STATE OF MICHIGAN

COURT OF APPEALS

LUCKY ENTERPRISES, INC., a Michigan corporation and CHARLES AGHAJOUN, Plaintiffs-Appellees, v JAMAL JOHN HAMOOD, Defendant-Appellant, and WILLIAM J. RUNCO, MICHAEL J. FERGESTROM, HAMOOD, RUNCO & FERGESTROM, P.C., HAMOOD AND FERGESTROM, P.C., and CARLY PUMMELL, Defendants.	UNPUBLISHED October 19, 2010 No. 293632 Oakland Circuit Court LC No. 2007-084144-NM

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant Jamal John Hamood appeals by right the trial court's award of damages following entry of a default judgment in favor of plaintiffs Lucky Enterprises, Inc. and Charles Aghajoun (collectively known as "Lucky Enterprises") in the underlying legal malpractice action. We affirm.[1]

I. BASIC FACTS

A. UNDERLYING LAWSUIT

This case arises out of Hamood's prior representation of Lucky Enterprises in a separate matter. Lucky Enterprises owned a gas station that Sunoco, Inc., operated. Lucky Enterprises

[1] This appeal has been decided without oral argument pursuant to MCR 7.214(E).

and Sunoco had entered into a franchise and assignment of leasehold interest contract. However, Sunoco breached the contract when it failed to pay an initial $41,000 to Lucky Enterprises, which the franchise agreement required, and when it failed to effectively remediate environmental contamination under the leasehold agreement. Lucky Enterprises retained Hamood and his former law firm to represent them in the lawsuit. During the course of litigation, Hamood allegedly did not properly prepare for trial by, among other things, failing to file a witness list. This failure estopped Lucky Enterprises from presenting evidence on number of issues, which Lucky Enterprises alleges resulted in damages in excess of $25,000. As a result, Lucky Enterprises filed a malpractice claim against Hamood.

B. LEGAL MALPRACTICE CLAIM

After Lucky Enterprises filed the complaint in this case, Michael Hechtman, attorney for Lucky Enterprises, requested that Hamood provide copies of all documents involving the underlying litigation within 28 days of September 5, 2007. Discovery was due on October 3, 2007. However, on September 13, 2007, Hamood notified both Lucky Enterprises and the trial court that he was suspended from legal practice until October 13, 2009. The trial court determined that this had no affect on his ability to comply with the discovery request. Then, on October 4, 2007, the day after the discovery request was due, Hamood contacted Hechtman to request a three-week extension in order to comply with the request. Hechtman responded the same day by granting an extension until October 22, 2007. Hamood failed to comply with the new date, and on October 23, 2007, Hechtman allegedly notified Hamood that he would seek a motion to compel discovery. Hechtman moved to compel discovery on October 31, 2007, but the court copy of the proof of service was not signed.

Hamood failed to attend the hearing on the motion to compel on November 7, 2007. On November 8, 2007, the trial court ordered Hamood to produce the documents. The order mandated that if Hamood did not comply within 7 days, then the trial court would enter a default judgment as to liability against Hamood and his counter claims would be dismissed with prejudice. Hamood again failed to produce the requested documents. This noncompliance resulted in the trial court granting a default judgment in favor of Lucky Enterprises and dismissing Hamood's counter claims.

Hechtman sent a copy of the default judgment to Hamood on December 3, 2007. Then, on February 13, 2008, Hamood moved to set aside the default judgment. At the March 17, 2008 hearing on the motion to set aside the default judgment, Hamood indicated that he was not aware that any discovery motions existed or that a default had been entered. Hamood explained that he learned of the default by chance when Hechtman mentioned it to another attorney at Hamood's old law office, who in turn relayed the information to Hamood. Hechtman argued that none of the documents sent to Hamood were ever returned by the post office indicating that Hamood was not at that address. The trial court denied Hamood's motion, finding that Hechtman had not erred in his service of the motion to compel discovery and that there was no evidence that Hamood was not aware of the proceedings. The trial court also denied Hamood's motion for

reconsideration. The trial judge entered a consent judgment that awarded Lucky Enterprises $200,000 in damages against Hamood.[2] Hamood now appeals.

II. ENTRY OF DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH DISCOVERY

A. STANDARD OF REVIEW

We review the entry of a default judgment upon failure to comply with a discovery order for an abuse of discretion.[3] A trial court abuses its discretion only when its decision is outside the range of reasonable and principled outcomes.[4] A trial court's factual findings relative to a default are reviewed for clear error.[5]

B. LEGAL STANDARDS

This Court generally does not set aside properly entered default judgments.[6] However, because dismissing a cause of action is a drastic measure,[7] the entry of a default judgment should only be imposed as a discovery sanction when there has been flagrant or wanton refusal to comply with discovery.[8]

In order to set aside a default judgment, a party must show good cause and file an affidavit showing a meritorious defense.[9] "[T]he good cause and meritorious defense elements of MCR 2.603(D)(1) . . . are 'separate requirements.'"[10] A party can establish good cause "by showing a substantial procedural irregularity or defect, a reasonable excuse for failure to comply with the requirements that created the default, or some other reason why a manifest injustice would result if the default judgment were not set aside."[11] "Failure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2) and is sufficient to show a substantial

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[2] The judgment further provided that if Hamood appealed and was unsuccessful, then the parties stipulated to an award in the amount of $950,000.

[3] *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

[4] *Saffian*, 477 Mich at 12.

[5] See *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).

[6] *Alken-Ziegler*, 461 Mich 219, 229; 600 NW2d 638 (1999).

[7] *Frankenmuth Ins v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992).

[8] *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994).

[9] *Alken-Ziegler*, 461 Mich at 229.

[10] *Shawl v Spence Bros Inc*, 280 Mich App 213, 233; 760 NW2d 674 (2008), quoting *Alken-Ziegler*, 461 Mich at 229.

[11] *Alken-Ziegler*, 461 Mich at 229-230.

defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D)."[12] Similarly, constitutional due process requires notice so that the opposing party has an opportunity to attend and present a claim or defense.[13] Therefore, a party is not required to demonstrate "a meritorious defense in order to get a default judgment set aside when the manner in which the default judgment was entered constituted a denial of due process."[14]

C. SERVICE OF MOTION TO COMPEL DISCOVERY

Hamood raises a number of challenges to the motion to compel discovery. Specifically, Hamood focuses on the proof of service and notice of hearing found in the record for Hechtman's motion to compel discovery. Hamood argues that the proof of service is void because it was sent to the wrong address, it was unsigned, and it failed to specify the manner in which service was effectuated.[15] Hamood also argues that Hechtman did not serve the notice of hearing and proof of service in a timely manner.

1. PROOF OF SERVICE

a. PROOF OF SERVICE SENT TO WRONG ADDRESS

As previously stated, Hechtman filed a motion to compel discovery and proof of service with the trial court on October 31, 2007. When Hamood failed to respond, the trial court entered a default judgment against Hamood.

Hamood argues that he never received the motion to compel discovery because it was sent to the wrong address. Hamood relies on the fact that a November 20, 2007 notice of default and proof of service showed his new address. In contrast, Hechtman argues that, even though Hamood's new address was handwritten on that notice of default, service at Hamood's old address was proper as it was the address that was set forth in the pleadings.

MCR 2.107(C) allows service on an attorney by mailing to the attorney at his or her last known business address. Furthermore, "[s]ervice on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings."[16] In this case, the November 20, 2007 notice of default and the proof of service listed Hamood's new address just below his captioned name. Therefore, Hamood argues that the trial court had the handwritten address on record. However, at the hearing on the motion to set aside default judgment, the trial court determined that the court file did not show any kind of modification to the formal caption, and

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[12] *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993).

[13] *Petroff v Petroff*, 88 Mich App 18, 21; 276 NW2d 503 (1979).

[14] *Id*.

[15] See MCR 2.104(A)(2).

[16] MCR 2.107(C).

there was nothing in the record to suggest that Hechtman was aware of Hamood's change in address. Furthermore, Hechtman stated that he did not know about the address change, and Hamood even admitted that he did not physically move to the new address until January 2008. Moreover, on February 26, 2008, Hamood filed a proof of service with the trial court that still listed his old address in the caption.

Hamood was responsible for informing Hechtman of his change in address given that both parties were engaged in on-going litigation. Hamood's change in address did not occur until January 2008, and he still filed court documents referring to his old address four months after Hechtman purportedly served him with the motion to compel discovery. Therefore, we conclude that the trial court did not commit a reversible error when it found that Hechtman's service to Hamood's old address listed in the pleadings was not improper, as it was the only address that Hechtman was aware of at the time.

b. LACK OF SIGNATURE

Hamood argues that in the absence of a valid proof of service, there is nothing in the record to contradict his sworn statement that he had not received the motion. In support, Hamood cites MCR 2.104(A)(2), which states that proof of service may be proved by "a certificate stating the facts of service[.]" He asserts that a certificate by an attorney is equivalent to a signed document.

There is nothing in the court rules that indicates that a party must sign a certificate of service. The only components the rule lists to be included are "the manner, time, date, and place of service[.]"[17] We recognize that MCR 2.114(C)(1) states that "[e]very document of a party represented by an attorney shall be signed by at least one attorney of record." MCR 2.114(C)(2) provides, "If a document is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the party." The omission here was not called to the attention of plaintiffs until after the default judgment was entered. In any event, reversal is not required because Hechtman's failure to sign the proof of service did not render service invalid.[18] Accordingly, we conclude that the trial court did not commit a reversible error in determining the validity of the proof of service.

c. MANNER OF SERVICE NOT SPECIFIED

Hamood argues that the proof of service was deficient because Hechtman did not specify the manner of service on the proof of service. While the proof of service did not mention the specific method of service Hechtman used, at the hearing on the motion to set aside the default, Hechtman indicated that he served all documents filed in the case on Hamood by mail.

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[17] MCR 2.104(A)(2).

[18] See MCR 2.104(B) ("Failure to file proof of service does not affect the validity of the service.").

Moreover, Hamood argues that the proof of service was untimely under MCR 2.119(C)(1)(a). And MCR 2.119(C)(1)(a) applies when service is made by mail. By relying on MCR 2.119(C)(1)(a) to attack Hechtman's proof of service, Hamood acknowledges that service was proper by mail, albeit untimely, even though the proof of service failed to state the manner of the service. Regardless, even if Hechtman did not specify the manner of service on the proof of service, reversal is not required because proof of service is not a prerequisite to the entry of a valid default judgment.[19] Therefore, we conclude that the trial court did not commit a reversible error when it found that Hechtman served Hamood with a valid proof of service.

d. TIMELINESS OF PROOF OF SERVICE

Hamood argues that Hechtman did not file the proof of service for the motion to compel discovery in a timely manner. MCR 2.107(D) states that a proof of service must be file promptly and at least at or before a hearing to which the paper relates. Here, Hechtman filed the proof of service on October 31, 2007. The hearing took place on November 7, 2007. Clearly, Hechtman filed the proof of service pursuant to the requirements of MCR 2.107(D). Accordingly, we find that the trial court did not commit a reversible error when it found that Hechtman served Hamood with a timely proof of service.

2. TIMELINESS OF NOTICE OF HEARING

Hamood argues that the notice of hearing for the motion to compel discovery was untimely because it was made seven days prior to the hearing date.[20] MCR 2.119(C)(1)(a) requires that a notice of hearing on the a motion must be served at least nine days before the time set for the hearing, if served by mail. Further, MCR 1.108(1) states that "[t]he day of the act, event, or default after which the designated period of time begins to run is not included" when computing time. Here, the notice of hearing was drafted on October 30, 2007, and filed on October 31, 2007. The hearing on the motion to compel discovery was set for November 7, 2007. Not counting the service date, Hechtman served the notice of hearing on Hamood only seven days prior to the hearing date. Because Hechtman served the notice of hearing by mail, service on Hamood was technically improper under MCR 2.119(C)(1)(a). However, the two-day discrepancy between the time requirement of MCR 2.119(C)(1)(a) and the actual service date does not alter our opinion that Hechtman's service of the notice of hearing was proper and that Hechtman sufficiently provided Hamood with notice of the upcoming hearing. Therefore, we conclude that the trial court did not commit a reversible error because its determination about the timeliness of the notice of hearing was not "inconsistent with substantial justice."[21]

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[19] *Thomas v Thomas*, 81 Mich App 499, 501; 265 NW2d 390 (1978); see also MCR 2.104(B).

[20] See MCR 2.119(C)(1)(a).

[21] MCR 2.613(A).

D. TIMELINESS OF NOTICE OF DEFAULT JUDGMENT

Hamood argues that Hechtman failed to serve the order of default judgment in a timely manner. MCR 2.602(D)(1) provides that "[t]he party securing the signing of the judgment or order shall serve a copy, within 7 days after it has been signed, on all other parties[.]" In this case, the trial court entered the default judgment against Hamood on November 19, 2007. The order was subsequently filed with the trial court on November 20, 2007.

On December 3, 2007, Hechtman mailed Hamood a proof of service for the default judgment. "Service by mail is complete at the time of mailing."[22] Although Hechtman's service was improper under MCR 2.602(D)(1), we conclude that Hechtman did not ultimately deprive Hamood of his right to due process when Hechtman mailed the notice of default judgment 12 days after judgment was entered. "In any proceeding involving notice, due process requires that the notice given be '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.'"[23]

Here, even though Hechtman served Hamood with the notice of default after the time set forth in MCR 2.602(D)(1), the trial court allowed Hamood to appear for a motion to set aside the default judgment on March 17, 2008. The trial court determined that Hechtman's service of the default judgment was sufficient to give Hamood notice of the default judgment. Finding no reason to set aside the default judgment, the trial court denied Hamood's motion. Accordingly, we conclude that the trial court did not commit a reversible error when it determined that the notice of the default judgment was properly served on Hamood.

E. DEFAULT JUDGMENT AS A PUNISHMENT FOR FAILURE TO COMPLY

Hamood argues that the trial court's entry of default judgment was punitive in nature and disproportionate to his failure to respond to discovery. MCR 2.313(B)(2)(c) explicitly authorizes an order of dismissal or entry of default as a sanction for the failure to obey an order to provide discovery.[24] However, a trial court must take care in exercising this option.[25] Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary.[26]

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[22] MCR 2.107(C)(3).

[23] *Trussell v Decker*, 147 Mich App 312, 323; 382 NW2d 778 (1985), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

[24] *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds by *Dimmitt & Owen Fin, Inc v Deloitte & Touche* (*ISC*), *LLC*, 481 Mich 618, 628; 752 NW2d 37 (2008).

[25] *Id*. at 26-27.

[26] See *Traxler*, 227 Mich App at 286.

"[T]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it."[27]

> The factors that should be considered in determining the appropriate sanction include the following:
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> > "(1) Whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice."[28]

These factors weigh heavily against Hamood. Hechtman made it clear that if Hamood did not respond to his motion to compel discovery, he would seek default judgment. Hamood should have known that he had failed to comply with the discovery request as of October 23, 2007. In fact, Hechtman contends that on October 23, 2007, he sent a letter to Hamood indicating that a motion to compel would be sought in the event that Hamood did not execute and return a stipulation and order regarding discovery. Furthermore, while it cannot be said with any certainty that the delay was willful, the evidence strongly suggests the likelihood that Hamood received actual notice. Hamood does not appear to have ever attempted to comply with the discovery order. Hamood asserts that he sent a letter to Hechtman indicating the documents were ready for viewing. However, this hardly counts as an attempt to comply with discovery. Instead, Hamood should have made a reasonable effort to send Hechtman the documents. Accordingly, the entry of a default judgment was proper, and the trial court did not abuse its discretion.

We affirm.

/s/ Karen Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck

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[27] *Dean*, 182 Mich App at 32.

[28] *Bass*, 238 Mich App at 26, quoting *Dean*, 182 Mich App at 32-33 (alterations by *Bass*).