STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BERTLING and TRACEY BERTLING,

Plaintiffs-Appellees,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 198952
Oakland Circuit Court
LC No. 96-524855 CZ

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Defendant appeals as of right the default judgment and an order denying its motion to set aside the default and default judgment entered by the trial court. We reverse and remand.

This action stems from plaintiffs' claim on an insurance policy issued by defendant that provided coverage for losses sustained to their mobile home in a fire on April 13, 1995. Defendant refused to cover the losses because it allegedly canceled the policy on April 4, 1995, after plaintiffs failed to pay past due insurance premiums.

On June 19, 1996, plaintiffs filed suit against defendant. On July 25, 1996, plaintiffs sought, and an order of default was entered against, defendant for failing to appear or to file an answer. Plaintiffs served defendant with notice of their intent to file a default judgment on August 1, 1996. On August 5, 1996, defendant filed its appearance and on August 7, 1996, defendant filed its answer and a motion to set aside the default. On August 9, 1996, a default judgment for $51,802.84 in favor of plaintiffs was entered. The trial court subsequently denied defendant's motion to set aside the default. Defendant filed a motion for rehearing on the court's order, which was denied.

Defendant argues on appeal that the trial court abused its discretion when it refused to set aside the default. We agree.

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 an abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). According to MCR 2.603(D)(1):

"A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." This Court defines "good cause" as:

> (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 and the resulting default judgment were allowed to stand. [*Lindsley v Burke*, 189 Mich App 700, 702; 474 NW2d 158 (1991).]

With respect to finding a "reasonable excuse" constituting "good cause," a party must demonstrate more than an attorney's negligence for failing to respond in a timely manner. *Park*, *supra* at 67. Where the neglect of filing a timely response is attributable to a source other than the defendant or her counsel, this Court has found a reasonable excuse for filing a late response. See *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699, 703, 468 NW2d 533 (1991), modified on other grounds 441 Mich 851 (1992).

Defendant asserts "reasonable delay" in responding to plaintiffs' complaint, which includes: (1) an internal clerical error; (2) defendant's sending the file from its Troy office to counsel located in Detroit; (3) defendant's counsel assigned to the case was in trial; and (4) defendant's counsel's preparation of pleadings responsive to plaintiffs' notice of intent to obtain a default judgment. Moreover, defendant points to the fact that plaintiffs chose to serve it through the Commissioner of Insurance resulting in delay[1] which constituted fault attributable to a source other than defendant. Although this choice of service did create some of the delay, the true reason for failing to respond rests completely on defendant and its counsel. Therefore, we find that defendant presents no reasonable excuse constituting good cause for delay in responding to the complaint.

In the alternative, this Court has considered whether defendant's failure to file a timely answer and the subsequent entry of a default order created "manifest injustice" establishing grounds for finding "good cause." *Park*, *supra* at 67. "Manifest injustice" occurs where: (1) a defendant has demonstrated a meritorious defense and raised questions that require a trial on the merits; (2) a defendant did not intentionally attempt to delay the adjudication of a plaintiff's claims by failing to file an answer in a timely manner; (3) a defendant's default did not cause prejudice to a plaintiff; and (4) a defendant's period of inactivity did not continue for an unreasonably long period. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 171; 454 NW2d 194 (1990).

Here, defendant only minimally delayed filing its answer to plaintiffs' complaint. Defendant's failure to answer plaintiffs' complaint fifteen days following the required time period provided no basis to believe that defendant did so intentionally or that the delay actually prejudiced plaintiffs. Therefore, the key to finding "manifest injustice" rests on whether or not a defendant can set forth a meritorious defense requiring a trial on the merits.

A "meritorious defense," necessary to show "manifest injustice" or "good cause," will satisfy the requirements of the court rule of filing an affidavit of meritorious defense to set aside a default or default judgment. An affidavit filed in support of a motion requires the affiant to have personal

knowledge of the facts, to state admissible facts with particularity, and to show that the affiant can testify competently to the facts set forth in the affidavit. *Miller v Rondeau*, 174 Mich App 483, 487; 436 NW2d 393 (1988). A "meritorious defense" comprises the showing of factual issues that warrant a trial on the merits. *Park, supra* at 68; *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). Therefore, the affidavit must set forth facts necessary to provide a defense to the allegations in a plaintiff's complaint.

Defendant argues that it has a meritorious defense to plaintiffs' complaint because it canceled plaintiffs' policy and plaintiffs are not entitled to recover for their losses. Dennis McQuade, Claims Adjuster for defendant, stated in his affidavit of meritorious defense the following relevant facts:

> 1. That he is the Claims Adjuster assigned to handle Claim No. 290 205 8292 which is a fire loss reported by the Plaintiffs in this cause which occurred on April 12, 1995.[2]
>
> 2. That the insureds had policy no. 065280975 which was canceled as of April 4, 1995 for non payment.
>
> 3. That the records reflect that no payment was received or accepted up to and including April 27, 1995.
>
> 4. Under the terms of this policy, the lien holder had to be notified of the cancellation and afforded coverage for a short period.
>
> 5. The lienhold Green Tree Financial was paid the sum of $27,247.30 and assigned all of its rights to Allstate Insurance Company.
>
> * * *
>
> 7. Allstate Insurance Company had no liability to the Plaintiffs because they had no insurance coverage on the date of loss.

The affidavit asserts a factual basis supporting a meritorious defense that coverage did not exist. Plaintiffs failed to pay their premiums, and defendant canceled the policy on April 4, 1995. The loss occurred on April 12, 1995, following the cancellation of the policy. Therefore, defendant demonstrated both a meritorious defense and a manifest injustice or good cause under MCR 2.603(D)(1). Therefore, the trial court abused its discretion when it denied defendant's motion to set aside default.

Plaintiffs argue that defendant did not prove a meritorious defense in its affidavit because it failed to demonstrate compliance with MCL 500.2833(1)(i); MSA 24.12833(1)(i) which requires a ten-day written notification of the cancellation of a fire insurance policy. Defendant argues that it provided factual support for the ten-day written notification of cancellation in its motion for rehearing stating, "[o]n March 21, 1995, Allstate sent a cancellation notice to the Bertlings for non-payment of the $88.40 premium." However, the trial court did not consider this additional fact in its order denying defendant's

motion for rehearing. The fact that defendant did not provide the actual notice of cancellation does not render its affidavit meaningless.

According to MCR 2.119(F)(3), the standard under which a court reviews a motion for rehearing is stated as follows:

> Generally, and without restricting the discretion of the court, a motion for rehearing . . . which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error.

Under the appellate standard of review, it is not an abuse of discretion for the trial court to deny a motion for reconsideration where a legal theory or facts could have been argued before the entry of the trial court's original order. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987); *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997) (abuse of discretion is standard of review). However, MCR 2.119(F)(3) does not prevent the court from giving a party another chance on a motion previously heard by the court. *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988).

Defendant essentially alleged in its affidavit of meritorious defense that it had canceled the policy. In its order denying defendant's motion to set aside the default, the court denied the motion without prejudice because it had failed to provide the notice of cancellation. On rehearing, defendant provided an affidavit and supporting documents stating when it sent the notice of cancellation. Although defendant could have raised this fact with greater specificity in the earlier proceeding, the trial court abused its discretion when it denied defendant's motion for rehearing because the trial court perpetuated a prior erroneous ruling on defendant's proof of a meritorious defense.

Defendant's final claim is that the trial court erred when it entered a default judgment in plaintiffs' favor without providing appropriate notice under MCR 2.603(B)(1)(a). Where the trial court refuses to set aside a default judgment, this Court will consider whether the trial court abused its discretion. *Perry v Perry*, 176 Mich App 762, 771; 440 NW2d 93 (1989).

According to MCR 2.603(B)(1)(a), "[a] party seeking a default judgment must give notice of the request for judgment to the defaulted party." Notice of the request for judgment must "be served at least 7 days before entry of the requested judgment" under subrule (1)(a). MCR 2.603(B)(1)(b). Notice of a request for default judgment is required in three separate instances: "(1) where the defaulted party filed an appearance; (2) if the request for entry of judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings or (3) if the pleadings do not state a specific amount demanded." MCR 2.603(B)(1)(a)(i)-(iii).

Here, plaintiffs' complaint states that "the amount in controversy is in excess of TEN THOUSAND ($10,000) DOLLARS." However, plaintiffs requested judgment in the amount of

$51,196. Plaintiffs did request relief greater in an amount than they stated in the pleadings. Therefore, the court rules entitled defendant to a seven-day notice of the requested entry of a judgment.

The parties dispute whether the court clerk or the court entered the judgment. Defendant claims that the court clerk erroneously entered the judgment, while plaintiffs dispute the contention. However, either outcome is subject to reversal for failure to meet the requirements of MCR 2.603(B).

A party can seek default judgment from the clerk where the amount requested is supported by an affidavit, and if: "(a) the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain, (b) the default was entered because the defendant failed to appear, and (c) the defaulted defendant is not an infant or incompetent person." MCR 2.603(B)(2)(a)-(c). All other default judgment entries must be made by application to the court. MCR 2.603(B)(3).

Plaintiffs could not seek a judgment from the court clerk for the following reasons: plaintiffs' claim did not constitute a "sum certain" and, defendant filed its appearance. MCR 2.603(B)(2)(a)-(c). Defendant filed an appearance four days before the entry of default judgment, preventing plaintiffs from seeking a default judgment from the clerk. Additionally, plaintiffs' losses did not constitute a sum certain. Here, the losses attributable to the fire, including the loss of the mobile home and personal property, do not have a fixed value or worth for the purposes of entering a default by the court clerk. Therefore, MCR 2.603(B)(3) required plaintiffs to obtain a judgment before the court.

On the other hand, if the court did enter default judgment in plaintiffs' favor, plaintiffs failed to provide defendant with sufficient notice of the hearing. A validly defaulted party is entitled to fully participate in any hearing necessary to adjudicate damages. *Dollar Rent-A-Car Systems v Nodel Construction Co, Inc*, 172 Mich App 738, 743; 432 NW2d 423 (1988). Notice of a request to seek judgment allows the defaulted party an opportunity to set aside the default. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358; 514 NW2d 257 (1994). Additionally, the notice may also alert a defaulted party of an impending judgment so the defaulted party can participate in any adjudication of damages. *Perry*, *supra* at 767-768; *Dollar Rent-A-Car Systems*, *supra* at 743-744.

Defendant was entitled to seven-days' notice of request for entry of judgment and a hearing on damages before the court. On August 1, 1996, plaintiffs served notice of intent to file judgment on defendant in the amount of $51,196. The notice did not include a motion for the entry of default, schedule a hearing or provide notice of the date of entry of the judgment. On August 6, 1996, defendant filed its objection to entry of default judgment. Three days later, the clerk (or the court) entered default judgment against defendant without defendant's knowledge. Although plaintiffs literally complied with the seven-day notice requirement of MCR 2.603(B)(1)(b), defendant was entitled to notice of request for entry of judgment in the context of when the actual entry of the judgment would take place. *Dollar Rent-A-Car Systems*, *supra* at 743-744. Therefore, the trial court abused its discretion in failing to set aside the judgment in favor of plaintiffs where defendant did not receive notice of a specific hearing related to the default judgment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly

[1] Defendant alleged that it did not receive notice of the suit from the Commissioner of Insurance until July 10, 1996. Thirteen days remained for defendant to file an answer to plaintiff's complaint. Defendant "mistakenly" placed the notice documents in a related file before it forwarded the documents to its attorney on the final day for filing its response to the complaint.

[2] According to the complaint, the fire loss occurred on April 13, 1995.