

STATE OF MICHIGAN
COURT OF APPEALS

INDEPENDENT BANK,

Plaintiff-Appellee,

v

MICHAEL TINDALL,

Defendant-Appellant.

UNPUBLISHED

January 28, 2010

No. 289642

Oakland Circuit Court

LC No. 2008-090183-PD

Before: Donofrio, P.J., and Meter and Murray, JJ.

MEMORANDUM.

Defendant appeals as of right a default judgment entered awarding plaintiff \$174,590.11 plus interest, as well as possession of certain collateral (three automobiles), following the trial court's granting of default as a discovery sanction. Because defendant never moved to set aside the default or the default judgment and did not carry his burden, we affirm.

The relevant facts in this case pertain to a June 18, 2008, order and a July 28, 2008, order. In the first order, the trial court, in addition to other relief, granted a motion to strike a limited appearance by defense counsel and also granted a motion to compel discovery, giving defendant until July 2, 2008, to answer five interrogatories. At a subsequent hearing, the trial court indicated that it had granted the motion to strike the limited appearance based on defense counsel's failure to appear and the mistaken belief that defense counsel had not given the court sufficient notice of a scheduling conflict. The trial court verbally set aside that "order." In a subsequent written order, the trial court stated that it was vacating the "June 18, 2008 order striking defendant's limited [sic] appearance" "for the reasons stated on the record." Defendant failed to answer the interrogatories. Thereafter, the trial court entered a default pursuant to MCR 2.313(B)(2)(c) based on the failure to comply with the order compelling discovery. The trial court subsequently entered a default judgment. Defendant now argues that the trial court should not have entered the default, asserting that in vacating the "June 18, 2008 order," the trial court vacated the entire order, including the provision compelling answers to interrogatories.

Defendant failed to preserve this issue because he never moved to set aside the default or the default judgment. MCR 2.603(D)(1) 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.

Since defendant did not pursue this remedy in the trial court, he has made no record indicating that he could satisfy any of these criteria. Indeed, defendant does not present such an argument on appeal. Had he made such a motion below, the argument presented here may have been enough to establish good cause, but it would not have established a meritorious defense. This was defendant's burden to carry. *Saffian v Simmons*, 477 Mich 8, 15; 727 NW2d 132 (2007). Defendant is not entitled to relief.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio

/s/ Patrick M. Meter

/s/ Christopher M. Murray