

STATE OF MICHIGAN
COURT OF APPEALS

JERRY HILL,

Plaintiff-Appellee,

v

OSCAR ROWLS,

Defendant-Appellant.

UNPUBLISHED

February 5, 2009

No. 282138

Oakland Circuit Court

LC No. 2006-074491-NO

Before: Zahra, P.J., and O'Connell and Hood, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order granting plaintiff's motion for reconsideration of an order setting aside a default judgment. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

On May 11, 2006, plaintiff filed a complaint alleging that on September 6, 2004, he was a resident of an adult foster care home owned by defendant. He alleged that someone pounded on the front door of the home at about 3:00 a.m., waking him up. Plaintiff claimed that he opened the front door, and men with baseball bats assaulted him. Plaintiff suffered various injuries as a result. According to plaintiff, no supervisory personnel were on the premises at the time of the alleged assault. Plaintiff alleged that as a licensed foster facility operator, defendant had a statutory duty to protect plaintiff. MCL 400.722. Plaintiff also alleged that defendant was obligated to protect him because there existed a special relationship between plaintiff and defendant. Defendant did not respond to the complaint and on March 1, 2007, the trial court entered a default judgment against defendant in the amount of \$500,000.

On August 13, 2007, defendant moved for relief from judgment pursuant to MCR 2.612(C) on the grounds of excusable neglect and plaintiff's misrepresentations. The motion stated that defendant, who was 81 years old, was not competent to understand the nature of the

complaint served on him.¹ The motion also asserted that the statutory provisions governing the operation of licensed adult foster care homes did not apply because defendant did not own or operate a licensed adult foster care home, but merely rented out rooms in the home.² The motion also noted that while plaintiff alleged in the complaint that he was attacked in the home owned by defendant, plaintiff told the police that he was attacked on the street. Defendant concluded that the absence of any statutory duties and plaintiff's misrepresentations of fact constituted a meritorious defense to the action.

In response, plaintiff noted that after the complaint was served but before the default was entered, defendant's daughter informed plaintiff's counsel that she would not turn over the suit to defendant's insurer because she did not believe that defendant had any liability for the incident. In addition, plaintiff asserted that defendant had made no showing that he had a mental disability when he was served with the complaint or when the default judgment was entered.

The trial court took the motion to set aside the default under advisement to allow defendant to submit medical information regarding his mental status when he was served with the complaint and when the default was entered. Defendant submitted an affidavit, a letter, and records from his physician, Dr. Ferguson, who stated that defendant did not have the mental capacity to understand legal matters, and would not have had such capacity in 2006 or thereafter.

The trial court granted defendant's motion to set aside the default judgment. The trial court found that, given defendant's medical condition, defendant's "failure to respond to this lawsuit was the result of excusable neglect."

Plaintiff moved for reconsideration. Plaintiff asserted that Dr. Ferguson was not qualified to make the determination that defendant was mentally incapable of responding to the lawsuit, and that the records submitted by Dr. Ferguson did not deal with defendant's mental condition at the time defendant was served with the complaint. The trial court granted plaintiff's motion for reconsideration, denied defendant's motion for relief from judgment, and reinstated the default judgment. This court granted defendant's application for leave to appeal.

II. Analysis

We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

A motion to set aside a default or a default judgment is to be granted only if the movant shows good cause and files an affidavit of meritorious defense. MCR 2.603(D)(1). Good cause

¹ The motion noted that on July 11, 2007, the probate court entered an order appointing a conservator to manage defendant's property and affairs. The order stated that defendant was mentally competent, but that he was unable to manage his affairs due to age or physical infirmity.

² Doris Jean Seay, defendant's conservator and daughter, stated in an affidavit that defendant did not operate a licensed adult foster care facility.

consists of: (1) a procedural defect or irregularity; or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). The decision to grant or deny a motion to set aside a default or a default judgment is within the discretion of the trial court. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). This Court defers to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

A default judgment may also be set aside under MCR 2.612, the rule pertaining to relief from judgment.³ A trial court may relieve a party from a final judgment, order, or proceeding on a variety of grounds, including mistake, inadvertence, surprise, or excusable neglect; or fraud, misrepresentation, or other misconduct of an adverse party. MCR 2.612(C)(1). The decision to grant or deny a motion to set aside a judgment is also reviewed for an abuse of discretion. *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004).

Defendant argues that the trial court abused its discretion by granting plaintiff's motion for reconsideration. We agree. In its opinion granting plaintiff's motion for reconsideration and reinstating the default judgment, the trial court did not conclude that Ferguson was unqualified. Rather, the trial court found that the records did "not reveal any mental incapacity or medical condition that would impede the Defendant's ability to respond to the Plaintiff's Complaint." This conclusion is directly contrary to the conclusion initially reached by the trial court when it set aside the default judgment, and thus not within a range of principled outcomes. The trial court abused its discretion in making this finding on reconsideration.

In support of defendant's original motion for relief from judgment, defendant submitted a variety of materials that were supported by an affidavit dated September 13, 2007, from Dr. Robert B. Ferguson. Dr. Ferguson stated that he had been defendant's primary physician for a number of years. He reviewed defendant's files and stated his opinion concerning defendant's medical condition over the immediately preceding few years. Specifically, Dr. Ferguson stated that during the years of 2005 through 2007, defendant had been hospitalized twenty-two times for various reasons, including dementia. Dr. Ferguson listed the medications that defendant had been taking. Dr. Ferguson concluded:

[Defendant's] health has rapidly worsened over the last 3 years, and he has not had the mental or physical capacity to take care of himself, communicate effectively, or make decisions for himself for quite some time. [Defendant] would not have had the mental capacity to handle legal matters in 2006 to current date. He would not have understood the serious nature of a lawsuit.

³ Defendant did not move to set aside the default judgment within 21 days, as required by MCR 2.603(D)(2)(b); therefore, defendant was required to satisfy the good cause and meritorious defense requirements, and the requirements for relief from judgment under MCR 2.612. See MCR 2.603(D)(3).

We conclude, contrary to the arguments advanced by plaintiff and the conclusion reached by the trial court, that the medical records and opinion offered by Dr. Ferguson do reveal a mental incapacity or condition that impeded defendant's ability to respond to the Plaintiff's Complaint. Significantly, plaintiff did not offer any expert testimony to the contrary. Thus, the trial court erred in rejecting the uncontroverted affidavit of Dr. Ferguson.

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

/s/ Brian K. Zahra

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood