

STATE OF MICHIGAN
COURT OF APPEALS

JULIE ATTY,

Plaintiff-Appellee,

v

MICHAEL SAARI and OAKLAND HOME
INSPECTIONS,

Defendants,

and

ZEEV SAGI and EVELIN H. SAGI,

Defendants-Appellants.

UNPUBLISHED
October 17, 2017

No. 333298
Oakland Circuit Court
LC No. 2014-139054-CZ

Before: GLEICHER, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendants, Zeev Sagi and Evelin H. Sagi, appeal as of right the trial court's April 7, 2016 opinion and order granting plaintiff's motion for default judgment. On April 22, 2016, the trial court entered a default judgment against Zeev and Evelin¹ in accordance with the April 7, 2016 opinion and order because they failed to submit discovery responses within the timeframes ordered by the trial court. We affirm.

I. BACKGROUND

This case arises out of the sale of residential real estate from defendants to plaintiff. On February 20, 2014, plaintiff filed her complaint against defendants, setting forth counts of breach of contract, negligence, fraud, failure to disclose, and concealment of a known defect, all arising

¹ Because Zeev and Evelin share the same last name, we use their first names in this opinion where appropriate.

from plaintiff's purchase of the property.² Defendants received plaintiff's first set of interrogatories on August 22, 2014. On October 21, 2014, defense counsel filed a motion to withdraw from the case, claiming there had "been a breakdown in the attorney client relationship to the extent that petitioner cannot effectively represent [d]efendants." A day later, plaintiff filed a motion to compel discovery, and on October 29, 2014, the trial court entered an order compelling discovery within 14 days.

On November 5, 2014, Zeev signed and filed answers to the interrogatories. Zeev provided brief answers to the first seven questions, but he did not produce any documents and answered the remainder of the interrogatories by stating, "Will not provide any information." Zeev refused to answer any questions pertaining to his past history of buying and selling real property or other basic information, such as his past addresses, income, or employment. On November 6, 2014, the parties entered into a stipulation and order, allowing defense counsel to withdraw from the case. On November 12, 2014, plaintiff filed her motion for sanctions, in which she claimed that the interrogatory responses were insufficient and requested that the trial court enter a default judgment. On November 19, 2014, the trial court entered the following discovery order:

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant Zeev Sagi shall comply with the October 29, 2014 Order to Compel Discovery Requests and provide answers within 7 days by November 26, 2014 or the court will enter a default judgment with regard to liability.

Neither defendant provided answers to the discovery requests, and on December 16, 2014, plaintiff filed a default request and affidavit against both defendants, wherein a default was entered. On April 23, 2015, plaintiff filed her motion for default judgment, and on April 29, 2015, defendants, through their newly retained counsel, filed a response to the motion. The trial court held a hearing on May 6, 2015, and granted plaintiff's motion. A hearing regarding damages was held on May 13, 2015. The trial court, after hearing testimony on damages, held that the proper award was \$80,134.88. On April 7, 2016, the trial court issued its opinion and order, and on April 22, 2016, the default judgment was entered.

On April 28, 2016, defendants filed a motion for relief from the default judgment and motion for reconsideration. A hearing on defendants' motion was held on May 18, 2016. The trial court denied defendants' request for relief. On appeal, defendants argue that the trial court abused its discretion (1) when it entered a default judgment against defendants as a sanction for violating its discovery order, (2) when it denied defendants' motion for relief from the default judgment, (3) when it denied the motion for reconsideration, and (4) that it failed to enter an order regarding defendants' motion to set aside the default before making subsequent rulings.

² Plaintiff alleged the house to have structural defects. Plaintiff also brought a claim of negligence against defendant Michael Saari, president of defendant Oakland Home Inspections, whom plaintiff alleges failed to uncover obvious defects in his inspection of the house. The parties, however, stipulated to the dismissal of Saari and Oakland Home Inspections as defendants. Accordingly, Saari and Oakland Home Inspections take no part in this appeal.

II. ANALYSIS

We review the “imposition of discovery sanctions for an abuse of discretion.” *Hardrick v Auto Club Ins Ass’n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). This Court will also “review for an abuse of discretion a trial court’s decision on a motion to set aside a default and whether to grant a default judgment.” *Huntington Nat’l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). Similarly, we review for an abuse of discretion a trial court’s decision to deny a motion for reconsideration. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). “This Court reviews any factual findings underlying a trial court’s decision for clear error.” *Hardrick*, 294 Mich App at 660, citing MCR 2.613(C). “A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made.” *Hardrick*, 294 Mich App at 660 (internal citation and quotation marks omitted).

The Default Judgment. Defendants first argue that the trial court abused its discretion when it determined that the proper sanction for the discovery violation was a default judgment. We disagree.

A default judgment is a possible sanction for a discovery violation. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992), citing MCR 2.313(B)(2)(c). This sanction is, however, “a drastic measure and should be used with caution.” *Frankenmuth*, 193 Mich App at 396. When determining whether a discovery violation merits a default judgment,

a trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to defendant, and whether willfulness has been shown. [*Hardrick*, 294 Mich App at 662, quoting *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994).]

“The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary.” *Frankenmuth*, 193 Mich App at 397. “Ultimately, the court’s chosen discovery sanction must be proportionate and just.” *Hardrick*, 294 Mich App at 662 (internal citation and quotation marks omitted). Finally, the trial court should evaluate on the record other available options before resorting to a default judgment as a sanction. *Frankenmuth*, 193 Mich App at 397.

Defendants admit that there was a violation of the trial court’s November 19, 2014 order compelling discovery because Zeev did not provide supplemented answers within seven days of the order. Instead, defendants argue that the severe sanction of a default judgment was inappropriate in this instance. Considering the discovery violation at issue, as well as their assertions that they were unrepresented, lived in California, and had a difficult time speaking English, defendants claim that a lesser sanction would have been sufficient. This argument is unavailing here.

First, defendants failed to respond to discovery requests over a substantial period of time. On August 22, 2014, plaintiff provided her first set of interrogatories to defendants. By October 22, 2014, defendants had yet to submit their answers, and plaintiff was forced to file a motion to compel discovery. On October 29, 2014, the trial court entered an order compelling discovery within 14 days. Zeev provided answers to the interrogatories on November 5, 2014, but he refused to produce any documents and wrote, "Will not provide any information," for a number of interrogatories, including those that asked for basic information. The trial court, finding the interrogatory answers entirely insufficient, entered an order requiring Zeev to provide complete answers to plaintiff's interrogatories by November 29, 2014. By December 16, 2014, defendants did not provide answers to the interrogatories. Therefore, after nearly four months of attempting to obtain discovery from defendants, plaintiff filed a request for a default pursuant to the trial court's November 19, 2014 discovery order. Still, defendants took no action until April 29, 2015, when they responded to plaintiff's motion for the default judgment.

Second, regarding defendants' violations of discovery orders, while defendants technically violated only the second discovery order, the fact remained that Zeev also provided clearly insufficient discovery answers after the first discovery order. Not only did defendants fail to provide sufficient discovery, they made it clear in their answers that they were not willing to cooperate with discovery. After the hearing on plaintiff's motion for sanctions, the trial court provided defendants another chance and gave them seven more days to provide appropriate answers. After the seven days, defendants still had not provided any discovery, violating the trial court's order.

Third, the time that elapsed from the discovery violation to when a default judgment was actually entered was substantial. The default was entered on December 16, 2014, but plaintiff's motion for a default judgment was not filed until April 23, 2015. In those four months, despite having notice of the default, defendants never filed a motion to set it aside, further demonstrating their unwillingness to participate in the litigation process.

Regarding the fourth factor, prejudice to the opposing party, defendants' failure to participate in written discovery as required necessarily prejudiced plaintiff's ability to prepare for depositions and determine the extent of defendants' involvement with the subject property. Moreover, defendants' refusal to participate meaningfully in discovery substantially delayed the litigation.

Finally, it is reasonable to infer that defendants' failure to answer discovery was willful. Defendants were twice ordered to participate in discovery. After the first order to compel discovery, Zeev refused to produce any documentation or answer a number of interrogatories. After the second order to compel discovery, defendants failed to provide any response. When this failure resulted in a default, defendants took no action to set aside the default. Accordingly, from November 5, 2014, when Zeev submitted his answers to interrogatories, to April 29, 2015, when defendants filed their response to plaintiff's motion for entry of the default judgment, defendants took no meaningful action in this case.

Therefore, each of the five factors set forth in *Hardrick* favored the trial court's entry of a default judgment. Defendants claim that a default judgment was inappropriate because their failure to participate in discovery was a result of not having an attorney during part of the

litigation. Nonetheless, while it appears that defendants' first attorney withdrew before the second order compelling discovery, "a lay defendant's lack of knowledge of the law and its consequences will not necessarily provide a reasonable excuse and good cause to set aside a default." *Reed v Walsh*, 170 Mich App 61, 65; 427 NW2d 588 (1988). Furthermore, a defendant's failure to obtain counsel, despite sufficient time to do so, is considered a problem of "his own making" that demonstrates neither good cause nor the occurrence of a manifest injustice. *First Bank of Cadillac v Benson*, 81 Mich App 550, 555; 265 NW2d 413 (1978).

Defendants' attorney filed his motion to withdraw as counsel on October 21, 2014, a stipulation and order to withdraw was signed by Zeev on November 5, 2014, the discovery order was entered on November 19, 2014, and defendants had until November 26, 2014, to answer discovery. Therefore, defendants had over a month, from October 21, 2014, until November 26, 2014, to retain new counsel and participate in discovery. Within that time, they had notice of all the orders compelling discovery. Despite this notice, they still failed to take any action until April 29, 2015, when they filed their response to plaintiff's motion for a default judgment. Defendants' conduct indicates a flagrant and wanton refusal to engage in discovery, and the trial court did not abuse its discretion when it entered the default judgment.

We acknowledge that the trial court did not "evaluate on the record other available options before resorting to a default judgment as a sanction." *Frankenmuth*, 193 Mich App at 397. Nonetheless, the record reflects that the trial court provided defendants a second chance to answer plaintiff's interrogatories when it entered its second order compelling discovery. The trial court notified defendants by written order that if they violated the discovery order, a default judgment would result. Accordingly, the record demonstrates that the trial court attempted to avoid entering a default judgment but defendants' own conduct rendered that sanction appropriate.

Defendants also argue that because Evelin was not named in the November 19, 2014 order compelling discovery, the trial court should not have entered a default against her. This argument is unavailing. While the trial court did not include Evelin in its November 19, 2014 discovery order, the fact remains that entry of a default judgment against her was proper.

At all times, Zeev and Evelin were represented by the same attorneys and received the same notice as to the discovery orders. Since the inception of the case, Evelin never submitted her own answers to discovery. In fact, plaintiff's first set of interrogatories were addressed to Evelin, but Zeev actually responded to them. When the trial court entered the default, defendants did not seek to set aside the default on the ground that Evelin was never named in the discovery order. At the hearing on plaintiff's motion for a default judgment, defendants still did not raise their concern that Evelin was never ordered to answer discovery. Defendants argued for the first time at the hearing on defendants' motion for relief from the default judgment that the default judgment should not have been entered against Evelin. The trial court, however, noted that discovery pertaining to both Evelin and Zeev had been outstanding for a substantial period, that neither defendant showed up for various proceedings, and that the default judgment against both parties would stand. This decision was not outside the range of reasonable and principled outcomes, and the trial court did not abuse its discretion when it entered the default judgment against both defendants.

Motion for Relief from Default Judgment. Defendants next argue that the trial court abused its discretion when it denied their motion for relief from the default judgment. We disagree.

Relief under MCR 2.612(C)(1)(f) may be granted only if “extraordinary circumstances . . . exist that mandate setting aside the judgment in order to achieve justice.” *King v McPherson Hosp*, 290 Mich App 299, 304; 810 NW2d 594 (2010) (internal citation and quotation marks omitted). Defendants only argue that relief was warranted due to the harshness of the sanction. Having concluded that the trial court’s entry of a default judgment was not an abuse of discretion, we similarly conclude that the trial court did not abuse its discretion by denying defendants’ motion for relief.

Motion for Reconsideration. Defendants next argue that the trial court abused its discretion when it denied their motion for reconsideration. Again, we disagree.

When seeking reconsideration, “[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.” MCR 2.119(F)(3). A motion, “which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.” MCR 2.119(F)(3).

Defendants raised the same issues as were already argued at the hearing on plaintiff’s motion for entry of the default judgment. Because those issues were already decided, defendant failed to show a palpable error that misled the court and the parties. Accordingly, the trial court did not abuse its discretion when it denied the motion for reconsideration.

Defendants’ Purported Motion to Set Aside Default. As a final argument, defendants claim that the trial court erred when it failed to issue a written order on their motion to set aside the default. A defendant may seek relief by filing a motion to set aside a default or a default judgment pursuant to MCR 2.603(D). The trial court may grant the motion if the defendant has shown good cause and provided an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1).

Despite their argument on appeal, defendants never filed a motion to set aside the default or default judgment. As the trial court noted, defendants argued “good cause” to set aside the default at the hearing on plaintiff’s motion for a default judgment. Because defendants never filed a motion to set aside the default, the trial court could not enter an order denying that motion. The only pertinent motion pending before the trial court was plaintiff’s motion for a default judgment, which the trial court granted in a written opinion and order. Twenty-one days later, the trial court entered the default judgment. Nothing about the trial court’s proceedings was improper.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Karen M. Fort Hood

/s/ Brock A. Swartzle