STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL and DEPARTMENT OF NATURAL RESOURCES, Plaintiffs-Appellees, v RICHARD DELENE, NANCY DELENE, and RICHARD DELENE CONTRACTING, INC., Defendants-Appellants.	UNPUBLISHED November 30, 1999 No. 204086 Ingham Circuit Court LC No. 92-073245 AZ

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Defendants Richard and Nancy Delene (the "Delenes")[1] appeal from a decision of the trial court issuing a permanent injunction. The injunction ordered them to conduct extensive restoration measures and levied fines, all with respect to their activities on lands they owned. The real thrust of the Delenes' appeal, however, is directed to the trial court's denials of their three consecutive motions to set aside a previously, and properly, entered default and to the trial court's denial of their untimely, and improperly, filed motion for summary disposition pursuant to MCR 2.116(C)(4), (5), (8), and (10). We affirm.

I. Basic Facts And Procedural History

Plaintiffs commenced this action in mid-November 1992, alleging that the Delenes violated several state environmental laws[2] and their activities on their land constituted a public nuisance; essentially, the Delenes were constructing large ponds on their land to control water drainage.[3] In connection with the complaint, plaintiffs filed a motion for a temporary restraining order and preliminary injunction on order to show cause. The trial court issued a temporary restraining order.

Although plaintiffs served the Delenes with the complaint,[4] they failed to plead or otherwise defend in response to the complaint.[5] As a result, in late January 1993, plaintiffs filed a default, prompting the Delenes to file three separate motions to set aside the default and another motion seeking summary disposition. Meanwhile, with a preliminary injunction in place, plaintiffs proceeded to

investigate appropriate remedies. The trial court found Richard Delene in contempt during the investigation process for repeatedly violating court orders. Following an evidentiary hearing on plaintiffs' motion for entry of a default judgment, in late May 1997, the trial court ordered a permanent injunction, restoration of the property, and civil fines.[6] The Delenes now appeal as of right.

II. The Motions To Set Aside Default

A. Preservation Of The Issue And Standard Of Review

The Delenes preserved this issue for appeal to the extent that the trial court decided the three motions to set aside the default. The Delenes failed to brief the specific grounds raised below for each motion, and they now raise additional grounds for setting aside the default for the first time. Therefore, technically, this issue is not properly before this Court. See generally *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We choose, however, to consider the matter, limiting our review to the specific grounds presented to the trial court for each motion. *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994). MCR 2.603(D) establishes the standards for setting aside a default or default judgment:

> (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.*
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> (2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed
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> (a) before entry of judgment, or
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> (b) if judgment has been entered, within 21 days after the default was entered.
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> (3) In addition, the court may set aside an entry of default and a judgment by default in accordance with MCR 2.612.
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> (4) An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee. [Emphasis added.]

Case law construes the relationship between MCR 2.603(D) and MCR 2.612(C), which provides relief from a final judgment, order, or proceeding, as allowing a motion to set aside a default any time before the court enters judgment. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 48; 445 NW2d 186 (1989). Thereafter, a motion to set aside the judgment may be made within a reasonable time,

subject to a one year limitation for most cases under MCR 2.612. *Id.* at 48. This Court reviews the trial court's decision on a motion to set aside a default or default judgment for a clear abuse of discretion. *Park v American Casualty Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996).

B. The First Motion

We note that the Delenes' challenge to the denial of the first motion is not properly before us because the Delenes have not provided this Court with a transcript of the motion hearing or a settled statement of facts. MCR 7.210(B)(2); *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 304-305; 486 NW2d 351 (1992). In any event, the conclusory averments in Richard Delene's March 8, 1993 affidavit, filed in connection with the first motion, failed to satisfy either the good cause or the meritorious defense requirements for setting aside the default. MCR 2.603(D)(1); see generally *Alken-Ziegler, Inc v Waterbury Headers Corp*, __ Mich __; 600 NW2d 638 (1999). Hence, we uphold the trial court's order denying the first motion for failure to present good cause for the delay in responding to the complaint and the failure to submit an affidavit of facts setting forth a meritorious defense.

C. The Second Motion

With regard to the second motion, we similarly find no basis for disturbing the trial court's decision. The Delenes provided no reasonable excuse for their failure to file an answer to the complaint. See *Alken-Ziegler, Inc*, *supra* 600 NW2d at 644-645. Further, the Delenes did not establish a meritorious defense to the Wetlands Protection Act (WPA), MCL 281.701 *et seq*.; MSA 18.595(51) *et seq.*, count or any of the other six counts. See n 2 *post*. Even if we were to disregard the allegations in plaintiffs' complaint pertaining to the Delenes' alleged violation of various environmental laws before Richard Delene submitted the two applications to build ponds involving wildlife, we would still find that the defense the Delenes claimed under the WPA was not meritorious. The complaint alleged that Richard Delene submitted incomplete applications and the Delenes failed to submit an affidavit of facts rebutting this allegation. *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 322; 520 NW2d 653 (1994). Consequently, we also uphold the trial court's order denying the second motion.

D. The Third Motion

The third motion principally focused on the failure of the Delenes' former attorney to file an answer to the complaint. However, the Delenes failed to show that their former attorney abandoned his representation. For this reason, and giving due regard to the case history before the trial court when it decided the motion, we are not persuaded that the Delenes have shown that the trial court clearly abused its discretion in declining to find either the requisite good cause or a meritorious defense for setting aside the default under MCR 2.603(D)(1). *Alken-Ziegler, Inc*, *supra*.

The Delenes' reliance on MCR 2.612(C) to show error with respect to the third motion is also misplaced. Although MCR 2.603(D)(3) provides that a default may be set aside in accordance with MCR 2.612, a rule that applies specifically to final judgments, orders and proceedings, the extraordinary circumstances standard of MCR 2.612(C)(1)(f), *Altman v Nelson*, 197 Mich App 467,

478; 495 NW2d 826 (1992), and the "excusable neglect" standard of MCR 2.612(C)(1)(a), both represent a *higher* standard for relief than MCR 2.603(D)(1). See generally *Komejan, supra*. While the Delenes' third motion to set aside the default relied on both MCR 2.603(D)(1) and MCR 2.612(C)(1)(a) and (f), we are not persuaded that either court rule provides a basis for disturbing the trial court's denial of the motion. Therefore, we uphold the trial court's order denying the third motion

E. Conclusion

We conclude that the Delenes have not demonstrated that the trial court clearly abused its discretion in denying each motion. *Park, supra* at 66-67.

III. Summary Disposition

A. Preservation Of The Issue And Standard Of Review

The Delenes preserved this issue for appeal to the extent that they moved for summary disposition and the trial court decided the motion. *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995). However, it was improper for the Delenes to bring a motion for summary disposition on the issue of liability when the trial court had not set aside the default. MCR 2.603(A)(3) states:

> Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.[7]

While the default did not preclude the Delenes from participating in the hearing on remedies, which was necessary to enter judgment under MCR 2.603(B)(3)(b), the trial court correctly determined that the Delenes' motion for summary disposition was not appropriate because it had entered a default.

Also, as is correctly argued by plaintiffs, the motion was untimely under the scheduling order. A trial court has discretion to refuse to entertain actions beyond the time frame of a scheduling order. *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997). Given the existence of the default and the untimeliness of the "summary disposition" motion, we could affirm the trial court's denial of the motion based on the trial court's holding that the motion was not appropriate. The Delenes' failure to address this aspect of the trial court's decision might also preclude review because it is necessary to a proper resolution of this appeal. See *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (failure to address an issue which necessarily must be reached precludes appellate relief).

Equally important, the motion was improper because a defaulted party may not proceed with an action until the default is set aside under MCR 2.603(D) or MCR 2.612. See MCR 2.603(A)(3). A default entered under MCR 2.603 for failure to defend, as distinguished from a default sanction for other conduct, e.g., violations of court orders, operates as an admission that there are no issues of liability, but allows the defaulting party to participate in the hearing to adjudicate monetary damages or equitable relief. See *American Central Corp v Steven Van Lines, Inc*, 103 Mich App 507, 512-

513; 303 NW2d 234 (1981). Thus, the default did not prohibit the Delenes from participating in any hearings on proper remedies for their "admitted" statutory violations, but they could not challenge that "admission" through the summary disposition device until the court set aside the default.

Despite these procedural defects in the Delenes' motion for summary disposition, because the trial court also addressed the merits of the defenses claimed in the motion, we choose to consider them. *Paschke, supra* at 705. We apply the de novo standard when reviewing a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. The Swamp Land Act

The Delenes claim that the Swamp Land Act, 43 USC 982 *et seq*., evinces Congress' intent to preempt state environmental laws, thereby precluding plaintiffs from instituting this enforcement action and providing the Delenes with a meritorious defense. We understand one aspect of the Delenes' argument essentially to be that their actions in excavating and constructing these ponds falls exclusively within the scope of land drainage and levee construction that the Swamp Land Act addresses. This particular claim warrants consideration because, when federal law preempts state law, states are deprived of subject matter jurisdiction. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997); see also *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 707; 575 NW2d 68 (1997) (subject matter jurisdiction is a question of law that may be raised at any time). If the Delenes could prove that the Swamp Land Act preempted state law, then summary disposition under MCR 2.116(C)(4) would have been appropriate.

In *Boulahanis v Prevo's Family Market, Inc*, 230 Mich App 131, 135; 583 NW2d 509 (1998), we identified the three forms of federal preemption of state law:

> Federal preemption is either express or implied. If express, the intent of Congress to preempt state law must be stated clearly in the language of the statute or impliedly contained in the structure and purpose of the statute. In the absence of express preemption, implied preemption may exist in the form of field or conflict preemption. Field preemption may be found where the state law at issue regulates conduct in a field that Congress intended the federal government to occupy exclusively. Conflict preemption exists when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of Congress' objectives. Conflict preemption is compelled not only when a state law is in conflict with a federal statute, but also when it conflicts with a valid federal regulation. Conflict preemption is also compelled when a state law is in conflict with a federal regulatory agency's intentional decision *not* to regulate. [Citations omitted.]

With those definitions of express, conflict, and field preemption in mind, we turn to the Swamp Land Act, 43 USC 982 *et seq*., to determine if Congress intended that law to displace the state environmental laws plaintiffs rely on in this action.

According to 43 USC 982, the Swamp Land Act's purpose is

> [t]o enable the several States . . . to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein – the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A.D. 1850, are granted and belong to the several States respectively, in which said lands are situated . . . .

By its plain language, 43 USC 982 entrusts the states with an active role in swamp land management while failing to preclude states from enacting laws to further its management goals. Thus, this statute does not provide express preemption. Nor does it appear to be in conflict with our Legislature's attempts to govern swamp land. Further, 43 USC 983 explains:

> It shall be the duty of the Secretary of the Interior, to make accurate lists and plats of all such lands, and transmit the same to the governors of the several States in which such lands may lie, and at the request of the governor of any State in which said swamp and overflowed lands may be, to cause patents to be issued to said State therefor, conveying to said State the fee simple of said land.
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> The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming said lands, by means of levees and drains.

The United States Supreme Court has construed the Swamp Land Act as making a "grant in proesenti to each state of land within its limits of the character described" or, stated otherwise, an immediate transfer of interest. *Wright v Roseberry*, 121 US 488, 496; 7 S Ct 985; 30 L Ed 1039 (1887). As a result of the land transfer process described in the statute, we have no choice but to conclude that Congress intended to pass governance of these lands completely into the hands of state legislatures once a patent properly identifying the land issues. See generally *Little v Williams*, 231 US 335, 339; 34 S Ct 68; 58 L Ed 256 (1913); *Wright*, *supra* at 500, 509-510. Field preemption cannot exist under these conditions indicating that the federal government specifically intended *not* to regulate this area of land management.

Our conclusion that the Swamp Land Act does not preempt state environmental laws is consistent with *Mills Co v Burlington & M R R Co*, 107 US 557, 566; 2 S Ct 654; 27 L Ed 578 (1883), in which the United States Supreme Court clarified the relationship between individuals, the states, and the federal government as it pertains to swamp land:

> Upon further consideration of the whole subject we are convinced that the suggestion then made, that the application of the proceeds of these lands to the purposes of the grant rests upon the good faith of the state, and that the state may exercise its discretion as to the disposal of them, is the only correct view. It is a matter between two sovereign powers, and one which private parties cannot bring into discussion. Swamp and overflowed lands are of little value to the government of the

> United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas the state governments, being concerned in their settlement and improvement; in the opening up of roads and other public works through them; in the promotion of the public health by systems of drainage and embankment,--are far more deeply interested in having the disposal and management of them. For these reasons it was a wise measure on the part of congress to cede these lands to the states in which they lay, subject to the disposal of their respective legislatures; and although it is specially provided that the proceeds of such lands shall be applied, 'as far as necessary,' to their reclamation by means of levees and drains, this is a duty which was imposed upon and assumed by the states alone, when they accepted the grant; and whether faithfully performed or not, is a question between the United States and the states; and is neither a trust following the lands, nor a duty which private parties can enforce against the state. [*Mills Co, supra* at 566.]

At the time of the enactment of the Swamp Land Act in 1850, the early reclamation of the lands, by constructing necessary levees and drains, was of great importance to states because of the extraordinary fertility of reclaimed lands and because, when not properly managed, swamp lands could serve as "source" of disease, which we now understand as a place for disease-transmitting insects to breed. *Wright, supra* at 496. As the *Mills Co* decision expresses, the states were, and still are, in the best position to act as stewards for these lands, managing them safely and beneficially through locally relevant laws uncluttered by concerns that may exist at the federal level because of the broad distinctions between the nature of swamp lands in different corners of this vast country.

Indeed, the Delenes do not actually look to federal law as the source of their claimed federal right or duty to drain land, but rather rely on state statutes enacted for the state's disposition of swamplands by sale, e.g., 1858 PA 31, MSA 13.791 *et seq*., and a case, *A P Cook Co v Auditor General*, 79 Mich 100; 44 NW 420 (1889), which held that the state has authority to collect drain taxes from a purchaser of such swamplands. Rather than support the Delenes' position on federal preemption, we find the holding in *A P Cook Co*, regarding the propriety of the drain tax, is entirely consistent with a lack of federal preemption, express or implied, because Congress intended for the states to determine the proper disposition of the lands.

It follows that, even if we were to assume that all alleged environmental law violations were confined to swamp land previously granted to the state under the Swamp Land Act, as the Delenes claim, and if we were further to assume that the Delenes have proper title, federal preemption principles do *not* preclude the state from subjecting the land to the state's environmental laws. Therefore, we hold that the Delenes have not shown that the trial court erred by denying summary disposition under MCR 2.116(C)(4) for lack of subject matter jurisdiction.

C. Other Jurisdictional Claims

The Delenes also raise other jurisdictional claims, concerning the Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq*., Inland Lakes and Streams Act (ILSA), MCL 281.951 *et seq*., MSA 11.475(1) *et seq*. counts in the complaint. We hold

that the Delenes' claims in this regard are without merit. The statutes in question, MCL 691.1202(1); MSA 14.528(202)(1) and MCL 281.963(1); MSA 11.475(13)(1), now codified respectively in the Natural Resources Environmental Protection Act (NREPA) at MCL 324.1701(1); MSA 13A.1701(1) and MCL 324.30112(1); MSA 13A.30112(1), are venue statutes. See *Robinson v Dep't of Transportation*, 120 Mich App 656, 659-660; 327 NW2d 317 (1981). The proper manner for challenging a trial court's denial of a change of venue is to file an interlocutory appeal from a trial court's order denying a motion for change of venue. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996). Because these venue statutes do not provide a jurisdictional basis for voiding the default, we hold that they do not afford the Delenes a meritorious ground on which to ask this Court to reverse the trial court's denial of their motion for summary disposition.[8]

D. Conclusion

The record would certainly allow us to conclude that the Delenes' motion for summery disposition was improper because it was untimely and because the default had not been set aside. Even after examining the substance of the Delenes' arguments, we conclude that the Delenes have not demonstrated any basis for disturbing the trial court's denial of their motion for summary disposition. For this reason, and because the remedies ordered by the trial court have not been challenged by the Delenes, we affirm the final judgment.

Affirmed.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] We include the corporate defendant Richard Delene Contracting, Inc. within the phrase the "Delenes."

[2] The complaint alleged violations of the Wetland Protections Act (WPA), MCL 281.701 *et seq.*; MSA 18.595(51) *et seq.*, Michigan Environmental Protection Act (MEPA), MCL 691.1201 *et seq.*; MSA 14.528(201) *et seq.*, Inland Lakes and Streams Act (ILSA), MCL 281.951 *et seq.*, MSA 11.475(1) *et seq.*, Dam Safety Act (DSA), MCL 281.1301 *et seq.*; MSA. 11.420(1) *et seq.*, Water Resources Commission Act (WRCA), MCL 323.1 *et seq.*; MSA 3.521 *et seq.*, and Soil Erosion and Sedimentation Control Act (SESCA), MCL 282.101 *et seq.*; MSA 13.1820(1) *et seq*. These acts were repealed and replaced with various parts of the Natural Resources Environmental Protection Act (NREPA), MCL 324.101 *et seq.*; MSA 13A.101 *et seq.*, before entry of the final judgment, but MCL 324.102; MSA 13A.102 contained the following savings clause: "The repeal of any statute by this act does not relinquish any penalty, forfeiture, or liability, whether criminal or civil in nature, and such statute shall be treated as still remaining in force as necessary for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of the penalty, forfeiture, or liability."

[3] The complaint included allegations that: (10) in 1981, Richard Delene sought, and received, a permit from the U.S. Corps of engineering to construct two small ponds; (11) after 1981 and before 1990, the

Delenes increased the size of the ponds behind the dams constructed under the Corps of Engineering permits, without obtaining any additional permits; (12) at times after 1982 and before 1989, the Delenes excavated and constructed additional ponds without permits from the Corps of Engineers, the Michigan Department of Natural Resources (the "MDNR"), or any local agency; (13) during the winter of 1989-90, the Delenes dredged the property to create approximately 4.5 miles of ditches without permits from the Corps of Engineers, the MDNR or any local agency; (14) on June 13, 1990, the MDNR received permit applications (MDNR File No. 90-1-72) from Richard Delene for a "pond for wildlife, nesting and habitat improvements" consisting of 18 acres behind a dam; (15) the 18 acre pond application was incomplete; (16) on July 6, 1990, the MDNR requested additional information from Richard Delene with respect to the 18 acre pond application; (17) on June 13, 1990, the MDNR received a permit application (MDNR File No. 90-1-71) from Richard Delene for a wildlife pond, apparently of 90 acres; (18) the 90 acre pond application was incomplete; (19) on July 10, 1990, the MDNR requested additional information from Richard Delene with respect to the 90 acre pond application; (2) by August 30, 1990, sufficient information had been acquired from Richard Delene so that the two applications could be forwarded for a field investigation; (25) on November 9, 1990, the MDNR denied the applications; (29) the MDNR ordered the Delenes to cease and desist unlawful activities; and (30) Richard Delene, through a letter from his attorney dated April 20, 1992, asserted his position that he had received a permit by operation of law and would not further explain his activities or cease and desist from them.

[4] On November 24, 1992, a proof of service was filed by Eugene Hagy regarding his personal service of the complaint, summons, plaintiffs' motion and temporary injunction on the Delenes between November 13 and 17, 1992.

[5] In a supporting affidavit, plaintiffs' attorney averred that attorney Robert Anderson appeared on the Delenes' behalf at a November 25, 1992 show cause hearing and represented that a motion for a change of venue would be filed. However, no answer to the complaint was filed.

[6] With respect to the Delenes' activities, the trial court made the following findings:

> The Court finds that Defendants' violations are willful in that they have engaged in unpermitted construction activities for years. They are either familiar with or charged with knowledge of the regulations governing wetlands, lakes, streams, soil changes, clean water and dam construction. It is beyond question that they are aware of permit obligations when they began their project. They prevented Department inspectors from obtaining information needed to evaluate the project and their permit applications.
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> They continued their project after the Department of Natural Resources advised them, in November 1990, that they lacked required permits. They continued their unpermitted activities after the Department ordered them to cease and desist in April, 1992. It is manifest that they continued their unpermitted activities and attempted to prevent access to the project even after this Court executed its preliminary injunction in November 1992. They continued even after the Court specifically authorized access for discovery and for compliance inspections. They have violated the Court's preliminary injunctions, even those entered with their consent.

[7] Indeed, while not argued by plaintiffs in this appeal, plaintiffs did argue in the written response to the Delenes' motion that the motion should not be heard on the authority of both MCR 2.603(A)(3) and the untimeliness of the motion under the scheduling order. It appears from the trial court's ruling that it considered both of these claims, although it also addressed the merits of the Delenes' claimed defenses:

> Well, let me just say this, I'm not sure the motion is properly before the Court. This Defendant is in default in several ways, and so, I don't know that the Court should probably even take up the motion. Secondly, the motions are clearly untimely presented after the deadlines established by the Court's scheduling order. I don't believe I have been requested since the last scheduling order to amend it by anyone. So, the Defendant to that extent is bound by the scheduling order. But in any case, I will proceed to discuss the merits.
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> If these are valid defenses, I think they have been waived because they weren't properly pled in the first instance or the second instance. They have not been preserved at this point.
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> * * *
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> I don't believe that there is any proper basis for this Court to grant the motion, even if it was appropriate for me to consider it at this point in time, which it is not. So, in its entirety the motion is denied.

[8] We also hold that the other non-jurisdictional claims raised by the Delenes concerning the various claims in plaintiffs' complaint similarly fail to establish any basis for disturbing the default. As noted above, we are under no obligation to address these issues given the procedural defects preceding and affecting the motion for summary disposition.