

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES TODD INNISS and
TODD COLLINS JOHNSON,

UNPUBLISHED
December 30, 1997

Plaintiffs-Appellees,

v

No. 194940
Wayne Circuit Court
LC No. 95-500639-CB

STEPHEN J. EGGED,

Defendant-Appellant.

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

PER CURIAM.

Defendant appeals as of right from the trial court order granting plaintiffs a default judgment in the amount of \$62,242.35 in this conversion action. We reverse and remand.

A trial court's decision to set aside a default judgment is reviewed on appeal for an abuse of discretion. *Park v American Casualty Ins*, 219 Mich App 62, 66; 555 NW2d 720 (1997). Except when grounded in lack of jurisdiction over the defendant, a motion to set aside a default judgment may only be granted if good cause is shown and an affidavit of facts showing a meritorious defense is attached to the motion. *Id.* at 66-67; MCR 2.603(D)(1). Good cause exists when (1) there is a substantial defect or irregularity in the proceeding that was the basis for the default; (2) the defaulted party has a reasonable excuse for the failure to comply with the requirements that were the basis for the default; or (3) there is some other reason that demonstrates that manifest injustice would result if the default judgment was not set aside. *Id.* at 67.

In this case, defendant was defaulted for his failure to comply with the trial court's arbitration order. Although only one of the elements is necessary to establish good cause, we have found that all three elements of good cause exist to set aside the default judgment. First, defendant argued that he never received notice that an arbitration order was to be entered pursuant to MCR 2.602(B)(3). A close examination of the lower court record reveals that he may not have received notice prior to its entry. For example, the trial court's docket listing states that the seven day order was submitted on a

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

date that is different than the clerk's stamp on the original document. Furthermore, a proof of service was not filed when the order was submitted for signing. The proof of service was submitted a month after the order was signed. Since the record is not clear regarding the submission of the seven day order, this suggests that the order was entered under irregular circumstances. Other irregular proceedings occurred in this case as well. This case was dismissed, sua sponte, by the trial court in September 1995, although there is no record that the parties moved to set aside the dismissal, the trial court continued with the case. Also, plaintiffs submitted the default judgment order pursuant to MCR 2.602(B)(3). Defendant filed objections to that order three days after it was submitted. The trial court still entered the order over defendant's objections. Since there were many irregular proceedings surrounding the issuance of the default judgment, the first element of good cause was demonstrated by defendant.

Second, defendant presented a reasonable excuse for his failure to comply with the arbitration order. Defendant, through an affidavit, stated that he did not received a copy of the arbitration order after it was entered. Plaintiffs argued that they had a proof of service on file that demonstrated that defendant was served with a copy of the order by certified mail. However, this proof of service does not satisfy the court rules. First, since defendant was served by certified mail, a return receipt should have been attached to the proof of service. MCR 2.105(K)(1). Second, plaintiff signed the proof of service without verifying it by oath or affirmation. MCR 2.104(A); MCR 2.113(A). Plaintiffs do not have proof that defendant was served with the order. Therefore, defendant has a reasonable excuse for his failure to comply with the arbitration order if he was not served.

Third, defendant submitted an affidavit of meritorious defense with his motion to set aside the default judgment. In the affidavit, defendant stated that plaintiffs were still in possession of the property that they allege is missing. He also stated that he was given an ownership interest in plaintiffs' comic book as compensation for his services, therefore, he owns the property that it is alleged that he stole. Since defendant has alleged a meritorious defense, manifest injustice would result if the default judgment is not set aside. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989).

Since good cause and a meritorious defense has been established, the trial court abused its discretion when it did not set aside the default judgment.

Reversed and remanded.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros