

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CRYSTAL DEVELOPMENT, LIMITED,

Plaintiff-Appellee,

v

SHELDON A. HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

December 12, 2000

No. 222579

Iron Circuit Court

LC No. 99-001339-CH

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment quieting title and ordering partition of real property once owned by him. Defendant challenges the trial court's denial of his motion to set aside the default entered against him for failing to timely file an answer, arguing that he had good cause and that there was a showing of a meritorious defense to the complaint sufficient to set aside the default. We reverse.

Defendant, an Illinois resident, in 1965 acquired title to property located in Iron County. In 1992, the taxes on the property became delinquent. On May 2, 1995, the tax lien on the property was sold to Harrison and Tinti, a co-partnership consisting of attorneys John L. Harrison and Steven J. Tinti. A tax deed was issued to Harrison and Tinti in 1996. In February 1997, Harrison and Tinti quit claimed their interest in the property to plaintiff for the sum of \$1. In addition to serving as plaintiff's attorney, Tinti was plaintiff's secretary and treasurer.

In June 1998, more than three years after the property had been sold at tax sale, Tinti signed as secretary and treasurer of plaintiff, the statutory "Notice by Persons Claiming under Tax Deed" notifying defendant of his redemption rights. The notice was sent by registered mail and defendant signed a receipt. The Iron County treasurer verified receipt of this service, and the following January, a copy of the notice was filed with the treasurer to establish the passing of the six-month plus thirty-day period that defendant had to redeem the property.

On January 18, 1999, plaintiff filed a complaint to quiet title and to partition the property. Personal service was made at defendant's place of business on January 25, 1999. Since defendant was served out of state with the summons, he had twenty-eight days under MCR 2.108 to answer the complaint, or until Monday, February 22, 1999. However, defendant did not file an answer by that date. The next day, February 23, 1999, plaintiff filed an application for default

and non-military affidavit seeking entry of default against defendant for failure to appear, plead, or otherwise defend the complaint brought against him. The Iron County clerk entered a default that same day.

Meanwhile, before the expiration of the time to answer the complaint, defendant contacted attorney John L. Harrison, a co-partner in Harrison and Tinti, the original purchasers of the tax lien on the land, seeking representation. According to defendant, between the time he contacted Harrison and the expiration of the time for answering the complaint, Harrison realized that there was a conflict of interest in his representation of defendant. Defendant was unable to find adequate representation until after the time for filing an answer to the complaint had expired. Defendant subsequently retained counsel, and on April 1, 1999 – thirty-eight days after the time to answer had expired – defendant’s counsel filed a motion to set aside the default and an answer to the complaint.

Defendant argues that the trial court erred in denying his motion to set aside the default because it failed to consider whether defendant had shown good cause and a meritorious defense in his affidavits. MCR 2.603(D)(1) provides that “[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.” The requirements of this court rule, that the moving party demonstrate good cause and show a meritorious defense, are conjunctive requirements that must be satisfied by separate inquiries to set aside a default. *Alken-Ziegler Inc v Waterbury Headers Corp*, 461 Mich 219, 231-234; 600 NW2d 638 (1999); *Barclay v Crown Building & Development, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000). Unless there has been a clear abuse of discretion, a trial court’s order denying a motion to set aside an entry of default will not be set aside. *Alken-Ziegler, supra* at 227.

Here, the record reveals that in refusing to set aside the default in this case, the trial court appeared to focus on the good cause inquiry, relying exclusively on the fact that defendant’s answer was filed more than a month late. However, the circuit court’s mere recitation of the time that had passed since the expiration for filing an answer was insufficient to fulfill the requirements of MCR 2.603. *Alken-Ziegler, supra* at 231-234; see *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 49; 445 NW2d 186 (1989) (The trial court failed to exercise its discretion at all where, based on an erroneous assumption that it had no authority to set aside a default more than one year after it was entered, it denied defendant’s motion to set aside the default solely because it was filed more than one year after entry of default.).

We find that the trial court abused its discretion when determining if good cause existed on the basis of its limited analysis of the amount of time transpiring from receipt of the summons and complaint to the entry of default to defendant’s filing of both a motion to set aside the default and an answer to the complaint. The record reveals that defendant attempted to obtain counsel before an answer was due, but that defendant’s counsel of choice discovered a conflict of interest and declined to represent defendant in the matter. Defendant thereafter sought and obtained alternative counsel, but the time to answer the complaint had expired. Defendant’s alternative counsel filed a motion to set aside the default and an answer to the complaint thirty-eight days after the time to answer had expired. On these facts, we conclude that defendant had a reasonable excuse for his failure to file an answer, and therefore good cause existed. See

*Bednarsh v Winshall*, 364 Mich 113, 114; 110 NW2d 729 (1961) (Where the defendant had to seek alternative counsel because his attorney also represented the plaintiff, and the defendant's second attorney filed the motion to set aside the default within 15 days after default and three days after judgment, the Supreme Court concluded that "defendant acted with reasonable care and dispatch, that the minor delay on the part of the defense resulted from confusion in the changing of attorneys and that this was seized upon with undue haste by plaintiff."). Because we conclude that the trial court abused its discretion in determining good cause and failed to properly consider the second requirement of MCR 2.603(D)(1), whether defendant had asserted a meritorious defense, we must reverse for that determination and any further action necessary as a result of that determination.

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

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra