

STATE OF MICHIGAN
COURT OF APPEALS

LORRAINE SIETSEMA,

Plaintiff-Appellee,

v

SHELBY PUBLIC SCHOOLS,

Defendant-Appellant.

UNPUBLISHED

February 6, 1998

No. 200135

Oceana Circuit Court

LC No. 95-004931-CK

Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right the order denying its motion to set aside a default judgment¹ in this action in which plaintiff alleged the breach of an employment contract. We affirm.

Defendant argues that the trial court abused its discretion in denying defendant's motion to set aside the default judgment because plaintiff failed to notify defendant of entry of the default. Pursuant to MCR 2.603(D)(1), a motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. Good cause sufficient to warrant setting aside a default includes (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default were allowed to stand. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

Where good cause is premised on a defect or irregularity, it must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989). In *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992), this Court held that, pursuant to MCR 2.603(A)(2), a defaulted party is entitled to notice of the entry of the default after the entry and that the failure to notify is sufficient to show a substantial defect. There is no requirement of advance notice before the taking of a default. *White v Sadler*, 350 Mich 511, 518; 87 NW2d 192 (1957). However, the failure to ever notify a party of an entry of default constitutes a

violation of MCR 2.603(A)(2) and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause. *Bradley v Fulgham*, 200 Mich App 156, 159; 503 NW2d 714 (1993).

Here, defendant was not served with a copy of the entry of default at the time it was filed on April 5, 1996, but admits to receiving oral notice from plaintiff's counsel on April 11, 1996, and written notice that was mailed on April 15, 1996. MCR 2.603(A)(2) sets no time limits for providing notice, and defendant has presented no authority that suggests that ten days constitute an unreasonable delay. Moreover, the notice that was provided enabled defendant to promptly file a motion to set aside the default and to participate in the hearing regarding the motion. Hence, we conclude that the trial court did not err in concluding that no substantial defect existed that would serve as a basis for finding good cause.

Defendant argues in the alternative that it had a reasonable excuse for failure to actively litigate the merits of the case. At the hearing on the motion to set aside the default, counsel for defendant cited ongoing settlement discussions and an agreement with counsel for plaintiff that she would not take action adverse to the school district while he was on vacation as reasonable excuses for not filing an answer. However, plaintiff's counsel denied both the existence of such an agreement and knowledge of the date that defense counsel was to return from vacation. Defense counsel's position is troublesome given that, by his own account, he had promised to file an answer by the April 10, 1996, no progress deadline, but actually filed an answer on April 11, 1996, one day after the matter would have been dismissed. Nonetheless, a misunderstanding between counsel causing a neglect or omission to file an answer is not an adequate ground for setting aside a default judgment. *Okros v Myslakowski*, 67 Mich App 397, 400; 241 NW2d 223 (1976). Further, a disputed verbal agreement is not binding and therefore does not constitute a ground for setting aside a default judgment. *Kibby v Rhoads*, 29 Mich App 261, 274; 185 NW2d 117 (1970). Accordingly, the trial court properly found no reasonable excuse that might have given rise to a finding of good cause.

Defendant also claims that manifest injustice will result if the default stands because it had a meritorious defense. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). To establish a meritorious defense, an affidavit has to be filed by one having personal knowledge of facts that would support the defense; conclusory statements are not sufficient. *Hartman v Roberts-Walby Enterprises, Inc*, 17 Mich App 724, 729-730; 170 NW2d 292 (1969); *Kibby, supra*. Here, defendant submitted the affidavit of defense counsel in which counsel mentioned that the position held by plaintiff within defendant schools was subject to the terms of the collective bargaining contract administered by the incumbent union. This fact appears to be more in the nature of a conclusion than a fact based on personal knowledge. In addition, the affidavit contains no other facts that might have supported a meritorious defense, such as facts indicating the nature of the annexation, the statutory provisions relied upon to annex, the existence of the union, the scope of bargaining units, the nature of plaintiff's position within a bargaining unit, and the contract benefits that plaintiff was to receive under the collective bargaining agreement. For these reasons, the trial court did not err in concluding that the affidavit did not establish the existence of a meritorious defense.

Manifest injustice could nonetheless result if plaintiff failed to state a claim upon which relief can be granted because such a complaint could not support a judgment. *Lindsley v Burke*, 189 Mich App

700, 703; 474 NW2d 158 (1991). In her complaint, plaintiff alleged that she entered into a contract with Ferry Schools and that Ferry Schools were annexed by defendant.

Plaintiff set forth defendant's statutory obligation to honor the contract pursuant to MCL 380.901(3); MSA 15.4901(3). Plaintiff alleged that defendant breached the statutory obligations and the contract, and that she incurred damages as a result of the breach. We conclude that plaintiff stated a cause of action for breach of contract, and accordingly, that no manifest injustice resulted from the trial court's refusal to set aside the default.

Plaintiff has requested actual and punitive damages as allowed by MCR 7.216(C). We reject plaintiff's request because the appeal was not so lacking in merit as to be vexatious and to warrant imposition of sanctions pursuant to MCR 7.216(C).

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ William C. Whitbeck

¹ The judgment was entered for failure to appear, plead, or otherwise defend.