STATE OF MICHIGAN

COURT OF APPEALS

ABLA ESSA, Individually and as Next Friend for NADIA ESSA and MAJEDA ESSA, Minors,

Plaintiffs-Appellees,

v

JOSEPH HOWARD,

Defendant-Appellant,

and

JOHN DOE,

Defendant.

UNPUBLISHED
October 29, 1999

No. 206632
Wayne Circuit Court
LC No. 96-607007 NI

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

PER CURIAM.

Defendant Joseph Howard appeals by leave granted from the trial court's orders denying his motion to set aside a default judgment and denying his motion for reconsideration. We affirm, but remand for a nunc pro tunc order appointing plaintiff Abla Essa as next friend for plaintiff Majeda Essa.

We initially note that, although the parties were directed to brief the issue whether defendant was entitled to an appeal as of right from the order denying his motion to set aside the default judgment, we now conclude that this issue is moot because defendant was granted leave to appeal. An issue is moot when it presents only abstract questions of law, or "when an event occurs that renders it impossible for a reviewing court to grant relief." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Because defendant has been granted leave to appeal, we cannot grant relief on the question whether defendant was entitled to an appeal as of right. As a general rule, appellate review of moot issues is inappropriate. *Id.* Accordingly, we decline to review this issue.

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

On February 22, 1996, plaintiffs brought an action against defendant arising from a motor-vehicle accident in which a vehicle owned by defendant and operated by an unidentified party, denoted as "John Doe," collided with plaintiffs' vehicle.[1] Defendant was personally served with the complaint and did not file a timely answer. On June 7, 1996, plaintiffs filed an application for default and a motion for default judgment. The court clerk did not sign the default, but did file it in the lower-court file. A proof of service contained in the lower-court file indicates that defendant and his insurer were mailed a copy of the motion for default judgment and notice of hearing on the motion, but does not indicate that defendant was served with the entry of default. An order for default judgment was entered on July 22, 1996 against defendant for $210,000 plus interest, costs, and attorney fees. A proof of service filed on July 26, 1996 indicates that defendant and his insurer were mailed a copy of the default judgment. Defendant moved to set aside the default judgment on May 9, 1997. The trial court denied the motion, holding that it was not brought within a reasonable time. Defendant's motion for reconsideration was also denied.

We review the trial court's decision whether to set aside a default judgment for a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, ___ Mich ___; ___ NW2d ___ (Docket No. 111783, issued 10/12/99), slip op at 7-8. *Huggins v MIC General Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998). Unless the motion is grounded on a lack of jurisdiction over the defendant, a motion to set aside a default judgment may only be granted if the defendant demonstrates good cause and files an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Huggins*, *supra* at 87. Additionally, if the motion is not brought within twenty-one days after the default judgment was entered, the defendant must demonstrate a basis for relief pursuant to MCR 2.612. MCR 2.603(D)(2)(b) & (3). Accordingly, because defendant's motion was not brought within twenty-one days, defendant noted that the motion was brought pursuant to MCR 2.603(D)(3) and MCR 2.612(C)(1)(a) & (f).[2] To obtain relief under MCR 2.612, the motion must be made within a reasonable time. MCR 2.612(2). The trial court's decision whether to grant relief under MCR 2.612 is discretionary, and we will not reverse absent an abuse of discretion. *Huber v Frankenmuth Mut Ins Co*, 160 Mich App 568, 576; 408 NW2d 505 (1987).

We conclude that the trial court did not abuse its discretion in denying defendant's motion because the motion was not brought within a reasonable time. In *Kowalczyk v Jones*, 443 Mich 881; 504 NW2d 185 (1993), the Supreme Court summarily reversed this Court and reinstated the judgment of the trial court denying the defendant's motion to set aside a default judgment. In that case, the defendant's motion was not filed until approximately nine months after the defendant learned of the entry of the default judgment, and the Court held that the trial court did not abuse its discretion in denying the motion because it was not made within a reasonable time. Specifically, the Court stated as follows:

> It was not until approximately nine months later that the defendant moved to set the default judgment aside despite the fact that the defendant learned of the entry of that judgment the day following its entry. MCR 2.612(C)(2) provides that a motion for relief from judgment must be made "within a reasonable time." Under the circumstances of the case, the Supreme Court finds that the trial judge did not abuse his discretion in denying the motion to set aside the default judgment on this basis. [*Id.*]

In the instant case, the record indicates that defendant was notified of the default judgment shortly after its entry. Like the defendant in *Kowalczyk*, defendant in the instant case waited until approximately nine months later to move to set aside the default judgment. Therefore, we conclude that the trial court did not abuse its discretion in denying the motion on the ground that it was not brought within a reasonable time, as required by MCR 2.612(C)(2).

Defendant argues on appeal that the default judgment should be set aside because no default was properly entered and defendant was not served with notice of any entry of default. However, defendant did not raise these arguments until his motion for reconsideration. Pursuant to MCR 2.119(F)(3), the party moving for reconsideration "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 correction of the error." The trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). An abuse of discretion does not occur where the trial court denies a motion for reconsideration based on grounds that could have been asserted in the original motion. *Charbeneau v Wayne County General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Therefore, we conclude that where defendant raised issues in his motion for reconsideration that could have been argued in his motion to set aside the default judgment, the trial court did not abuse its discretion in denying the motion for reconsideration.[3]

Defendant also contends that the default judgment should be set aside because no order appointing plaintiff Abla Essa as next friend for her minor daughter, plaintiff Majeda Essa, was ever entered by the lower court. Defendant did not raise this issue until his motion for reconsideration; therefore, the trial court did not abuse its discretion in denying the motion because this issue could have been raised in defendant's motion to set aside the default judgment. *Charbeneau*, *supra* at 733. We also conclude that the lack of a next-friend order did not invalidate the default or default judgment. *Kamieniecki v Garden City Hosp*, 375 Mich 257, 260; 134 NW2d 219 (1965). Plaintiffs had petitioned for an appointment of Abla Essa as next friend of Majeda Essa, but no such order was entered. At the hearing on defendant's motion for reconsideration, the trial court indicated that it would enter such an order and that the lack of entry was likely a clerical mistake. However, the record does not indicate, contrary to plaintiffs' assertion on appeal, that a next-friend order was ever entered after that hearing. Accordingly, we remand this case to the trial court for entry of a proper nunc pro tunc order appointing Abla Essa as next friend for Majeda Essa.[4]

Affirmed, but remanded for entry of a nunc pro tunc order consistent with this opinion. We do not retain jurisdiction. Plaintiffs, as the prevailing parties, may tax costs under MCR 7.219.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns

[1] Because defendant "John Doe" is not a party to this appeal, any references to "defendant" in this opinion refer only to defendant-appellant Joseph Howard.

[2] MCR 2.612(C)(1)(a) provides for relief from a judgment on grounds of "[m]istake, inadvertence, surprise, or excusable neglect." MCR 2.612(C)(1)(f) provides for relief for "[a]ny other reason justifying relief from the operation of the judgment."

[3] We do note that the record does not reflect that defendant was served with notice of the entry of default. This constitutes a substantial defect in the proceedings that satisfies the good-cause requirement to set aside a default judgment. *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993); *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992). However, defendant must also demonstrate a meritorious defense by way of filing an affidavit of facts. *Gavulic*, *supra* at 26. Defendant did not file an affidavit of meritorious defense with the motion to set aside the default, but rather with the motion for reconsideration. As noted above, the trial court did not abuse its discretion in denying the motion for reconsideration where defendant raised issues that could have been raised in the original motion. *Charbeneau*, *supra* at 733. Moreover, the affidavit does not assert facts demonstrating a meritorious defense; rather defense counsel merely states that, after reviewing the medical records, counsel did not believe that plaintiffs suffered injuries sufficiently serious to recover damages under the no-fault act. We would find this affidavit to be insufficient to establish facts demonstrating a meritorious defense. We also note that, although the court clerk did not sign the default submitted by plaintiffs, the clerk did file the default in the lower-court file. Because of the above analysis, we need not determine whether this constituted a proper "entry" of default.

Defendant also contends that the default judgment was void ab initio because it was not entered in compliance with the procedures set forth by court rule and that this denied defendant due process of law. We disagree. Defendant cites *Dundee Cement Co v Schupbach Bros, Inc*, 94 Mich App 277, 279; 288 NW2d 379 (1979) for the proposition that a default judgment entered in noncompliance with the court rules is void ab initio. However, that case was decided before 1990 and therefore is not binding precedent. MCR 7.215(H)(1). Moreover, to the extent that *Dundee* established a per se rule that a procedural defect, alone, requires the setting aside of a default judgment, this Court later disavowed that decision. See *Emmons v Emmons*, 136 Mich App 157, 165; 355 NW2d 898 (1984). In any event, cases that are binding on this Court hold that even where a substantial defect in the proceedings exists, a defendant must also file an affidavit of facts demonstrating a meritorious defense in order to successfully set aside a default judgment. *Gavulic*, *supra* at 26. Our Supreme Court has also recently emphasized that the good-cause requirement is separate from the meritorious-defense requirement. *Alken-Ziegler*, supra at 10. Additionally, defendant was not denied due process of law because he was notified of the motion for default judgment and was therefore given an opportunity to challenge the motion or set aside the default before default judgment was entered.

[4] A nunc pro tunc order "is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake." *Shifferd v Gholston*, 184 Mich App 240, 243; 457 NW2d 58 (1990).