

STATE OF MICHIGAN
COURT OF APPEALS

TRANSAMERICA CONSTRUCTION
COMPANY and PETE STANAJ,

UNPUBLISHED
February 11, 2000

Plaintiffs/Counterdefendants-
Appellees,

v

No. 211943
Wayne Circuit Court
LC No. 97-704817 CK

KEVIN KULYK and CHERYL KULYK,

Defendants/Counterplaintiffs-
Appellants.

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from an order of default judgment and dismissal of their counterclaim. We reverse and remand for further proceedings before a different judge.

Defendants' home was destroyed by fire. Consequently, defendants entered into a fire repair agreement with plaintiff, Transamerica Construction Company (hereinafter "Transamerica"), to make all necessary repairs. This agreement provided that plaintiff Transamerica would receive insurance proceeds in exchange for all services rendered. On February 18, 1997, plaintiff Transamerica filed a complaint alleging that defendants breached the contract after the repairs had been substantially completed and that defendants were unjustly enriched as a result of their conduct. On March 7, 1997, defendants filed a counterclaim which added plaintiff Pete Stanaj, a corporate officer of plaintiff Transamerica. The counterclaim alleged breach of contract, breach of express warranty, breach of implied warranty, negligence, and violation of the Michigan Consumer Protection Act.

On December 18, 1997, a settlement conference was held before Judge John Gillis, Jr. While the substance of the settlement conference was not preserved in the record on appeal, the parties allege that Judge Gillis ordered that plaintiffs would complete the repairs to the defendants' home, and defendants were to allow plaintiffs access to the home to perform the necessary work.¹

On May 6, 1998, the parties appeared before the trial court for a settlement conference and show cause hearing requested by plaintiffs.² Plaintiffs asserted that defendants refused to allow “corrections” to the property. Defendants responded that they gave plaintiffs continuous access to the property for a three-month period. During that time, the property failed inspection on seven different occasions, with the most recent failure occurring on May 5, 1998. Defendants asserted that plaintiff Stanaj had recently threatened defendant Cheryl Kulyk as well as the City of Detroit Inspector. The threat was allegedly preserved on tape and delineated in the inspector’s report. Consequently, defendant Cheryl Kulyk obtained a personal protection order which precluded plaintiff Stanaj from returning to the property. Despite the threat, defendants allowed plaintiffs on the property until the middle of April and on May 5, 1998, to allow the most recent inspection. Based on those facts, defendants asserted that they had substantially complied with the contract while plaintiffs were unwilling or unable to complete the project in a timely or workmanlike manner. Defendants requested a trial on the merits.

Judge Gillis did not address the factual allegations raised by defendants, but merely inquired how long it would take plaintiffs to complete the job. Plaintiffs’ counsel represented that it would take one week of forty-hour access to complete the work. Judge Gillis stated that defendants had been cooperating and would have to allow plaintiffs to complete the work. Defendant Kevin Kulyk responded that he would not allow plaintiff Stanaj into the home. Judge Gillis stated that defendants had to comply with the order *within ninety days* or they would be found in contempt and sent to jail. Counsel for defendants asked Judge Gillis to provide a factual finding or legal basis for his conclusion that defendants had to allow plaintiff Stanaj access to their property following a threat to their safety. Judge Gillis responded that if the court’s order was not complied with, a default judgment would enter. A written order evidencing the trial court’s ruling was not filed in the lower court record.

Although Judge Gillis had ruled that defendants had ninety-days to comply on May 6, 1998, the parties appeared before Judge Gillis on May 13, 1998, for what plaintiffs deemed an “adjourned motion” to hold defendants in contempt. Defendants requested that Judge Gillis make findings of fact and conclusions of law on the record to justify a default judgment and dismissal of the counterclaim. Judge Gillis did not respond to defense counsel’s request, and the following exchange took place between Judge Gillis and defense counsel:

[JUDGE GILLIS]: You admit your clients violated the [c]ourt’s order and would not allow Transamerica [sic] to come in to complete four hours of work which the [c]ourt ordered one week ago? Answer my question? Did you allow them in or not?

[DEFENDANTS’ COUNSEL]: We did not allow them in.

[JUDGE GILLIS]: Then it’s a direct violation of this [c]ourt’s order of one week ago. The motion for default judgment is granted as to Transamerica [sic]. The motion to dismiss [d]efendant’s [sic] counterclaim is granted. The [c]ourt will order the money in escrow to be transferred to Transamerica [sic].

[DEFENDANTS' COUNSEL]: Judge, I want to make a record on this for appeal. What are your findings of fact and conclusions of law? We need to make a record on that.

[JUDGE GILLIS]: We've made a record. The [d]efendants violated the [c]ourt's order. I've granted default judgment to the [p]laintiffs, Transamerica. I've made my ruling, counsel.

Judge Gillis later denied motions for relief from judgment, reconsideration, and stay pending appeal.

Defendants argue that their due process rights were violated and the trial court abused its discretion in granting a default judgment without considering other available sanctions. We agree. Although the trial court stated that it was granting the motion for default judgment and motion to dismiss, there were no such motions pending. Rather, the issue before the trial court was whether defendants should be held in contempt. Contempt which is committed in the immediate view and presence of the court may be summarily punished by fine or imprisonment or both. MCL 600.1711(1); MSA 27A.1711(1). When contempt is committed outside the immediate view and presence of the court, it may be punished by fine or imprisonment or both, *after* proof of the facts charged have been made by affidavit or other method and an opportunity to defend. MCL 600.1711(2); MSA 27A.1711(2). In the present case, the alleged contempt did not occur in the immediate presence of the trial court. Accordingly, the initiation of the contempt proceeding should have been initiated through an ex parte motion supported by an affidavit of facts showing the alleged contemptuous conduct. MCR 3.606(A); *In re Contempt of Barnett*, 233 Mich App 188, 192-193; 592 NW2d 431 (1998). Once accused of contempt, defendants were entitled to be informed of the nature of the offense, entitled to secure time to prepare a defense including the production of witnesses, and entitled to secure the assistance of counsel. *In re Collins*, 329 Mich 192, 196; 45 NW 31 (1950). Here, the trial court did not advise defendants of the nature of the contempt proceeding, that is, whether it was a civil or criminal contempt proceeding, and did not allow defendants the opportunity to prepare a defense. Although defendants indicated that they had documentary evidence to justify their conduct in excluding plaintiffs from their home, the trial court did not address or hear any defense. Accordingly, the trial court's entry of a default judgment and dismissal of the counterclaim as contempt sanctions for violation of the "court's order" is reversed.

Furthermore, the trial court's conclusion that defendants were in violation of its orders is without merit. An order does not become effective until it is reduced to writing and signed. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Irrespective of whether defendants agreed to any compromise to allow plaintiffs into their home, an order evidencing any agreement was not filed in the lower court record. Additionally, an order that defendants had to continue to allow plaintiffs access to the home was not reduced to writing. Accordingly, the trial court erroneously held defendants in contempt of orders which were not reduced to writing. Even assuming that the trial court's oral rulings were effective when rendered, the trial court did not properly enforce the oral ruling because it allowed defendants *ninety* days to comply. A mere seven days had passed when defendants were held in contempt.

The trial court's orders are vacated. After a review of the record, we find that the case should be assigned to a different trial judge on remand. MCR 7.216(A)(7); *DeRush v DeRush*, 218 Mich App 638, 643; 554 NW2d 322 (1996).

Reversed and remanded for proceedings consistent with this opinion before a different trial judge. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

¹ The parties dispute what transpired at the settlement conference. Defendants contend that Judge Gillis sua sponte ordered plaintiffs to complete the repairs and that defendants would allow them to do so. Defendants contend that they initially objected to this arrangement, but relented. Plaintiffs contend that Judge Gillis proposed that work would be completed as an interim compromise to which neither party objected. Plaintiffs contend that this compromise was placed on the record, but were advised that no record existed for that date. There is no transcript of the settlement conference in the record on appeal, and there is no written order to evidence any ruling which resulted at the settlement conference.

² On April 22, 1998, plaintiffs filed a document entitled "Plaintiff's [sic] petition for order to show cause for willful violation of Judge Gillis' *instructions*."