STATE OF MICHIGAN

COURT OF APPEALS

VICKY VIVIA SAITES,

Plaintiff-Appellee,

v

ELIAS ARISTOTLIS PAPAIOANNOU,

Defendant-Appellant.

UNPUBLISHED
February 27, 2001

No. 215487
Genesee Circuit Court
LC No. 97-186014-DM

Before: Meter, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying his motion to set aside a default judgment of divorce pursuant to MCR 2.603(D) and MCR 2.612(C). We reverse and remand.

Plaintiff obtained a default judgment of divorce from defendant, who resides in Greece. Defendant moved to set aside the judgment, asserting that the court lacked personal jurisdiction, that he did not have notice of the entry of default, and that the property settlement was grossly inequitable. "The question whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion." *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996).

A motion to set aside a default or default judgment shall be granted if the court did not obtain jurisdiction over the defendant. The defendant bears the burden of proving that he was not served with process. Where the return of service is regular on its face, mere denial of service is insufficient to establish lack of jurisdiction. MCR 2.603(D)(1); *Ins Co of North America v Issett*, 84 Mich App 45, 49; 269 NW2d 301 (1978); *James v James*, 57 Mich App 452, 454; 225 NW2d 804 (1975). Otherwise, the motion shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). Good cause sufficient to set aside an entry of default includes such matters as (1) a substantial defect or irregularity in proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. *Harrison v VMC Building Corp*, 71 Mich App 458, 460; 248 NW2d 584 (1976). The failure to provide such notice constitutes a substantial defect in the proceedings meriting a finding of good cause. *Bradley v Fulgham*, 200 Mich App 156, 158; 503 NW2d 714 (1993).

Because defendant lived abroad, service had to be effectuated in a manner provided by the Hague Convention, which preempts any conflicting provisions of state law. The Convention governs both service of process and the sending of subsequent documents after service of process has been obtained. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 392-393; 484 NW2d 718 (1992). Both the United States and Greece are signatories to the Convention. Plaintiff bypassed the central authority in favor of the method of service authorized under Article 10 of the Convention, which provides:

> Provided the State of destination does not object, the present Convention shall not interfere with --
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Plaintiff made service by mail and by posting. Because Greece objected to Article 10(a) of the Convention, mailing the summons and complaint was not a legal means of effectuating service. Plaintiff retained a local court clerk to effectuate service of process on defendant. He was unable to serve defendant personally and thus posted the documents on his door "accordi[n]g to 123 code." Nothing in the record indicates what the 123 code is. Because plaintiff could not legally serve defendant by mail and plaintiff has not shown that the 123 code permits process servers to post the summons and complaint at their discretion, the proofs call the validity of the return of service into question. While technical noncompliance with the rules governing service of process is not grounds for declaring the service void unless the defendant did not have actual notice of the proceeding within the time allowed for service of process, MCR 2.105(J)(3), there is nothing in the record to show that defendant had actual knowledge of the suit before the summons expired. Therefore, whether the trial court actually acquired jurisdiction over defendant is questionable. In addition, the service of the notice of entry of default was defective because it was done by mail, a method not permitted by Greece, and there is nothing in the record to show that defendant had actual notice of the entry of default.

Given the defects in service in this case, we reverse the order of the circuit court and remand for an evidentiary hearing regarding the issue of good cause for setting aside the default, i.e., whether the court acquired jurisdiction over defendant and, if so, whether defendant received notice of the action during the life of the summons and whether defendant received notice of the default.

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

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Peter D. O'Connell