STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY D. ELLING, Plaintiff-Appellee,	UNPUBLISHED June 26, 2012
v	No. 303340 Genesee Circuit Court
SAMUEL A. RAGNONE, Defendant-Appellant,	LC No. 10-092861-NM
and J. MICHAEL DOWLING, Defendant.	

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Samuel A. Ragnone[1] appeals by right the default judgment entered against him in this legal malpractice action. We affirm.

Underlying this matter is a prior lawsuit plaintiff brought against a Colorado corporation. Plaintiff initially retained defendant, who remains an attorney in good standing in Michigan, to represent him in Michigan, although Dowling was eventually retained to represent plaintiff's interests in Colorado. The suit was unsuccessful, allegedly in part due to defendant's malpractice. Prior to the commencement of the instant action, defendant moved to California, although he left an address in Flint with the Michigan Bar as his business address. Plaintiff moved for, and was permitted, alternate service; it appears that defendant was actually made aware of the commencement of this suit through his email address. Rather than answer the complaint, defendant attempted to negotiate with plaintiff.

[1] Because J. Michael Dowling was dismissed by stipulation, all references to "defendant" in this opinion are to Ragnone only.

During the course of those discussions, plaintiff invited defendant to settle the matter multiple times, one of those times making reference to having "reached a settlement" with Dowling. Plaintiff dismisses defendant's characterization of these discussions as "settlement negotiations" as "illusory" or "a farce," which we find disingenuous. Conversely, however, defendant contends that plaintiff somehow indicated that defendant would be informed prior to entry of a default; we have reviewed the emails attached by the parties and find no such representation in any of them. These discussions continued for months. In July of 2010, defendant offered a possible settlement to plaintiff. In September, plaintiff's counsel replied that "[y]our proposal is unacceptable to my client. Please file your Answer immediately." In October, approximately ten months after plaintiff filed his complaint, the trial court entered a notice of intent to dismiss for no progress. Later in October, defendant informed plaintiff that "[y]ou should have my answer by Monday." The following Tuesday, plaintiff entered a default against defendant.

Shortly thereafter, defendant filed an appearance and moved to have the default set aside. It appears that there was some irregularity in plaintiff's affidavit showing a meritorious defense. Nevertheless, the trial court ultimately ruled that defendant had, in fact, shown a meritorious defense, and it allowed the affidavit to be filed.[2] The trial court ruled that MCR 2.603(D)(1) required a showing of both a meritorious defense *and* good cause for having failed to respond, and defendant had not established the latter. The trial court therefore denied the motion to set aside the default. It subsequently also denied reconsideration, and this appeal followed.

A trial court's decision whether to set aside a default, and the court's decision whether to grant or deny a motion for reconsideration, are both reviewed for an abuse of discretion. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 218; 760 NW2d 674 (2008). An abuse of discretion occurs when the trial court arrives at a decision that falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Setting aside a default requires the defaulted party to show good cause and file an affidavit of facts showing a meritorious defense. MCR 2.604(D)(1). Good cause "'include[s] (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.'" *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 230; 600 NW2d 638 (1999), quoting the Authors' Comments to 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed.), p. 662 of the predecessor court rule, GCR 1963, 520.4. "Manifest injustice,"

[2] While, as will be apparent, it is unnecessary for us to address plaintiff's arguments regarding this affidavit, we reject plaintiff's bald and unsupported assertion that the affidavit was insufficient. Furthermore, because the affidavit unambiguously was accepted for filing by the trial court, as reflected by the trial judge's commentary on the record and by the lower court register of actions (in contrast to defendant's proffered answer, which appears not to have been accepted), we find that the trial court properly held that defendant had established a meritorious defense under MCR 2.603(D)(1).

however, is not itself a discrete occurrence, but rather a reference to the interplay between the meritoriousness of the defense and the severity of the defect or reasonableness of the excuse: the stronger the defense, the lesser showing of "good cause" will be required, and vice versa. *Alken-Zeigler, Inc*, 461 Mich at 233-234.

Initially, defendant fails to identify any error in the alternate service effectuated against him. To the extent defendant even argues the matter, this Court will not search for a basis to sustain it. See *Begin v Mich Bell Tel Co*, 284 Mich App 581, 590; 773 NW2d 271 (2009). Furthermore, defendant admits that he was actually informed of the action. To constitute good cause to set aside a default, a procedural error must have actually prejudiced the defaulted party. *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989). Defendant argues that plaintiff's delay in entering the default while the parties were engaged in communications for nine months constitutes a defect or irregularity in the proceedings, but fails to explain how those communications constitute "proceedings" in the action.

Defendant's assertion that the email communications between himself and plaintiff's counsel provide him with a reasonable excuse. Again, none of the emails contain any suggestion that plaintiff would notify defendant prior to entering a default or that no default would be entered. While we agree that they do constitute settlement negotiations, that fact does not insulate defendant from entry of a default.

In *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 537; 672 NW2d 181 (2003), the attorneys attempted to resolve the litigation informally; during those discussions, they "set forth pledges to continue the informal communications and deadlines for actions" but "did not follow through with these pledges and deadlines until the filing of the request for a default." In *Lapham v Oakland Circuit Judge*, 170 Mich 564; 136 NW 594 (1912), the parties engaged in settlement negotiations that specifically included "assurances from which a settlement might be anticipated," and which mislead the defaulted party's attorneys. Consequently, if the party who enters a default does so after communicating to the defaulted party some kind of indication that the defaulted party has more time in which to give a formal response, the defaulted party may have a reasonable excuse. In contrast, the attached emails here do not contain any representations that informal communications would continue rather than further proceedings in the court.[3]

Defendant cites the non-exclusive list of "good cause" factors enumerated by this Court in *Shawl*, 280 Mich App at 238. Although the propriety of setting aside a default truly depends on the totality of the circumstances, *id*. at 237, those factors are as follows:

[3] In *Ragnone v Wirsing*, 141 Mich App 263; 367 NW2d 369 (1985), cited by defendant, the issue was whether the defendant had "appeared" in the case by attending settlement negotiations, thus entitling him to seven days' notice prior to entry of a default judgment. This Court held that the defendant's communications with the plaintiff and attendance at a settlement meeting constituted an "appearance," not an independent reasonable excuse for failing to file an answer. Defendant does not appear from the lower court record to have filed an appearance until after the default was entered, and he does not contend otherwise.

(1) whether the party completely failed to respond or simply missed the deadline to file;

(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;

(4) whether there was defective process or notice;

(5) the circumstances behind the failure to file or file timely;

(6) whether the failure was knowing or intentional;

(7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); [footnote omitted]

(8) whether the default judgment results in an ongoing liability (as with paternity or child support); and

(9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238]

Although defendant did technically attempt to file an answer eventually, the deadline to file would be established by MCR 2.108(A). Because there was no personal service pursuant to MCR 2.105(A)(1), and because service was not effectuated by posting or publication pursuant to MCR 2.106, the deadline for filing an answer would have been 28 days pursuant to MCR 2.108(2). Defendant did not "simply miss[] the deadline," he did not attempt to file an answer until after the court issued a notice of intent to dismiss for lack of progress some *ten months* after the complaint was filed. As discussed, there was no defect in the process or notice, defendant had no basis for believing that plaintiff would waive any deadlines, and defendant knew that he had not filed an answer. Defendant did move to set aside the default almost immediately, and the judgment is substantial for someone who apparently has no assets, although it does not create an ongoing liability. At most, two of these factors weigh in defendant's favor.

In summary, defendant simply fails to establish that the trial court abused its discretion. In our view, defendant *might* have a plausible argument that he had been misled by plaintiff's course of conduct or by a simple lack of comprehension of his obligations if he had been an unsophisticated party unrepresented by counsel. However, while defendant no longer lists a Michigan business address, he remains an active and in good standing member of the Michigan Bar. The trial court properly found that defendant lacked good cause to warrant setting aside the default.

Defendant further argues that the trial court abused its discretion by denying defendant's motion for reconsideration. The entirety of defendant's argument is that the trial court abused its discretion by failing to recognize that it had the discretion to depart from the dictates of MCR 2.119(F). Defendant correctly points out that a trial court abuses its discretion by failing to recognize that it has discretion and thereby failing to exercise it. *People v Merritt*, 396 Mich 67, 80; 238 NW2d 31 (1976). Defendant also correctly points out that the plain language of MCR 2.119(F)(3) does not impose a restriction on the trial court's discretion to reconsider a prior

ruling. See *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006). Indeed, this Court has held that trial courts generally have the power to revisit their orders or decisions and determine that they had been mistaken, even if presented with nothing new. *Hill v City of Warren*, 276 Mich App 299, 306-307; 740 NW2d 706 (2007). However, nothing in the trial court's ruling suggested that it was inclined to reach a different result but felt constrained by MCR 2.119(F); rather, it opined that its prior ruling was correct. We find no abuse of discretion.

Defendant finally argues that the default must be set aside because the complaint fails to allege a valid and cognizable cause of action against him. "There can be no question but that the entry of a default means an admission only of matters well pleaded." *Smak v Gwozdik*, 293 Mich 185, 188; 291 NW 270 (1940). Consequently, a complaint that fails to make out a claim upon which relief can be granted cannot support a default against the other party. *Id*. at 189; see also *Lindsley v Burke*, 189 Mich App 700, 702-703; 474 NW2d 158 (1991). Therefore, defendant correctly concludes that if plaintiff's complaint fails to make out a cause of action, the default must be set aside.

However, we disagree with defendant's characterization of the complaint. The complaint clearly sets forth assertions that plaintiff suffered losses due to defendant's own conduct, including giving false advice that the Colorado proceedings would not affect the Michigan proceedings, accepting money from plaintiff, failing to appear at a Genesee Circuit Court hearing, failing to recognize and address the significance of an arbitration clause in the contract at issue in the underlying suit, and harming plaintiff to the extent of, *inter alia*, the cost of financing the action itself. We express no opinion as to the substantive merits of these allegations, but *if* proven, they would establish a cognizable cause of action for legal malpractice against defendant. See *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Consequently, the default need not be set aside on this basis.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause