 2006, plaintiff's process server, Steve Gerlach, unsuccessfully attempted to personally serve process on both the

[1] This Court initially denied leave to appeal, *Lawrence M Clarke, Inc v Richco Constr, Inc*, unpublished order of the Court of Appeals, entered May 27, 2008 (Docket No. 285567), and defendants filed leave to appeal with our Supreme Court. That Court remanded the matter back to this Court for consideration on leave granted. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 481 Mich 939; 751 NW2d 33 (2008).

corporate and individual defendants at 27734 Ecorse Road, Romulus, Michigan, the current "active" address defendants had on file with the Michigan Department of Labor and Economic Growth (DLEG). According to Gerlach, the building was empty. A tenant in another building provided Gerlach with the landlord's contact information and someone also told Gerlach that a motor home parked on the property belonged to either Ronald or Thomas. Plaintiff's counsel contacted the landlord, who indicated that defendants had not left a forwarding address. Plaintiff's counsel also ran a search of the motor home's license plate number and contacted via telephone the person associated with the license plate. The person denied that the motor home was associated with either Ronald or Thomas. In October 2006, Gerlach followed-up on an additional lead in Waterford, Michigan. However, after speaking to the woman at that address, he believed that the "Ronald Richards" associated with that address was not the same Ronald Richards involved in this lawsuit. Because plaintiff was unable to serve defendants with a complaint, the suit was dismissed on October 30, 2006.

Plaintiff, however, continued searching for defendants. In early November 2006, plaintiff sought Ronald and Thomas' addresses from the Michigan Secretary of State's office but this search was unsuccessful because full names and birth dates, or a driver license number, was necessary to obtain the information. Plaintiff also conducted another search of DLEG's files, but found that defendants had not updated their information; their status was still active and the Ecorse Road location remained their current address.

On January 8, 2007, plaintiff filed a new summons and complaint, accompanied by a motion requesting alternate service of process. Plaintiff requested that the court allow it to serve process upon defendants by (1) posting a notice at the Ecorse Road address, (2) mailing the documents to Ronald and Thomas at the Ecorse Road address, and (3) publishing the notice in a newspaper in Monroe County, where the action was pending. The next day, the trial court granted the motion. Defendants never responded to the complaint and the court clerk entered defaults against defendants on April 6, 2007.

On September 28, 2007, plaintiff moved for entry of a default judgment seeking $371,598 in damages. Defendants did not appear at the hearing and the trial court entered a default judgment against defendants in the amount requested. Subsequently, in April 2008, defendants' property was seized.

Several days later, defendants moved to set aside the default judgment. Defendants argued that the court did not have personal jurisdiction under MCR 2.612(C)(1)(d) and in the alternative, that they had good cause for not answering the complaint, as well as meritorious defenses, thus warranting relief under MCR 2.603(D)(1). Defendants did not attach any affidavits in support of their alleged meritorious defenses. The trial court denied defendants' motion, as well as their subsequent motion for reconsideration. This appeal followed.

III. Standards of Review

We review a trial court's denial of a motion to set aside a default judgment for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 628; 750 NW2d 228 (2008). Whether a court has properly determined that it has personal jurisdiction over a party is a question of law that we review de novo. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004). Further, we review a court's discretionary decision to disallow or permit alternate

service for an abuse of discretion. See *Sturak v Ozomaro*, 238 Mich App 549, 569 & n 14; 606 NW2d 411 (1999). "[A]n 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).

IV. Motion to Set Aside Default Judgment

On appeal, defendants argue that the trial court erred by denying their motion to set aside the default judgment. Specifically, defendants contend that the trial court erred by finding that plaintiff's "underlying service efforts" sufficiently complied with the court rules, thereby causing the court to lack personal jurisdiction over defendants. We disagree.

A. Service of Process

The Due Process Clause of the Fourteenth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Obviously, at stake in this proceeding is defendants' property. A fundamental due process requirement in such proceedings is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). If "service of process is defective, the trial court may be deprived of personal jurisdiction over the defendant and left without legal authority to render a judgment." *Alycekay Co v Hasko Constr Co*, 180 Mich App 502, 505-506; 448 NW2d 43 (1989).[2] Because the court rules pertaining to service of process are intended to satisfy due process requirements, a party who serves process consistently with those rules will, generally, comport with due process requirements. See MCR 2.105(J). However, the court rules do not comprise a rigid formula that must be followed precisely in each lawsuit. See *Krueger v Williams*, 410 Mich 144, 158-159, 166; 300 NW2d 910 (1981). Rather, given the unique circumstances of an individual case, a court may fashion whatever method is necessary to effect notice; but, whatever method is employed, it must be "reasonably calculated under all the circumstances to afford notice." *Id*. 165. And, the method used cannot "be substantially less likely to afford notice than other customary substitutes." *Id*.

To plaintiff's knowledge, when the first lawsuit was filed, defendant Richco was an active corporation and Ronald and Thomas were its shareholders. Thus, plaintiff attempted to accomplish process pursuant to MCR 2.105(D), which provides, in part, that service of process

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[2] We note that notice and personal jurisdiction are two separate aspects of the due process clause. *Krueger v Williams*, 410 Mich 144, 157, 166; 300 NW2d 910 (1981). In order for a court to have personal jurisdiction over a party, that party must have sufficient minimum contacts with the forum and the subject matter of the litigation. See *Shaffer v Heitner*, 433 US 186; 97 S Ct 2569; 53 L Ed 2d 683 (1977). The notice requirement is concerned with a party's right to notice and opportunity to be heard before being deprived of life, liberty, or property. *Mullane*, *supra*. However, as noted, insufficient service of process can deprive a court of its personal jurisdiction over a party. *Alycekay Co*, *supra*.

may be made by "serving a summons and a copy of the complaint on an officer or the resident agent[.]" Accordingly, plaintiff initially attempted to personally serve defendants at 27734 Ecorse Road, Romulus, Michigan, which was the current corporate address on file with DLEG. This address was listed as the current business address for Richco and the contact addresses for both officers, Ronald and Thomas. However, the location was vacant and the landlord did not have a forwarding address for defendants. Plaintiff made contact with someone associated with a motor home believed to have belonged to one of the defendants and it also attempted to serve process at the home of a "Ronald Richards" in Waterford, Michigan. Both leads proved to be unfruitful. Plaintiff made further attempts to located defendant's through the Secretary of State's office but this search was unsuccessful because full names and birth dates, or a driver license number was necessary to obtain defendants' addresses. In addition, plaintiff conducted another search of DLEG's database to see if defendants had updated their information; defendants had not done so. In light of these facts, it is plain that plaintiff conducted a diligent search in its first attempt to serve process on defendants.[3]

Further, given that defendants' whereabouts remained unknown after plaintiff had completed this diligent inquiry, the court's decision to order alternate service was not an abuse of discretion, as defendants suggest. The court ordered alternate service under MCR 2.105(I)(1), which permits alternate service by publication, and provides:

> [T]he defendant shall be notified of the action by
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> (1) publishing a copy of the order once each week for 3 consecutive weeks, or for such further time as the court may require, in a newspaper in the county where the defendant resides, if known, and if not, in the county where the action is pending; and
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> (2) sending a copy of the order to the defendant at his or her last known address by registered mail, return receipt requested, before the date of the last publication.

In addition, the court also ordered that a notice of summons be posted at the vacated Ecorse Road building. Plaintiff complied with the order and had a notice published in the Monroe county newspaper where the suit was pending, mailed copies of the summons and complaint to the Ecorse Road location, which still remained on file with DLEG as defendants' current address, and also posted a notice at the Ecorse Road building.

Under the circumstances, this method was not "substantially less likely to afford notice than [the] other customary substitutes," *Krueger*, *supra* at 165, and defendants have not suggested such a method on appeal. Rather, in these circumstances—where defendants' location remained unknown despite plaintiff's diligent and consistent searching and the fact that

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[3] On appeal, defendants argue that plaintiff should have conducted an internet search for Ronald and Thomas' residences, which allegedly would have readily revealed their addresses. Regardless of whether or not this allegation is true, it does not make plaintiff's searches, when considered all together, any less diligent. For this reason, this argument is unavailing.

defendants chose to maintain their status as "active" and keep their address on file with DLEG—this method of service was reasonably calculated to afford defendants notice of the lawsuit against them. See *id*. The fact that the method of service employed did not allegedly apprise defendants of the litigation is immaterial under the circumstances. "[I]n the case of persons missing . . . employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, *supra* at 317.

Defendants, however, argue that plaintiff's efforts were insufficient under the court rules because they never received actual notice of the lawsuit. The implication of this position is that the court should not have ordered alternate service and instead should have simply dismissed the case. We cannot agree. The court rules do not explicitly require that a matter be dismissed in the event that a party is not given actual notice of litigation against him. In fact, due process does not require that actual notice be given in every case. *Krueger*, *supra* at 165. All that is required is that the notice be reasonably calculated under the circumstances to provide a defendant with notice of the lawsuit. That was accomplished in this matter. To find otherwise, would be tantamount to requiring "impracticable and extended searches [that] are not required in the name of due process." *Mullane*, *supra* at 317-318. Thus, we conclude that the trial court did not err by concluding that it had personal jurisdiction over defendants as the method of service in this case was reasonably calculated to provide defendants with notice of the claims pending against them.[4]

B. Meritorious Defense

Defendants' alternative ground for relief under MCR 2.603(D)(1) is also unavailing. Under that rule, a defendant may move to set aside a default judgment, which provides:

> 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.

Stated differently, no showing of good cause or affidavits are required if the motion is based on a lack of personal jurisdiction, but if it is based on any other ground then the moving party must show good cause and must produce an affidavit of facts demonstrating a meritorious defense. *Woods*, *supra* at 628; see also *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). Here, defendants did not file any affidavits with their motion to set aside

[4] There is also no merit to defendant's additional argument that it was improper for the court to have considered the circumstances surrounding plaintiff's initial attempts to serve defendants after it filed its first complaint. Nothing in the court rules limits the trial judge's consideration of the circumstances, as defendant suggests.

the default judgment.[5] Consequently, relief on this basis was not appropriate and the trial court did not err by declining to grant such relief. See *Alken-Ziegler, Inc, supra* at 233.

Accordingly, because the trial court had personal jurisdiction over defendants and defendants did not otherwise meet the requirements of MCR 2.603(D)(1), we conclude that the trial court did not abuse discretion by denying defendants' motion to set aside the default judgment.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald

[5] Affidavits, however, were filed in conjunction with defendants' motion for reconsideration, but as the trial court noted, that was not the "time to consider new arguments or authority." Because the trial court did not consider the affidavits and because defendants appeal only the trial court's order on their motion to set aside the default judgment, we also will not consider the affidavits. See *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).