STATE OF MICHIGAN

COURT OF APPEALS

ROSA WOODS,

Plaintiff-Appellant,

and

ROSETTA HALL,

Plaintiff,

v

CITIMORTGAGE, INC.,

Defendant-Appellee.

UNPUBLISHED
March 15, 2016

No. 325860
Wayne Circuit Court
LC No. 14-005094-CH

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff Rosa Woods, who has proceeded in *propria persona* throughout these proceedings, appeals from the final order of the trial court, which dismissed her claim of unjust enrichment[1] against defendant. The appeal also involves the trial court's decision in a prior order, which denied plaintiff's request for a default judgment. Because plaintiff never served defendant with the complaint and summons, we affirm.

Plaintiff filed suit against defendant on April 17, 2014. Plaintiff then attempted to serve the complaint and summons on defendant on April 20, 2014, through e-mail. As plaintiff explained to the trial court, "[W]hen I filed the case, you can E-serve it. And the clerk of the court E-served it to a[n] e-mail address [of defendant]."

[1] Although the complaint does not use this term, we believe that this is a fair characterization of her claim. See *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) ("It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.").

Because defendant did not file an answer, plaintiff moved for entry of default and default judgment. Defendant appeared for the hearing and argued that plaintiff's motion should be denied because defendant was not served with the complaint. Plaintiff countered that service was accomplished though "E-service." The trial court denied plaintiff's motion and explained:

> [T]here are certain rules that you have to follow, okay, in terms of serving the other side. And . . . service has to be effectuated in a certain amount of time. . . .
>
> Doing E-Filing is not a substitution of service. That's a misnomer. You actually have to serve them.

Afterward, defendant moved for the dismissal of plaintiff's action based on plaintiff's failure to properly serve defendant. Plaintiff again argued that service was proper under E-service. The court granted defendant's motion because service was not done in accordance with the court rules and the time for serving the complaint and summons had elapsed.

On appeal, plaintiff makes several related arguments, which can be synthesized down to just two: (1) the trial court erred in denying her motion for default judgment and (2) the trial court erred in granting defendant's motion for dismissal.

I. MOTION FOR DEFAULT JUDGMENT

We review a court's decision to grant or deny a default judgment for an abuse of discretion. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). "A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Id.*

Plaintiff claims that defendant's failure to answer the complaint within the time period required under MCR 2.108 entitled her to default judgment. However, it is axiomatic that the obligation to answer a complaint is only triggered after being properly served with the complaint and summons. See *Dogan v Mich Basic Prop Ins Ass'n*, 130 Mich App 313, 319; 343 NW2d 532 (1983) ("The validity of the default and default judgment must ultimately turn upon the fact of due service of process."). Service of process on a corporation, like defendant, is governed by MCR 2.105(D), which provides, in relevant part, that service is to be accomplished through either of the following means:[2]

> (1) serving a summons and a copy of the complaint on an officer or resident agent;
>
> (2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an office or business establishment of the corporation and

[2] Subsections (3) and (4) are not applicable here because they primarily relate to corporations that have ceased to exist.

> sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation[.]

Plaintiff does not dispute that she did not serve defendant though either of these means. Instead, she claims, as she did at the trial court, that her e-filing or e-serving of the complaint sufficed. It did not because "the court rules require personal service" in this circumstance. *Bullington v Corbell*, 293 Mich App 549, 557; 809 NW2d 657 (2011). There is nothing in the record to indicate that any of the enumerated corporate people in MCR 2.105(D)(1) and (2) had access to the e-mail address at issue. Moreover, plaintiff's argument that defendant had actual notice (and therefore there is no reason to find that service was wanting) is unavailing, as her own document shows that the e-mail with the complaint was never opened by defendant. We also note that plaintiff's reliance on our Supreme Court's *proposed* new court rules concerning e-filing is misplaced.[3] The proposal clearly has no force of law, as it is merely a proposal. The content is further prefaced with the following:

> Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its current form.

We also note that plaintiff's stated belief that the proposed rules were somehow valid is belied by her statement that she read the court rules and saw no mention of e-filing or e-service. After all, the best way to determine what the court rules require is to simply look at the rules themselves. Furthermore, the lack of any reference to e-filing or e-service in the rules a year after the proposal was issued should have been a red flag to plaintiff.

Plaintiff also avers that the trial court erred because defendant "made a general appearance and submitted to jurisdiction." Plaintiff relies on a witness list that defendant submitted to the trial court. However, that witness list was submitted *after* the trial court entered the order to deny plaintiff's motion for a default judgment. It is clear that whatever happened after the court made its decision cannot have any bearing on whether the court abused its discretion at the time it made its decision. In other words, at the time of plaintiff's motion for default judgment, it is undisputed that defendant had not made any other "appearance" or took any other action other than to oppose plaintiff's motion on the ground that it was never served with the complaint and summons.

Therefore, because plaintiff failed to properly serve defendant in the proceeding, the court properly denied plaintiff's request for a default judgment.

II. MOTION TO DISMISS

We review a trial court's decision on a motion to dismiss for an abuse of discretion. *Donkers v Kovach*, 277 Mich App 366, 368; 745 NW2d 154 (2007).

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[3] These court rules were from a proposal dated May 1, 2013, and are contained in ADM File No. 2013-18.

Defendant moved for dismissal of the action pursuant to MCR 2.102(E), which provides in relevant part:

> **(E) Dismissal as to Defendant Not Served.**
>
> (1) On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process *as provided in these rules*, unless the defendant has submitted to the court's jurisdiction. . . . [Emphasis added.]

As already discussed in relation to the motion for default judgment, there is no question that defendant was not served with process *as provided in the court rules*. Thus, the only way for plaintiff to avoid dismissal was if defendant had submitted to the court's jurisdiction. Plaintiff again relies on the witness list that defendant filed, as evidence that defendant submitted to the court's jurisdiction. We disagree.

> A party who enters a general appearance *and contests a cause of action on the merits* submits to the court's jurisdiction and waives service of process objections. Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objection to the court's jurisdiction, will constitute a general appearance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. [*Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993), overruled in part by *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007)[4] (emphasis added).]

However, defendant's action of filling a witness list did not demonstrate "an intent to appear" or an intent to contest the cause of action on the merits. First, it should be noted that the very first filing defendant made at the trial court was its motion to set aside the default,[5] which stated in its very first sentence that plaintiffs "failed to effect proper service of process." Second, the witness list that defendant filed after the trial court denied plaintiff's motion for a default judgment also was prefaced with the statement that defendant was never properly served with the complaint and has only appeared for the limited purpose of opposing plaintiff's motion for default judgment. Therefore, it is apparent that defendant made its intention clear that it was not "appearing" in any meaningful sense of the word. Accordingly, the trial court did not abuse its discretion in dismissing plaintiff's cause of action.

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[4] *Al-Shimmari* overruled *Penny*'s general statement to the extent that it conflicts with MCR 2.116(D)(1), which is not at issue here.

[5] Unbeknownst to defendant, no default had ever been entered against it. This is why the trial court dismissed its motion as moot.

Plaintiff also relies on MCR 2.105(J) for the proposition that the trial court should not have dismissed her claim. MCR 2.105(J)(3) provides that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." However, as this Court has noted, "MCR 2.105(J)(3) is not applicable . . . where the question is not one of defects in the manner of service, but rather a complete failure of service of process." *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991). In other words, this court rule "does not forgive a failure to serve process." *Id.* at 426. Thus, because the issue here involves a complete failure of service of process, plaintiff's reliance on MCR 2.105(J)(3) is misplaced.

Plaintiff also alleges that defendant's motion to dismiss was "untimely." It appears that plaintiff's position is that the motion to dismiss could not have been brought absent the issue being initially raised as an affirmative defense. She relies on MCR 2.111(F)(3), which requires that affirmative defenses be stated in a party's original (or amended) responsive pleading. Here, defendant did not file a responsive pleading, i.e., an answer. Plaintiff does not provide any authority that suggests that, in order to get a dismissal under MCR 2.102(E), a party must file an answer first. Indeed, because MCR 2.102(E)(1) requires that to dismiss the action, a defendant must not have not submitted to the court's jurisdiction, filing an answer could be antithetical to that concept. Moreover, it is evident that if one was never served with process and never received a complaint, then filing a responsive pleading to that complaint would be nigh impossible.[6] See MCR 2.116(D)(1) (allowing for a party to move for summary disposition on the basis on a lack of service of process without having filed a responsive pleading).

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

[6] We note that during the proceedings at the trial court, defendant asked plaintiff for a copy of the complaint to me mailed to it and, in exchange, defendant would withdraw its motion to dismiss. Remarkably, plaintiff refused defendant's request.