

STATE OF MICHIGAN
COURT OF APPEALS

AUBREY FONDREN,

Plaintiff-Appellee,

v

ROBERTO J. WILLIAM, M.D., and PEOPLE'S
CLINIC, P.C.,

Defendants-Appellants.

UNPUBLISHED

November 25, 1997

No. 190837

Wayne Circuit Court

LC No. 94-424399-NO

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

In this negligence action, defendants appeal as of right an order of the circuit court denying their motion to set aside a default judgment. We affirm.

Plaintiff filed a complaint on August 15, 1994, alleging that he was injured when he slipped and fell while a patient at People's Clinic, P.C., which was owned and operated by defendant Dr. William. Plaintiff alleged that his fall was caused by water, or another liquid, which defendants negligently allowed to accumulate on the floor of the clinic. Defendants failed to answer or otherwise respond to the litigation. Therefore, on December 13, 1994, the circuit court entered a default against defendants. On May 26, 1995, a default judgment was entered against defendants in the amount of \$35,000.

In September 1995, defendants moved to set aside the default judgment pursuant to MCR 2.603(D) and MCR 2.612, arguing that good cause existed to set aside the default because their attorney abandoned the case without notifying them and because plaintiff committed fraud on the court by filing a false claim. The court denied defendants' motion after finding that defendants failed to establish a reasonable excuse for their failure to timely respond to the action.

On appeal, defendants first argue that the circuit court did not have personal jurisdiction over People's Clinic, P.C. and that, therefore, the court erred in entering a default and default judgment against People's Clinic, P.C. We disagree with defendants' position.

Due process requires proper service of process in order to obtain personal jurisdiction over a defendant. *Fulton v Citizens Mutual Insurance Co*, 62 Mich App 600, 604; 233 NW2d 820

(1975). The purpose of service of process rules is to insure actual notice of a lawsuit and an opportunity to defend. *H & L Heating Company v Bryn Mawr Apartments*, 97 Mich App 496, 502-503; 296 NW2d 354 (1980). MCR 2.105(D)(1) provides that service of process on a corporation may be made by serving a summons and a copy of the complaint on an officer or resident agent of the corporation.

Plaintiff originally named People's Medical, P.C., another corporation associated with Dr. William, as a defendant in the instant action, and personally served Dr. William with two summonses and complaints. At the hearing on defendants' motion to set aside the default judgment, Dr. William acknowledged that plaintiff's alleged fall occurred at the location of People's Clinic, P.C., and that he was the owner of People's Clinic, P.C. We find that Dr. William had actual notice that People's Clinic, P.C. was being sued, and the corporation therefore had notice of the lawsuit as well. Accordingly, we also find that the circuit court had personal jurisdiction over People's Clinic, P.C.

Defendants next argue that the trial court abused its discretion in denying their motion to set aside the default judgment. We disagree. The question whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992).

Except when grounded on lack of jurisdiction over a defendant, a motion to set aside a default or a default judgment may be set aside only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Park v American Casualty Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996). Good cause sufficient to warrant setting aside a default or a default judgment includes: (1) a substantial defect or irregularity in the proceeding on which the default was based, (2) a reasonable excuse for the failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default or default judgment were allowed to stand. *Id.* at 67. Defendants assert that good cause to set aside the default judgment existed because defendants' attorney abandoned the case without giving notice to defendants and because, based on the clear evidence indicating that plaintiff committed a fraud on the court by filing a false claim, manifest injustice would result if the default judgment were allowed to stand. While we may have some sympathy for these defendants because of the possibility that plaintiff committed fraud, we believe that the court rules do not allow us to accept their position.

If personal service was made on the defaulted party and the motion to set aside the default judgment was not filed within twenty-one days after the default judgment was entered, the default judgment may only be set aside if, in addition to demonstrating good cause and a meritorious defense, the defaulted party satisfies the requirements of MCR 2.612 for relief from judgment. MCR 2.603(D)(2)(3); *Perry v Perry*, 176 Mich App 762, 766; 440 NW2d 93 (1989). MCR 2.612(C) provides in pertinent part:

(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:

(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.

In the present case, defendants did not move to set aside the default judgment within 21 days of the entry of default. The default was entered on December 13, 1994, but defendants did not move to set it aside until September 1995. Therefore, the circuit court should not have set aside the default unless, in addition to establishing good cause and providing an affidavit showing a meritorious defense, defendants met the requirements of MCR 2.612. Martin, Dean & Webster, Michigan Court Rules Practice, MCR 2.603, p 134.

Defendants argued to the circuit court that good cause existed to set aside the default because their attorney abandoned the case without giving notice to defendants. They now contend that the circuit court erred in finding that no attorney-client relationship was ever created between Dr. William and Mary Banks. Although a lawyer's negligence is attributable to the client and normally will not constitute good cause for setting aside a default judgment, a lawyer's withdrawal from representation without notice to the client will be considered good cause to set aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 299-301; 530 NW2d 781 (1995). However, after a review of the evidentiary hearing transcript, we do not believe the trial court clearly erred in accepting the testimony of attorney Mary Banks, rather than that of Dr. William, regarding their professional relationship. Accordingly, we find that the trial court did not abuse its discretion in denying defendants' motion to set aside the default judgment on the ground that a reasonable excuse existed for their failure to respond to the action.

Defendants also contend that the circuit court should have set aside the default because they established good cause through the submission of three affidavits in support of their motion to set aside the default judgment. The affidavits of three employees of the People's Clinic, P.C. indicated that they observed plaintiff pour water on the floor of the clinic, pretend to fall, and then threaten to sue if he was not prescribed certain drugs he requested. Defendants assert that these affidavits support a finding of fraud upon the court by plaintiff, establish a meritorious defense to plaintiff's claim, and demonstrate that manifest injustice would result if the default judgment were allowed to stand. Therefore, according to defendants, the circuit court abused its discretion in refusing to set aside the default pursuant to MCR 2.612(C).

Defendants correctly assert that a showing of a meritorious defense and factual issues for trial can establish that manifest injustice will result if the default is allowed to stand. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). However, the circuit court failed to address this argument, apparently because the court believed that defendants had not demonstrated a reasonable excuse for their failure to timely respond to plaintiff's complaint and could not therefore demonstrate good cause for setting aside the default. Although we may not entirely agree with the logic employed by the circuit court in rendering its judgment and may feel some sympathy for the defendants in this case, the decision whether to set aside the default was well within the circuit court's discretion. We therefore decline to find an abuse of discretion under the facts of this case and accordingly affirm the circuit court's decision not to set aside the default.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage