STATE OF MICHIGAN

COURT OF APPEALS

EMMANUEL JOHNSON,

Plaintiff-Appellant,

v

MARY THOMAS (GALLET),

Defendant-Appellee.

UNPUBLISHED
November 26, 1996

No. 177956
LC No. 91-000409-DO

Before: Gribbs, P.J., and Markey and T.G. Kavanagh,* JJ.

PER CURIAM.

Plaintiff originally brought this action seeking a divorce from defendant. He later amended his complaint to seek a declaratory judgment as to the legal status of the parties. The trial court declared that there was no valid marriage between the parties and awarded $3,000.00 in sanctions against plaintiff for filing a frivolous suit pursuant to MCR 2.114(E) and (F). Plaintiff now appeals as of right. We affirm.

First, plaintiff argues that he was denied justice because of the trial court's bias. Plaintiff has not preserved this issue for appeal because he did not move for disqualification below. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993); *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). In any event, the record does not support plaintiff's assertions.

Second, plaintiff argues that the trial court abused its discretion in setting aside a stipulation wherein defendant had agreed to withdraw her answer and be judged in default. Plaintiff correctly notes that a stipulation is binding on the parties. *Nuriel v Young Women's Christian Assoc of Metropolitan Detroit*, 186 Mich App 141, 147; 463 NW2d 206 (1990). Any error on the part of the trial court in setting aside the stipulation is harmless, however, because the stipulation had been fully performed by the time defendant filed its motion to set aside the default, i.e., defendant's answer had been withdrawn and a default judgment entered. The stipulation did not waive defendant's right under MCR 2.603(D) to move to set aside the default judgment. A stipulation may not be construed to effect the waiver of a right unless such an intent is plainly indicated. *Nuriel*, *supra*. The parties' agreement could not be

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

construed to supersede the procedures and conditions of the court rule. *In re Ford Estate*, 206 Mich App 705, 708; 522 NW2d 729 (1994). We therefore find no error.

We also find that the trial court did not abuse its discretion by holding that defendant had presented the good cause and meritorious defense necessary to set aside a default judgment. See *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358; 514 NW2d 257 (1994). A substantial defect in the proceedings upon which the default was based can constitute good cause for setting aside a default. *Gavulic v Boyer*, 195 Mich App 20, 24-25; 489 NW2d 124 (1992). Here, the trial court's failure to consider defendant's filed objections to the stipulation and entry of the default judgment before the trial court entered the order constituted good cause for setting aside the default judgment. Defendant further demonstrated a meritorious defense when she argued that the amended complaint was barred by the doctrine of res judicata. Defendant adequately supported that defense by attaching copies of opinions and orders from courts in Iowa and Texas and from the federal bankruptcy court demonstrating that the issues and parties in those actions were identical to the instant action. *King v Mich Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989).

Third, plaintiff argues that the trial court erred in awarding sanctions against him for filing a frivolous claim. We find no clear error in the court's determination that plaintiff's claim was frivolous. S*iecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995). Using an objective standard of reasonableness, plaintiff's counsel did not sufficiently inquire into the facts before filing this action. *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 792-794; 415 NW2d 310 (1987). When an attorney signs a document, that attorney is certifying that the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law. MCR 2.114(D); *In re Pitre*, 202 Mich App 241, 243-244; 508 NW2d 140 (1993). In this case, the facts do not support plaintiff's allegation of a valid marriage in Texas at the time plaintiff filed either the complaint or amended complaint. Because the validity of the Iowa marriage was in issue when plaintiff filed his first complaint, that complaint cannot be considered as unfounded. By the time plaintiff filed his amended complaint, which alleged a common law marriage in Texas, however, plaintiff and his counsel should have known, with reasonable inquiry, that there was no valid marriage in Texas.

Although plaintiff correctly notes that Tex Code Ann 2.22 provides that a marriage deemed void because of an impediment becomes valid when that impediment is removed, he ignores the facts that a divorce was entered regarding his Texas marriage before the impediment was removed; further, instead of moving to validate the marriage according to Tex Code Ann 2.22 or 1.91, plaintiff specifically requested that the Texas court declare his marriage void from its inception. In addition, in a motion requesting that the trial court give full faith and credit to the Texas decree voiding the divorce decree, plaintiff acknowledged that the Texas decree voided his marriage. In any event, under Tex Code Ann 1.91, plaintiff missed the obvious statute of limitations for seeking a declaration of a common law marriage. Thus, at the time plaintiff filed his amended complaint, there was no basis in law or fact for seeking a declaration of a valid Texas marriage between the parties. Sanctions were therefore appropriate pursuant to the mandatory sanction provision of MCR 2.114(E).

The trial court also correctly imposed the $3,000.00 in sanctions against plaintiff for filing a frivolous claim as provided in MCR 2.114(F). Sanctions may be imposed where the claim is frivolous and the party's primary purpose in initiating the action is to harass, embarrass or injure the prevailing party. *Dep't of Natural Resources v Bayshore Associates, Inc*, 210 Mich App 71, 86; 533 NW2d 593 (1995). Plaintiff's actions in pursuing this matter in numerous courts, including filing suit in Oakland County on most of the same issues at the time this action was pending, demonstrate that his primary purpose was to harass defendant. His continued vigorous arguments for the finding of a valid Texas marriage in the face of overwhelmingly opposite facts further reveal his purpose to harass and support a finding that the instant appeal is frivolous and vexatious. MCR 7.216(C)(1)(a); *Briarwood, supra* at 795. Consequently, we also order that sanctions are to be assessed against plaintiff for this frivolous appeal in the amount of $1,000.00. *Briarwood, supra*; MCR 7.216(C).

Plaintiff correctly argues he was entitled to an award of mandatory costs as the losing party in the motion to set aside default judgment as provided in MCR 2.603(D)(4). Plaintiff apparently failed to allege or prove, however, any "taxable costs incurred by [plaintiff] in reliance on the default," MCR 2.603(D)(4), so no costs were awarded at the hearing to set the default judgment aside or at any subsequent hearing.[1] Because plaintiff has been on notice since at least October 1994 that the trial court could not assess costs under the court rule absent a bill of costs or other appropriate accounting yet he failed to submit those costs to either the trial court or this Court, we find that plaintiff has waived his right to recover his costs under MCR 2.603(D)(4).

Plaintiff also argues that the trial court abused its discretion in failing to award costs for defendant's violation of certain orders of the court and for failing to enforce its orders. Plaintiff has failed to demonstrate that the trial court abused its discretion in this regard. *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 251; 477 NW2d 133 (1991). The total costs of $4,000.00 are joint and several, to be imposed upon both Ms. Randall, the person who signed the frivolous pleadings in both this Court and the trial court, and the plaintiff per MCR 2.114(E).

In addition, we believe it appropriate at this time to remind counsel and plaintiff, who is also apparently an attorney licensed to practice law in the State of Michigan, of their professional responsibilities and specifically refer them to Rules 3.6 and 3.2 of the Rules of Professional Conduct.

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Thomas Giles Kavanagh

[1]In the trial court's October 12, 1994 order denying plaintiff's motion for costs, the court found that the "motion is unsupported by any evidence as to the amount of costs incurred." Notably, this order was entered seven months after the March 1994 hearing where the trial court first acknowledged that plaintiff was entitled to costs and fees. Our review of the record shows that in the seven months

between these two events, plaintiff did not submit to the trial court a list of taxable costs incurred in reliance on the default. Clearly, it was plaintiff's obligation to inform the court of these costs, and plaintiff has failed to cite any authority for the proposition that the court had to award them absent plaintiff's bill of costs.