STATE OF MICHIGAN

COURT OF APPEALS

INSURANCE PROCESSING MANAGEMENT, INC.,

Plaintiff-Appellant,

v

NORTHWEST HEALTH SUPPLIES, INC., DIANA J. DOUGE, AND GARY J. DOUGE,

Defendants-Appellees.

UNPUBLISHED
July 7, 1998

No. 198065
Monroe Circuit Court
LC No. 93-101975 CK

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing the individual defendants, Diana J. Douge and Gary J. Douge. We vacate the order on jurisdictional grounds. However, pursuant to our authority under MCR 7.216(A)(2), we delete Diana J. Douge and Gary J. Douge as individual defendants and remand for further proceedings consistent with this opinion.

I. Basic Facts

A. The Parties

Plaintiff in this matter is Insurance Processing Management, Inc. ("IPM"), an Ohio corporation that is in the business of providing medical and insurance billing services. There are three defendants: (1) Northwest Health Supplies, Inc. ("NHS"), a Delaware corporation that, according to the evidence of record below, was incorporated on May 3, 1991, and that sells diabetic testing equipment and supplies and provides instructions to patients regarding the use of such equipment, (2) Diana J. Douge ("Diana Douge"), who is the resident agent and a shareholder, director, and officer of NHS, and (3) Gary J. Douge ("Gary Douge"), who is the husband of Diana Douge and apparently is, or has acted as, an officer of NHS.

B. The Alleged Contract

According to IPM, another corporation, Patient Care Services, provided billing services to NHS. However, when defendants terminated their relationship with Patient Care Services, Gary Douge and/or Diana Douge orally requested IPM to provide the same or similar billing services to NHS. When Patient Care Services thereafter sued defendants, IPM also provided defendants with litigation assistance. According to the trial court, no written contract exists between the parties.

Again according to IPM, in July, 1991, Gary Douge and/or Diana Douge personally guaranteed sums owed by NHS to IPM. IPM contends that this account was stated in writing but, according to the trial court, this purported agreement does not appear attached to IPM's pleadings or anywhere else in the court file. IPM asserts that the defendants paid IPM from June, 1991 through July, 1992. IPM further asserts that in July, 1992, however, the payments slowed and by June, 1993, the payments stopped completely.

C. IPM's Suit

On November 23, 1993, IPM filed this suit for collection with the trial court, alleging damages in the amount of $22,778.63. IPM filed a second amended complaint on January 17, 1995. IPM ultimately asserted claims for breach of contract, fraud, and unjust enrichment.

II. Procedural History

A. The Stipulated Orders

On October 4, 1994, the trial court entered a stipulated order requiring defendants to provide answers to interrogatories and to respond to a request for production of documents within twenty-one days of September 28, 1994. On November 2, 1994, Diana Douge failed to appear at a pretrial conference. On May 31, 1995, the trial court entered a stipulated order awarding IPM's attorney the sum of $565 in costs and attorney fees, apparently related to defendants' failure to comply with an order of the trial court of October 4, 1994.

B. Defendants' Summary Disposition Motion

On March 3, 1995, defendants moved for partial summary disposition in favor of Diana Douge and Gary Douge under MCR 2.116(C)(7), arguing that the statute of frauds, MCL 566.132; MSA 26.922, barred IPM's claim against them. On July 27, 1995, the trial court agreed. The trial court stated that the prevailing party (i.e., defendants) shall prepare and submit an order in accordance with the trial court's decision. Defendants submitted no such order.

C. IPM's Motion for Entry of Default and Judgment

On December 7, 1995, IPM moved for entry of default and judgment against defendants for failing to comply with both a September 27, 1994, discovery order and with the October 4, 1994, stipulated order awarding $565 in costs and attorney fees. IPM purported to serve this motion on defendants by mailing it to attorney James R. Sheehan. However, Sheehan was not an attorney of

record and had never filed an appearance on behalf of defendants. In addition, the trial court sent Sheehan, rather than defendants' attorney of record, a copy of a pretrial conference notice for December 13, 1995.[1]

No one appeared on behalf of defendants at the pretrial hearing held on December 13, 1995. IPM's counsel indicated at the hearing that she had talked to Sheehan's office and discovered that Sheehan had not been retained by defendants, but that Sheehan had forwarded the pretrial notice to defendants. IPM's counsel further indicated that defendants had still not complied with the trial court's earlier discovery order nor had they paid the costs and fees awarded to IPM. The trial court received testimony from IPM's agent regarding damages. The trial court then entered a default judgment against all the defendants in the amount of $24,000. IPM claims to have served this order on defendants (rather than on their attorney) by depositing it in the U.S. mail.

D. Defendants' Motion to Vacate the Default Judgment

On March 13, 1996, subpoenas were issued requiring Diana Douge and Gary Douge to testify regarding their assets. On April 9, 1996, attorney Daniel S. White filed an appearance on behalf of defendants. On April 15, 1996, defendants filed a motion to vacate the default judgment and to dismiss the individual defendants ("Defendants' Motion to Vacate the Default Judgment"). Defendants claimed that their prior attorney, Jeffrey Dulany, had been ill and had failed to prepare an order to comply with the trial court's July 27, 1995, decision to dismiss the individual defendants on the basis of the statute of frauds. Defendants argued that they did not receive notice of either the pretrial conference or of the hearing on IPM's motion for entry of default judgment, since those notices were sent, not to defendants, but to attorney Sheehan. Therefore, defendants argued, the trial court should vacate the judgment against them under MCR 2.612(C)(1)(a), (C)(1)(c), and (C)(1)(f), due to mistake, inadvertence, surprise, fraud, attorney misconduct, or excusable neglect. Moreover, defendants argued, the trial court should dismiss Diana Douge and Gary Douge in accordance with its earlier decision that IPM's claims against them were barred by the statute of frauds.

At the hearing on Defendants' Motion to Vacate the Default Judgment, the trial court acknowledged that there had been some irregularities, but decided that the default judgment would stand because defendants had had many opportunities to comply with the various orders that had been violated. On August 8, 1996, the trial court entered an order denying defendants' motion to vacate the default judgment and to dismiss the individual defendants.

E. Defendants' Claim of Appeal

On August 12, 1996, defendants filed a claim of appeal ("Defendants' Claim of Appeal") from the trial court's August 8, 1996, order. This Court eventually dismissed Defendants' Claim of Appeal on October 30, 1996.

F. Defendants' Motion To Stay

On August 9, 1996, defendants filed a motion in the trial court to stay the trial court proceedings, including execution on the default judgment, pending appeal. The trial court held a hearing on that motion on August 28, 1996. Defendants' counsel acknowledged that defendants had already filed Defendants' Claim of Appeal with this Court. Although the hearing was noticed only as to defendants' motion for a stay, the trial court went beyond that motion:

> Alright, the ruling of the court is as follows. If it is received by this court within 2 weeks from today, an order dismissing the individuals, that is tardy, that is late and perhaps there ought to be some costs and I'm not dealing with that, going to the plaintiff as a result of that tardiness, but if I receive such an order I will sign an order pursuant to what I said long ago and we should have had an order long ago, taking the individuals out of the case.

On August 29, 1996, the trial court entered an order dismissing Diana Douge and Gary Douge as defendants, reserving the issue of costs, and ordering a stay of execution of the judgment against NHS upon the posting of a $24,000 bond.

G. IPM's Appeal

On September 13, 1996, IPM filed this appeal as of right from the trial court's August 29, 1996, order.

III. The Trial Court's Jurisdiction To Set Aside the Default Judgment And To Dismiss Diana Douge and Gary Douge

IPM argues that the trial court erred in setting aside the default judgment and dismissing Diana Douge and Gary Douge, because it lost jurisdiction when defendants filed their Claim of Appeal on August 12, 1996. We agree. We review this question of law de novo. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997). After a party files a claim of appeal, the trial court loses jurisdiction and may not amend or set aside the judgment or order being appealed except pursuant to an order of this Court, by a stipulation of the parties, or as otherwise provided by law. MCR 7.208(A); *Co-Jo, Inc v Strand*, 226 Mich App 108, 118; 572 NW2d 251 (1997); see also *Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990).

Here, the trial court entered its order dismissing Diana Douge and Gary Douge on August 29, 1996, *after* defendants filed their Claim of Appeal on August 12, 1996. Therefore, the trial court no longer had jurisdiction. Contrary to defendants' assertion on appeal, the trial court was not merely acting to correct the record. Rather, the trial court in essence changed its mind for the second time and decided to dismiss Diana Douge and Gary Douge after it had previously decided not to do so. Because the trial court lacked jurisdiction, we vacate the trial court's August 29, 1996 order.

IV. Defendants' Motion to Vacate The Default Judgment, MCR 2.611(B), MCR 2.603(D)(3), and MCR 2.612(C)

IPM argues that the trial court erred in its August 29, 1996 order setting aside the default judgment against the individual defendants. IPM contends that Defendants' Motion to Vacate the Default Judgment of April 15, 1996 was not filed within twenty-one days of entry of the judgment as required by MCR 2.611(B). IPM asserts that, since Defendants' Motion to Vacate the Default Judgment was not timely, the trial court should not ultimately have granted it as it did through its August 29, 1996 order.

We first note that IPM has failed to cite any relevant authority in support of this argument. This Court will not search for authority to support a party's position. *Winiemko v Valenti*, 203 Mich App 411, 419; 513 NW2d 181 (1994). This issue is therefore abandoned.

We secondly note that defendants moved to set aside the default judgment under MCR 2.612(C) due to mistake, inadvertence, or attorney misconduct. The default judgment rule, MCR 2.603(D)(3), permits a party to move to set aside a default judgment under MCR 2.612(C), as defendants did in this case. A motion to set aside a judgment under MCR 2.612(C) must be brought within a reasonable time, and within one year from entry of judgment when brought under subrules (C)(1)(a), (b), or (c). See MCR 2.612(C)(2), upon which defendants relied in part.[2]

IPM's argument that Defendants' Motion to Vacate The Default Judgment was not timely thus does not address the court rule upon which defendants relied, MCR 2.612(C). Rather, IPM cites only the twenty-one day time limit for filing a motion to alter or amend a judgment under MCR 2.611(B). However, defendants did not file a motion under that court rule, and there is no indication that the trial court relied upon that rule in setting aside the default judgment. IPM has cited no authority to establish that the time limit set forth in MCR 2.611(B) applies to motions brought under MCR 2.612(C). Therefore, IPM has failed to support its argument that Defendants' Motion to Vacate the Default Judgment, brought under MCR 2.612(C), was untimely. We conclude, however, that this issue is moot in light of our decision, above, to vacate the trial court's August 29, 1996 order.

V. Application of the Statute of Frauds

IPM argues that the statute of frauds did not bar its claim against Diana Douge and Gary Douge because they assumed a direct and independent duty to pay IPM for the services provided to NHS. IPM asserts that NHS was not even incorporated when the original "contract" was entered. Therefore, IPM contends, Diana Douge and Gary Douge must have assumed an independent duty to pay for IPM's services. IPM concludes that the oral "contract" did not fall within the statute of frauds because it did not involve a promise to pay the debt of another.

We first note that the statute of frauds argument is preserved for appellate review because it was raised before and addressed by the trial court. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

We secondly note that the trial court decided to grant summary disposition in favor of the individual defendants under MCR 2.116(C)(7). When we review an order granting a motion under

MCR 2.116(C)(7), this Court accepts as true the nonmoving party's well-pleaded allegations and construes them in the light most favorable to that party. *In re Beglinger Trust*, 221 Mich App 273, 275; 561 NW2d 130 (1997). A trial court should grant such a motion only when no factual development could provide a basis for recovery. *Id*. at 275-276. "This Court reviews a summary disposition determination de novo as a question of law." *Id*. at 276.

As to substance of the matter, under the statute of frauds, MCL 566.132(1)(b); MSA 26.922(1)(b), a special promise to answer for the debt, default, or misdoings of another is void unless it is in writing and signed by the party to be charged. See *Crest the Uniform Co v Foley*, 806 F Supp 164, 168-169 (ED Mich, 1992) (under Michigan law, an oral promise by a person to guarantee the past debts of that person's corporation is a collateral promise covered by the statute of frauds). On the other hand, a promise to pay for goods or services to be rendered to a third party, when based on sufficient consideration, is not covered by the statute of frauds because it is an original rather than a collateral promise. *Gillhespy v Bolema Lumber & Building Supplies, Inc*, 5 Mich App 351, 355; 146 NW2d 666 (1966).

Here, the alleged oral promise by Diana Douge and Gary Douge to guarantee or answer for the debts of their corporation, NHS, was a collateral promise covered by the statute of frauds. According to IPM's own allegations, Diana Douge and Gary Douge guaranteed payment to IPM only *after* NHS began to fall behind in its payments. Therefore, the oral promise was a guarantee to pay for the *past* debts incurred by NHS, and is not enforceable. Further, to the extent that IPM's allegations suggest that Diana Douge and Gary Douge promised to pay for any *future* services provided by IPM to NHS, the statute of frauds is *still* applicable, because there is no allegation or evidence that sufficient consideration was paid in return for such a promise. *Gillhespy*, *supra* at 355.

IPM asserts that Diana Douge and Gary Douge were not merely promising to answer for the past debts of NHS, but rather were making an original promise to IPM because NHS was not a valid corporation until *after* the alleged contract was formed. That assertion is flatly contradicted by the evidence of record, that indicates that NHS was validly incorporated in Delaware on May 3, 1991, *before* the date of the contract, if any, involving these parties. The alleged oral promise of Diana Douge and Gary Douge was made in *July*, 1991, two months *after* NHS's incorporation. Although IPM asserts that NHS was not authorized to transact business in Michigan or Ohio, where some of the transactions allegedly occurred, that fact would not alter the conclusion that NHS was a corporation and is therefore a "person" whose debts Diana Douge and Gary Douge allegedly agreed to guarantee. See *Crest*, *supra*, at 168-169. The fact that NHS may have violated Michigan or Ohio law by transacting business in these states without permission does not change the fact that NHS was a separate legal entity.

IPM has not disputed on appeal that the alleged guarantee was not in writing. Therefore, the trial court's determination that the statute of frauds barred IPM's breach of contract claim against Diana Douge and Gary Douge was substantively correct.

VI. Relief Under MCR 7.216(A)

As we noted above, we have vacated the trial court's August 29, 1996 order on jurisdictional grounds. Pursuant to our authority under MCR 7.216(A)(2), however, we delete Diana Douge and Gary Douge as individual defendants in this matter on the ground that the statute of frauds substantively bars any claim by IPM against them for their alleged guarantee of the past debts of NHS.[3] We therefore remand for further proceedings consistent with this opinion. No costs, no party having prevailed in full. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] The hearing on IPM's motion for default judgment was scheduled for the same date and time as the pretrial conference.

[2] It should be noted that the trial court did not identify under which court rule it was setting aside the default judgment, and never specifically stated that it was setting it aside. Nevertheless, in dismissing Diana Douge and Gary Douge, the trial court effectively set aside the default judgment and, therefore, must be presumed to have set aside the default judgment on the grounds set forth in defendants' motion, i.e., under MCR 2.612(C).

[3] We note that we have similar broad authority under MCR 7.216(A)(7).