

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER ELDER AND SUSANNE ELDER,

UNPUBLISHED

April 11, 1997

Plaintiffs-Appellants,

v

No. 188228

Wayne Circuit Court

MR. MIKE'S CONEY ISLAND, INC.,

LC No. 94-433434

Defendant-Appellee,

and

JIMMIE CAPENEKA, JR., and STEED
CORP., d/b/a BEAVER CREEK, a Michigan
Corporation,

Defendants.

Before: Holbrook, P.J., and White and A. T. Davis, Jr.*, JJ.

MEMORANDUM.

Plaintiffs appeal the circuit court's order granting partial summary disposition in favor of defendant Mr. Mike's Coney Island, Inc., (Mr. Mike's) in this dramshop action. We reverse and remand.

I

On July 22, 1994, while working as an independent contractor at Mr. Mike's, plaintiff Christopher Elder was struck by three darts from a blow gun operated by Jimmie Capeneka, Jr., the adult son of the president and sole stockholder of Mr. Mike's, Jimmie Capeneka, Sr. The darts struck plaintiff in the right arm, groin and left eye, causing permanent loss of vision in that eye. Plaintiff's complaint, filed on November 15, 1994, alleged that Mr. Mike's had served intoxicating liquor to Capeneka, Jr., while he was visibly intoxicated.¹

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

Mr. Mike's and Capeneka, Jr., failed to timely answer the complaint and defaults were entered. On March 3, 1995, plaintiff filed a motion for entry of default judgment against Mr. Mike's and Capeneka, Jr. However, at the request of Mr. Mike's counsel and as a professional courtesy, plaintiff stipulated to setting aside the default against Mr. Mike's, and, on the scheduled date, March 31, 1995, a default judgment was entered against Capeneka, Jr., only. On April 13, 1995, Mr. Mike's filed a motion to set aside default. The court heard the motion on April 24, and entered a praecipe order setting the default aside.²

Mr. Mike's filed a motion for partial summary disposition on May 26, 1995, which argued that plaintiff had failed to name and retain the alleged intoxicated person by obtaining a default judgment against Capeneka, Jr. Anticipating that plaintiff would seek to set the judgment aside, the motion further argued that plaintiff lacked standing to move to set aside the default judgment against Capeneka, Jr. Also on May 26, 1995, anticipating Mr. Mike's motion,³ plaintiff filed a motion to set aside the default judgment entered against Capeneka, Jr., arguing that the circuit court had equitable authority to set aside a judgment under MCR 2.612(C)(1)(f) for "any other reason justifying relief," that Capeneka, Jr.'s whereabouts were unknown, and that Capeneka, Jr., was not expected to contest the motion. Plaintiff's response to defendant's motion for summary disposition argued that obtaining the default judgment did not violate the name and retain provision, and, in the alternative, requested that the judgment be set aside.

At a June 2, 1995 hearing, the circuit court granted defendant's summary disposition motion, concluding that the default judgment against Capeneka, Jr., violated the name and retain provision. The court stated that it "would be happy to set [the default judgment] aside," but nonetheless denied plaintiff's motion to set aside default judgment and granted defendant's motion for summary disposition, apparently concluding that it did not have discretion to do otherwise.

We conclude that the circuit court erroneously believed that it lacked discretion to set aside the default judgment, and that it erred in failing to exercise discretion in ruling on plaintiff's motion to set aside the default judgment. Under the circumstances presented, where plaintiff entered the defaults of the dramshop and the AIP when they both failed to answer, and then agreed to set aside the dramshop's default at the dramshop's request, so that plaintiff took judgment only against the AIP; plaintiff promptly moved to set aside the default judgment after learning that the dramshop would assert it as a ground for dismissal; plaintiff had no involvement in, or control over, the AIP's decision whether to answer or default; there was no collusion or negotiation between plaintiff and the AIP⁴; and the dramshop defendant would not be prejudiced by setting aside the default judgment, the court had authority to set the judgment aside under MCR 2.613(C)(1)(f), as requested by plaintiff.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis

¹ Plaintiffs' first amended complaint, which is not in the lower court record, added a dramshop claim against Steed Corporation, d/b/a Beaver Creek, which had served Capeneka, Jr., alcohol earlier that evening. Plaintiff's dramshop claim against Steed Corporation was settled and is not at issue here.

² A second stipulated order granting the motion was entered on June 13, 1995.

³ Apparently, counsel had consulted with each other.

⁴ If anyone had access to the AIP, it would appear to be defendant, because of the family relationship.