STATE OF MICHIGAN

COURT OF APPEALS

SOLUTION SOURCE, INC,

Plaintiff-Appellee,

v

LPR ASSOCIATES LTD and LPR LAND COMPANY,

Defendants-Appellants,

and

MANUFACTURERS NATIONAL BANK, a/k/a COMERICA BANK

Defendant-Appellee.

UNPUBLISHED
April 11, 1997

No. 184798
Wayne Circuit Court
LC No. 93-323182 CZ

ON REHEARING

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Defendants LPR Associates and LPR Land Company appeal as of right the trial court's March 23, 1995, order denying defendants' motion for relief from judgment. We affirm.

Defendants raise three arguments in support of their claim that they were entitled to relief from judgment. All three arguments are based on MCR 2.612(C), which states:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

* Circuit judge, sitting on the Court of Appeals by assignment.

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

First, defendants claim that they were entitled to relief from judgment on the basis of subrule (a), because they and the trial court had been acting under the mistaken impression that defense counsel was still representing them. We disagree. Relief from a judgment on the grounds of mistake will only be granted where the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice. *Gillespie v Bd of Tenant Affairs of the Detroit Housing Comm*, 145 Mich App 424, 428; 377 NW2d 864 (1985).[1] Where a party seeking modification or his counsel made ill-advised or careless decisions, and then alleges mistake under this subrule, no relief can be granted. *Lark v Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980). The subrule was not intended to give parties a second chance to prevail in their cause. Accordingly, we find that the trial court did not abuse its discretion in holding that defendants' claimed "mistake" was not of the type contemplated by MCR 2.612(C)(1)(a).

Next, defendants assert that relief from judgment was warranted under MCR 2.612(C)(1)(d) because the default judgment and order were void, as they were entered at a time when defendants' counsel was suspended from the practice of law. Again, we disagree. A judgment is void when the court entering it lacked subject matter or personal jurisdiction in the action. See *Abbott v Howard*, 182 Mich App 243, 247-248; 451 NW2d 597 (1990). A "voidable" judgment is one characterized by procedural irregularities. *Id. at* 248. Defendants allege a procedural irregularity, not the trial court's lack of jurisdiction. According to the plain reading of the court rule, therefore, defendants have not shown entitlement to relief.

Furthermore, while defendants' counsel had an obligation pursuant to MCR 9.119 to apprise his clients and the court of his temporary suspension, and while the court would have been obligated, pursuant to MCR 2.503(F)(3), to grant a continuance had it found that defendants' counsel had been suspended from the practice of law, neither rule voids judgments entered under the circumstances of this case. Accordingly, the trial court did not abuse its discretion in refusing to grant relief from judgment under MCR 2.612(C)(1)(d).

Finally, defendants argue that they are entitled to relief under MCR 2.612(C)(1)(f), for "[a]ny other reason justifying relief from the operation of the judgment." Defendants state that their counsel abandoned representation without their knowledge, and that a substantial injustice to defendants has resulted. However, before relief from judgment can be granted under this subrule, all of the following must be shown: 1) the reason for setting aside the judgment does not fall in any of the other subrules, 2) the substantial rights of the opposing party will not be detrimentally affected, and 3) extraordinary circumstances exist, mandating the setting aside of the judgment. *Lark*, *supra* at 284.

As a general principle, an attorney's negligence is attributable to the client and cannot constitute grounds for setting aside a default judgment. See, e.g., *White v Sadler*, 350 Mich 511, 521-523; 87 NW2d 192 (1957); *Everett v Everett*, 319 Mich 475, 5481-483; 29 NW2d 919 (1947). Nevertheless, defendants rely on *Pascoe v Sova*, 209 Mich App 297; 530 NW2d 781 (1995),[2] and *Bye v Ferguson*, 138 Mich App 196; 360 NW2d 175 (1984). In these cases, this Court found that where the attorneys abandoned the representation of their clients, the setting aside of the respective default judgments was warranted. However, we find *Pascoe* and *Bye* to be distinguishable from the present case.

In *Pascoe*, the defendant's counsel requested to withdraw at the time of trial, and the trial court permitted the withdrawal without notice to the defendant. A default judgment was entered after the defendant failed to present evidence to rebut the plaintiff's case. *Pascoe, supra* at 298. In reversing, this Court distinguished ordinary attorney negligence, which is attributable to the client, from an attorney's abandonment of representation without notice to the client. *Id*. at 300. Similarly, in *Bye*, the defendant's counsel withdrew on the day of trial based on the facts that his pre-trial attempts to communicate with his client had been unsuccessful, his client had not paid his legal bills, and he had been informed the night before trial that his client would be unable to attend. The trial court granted the attorney's motion to withdraw and then allowed the plaintiff to present his proofs. *Bye, supra* at 199-200.

In the instant case, plaintiff presented circumstantial evidence that defendants had notice of their attorney's emotional problems – specifically, that defendants and their counsel shared an office, reception area, and fax machine. Defendants claim that they did not have notice of the particular hearings which produced the discovery order and the default judgment. However, this is the very type of attorney negligence that is attributable to a client. The client has the responsibility of keeping himself informed about the progress of his case, notwithstanding his attorney's failure to contact him. See *White, supra* at 523.

Moreover, *Pascoe* and *Bye* share the added element that the trial court approved the attorney's withdrawal and allowed the case to proceed to trial. This Court found that the respective trial courts abused their discretion in allowing the cases to go to trial knowing that one party was without representation. *Pascoe, supra* at 300-301; *Bye, supra* at 204. In contrast, there is no allegation in the present case that the trial court was aware that defendants' counsel had abandoned his representation.

The trial court did not specifically make a finding as to whether defendants should have known of their counsel's failure to proceed with their case. However, the trial court did state that "the circumstances set forth … are not of an extraordinary character within the intendment [sic] of the subrule." Under the circumstances, we cannot find that the trial court abused its discretion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

[1] *Gillespie* and other cases cited herein were decided under GCR 1963, 528.3, the predecessor to MCR 2.612(C)(1). However, GCR 1963, 528.3 was substantially identical to MCR 2.612(C)(1), and we see no reason to apply the rules differently.

[2] The trial court relied on *Marshall v Marshall*, 135 Mich App 702; 355 NW2d 661 (1984). Defendants argue that *Marshall* and its progeny erroneously held that relief pursuant to MCR 2.612(C)(1)(f) may be granted only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. See *id*. at 712. We agree that the trial court erred in relying on *Marshall*. In *Pascoe*, *supra*, this Court did not specifically address this question. However, the *Pascoe* panel did not require improper conduct by the opposing party in finding that the defendant was entitled to relief under the subrule. Pursuant to Administrative Order 1996-4, the *Pascoe* Court's interpretation of MCR 2.612(C)(1)(f) is binding on this Court and all lower courts.