STATE OF MICHIGAN

COURT OF APPEALS

RBS CITIZENS NATIONAL ASSOCIATION, d/b/a CHARTER ONE BANK, Plaintiff-Appellee,	UNPUBLISHED June 14, 2012
v	No. 302844 Wayne Circuit Court
WEST TOWN HOMES I, L.L.C., CYNBA INTERNATIONAL, INC., and COMMUNITY PLANNING ASSOCIATION, Defendants-Appellants.	LC No. 09-023051-CK

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

In this loan default case, defendants appeal as of right the trial court's order granting plaintiff's motion for entry of a default judgment. For the reasons stated in this opinion, we affirm.

This case arises out of a loan agreement between plaintiff and defendants. On May 1, 2006, defendants entered into a revolving credit agreement with plaintiff in order to fund a home construction project in the city of Detroit. West signed the agreement as a borrower. Cynba signed the agreement as a guarantor. Community signed the agreement as a borrower and as a guarantor. On the same day, Cynba and Community entered into a separate guaranty agreement with plaintiff to guarantee plaintiff's loans to West. On August 21, 2006, West and Community signed a promissory note for $2 million, and entered into a mortgage agreement with plaintiff. The mortgaged property was the property West planned to develop.

On November 21, 2008, West and Community signed an amended promissory note in favor of plaintiff for $1,123,200. The amended and restated promissory note superseded the terms of the original promissory note.

West defaulted on the loan with plaintiff, and Cynba and Community refused to honor the guaranty agreements that were signed in regard to the loan.

West also entered into a loan agreement and a mortgage agreement with the city of Detroit in regard to its development plan. While not at issue in this case, defendants claim that Detroit failed to provide the promised funding for the project, and that Detroit's failure to

provide the funding is the reason defendants were unable to honor their agreements with plaintiff.

On September 18, 2009, plaintiff filed a complaint against defendants, asserting breach of contract against West, and breach of guaranty against Cynba and Community. Plaintiff alleged that (1) plaintiff loaned money to West; (2) West signed an amended promissory note promising to repay the principal amount of $1,123,200 over a period of 10 years in monthly installments; (3) a mortgage and a guaranty agreement signed by Cynba and Community secured the loan; (4) West defaulted on the amended promissory note, refused to pay, and has not paid taxes on the property as required by the loan agreement; (5) Cynba and Community guaranteed West's performance and have refused to pay under the guaranty agreement; and (6) as of June 23, 2009, the outstanding loan balance was $1,093,899.45.

Defendants did not respond to plaintiff's complaint, and on September 10, 2010, plaintiff moved for entry of a default judgment. In its motion, plaintiff maintained that defendants failed to respond to the complaint in any way. Plaintiff argued that its claim against defendants was for a sum certain, and that defendants had failed to respond within a reasonable time.

The record indicates that a default was never entered by the trial court. Because a default was never entered, defendants did not receive notice of default; however, it is clear from the record that defendants did receive notice of plaintiff's motion for entry of a default judgment.

On November 23, 2010, defendants filed an answer denying liability for breach of contract and breach of the guaranty agreement. On January 11, 2011, defendants filed a response to plaintiff's motion for entry of a default judgment. Defendants stated that the parties had been involved in settlement negotiations in the period between plaintiff's complaint and defendants' answer. Defendants argued that the trial court clerk never entered a default or provided notice to defendants, and therefore, the trial court could not enter a default judgment against defendants.

On January 14, 2011, the trial court held a hearing on plaintiff's motion for default judgment. At the hearing, plaintiff stated that it filed a request with the trial court to enter a default and that it also filed a motion requesting entry of a default judgment. Defendants argued that because a default was never actually entered by the trial court, entry of a default judgment was improper. The trial court did not address defendants' argument, and summarily granted plaintiff's motion, entering a default judgment against defendants for $1,144,102.48.

On January 28, 2011, defendants filed a motion for relief from judgment. The trial court dismissed defendants' motion for relief from judgment on February 3, 2011. On February 4, 2011, defendants filed a motion for reconsideration. Defendants argued that the trial court lacked the authority to enter a default judgment because the clerk never entered a default against defendants. On February 9, 2011, the trial court denied defendants' motion for reconsideration without stating its reasons. Defendants now appeal as of right.

On appeal, defendants reiterate their argument that the trial court erred by entering a default judgment without first entering a default as required by the court rules. Defendants further argue that the trial court erred by entering a default judgment because defendants filed their answer and affirmative defenses before a default was entered.[1]

We review a trial court's interpretation and application of the court rules de novo. *Bullington v Corbell*, 293 Mich App 549, 554; 809 NW2d 657 (2011).

We apply the same principles that govern statutory interpretation to the interpretation and application of court rules. *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). We apply the plain language of the court rule to determine the intent of the drafter. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). Clear and unambiguous language is applied as written and judicial construction is not permitted. *Id.* at 247.

In this case, it is not disputed that the trial court failed to enter a default against defendants as required by the court rules. MCR 2.603 provides, in relevant part:

> (A) Entry of Default; Notice; Effect.
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> (1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.
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> (2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.
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> (b) In [the circuit court], the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

Based on the plain language of the court rule, default should have been entered in this case because defendants "failed to plead or otherwise defend as provided by these rules." MCR 2.603(A)(1). Defendants failed to file a timely response to plaintiff's complaint in accordance with the court rules. When service of process is made by publication or posting, MCR 2.108(A)(3) states that a court shall allow the defendant to answer the plaintiff's complaint or take another permitted action in "a reasonable time;" however, the court "may not prescribe a

[1] We note that defendants never filed a motion to set aside the default judgment pursuant to MCR 2.603(D)(1); accordingly, in determining whether the entry of the default judgment must be reversed, we will not directly consider whether defendants have demonstrated good cause and a meritorious defense.

time less than 28 days after publication or posting is completed." In this case, plaintiff filed a proof of alternative service by publication with the trial court on February 25, 2010. Therefore, plaintiff served process on defendants about nine months before defendants filed their answer on November 23, 2010. Thus, defendants failed to plead or otherwise defend as provided by the court rules, and plaintiff was entitled to entry of default. Pursuant to the plain language of MCR 2.603(1), the clerk should have entered the default of defendants. Accordingly, it is not disputed that the trial court failed to comply with the applicable court rule.

The issue before us is whether the trial court's failure to properly enter a default before entering a default judgment is error requiring reversal. MCR 2.613 places limitations on this Court's correction of error. In pertinent part, MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

A party must demonstrate prejudice to establish that an error is inconsistent with substantial justice. See *Estate of Jilek v Stockson*, 490 Mich 961, 962; 805 NW2d 852 (2011).

Similarly, MCL 600.2315 provides in pertinent part that a judgment upon default shall not "be reversed, impaired, or in any way affected, by reason of the following imperfections, omissions, [or] defects, [including] . . . any other default or negligence of a clerk or officer of the court, . . . by which neither party shall have been prejudiced."

In *Alycekay Co v Hasko Const Co, Inc*, 180 Mich App 502, 506; 448 NW2d 43, 45 (1989), citing *Emmons v Emmons*, 136 Mich App 157, 163; 355 NW2d 898 (1984), this Court recognized that the failure to enter a default is not a substantial defect in the proceedings and that "[t]he entry of a default is generally a ministerial act." Further, this Court held that because the failure to file a default did not prejudice the defaulted party, it was not a substantial defect and the default judgment should not be set aside. *Id.* at 507. This Court also found that the defaulted party was not prejudiced because it had actual notice of the intent to take a default. *Id.*

Similarly, in this case, defendants received notice of plaintiff's intention to enter a default against them because plaintiff provided notice to defendants about the default judgment hearing. Therefore, this is not a case where defendants were completely unaware of the default proceedings. In addition, we conclude that defendants were not prejudiced by the trial court's failure to enter a default because they received notice of both the proceedings against them and the trial court's likely entry of default and default judgment against them.

Further, there is no indication that defendants could prevail if the default judgment were set aside. Defendants argue that (1) the loan agreement with plaintiff was dependent upon funding from the city of Detroit, and therefore, the city of Detroit is primarily liable for any default, and (2) plaintiff fraudulently represented to defendants that it would finance potential buyers of defendants' homes. In regard to their first claim, defendants argued that the written agreement is not complete because all the parties understood that the city of Detroit had to

provide funding in order for defendants to pay back the loan. This argument fails because the loan agreement contains a merger and integration clause that precludes admission of extrinsic evidence to show that the agreement was not complete. *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 169; 721 NW2d 233 (2006). There is no language in the loan agreement itself providing that the agreement is dependent upon other funding or making the city of Detroit liable for any default.

Defendants' second argument similarly fails. As explained by this Court in *Hamade*:

> [W]hile parol evidence is generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself . . . . [*Id.*]

There is no language in the loan agreement making repayment contingent upon financing for potential homebuyers. Because the merger and integration clause nullifies any oral agreement between defendants and plaintiff about financing defendants' homebuyers, defendants' claim in regard to plaintiff's alleged failure to provide financing would also fail. Therefore, defendants cannot demonstrate prejudice from the trial court's failure to enter a default because defendants have not demonstrated that they would be successful if the case were allowed to proceed.

Because defendants were not prejudiced by the trial court's failure to enter a default before entering a default judgment, defendants are not entitled to relief on appeal. MCR 2.613(A); MCL 600.2315.

Finally, the trial court's entry of a default judgment after the filing of the answer was not erroneous because defendants did not file a timely answer as required by the court rules. MCR 2.108(A)(3). See also *Law Offices of Lawrence J Stockler, PC v Semaan*, 135 Mich App 545, 551; 355 NW2d 271 (1984) (when the defendants answered the complaint on the day that the plaintiff filed for a default judgment, the defendants' answer did not set aside the default). Therefore, the fact that defendants filed an answer before a default was entered does not invalidate the default or the default judgment.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra