

STATE OF MICHIGAN
COURT OF APPEALS

STEVIE PERRY,

Plaintiff-Appellant,

v

WAYNE COUNTY MEDICAL FACILITY,

Defendant,

and

COUNTY OF WAYNE,

Defendant-Appellee.

UNPUBLISHED

July 24, 2012

No. 304503

Wayne Circuit Court

LC No. 10-008854-NO

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiff argues¹ that defendant was placed in default and that a default judgment should have been entered against defendant for failure to timely respond to the complaint. We disagree.

This Court "reviews a trial court's refusal to set aside a default or default judgment for an abuse of discretion." *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).²

¹ Plaintiff's statement of facts in his brief on appeal does not contain record citations contrary to MCR 7.212(C)(6).

² Plaintiff incorrectly argues that the de novo standard of review applies.

The first flaw with plaintiff's argument is that the clerk never entered the default of defendant. According to MCR 2.603(A):

(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.*

(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.

(a) In the district court, the court clerk shall send the notice.

(b) In all other courts, 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.

(3) Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612. [Emphasis added.]

Plaintiff argues that a default was entered against defendant, which serves as the basis for the default judgment that plaintiff claims should have been entered against defendant. However, it does not appear that the clerk ever entered the default of defendant. On August 31, 2010, plaintiff filed a document titled "default, request, affidavit, and entry." While plaintiff filled out the section of the form titled "request and affidavit," the section titled "default entry," with a blank space for the court clerk's signature and date of signature, was left blank and unsigned by the court clerk. Also, the register of actions does not have an entry indicating that the court clerk entered a default against defendant.

On September 22, 2010, plaintiff submitted a document titled "default request, affidavit, entry, and judgment (sum certain)." While plaintiff again filled out the portion of the form titled "request and affidavit," the portion of the form titled "default entry" was left blank, unsigned by the court clerk. Again, there is also no entry in the register of actions indicating that the court clerk entered a default against defendant. Thus, despite plaintiff's argument, it appears that the clerk never actually entered a default against defendant. Since the "entry of a default provides the basis for the entry of a default judgment[.]" *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 530; 672 NW2d 181 (2003) (citation omitted), there was no basis to enter a default judgment against defendant.

Moreover, even if a default against defendant was (or should have been) entered, the default was set aside in the stipulated order of October 22, 2010. A stipulation is "an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys, respecting some manner incident thereto. Its purpose is generally stated to be the avoidance of delay, trouble, and expense." *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*,

205 Mich App 371, 378-379; 521 NW2d 847 (1994) (citation omitted). A stipulated order is “generally construed under the same rules of construction as contracts.” *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). When interpreting a contract, the language in the contract should be given a plain and ordinary meaning. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). “If the language of the contract is unambiguous, we construe and enforce the contract as written.” *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

Plaintiff’s suggestion that the stipulated order did not set aside the alleged default is contrary to the plain meaning of the stipulated order. According to the stipulated order, the parties and the court agreed that “the suit shall proceed against [defendant].” However, MCR 2.603(A)(3) specifically states that “[o]nce the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court” Therefore, since the parties agreed in the stipulated order that the suit shall proceed, and the suit could not proceed if defendant was still in default, the plain meaning of the stipulated order is that any default of defendant was set aside.

Lastly, even assuming that a default was entered against defendant and was not set aside, the trial court did not abuse its discretion in refusing to enter a default judgment against defendant. On September 22, 2010, plaintiff requested that the court clerk enter a default judgment, sum certain, in the amount of \$1,007,600. According to MCR 2.603(B)(2):

- (2) *Default Judgment Entered by Clerk.* On request of the plaintiff supported by an affidavit as to the amount due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if
- (a) the plaintiff’s claim against a defendant is for a sum certain or for a sum that can by computation be made certain;
 - (b) the default was entered because the defendant failed to appear; and
 - (c) the defaulted defendant is not an infant or incompetent person.

However, plaintiff was alleging a negligence action, with damages like mental anguish, pain and suffering, helplessness, and humiliation. Such losses were not sum certain, as they do not have a fixed value and are not susceptible to a certain computation. Moreover, plaintiff vacillated between requesting \$400,000 and \$1,007,600 at various points throughout the litigation, which further demonstrates that even plaintiff was uncertain about the amount of his damages.³ Thus, there was no error in refusing to enter a default judgment based on MCR 2.603(B)(2).

Accordingly, the only way plaintiff could have properly obtained a default judgment was to file a motion for the court to enter a default judgment pursuant to MCR 2.603(B)(3). Plaintiff first filed a motion to enter a default judgment on October 5, 2010, claiming that defendant failed to answer the complaint. Yet, plaintiff then signed a stipulated order, specifically agreeing that

³ This vacillation is no surprise given the fact that plaintiff was treated in an emergency room on one day for asthma related issues, and allegedly incurred approximately \$2,000 in hospital costs.

“plaintiff’s motion to enter default judgment and motion to strike pleadings are dismissed.” Plaintiff filed another motion to enter a default judgment on March 1, 2011, claiming that defendant failed to timely respond to the complaint and failed to timely respond to discovery requests. However, plaintiff again signed a stipulated order, agreeing that “[p]laintiff’s motions for default and to quash are dismissed.”

Thus, while plaintiff now argues that a default judgment should have been entered, plaintiff expressly agreed to set aside his motions for default judgment. “A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (citation omitted). Plaintiff’s argument that a default judgment should have been entered is without merit, as plaintiff waived this issue.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello