STATE OF MICHIGAN

COURT OF APPEALS

AMY SALMONS, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 287179; 289101 Wayne Circuit Court
TAYLOR POST 200 AMERICAN LEGION, and TAYLOR MEMORIAL HOME, INC POST 200, Defendants-Appellants.	LC No. 07-719813-NO

Before: HOEKSTRA, P.J. and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right the trial court's denial of their motion to set aside a default judgment and their motion for reconsideration. We reverse and remand for additional proceedings consistent with this opinion.

I. SUMMARY OF FACTS AND PROCEEDINGS

On January 27, 2005, plaintiff Amy Salmons fell while walking on defendants' walkway. On December 1, 2005, counsel for plaintiff sent a letter to defendants informing them that plaintiff had sustained injuries as a result of the fall. On December 2, 2005, a claim notice was forwarded from The Insurance House to the claims department for Burns & Wilcox. On December 5, 2005, Tom Hay of Burns & Wilcox wrote to plaintiff's counsel, advised that he was the adjuster in charge of the claim, and requested additional information. Plaintiff's counsel corresponded with Hay on January 30, March 20 and April 25, 2006, regarding furnishing medical records and indicated that he would keep Hay advised of plaintiff's progress.

On October 24, 2006, Sally Rock at USF Insurance Company sent a letter to plaintiff's counsel advising that the claim had been reassigned to her for handling.

On January 23, 2007,[1] plaintiff's counsel sent a letter to Rock forwarding copies of medical bills for $316 and demanding payment for those bills. On January 25, 2007, USF

[1] Although the letter is dated January 23, 2006, the fax detail at the top indicates it was sent January 23, 2007, which is consistent with the fact that Rock was not assigned the claim until (continued…)

Insurance paid plaintiff $316 for reimbursement of medical bills. Five months later, having received nothing further from plaintiff, Steven Gabel at USF Insurance Company sent a letter to defendants on June 26, 2007, indicating that "the above-referenced claim has been resolved, and the file is now closed."

Plaintiff filed her complaint on July 25, 2007. In the complaint, plaintiff alleged that on January 27, 2005, she was a business invitee at defendants' business when "she suddenly slipped and fell on black ice while walking on Defendant's walkway which formed as a direct result of Defendant's failure to have gutters, in which in turn [sic] caused ice to form through a defective door onto said walkway, causing her to violently fall to the ground and sustain serious injuries." On July 31, 2007, plaintiff's counsel sent a copy of the lawsuit to Hay and informed Hay that he would be serving defendants with the summons and complaint "within the next several days."

On November 7, 2007, plaintiff's counsel sent a letter to the Wayne Circuit Court Clerk requesting filing of a proof of service on the resident agent for defendants for the default, application, entry and affidavit. The letter was copied to defendants' resident agent, Robert Matkin. On November 12, 2007, a proof of service was filed with the trial court indicating that the default and related documents were served via first class mail on defendants' resident agent. On November 20, 2007, plaintiff's counsel sent a letter to the Wayne Circuit Court Clerk enclosing "a Proof of Service referencing service of the Status Conference Scheduling Order, etc. upon Defendant's Resident Agent, Robert Matkin" and requesting it be filed. This letter was copied to Matkin, and a proof of service was filed with the trial court on November 28, 2007.

On January 29, 2008, plaintiff's counsel sent a letter to the Wayne Circuit Court Clerk enclosing plaintiff's motion for entry of default judgment, brief in support, notice of hearing, praecipe, and motion fee. As before, the letter was copied with enclosures to Matkin, but unlike plaintiff's previous filings, the record does not include a filed proof of service. The motion requesting entry of a default judgment was filed February 1, 2008, along with a notice of hearing indicating that a hearing on plaintiff's motion for entry of a default judgment would be held on February 15, 2008. Although the hearing notice was addressed to both the clerk of the court and Matkin, there is no proof of service for either the motion or the hearing notice.

On February 15, 2008, a notice of entry of default judgment was filed and the order indicated that plaintiff was awarded a judgment of $500,000. However, on May 16, 2008, when a request and order to seize property was filed, the request stated that judgment was granted for $575,000 and that, including interest and costs, the total amount due was $584,624.

On May 28, 2008, $400 cash was collected from Timothy Deinhart at defendants' place of business. However, based on the accounting filed with the court, the funds were applied to statutory expenses incurred and the total balance due did not decrease.

On May 29, 2008, The Insurance House sent a fax to Rock's attention at Burns & Wilcox informing them of the default judgment against defendants and indicating, "at no time did we know that a suit or judgement [sic] was filed with the court." The following day, Rock sent a

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October 2006.

letter to defendants' counsel, indicating that "[t]his is USF's first notice that a lawsuit has been filed against the American Legion Post #200" and that its first priority would be to get the default judgment set aside.

Shortly thereafter, on June 24, 2008, defendants filed their motion to set aside the default judgment. Along with their motion, defendants provided an affidavit from Deinhart that stated defendants had both good cause and a meritorious defense. Deinhart asserted defendants had a meritorious defense based on a lack of notice of "any icy conditions" and because the claim was open and obvious.[2] Deinhart asserted defendants had good cause because he received the summons and complaint around September 12, 2007 and "immediately turned this document over to my insurance agent" and "[a]t that point, I believed that this matter was being handled by my insurance company." However, defendants noted in their motion, "Unfortunately, the insurance agent, The Insurance House, denies ever receiving a copy of the complaint." In response, plaintiff argued that defendants failed to show that they had turned over the case to their insurer based on Deinhart's failure to identify the insurance agent to whom he submitted the complaint or "what method he used to provide notice to the independent insurance salesman."

At the hearing, defendants' counsel again argued that defendants thought the claim was closed or resolved or, at the very least, being handled by the insurance company. Plaintiff's counsel argued that not only had defendants been served with notice, but that he had "sent a letter to the insurance company and the adjuster we were dealing with at Burns and Wilcox" and had included "a courtesy copy of the summons and complaint" and indicated that he would "hold off service in an effort to try to resolve this case."

The trial court found: "[T]he defendants were served a long time ago, they have an insurance policy, Court's gonna deny the motion. There's no good cause." Defendants then informed the trial court that the insurer was going to decline coverage because "they didn't get notice of this according to them" to which the trial court replied, "Well, the carrier has to pay the judgment. It's that simple."

Defendants filed a motion for reconsideration, indicating that they never received notice of the proposed entry of a default judgment as required by MCR 2.603(B), denying them their due process right to contest damages. In conjunction with their motion for reconsideration, defendants provided another affidavit from Deinhart, which stated that "[a]t no time prior to February 15, 2008 did I receive notice that the plaintiff had filed a motion for the entry of a default judgment, or the amount of the judgment that plaintiff was seeking." The trial court denied the motion without explanation.

Subsequently, USF Insurance filed an appearance as a garnishee defendant and indicated that it was not indebted to defendants because there was no insurance coverage for the claim based on, among other things, late notice and a failure to mitigate damages. Defendants then

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[2] Although the affidavit did not explicitly reference the "open and obvious" doctrine, we read the provision that plaintiff "should have noticed the icy condition" as a sufficient implied reference for the purposes of the motion in this case.

requested a stay of the proceedings pending appeal, which the trial court granted. During the course of the hearing on that motion, it came to the trial court's attention that it had granted plaintiff only $500,000, not the $575,000 contained in the order that the trial court had subsequently signed. The trial court, on its own motion, amended the default judgment to reduce defendants' liability to $500,000.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a motion to set aside a default as well as its decision to deny a motion for reconsideration. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008).

III. ANALYSIS

As an initial matter, plaintiff argues that *Shawl* and various other cases are inapplicable to this case because this case involves a default judgment, not simply a default.[3] We disagree. MCR 2.603 explicitly references setting aside a default *or* default judgment, and *Shawl*, 280 Mich App at 237, lists factors to provide guidance to trial courts to determine whether a party has shown good cause and a meritorious defense for "setting aside a *default judgment* (emphasis added)." Thus, the law is clear that the standards for setting aside a default or a default judgment are identical. Furthermore, as a published case of this Court, *Shawl* is controlling. MCR 7.215(C)(2).

MCR 2.603(D)(1) provides that "[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." Defendants argue that they demonstrated both good cause and a meritorious defense, such that the trial court erred when it denied their motion to set aside.

We agree with defendants that their affidavit asserted a meritorious defense. Deinhart's affidavit indicated that defendants had no notice of the icy conditions and that, in any event, the conditions were open and obvious. These defenses, if substantiated at trial, could be a defense to plaintiff's claim, see *Shawl*, 280 Mich App at 235, as they constitute evidence that "the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement." *Id.* at 238.

Accordingly, the controlling outstanding question is whether defendants showed good cause, i.e. whether there was a procedural irregularity or defect, or there was a reasonable excuse for the failure to timely answer the complaint. We conclude, however, that we cannot determine this issue based on the record before us. Therefore, we direct the trial court to reconsider

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[3] For example, plaintiff's brief provides, "The recent Court of Appeals case of *Shawl* . . . relates to the issue of setting aside a default, not a default judgment and is not at all helpful in resolving this matter."

defendant's motion to set aside the entry of default and to make those factual findings necessary to such a ruling.

The trial court concluded that there was no good cause, but the entire basis for its decision was that "the defendants were served a long time ago [and] they have an insurance policy." Since the trial court ruled, this Court decided *Shawl*, which mandates a more detailed analysis. Under *Shawl*, to determine whether a party has shown good cause, a trial court should consider:

> (1) whether the party completely failed to respond or simply missed the deadline to file;
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> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
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> (4) whether there was defective process or notice;
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> (5) the circumstances behind the failure to file or file timely;
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> (6) whether the failure was knowing or intentional;
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> (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); . . . and
>
> (9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238.]

If there were no relevant factual disputes, we would consider the factors and either affirm the entry of default judgment, or vacate it and remand for full proceedings. The difficulty we have in reviewing the trial court's decision in this case is that there are outstanding factual disputes that must be resolved before several of the factors can be weighed.

As to the fourth factor, there is an outstanding dispute as to whether there was defective notice. Plaintiff alleges that defendants were given notice of the motion for entry of default judgment, but defendants filed an affidavit indicating that such notice was never provided and pointing out that the record does not contain a proof of service.[4] Similarly, factors five and six

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[4] We note that under MCR 2.603(B)(1)(c), plaintiff was entitled to provide notice "by ordinary first class mail at the defaulted party's last known address or the place of service." Plaintiff has provided evidence of a letter to the Wayne Circuit Court Clerk enclosing the motion for entry of default judgment that includes a designation of a "cc w/encl" to defendants' resident agent at defendants' address. Defendants argue that the lack of a proof of service is fatal to plaintiff's claim of notice. We disagree. MCR 2.104(B) provides that "[f]ailure to file proof of service (continued…)

involve questions regarding when or if defendants became aware of the motion for entry of the default judgment and when or if defendants' insurer received notice of the lawsuit. Defendants' insurer has alleged that it never received notice of the lawsuit, but defendants assert that they forwarded the lawsuit to their insurer and plaintiff's counsel alleges that he notified the insurer of the lawsuit as well. These disputes must be resolved before an assessment can be made into the circumstances behind the failure to file and whether it was knowing or intentional. Finally, because an insurer is involved, there is a question of whether its internal policies were followed, but concomitant with that determination is whether defendants' insurer actually received notice in the first place. In each of these cases, there are outstanding factual disputes that must be resolved by the trial court before the factors may be properly weighed.

Furthermore, because this claim involves an alleged failure to respond by an insurer, we must consider the parties' arguments regarding whether that failure can be imputed to defendants. Plaintiff argues that defendants' insurer's failure to respond to the lawsuit can be imputed to defendants. Defendants argue that *Shawl* determined that their insurer's failure to reply cannot be imputed to them. We disagree with both parties. *Shawl* rejected the rule that "the negligence of the insurer should be *presumptively* imputed to the defendant" and held was that "an insurer's negligence should not be conclusive on the procedurally nonnegligent defendant." *Id.* at 231 (emphasis added). The holding in *Shawl* neither requires nor prevents the imputation of an insurer's negligence on a defendant. Rather, it rejected both extreme positions and found that imputation may be appropriate under certain circumstances. To the degree negligence of the insurer is at issue, the trial court should consider whether such negligence should be imputed to the defendants.

Indeed, before it can be determined whether defendants' insurer's failure to reply can be imputed to defendants, it must be determined whether defendants' insurer was actually notified of the lawsuit. If defendants' insurer was never given notice of the lawsuit, then there is no negligence in its failure to respond. If defendants' insurer was notified of the lawsuit, then a determination must be made as to whether its internal policies were followed and whether it was negligent in failing to respond. Finally, even if a determination is made that defendants' insurer was notified of the lawsuit and was negligent in failing to respond, the question is whether defendants are "procedurally non-negligent." If they are not, then their insurer's negligence may be imputed to them under *Shawl*. *Id.*

We recognize that *Shawl* had not been decided at the time the trial court denied defendants' motion and the trial court obviously did not err in failing to consider all the *Shawl* factors. However, because *Shawl* is the controlling standard under which this Court must review the claim, and there are outstanding factual questions that must be resolved before we can make our evaluation, we are remanding this case back to the trial court to resolve the factual questions and reconsider defendants' motion under the *Shawl* "totality of the circumstances" standard.

If the trial court determines that the default should not be set aside based on the totality of the circumstances, but concludes that defendants did not receive notice of the motion for entry of

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does not affect the validity of the service." Thus, there is no legal question as to whether proper notice was given; only a factual one that the trial court must determine.

the default judgment, the trial court shall affirm the entry of default but set aside the default judgment and hold such hearings as are necessary to determine the amount of damages pursuant to MCR 2.603(B)(3)(b). See *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982) (Holding that although the default settles the question of liability, defendants have "a right to participate if further proceedings are necessary to determine the amount of damages."). However, if the trial court determines that the default should not be set aside and that defendants received notice of the motion for entry of default judgment, it shall affirm the entry of the default judgment.

IV. CONCLUSION

Because we conclude that the record is insufficient for us to determine whether the trial court properly refused to set aside the default, we remand this case back to the trial court to make factual findings as to whether defendants received the required notice of the motion for entry of default judgment; whether defendants ever turned the case over to their insurer; whether plaintiff notified defendants' insurer of the lawsuit; if the insurer had notice of the lawsuit, whether the insurer was negligent in failing to respond; and, if the insurer was negligent, whether defendants are "procedurally non-negligent defendants." The trial court may make these determinations based on the evidence already placed in the record, or it may elect to hold an evidentiary hearing on these matters. After making these determinations, the trial court shall consider the factors set forth in *Shawl* and determine, based on those factors, whether defendants showed good cause and, if not, whether they are at least entitled to a hearing on damages.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro