STATE OF MICHIGAN

COURT OF APPEALS

ERIC R. WIGHTMAN,

Plaintiff-Appellee,

v

KARRIE J. WIGHTMAN,

Defendant-Appellant.

UNPUBLISHED
September 17, 2002

No. 238041
Tuscola Circuit Court
Family Division
LC No. 00-019488-DM

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from the parties' default judgment of divorce. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

Plaintiff sued defendant for divorce on November 21, 2000, shortly after the parties separated. They had been married for almost five years and had three children. According to defendant, plaintiff took custody of the children on New Year's Eve 2000. Defendant was served with a copy of the summons and complaint on January 4, 2001 at 5:00 p.m.

In the interim, on December 14, 2000, the family court entered an ex parte order requiring both parties to attend a custody investigation conference at the office of the friend of the court (FOC) on January 4, 2001, at 10:00 a.m. The order included a notice that the failure to attend the conference could result in the entry of orders of custody or other relief in a party's absence. Defendant was served with a copy of the order by mail.

Defendant did not attend the January 4, 2001 friend of the court conference. The following day, she was served with a proposed temporary order granting her physical custody of the children three weekends per month, along with parenting time Wednesday evenings, and ordering her to pay weekly child support of $113 based on her imputed income as a nurse's aide. The proposed order included a notice that she had twenty-one days to object. Defendant did not do so and the family court entered the order on January 25, 2001.

The office of the clerk of the court entered a default of defendant on February 2, 2001, and plaintiff filed a notice of entry of default on February 6, 2001. The court subsequently

noticed the case for a June 7, 2001 entry of judgment. The hearing was later re-noticed for May 31, 2001.

At some point, defendant's parents supplied her money to retain counsel, and on May 21, 2001, the attorney filed an appearance and motion to set aside the default. At a May 31, 2001 hearing on the motion, defendant admitted that she received the order to appear at the FOC conference, but she said that she was advised by a legal aid attorney (who later said she could not represent her) not to attend because she had not yet been served with a summons and complaint. Defendant also said that she had not worked since the birth of the parties' first child and she had allowed her professional license to lapse. She claimed she was unable to afford an attorney and she explained that she did not object to the temporary custody order because she did not know what to do. Her attorney argued that the default should be set aside because there were children and property involved.

Plaintiff countered that defendant failed to establish manifest injustice or a meritorious defense warranting setting aside the default. With regard to the latter, he testified that the divorce was prompted by defendant's extramarital affair and that she had asked to see the children only twelve times in the five months since he had primary custody. Plaintiff asked that the family court to impose a minimum of $250 in costs to cover his attorney fees if the court decided to set aside the default.

On June 4, 2001, the trial court entered an opinion setting aside the default and giving defendant until June 29 to answer, but the court assessed defendant $300 in costs to be paid before she filed an answer. The opinion read in part:

> As a practical matter, it appears that Plaintiff [sic] has sat upon her rights until the zero hour. As suggested by Plaintiff in his well written brief, Defendant has shown no defect or irregularity in the proceedings, and there is no reasonable excuse for her failure to answer within 21 days period [sic]. If the proofs would support Plaintiff's representation regarding defendant's conduct, neither would manifest injustice result with regard to property distribution or child custody. However, in divorce actions, this court believes that its first and foremost responsibility is to the children. Therefore, the court believes that it would be just and equitable to allow defendant an opportunity to argue her case before judgment is entered in order to prevent any possibility of an improper award of custody. For that reason and that reason alone, the court grants the motion to set aside the default provided, however, that Defendant is assessed the sum of $300 in costs for the expenses resulting to Plaintiff as a result of having to answer her motion. . . . It is further the decision of the court that an answer to the complaint must be filed on or before June 29, 2001 and further provided that said answer may not be filed until the costs assessed have been paid in full to Plaintiff through Plaintiff's counsel.

Defendant did not pay the costs or answer within the allotted time. When plaintiff's counsel submitted a proposed order reflecting the opinion, defense counsel filed an objection to entry of order and a motion for reconsideration and recusal arguing that the $300 was improperly assessed. Defendant further alleged that she had no funds to pay the costs and while she wished to pay using funds out of an $11,000 check the parties received from the June 8 sale of the

marital home, plaintiff had withheld the money so that he could get a default judgment. The family court denied the motions, finding that the order conformed to the opinion, that there was no palpable error in assessing $300, and that it was not biased against defendant. In reaching that conclusion the family court noted that the check should be put in trust and earmarked for covering the marital debts, which plaintiff testified exceeded the amount of the check. By order entered September 12, 2001, the family court allowed plaintiff to take a default judgment. A second default was entered and the default judgment was finally entered the following November.

As unusual as the proceedings in this case may have been, especially with respect to the timing of the first custody meeting with the FOC, defendant does not raise any procedural or substantive issues related to the divorce or custody arrangement in this case. Rather, defendant now argues that the family court erred in ordering her to pay $300 before it would set aside the default.

II. Standard Of Review

Normally, this Court reviews a ruling on a motion to set aside a default or default judgment for an abuse of discretion.[1] We conclude that the same standard applies in this case in light of MCR 2.603(D)(4)'s discretionary language permitting the court to impose other conditions as it deems proper.

III. Conditions For Setting Aside A Default

MCR 2.603(D)(4) provides:

> 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.

MCR 2.625(D) governs costs when a default or default judgment is set aside and provides in pertinent part:

> (1) If personal jurisdiction was acquired over the defendant, the order must be conditioned on the defendant's paying or securing payment to the party seeking affirmative relief the taxable costs incurring in procuring the default or the judgment and acting in reliance on it[.]

While defendant contends that she had no money to pay the assessed costs to cover plaintiff's attorney fees, she admits that she was no longer staying at home with the parties' children . Nor did she assert that she was incapable of working, except for a period after entry of the order when she underwent surgery. Furthermore, her motion to set aside the default focused largely on plaintiff's alleged misconduct rather than showing that defendant had good cause and a

[1] See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

meritorious defense.[2] Her motion also included some factual inaccuracies and was rather inflammatory, justifying a vigorous response by plaintiff's attorney. While we understand defendant's frustration in not participating in the formulation of the divorce judgment, her nonparticipation was the product of her own inaction. Under these circumstances, the family court did not abuse its discretion in ordering defendant to pay $300 in costs, representing fees for plaintiff's attorney's time in defending the motion, as a condition of setting aside the default.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

[2] MCR 2.603(D)(1).