STATE OF MICHIGAN

COURT OF APPEALS

BARBARA BOWLING,

Plaintiff-Appellant/Cross-Appellee,

v

#707 AUTOMOTIVE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 25, 2003

No. 241231
Wayne Circuit Court
LC No. 01-135825-AV

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a circuit court order reversing a default judgment that the district court entered against defendant. Defendant cross-appeals the circuit court's denial of its request for attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff sued several defendants in district court, seeking damages for alleged problems with a van that she purchased from one of the defendants. Plaintiff amended her complaint to add defendant, an Indiana business that had performed some conversion work on the van before plaintiff purchased it. Although the other defendants were dismissed, defendant's failure to appear led to a default judgment. Defendant filed a motion for relief from judgment, which was granted by the district court, but limited to the issue of damages. Eventually, the district court entered another judgment in favor of plaintiff. The circuit court reversed, finding merit in defendant's contention, raised for the first time on appeal, that the district court lacked personal jurisdiction over defendant.

On appeal, plaintiff challenges the circuit court's ruling that the district court lacked personal jurisdiction over defendant. As a question of law, we review de novo whether a trial court had personal jurisdiction over a party. *Poindexter v Poindexter*, 234 Mich App 316, 319; 594 NW2d 76 (1999).

It is well established that the defense of lack of personal jurisdiction is waived if it is not raised in the defendant's first motion for summary disposition or its first responsive pleading. MCR 2.116(D)(1); *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993). Here, because of the default, defendant never filed a document meeting the definition of a responsive pleading, MCR 2.110(A), nor did defendant move for summary

disposition. Further, a general appearance alone is insufficient to waive personal jurisdiction as a defense. MCR 2.117(A)(2); see also *Maxman v Goldsmith*, 55 Mich App 656, 658; 223 NW2d 113 (1974).

However, a defendant "who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections." *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993).[1] "Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance." *Id.* at 181-182. As we have explained previously, it would be unreasonable to find that a defendant who defended on the merits did not submit to jurisdiction simply because it did not actually file an answer or a summary disposition motion. See *Gougeon Bros, Inc v Phoenix Resins, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2000 (Docket No. 211738).

Here, the initial default judgment was entered in November 1999. On December 8, 1999, defendant filed a motion for relief from judgment, which did not raise the personal jurisdiction issue. On January 31, 2000, the district court set aside the damages awarded in the default judgment. Over the next eighteen months, defendant filed several documents, including another motion for relief from judgment. At no time did defendant bring the personal jurisdiction issue to the district court's attention. In light of defendant's litigation activity, we believe that defendant submitted to the personal jurisdiction of the circuit court. *Penny, supra* at 181-182. Defendant could have raised the personal jurisdiction issue in its initial motion for relief from judgment. Instead, defendant opted to challenge the merits of the default judgment. Therefore, we agree with plaintiff's contention that defendant's challenge to the district court's personal jurisdiction over defendant was untimely. *Id.* Consequently, the circuit court erred in ruling that the district court lacked personal jurisdiction over defendant.[2]

Defendant argues on cross-appeal that the circuit court should have awarded attorney fees as a sanction for filing a frivolous complaint; however, because the circuit court erred in finding for defendant, defendant is not properly the prevailing party. See MCR 2.625(A)(2); MCL 600.2591(1). Therefore, we affirm the circuit court's denial of defendant's request for attorney fees.

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[1] Although *Penny* applied to service of process objections, its language applies to personal jurisdiction challenges as well.

[2] In light of our ruling, we need not address plaintiff's contention that the circuit court improperly accepted defendant's unsupported assertions regarding its connections with this state.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad