STATE OF MICHIGAN

COURT OF APPEALS

LORI ANN JONES-JUDGE,

Plaintiff-Appellee,

V

JOSEPH JUDGE, JR.,

Defendant-Appellant.

UNPUBLISHED
December 19, 2006

No. 261481
Washtenaw Circuit Court
LC No. 02-000551-DM

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the default judgment of divorce entered against him and the subsequent denial of his motion to set aside the default judgment. The default judgment was entered after defendant failed to appear at trial. On appeal, he challenges the portion of the default judgment pertaining to the division of property. We affirm.

Plaintiff and defendant were married on August 6, 1988, and plaintiff filed for divorce in March 2002. Pursuant to a stipulation of the parties, the scheduled trial date of March 6, 2003 was adjourned by the trial court to April 24, 2003. At the time of the stipulation between the parties, defendant was not represented by counsel, and defendant authorized plaintiff's counsel to sign in his (defendant's) behalf. In addition, pursuant to the stipulated order, defendant was required to respond to plaintiff's interrogatories and request for his financial records.

Although his newly hired counsel was present, defendant failed to appear at trial and plaintiff requested entry of a default judgment. Defendant contends that he was informed by plaintiff's counsel that the new trial date was April 29, 2003, and that he did not receive written notice of the new trial date because it was sent to an incorrect address.

Noting that defendant had apparently given the incorrect address to two different people, the trial court found that, even if defendant did not receive notice from plaintiff's counsel regarding the new trial date, he should have contacted the court or counsel regarding the requested adjournment. Accordingly, the trial court granted the default and permitted plaintiff to proceed with her case. Defendant subsequently moved to set aside the default pursuant to MCR 2.603(D)(2), arguing that there was good cause for his failure to appear because he thought the trial was scheduled for April 29, 2003.

Despite concluding that there was "weak" evidence that defendant had demonstrated good cause to set aside the default judgment, the trial court agreed to set aside the portion of the judgment relating to the division of property and have a full hearing on the issue on the condition that defendant provide full and complete answers to plaintiff's interrogatories and pay plaintiff's counsel $1000 in costs and fees within two weeks.

Six months later, after a hearing on defendant's third motion to set aside the default judgment, however, the trial court denied defendant's motion, noting that, even if his interrogatory answers were satisfactory, defendant had failed to make the $1000 payment for costs and fees that was ordered as a condition of setting aside the default judgment. On February 23, 2005, the trial court entered an order completely reinstating the property division of the May 22, 2003 judgment of divorce.

On appeal, defendant first argues that the trial court erred by denying his motion to set aside the default judgment. We disagree. A trial court's ruling on a motion to set aside a default judgment will be reversed only if there is a clear abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). The standard of review is highly deferential and, "[w]here there has been a valid exercise of discretion, appellate review is sharply limited." *Id.* at 227-228.

Pursuant to MCR 2.603(D), a motion to set aside a default judgment should be granted only on a showing of good cause and the filing of an affidavit of facts showing a meritorious defense. *Alken-Ziegler*, *supra* at 223. Good cause for setting aside a default judgment exists if (1) there is a substantial irregularity or defect in the proceeding on which the default is based, or (2) there is a reasonable excuse for failure to comply with the requirements that created the default. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 531; 672 NW2d 181 (2003).

Despite its determination that there was no good cause to set aside the default judgment, the trial court agreed to do so provided that defendant fully responded to plaintiff's interrogatories and paid $1000 in costs and fees to plaintiff's counsel within two weeks. Pursuant to MCR 2.603(D)(4), an order setting aside a default judgment must be conditioned on the payment of costs incurred by the other party in reliance on the judgment, and the order "may also impose other conditions the court deems proper, including a reasonable attorney fee." Given that the order conditionally setting aside the default judgment was not entered until October 2003, it is clear that defendant did not comply with the conditions imposed by the trial court by June 25, 2003, as originally required. Although the trial court was apparently willing to give defendant additional time to comply, he had failed to do so by January 2004. Therefore, even if there was good cause to set aside the default judgment, the trial court correctly refused to set it aside after defendant failed to comply with the conditions imposed by the trial court.

Further, to the extent that the trial court's decision not to set aside the default judgment was based on its conclusion that defendant had not demonstrated good cause, we conclude that the trial court acted within its discretion. Under some circumstances, failure to mail a summons to the correct address may constitute a reasonable excuse for failure to appear, and therefore provide good cause for setting aside the default. See *Mason v Marsa*, 141 Mich App 38, 41-42; 366 NW2d 74 (1985). In this case, however, the trial court did not find defendant credible with regard to his assertion that the address used by plaintiff's counsel was incorrect. This Court

gives "special deference" to findings of the trial court that are based on an assessment of a witness's credibility. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997).

Further, despite retaining an attorney, defendant still had not complied with plaintiff's discovery requests by the date of trial, even though the parties were ordered to do so as early as December 2002. The trial court may reasonably have concluded that defendant was deliberately delaying or avoiding the divorce proceedings, and a default judgment is an appropriate remedy in such circumstances, given that one of the purposes of the default procedure is to prevent a "procrastinating defendant from impeding the plaintiff in the establishment of his claim." See *Mason, supra* at 41. Therefore, particularly in light of the deference afforded a trial court's decision regarding a motion to set aside a default judgment, we conclude that the trial court did not err in denying defendant's motion to set aside the default judgment. See *Alken-Ziegler, supra* at 227-228.

Defendant next argues that the division of property in the default judgment was inequitable. Specifically, he challenges the award of the entire marital home and fifty percent of his business interest to plaintiff. We disagree. The circuit court's findings of fact with regard to the division of marital property are reviewed for clear error. *Byington v Byington*, 224 Mich App 103, 109; 168 NW2d 141 (1997). If the findings of fact are upheld, this Court then determines whether the ultimate dispositional ruling was fair and equitable in light of those facts. *Id.* at 109. The dispositional ruling is discretionary and should be reversed only if this Court is left with the firm conviction that the distribution was inequitable. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003).

When apportioning a marital estate, the goal of the court is to reach an equitable division in light of all the circumstances. *Byington, supra* at 114. Although each spouse need not receive a mathematically equal share, "significant departures from congruence must be explained clearly by the court." *Id.* at 114-115. Relevant factors include "the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance." *Id.* at 115, citing *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). The weight given to each factor need not be equal and will vary from case to case depending on the circumstances. *Byington, supra* at 115. Assets earned by one spouse during the marriage are presumed to be marital property and therefore subject to equitable division. See *id.* at 112-113.

With the exception of the award of the entire marital home to plaintiff, the distribution of property was roughly equal, including the award of 50 percent of defendant's business interest to each party. We conclude that the trial court did not err in awarding 50 percent of defendant's interest in his business to plaintiff. The business was an asset that appreciated in value during the marriage, and plaintiff testified that she assumed a greater share of the responsibility for their children so that he could devote more time it. See *Hanaway v Hanaway*, 208 Mich App 278, 293-294; 527 NW2d 792 (1995).

With regard to the marital home, the trial court did not divide the property equally between the parties. The trial court stated when it awarded the entire home to plaintiff that it "would have been in a better position to formulate an equitable division of property if information had been given by [defendant]."

A trial court is generally required to make findings of fact with regard to those factors relevant to reaching an equitable division of property. *Gates, supra* at 424. In cases in which property is distributed pursuant to the consent of the parties or by default, however, concerns about fairness and equity "are less salient." *Applekamp v Applekamp*, 195 Mich App 656, 661; 491 NW2d 644 (1992). Further, when the lack of fact-finding is due to a defendant's default, the defendant cannot later complain that the trial court erred in its factual findings, and a party's failure to comply with discovery is a relevant factor in determining an equitable division of property. See *Draggoo, supra* at 430. Given that the limitations on the trial court's findings of fact were attributable to defendant, we conclude that the division of property was sufficiently fair and equitable. Plaintiff was awarded custody of the children and testified that it would be in their best interests to remain in the home to which they were accustomed. Further, as noted by the trial court, there was only modest equity in the home and a fairly large debt. We therefore conclude that the trial court did not abuse its discretion in its division of property.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto