STATE OF MICHIGAN

COURT OF APPEALS

EDWARD THOMPSON, Plaintiff-Appellant,	UNPUBLISHED March 21, 2017
v	No. 334568 Oakland Circuit Court Family Division
LATASHA THOMPSON, Defendant-Appellee.	LC No. 2015-834637-DM

Before: TALBOT, C.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the default judgment of divorce entered by the trial court following a bench trial at which plaintiff did not appear. Plaintiff also challenges the trial court's order denying plaintiff's motion to set aside a default and to enforce a settlement agreement. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 8, 2015, plaintiff filed a complaint for divorce alleging that "[t]here ha[d] been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." On September 17, 2015, defendant filed an answer to plaintiff's complaint and a counterclaim for divorce, admitting that the marriage relationship had broken down and that there was no reasonable likelihood that the marriage could be preserved. Defendant asserted that she was a victim of domestic violence, that "[p]laintiff had abdicated his parenting responsibilities to Defendant for years," and that defendant and their two minor children were financially dependent on plaintiff. Defendant requested sole legal and physical custody of the two minor children as well as spousal support.

Between the date the complaint was filed and the date of the bench trial, the parties filed a number of motions, including a motion to maintain the financial status quo, a motion to compel discovery, and a motion to adjourn. A number of scheduling orders were also issued. The June 10, 2016 scheduling order set the bench trial date for July 11, 2016, beginning at 9:00 a.m. On June 29, 2016, plaintiff's trial counsel filed a motion to withdraw his representation of

plaintiff, which the trial court granted on July 6, 2016. The trial court's July 6 order stated that the July 11 bench trial would proceed as scheduled.

Plaintiff did not appear for the bench trial on July 11. Defense counsel requested that the trial court enter a default against plaintiff. While the trial court did not explicitly state on the record that it was entering a default, it proceeded with the taking of proofs on that date in plaintiff's absence. Plaintiff has acknowledged that he was in fact defaulted.

Two days later, plaintiff filed (but did not properly serve) a motion to enforce what he alleged was a settlement between the parties as reflected in a January 2016 email exchange between them. That same day, defendant filed a motion asking the court to adopt the recommendations of the Friend of the Court concerning custody and support. On July 20, plaintiff refiled his motion to enforce the settlement. At a motion hearing on July 20, plaintiff appeared and stated on the record that his attorney had not informed him of the July 11, 2016 trial date. The following colloquy took place between the trial court and plaintiff:

> [*Trial Court*]: [H]ere's a new scheduling order that says trial is to be July 11th at 9:00 a.m. and your attorney signed it. This is a different attorney, Tim Crawford.
>
> [*Plaintiff*]: Right. And –
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> [*Trial Court*]: So look – [sic] so, do you see that?
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> [*Plaintiff*]: Right. And I was told that it was rescheduled for August the 1st or the 10th.
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> [*Trial Court*]: That was your day two. That was scheduled, that was day two.
>
> [*Plaintiff*]: Oh, well. That's what [sic]– he did not clarify that to [sic] me. I didn't know that they were split between –
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> * * *
>
> [*Trial Court*]: Okay. And then he withdrew, it says the trial date set for July 11th will proceed as set.
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> [*Plaintiff*]: Yeah, I – I have no idea of any of that information. I thought August was our date. I was calling your clerks every day saying if you didn't have time to handle our trial because this has been going on since last September, could I be added to another Judge's calendar. And then she goes, "No, you're supposed to be here today." And I said, "No, you've got the wrong Thompson." And she went over and said, "Nope, that's you."
>
> [*Trial Court*]: Okay. The Court – this Court speaks through its written orders and there's an order. You had a couple attorneys. The date keeps getting

adjourned. Your attorneys have filed trial briefs. The day was here. The day came and went. You took [sic] – we had a trial without you, sir.

[*Plaintiff*]: Well, I didn't – again, I wasn't – I was told it was in August, not in July.

* * *

[*Trial Court*]: Okay sir. So, I have to say that you have not presented to me – you have failed to show good cause. You've also failed to show a meri – meritorious defense, so I'm – I'm not setting aside the default judgment.[1]

* * *

[*Trial Court*]: That's my ruling, so I expect you two to follow it.

Following the hearing, the trial court entered an order granting defendant's motion to adopt the Friend of the Court's Recommendation, and denied plaintiff's motions "because he [was] in default and [] failed to show good cause and a meritorious defense to set aside the default." Later in July, defendant moved the trial court to enter a default judgment of divorce and default uniform child support order, noting that the trial court had refused to set aside plaintiff's default at the previous motion hearing.

On August 1, 2016, plaintiff filed a motion to set aside the default and (again) to enforce the parties' settlement. Plaintiff alleged that he had good cause for failing to appear at trial because when he called the trial court's chambers on July 5, 2016, he was advised that his trial date had been moved to August 1, 2016. In support of his assertion, plaintiff stated that an entry in the register of actions indicates: "Date Set for Trial August 1, 2016." Moreover, plaintiff argued that he and defendant had reached an agreement following a settlement conference that took place on January 12, 2015,[2] and that the settlement constituted a meritorious defense for purposes of setting aside the default. Plaintiff attached an affidavit to his motion in which he attested that he was originally aware of the July 11, 2016 trial date, but had spoken on the phone with a judicial staff member who had informed him the trial date had been moved to August 1, 2016. Further, plaintiff's affidavit stated that plaintiff believed the parties had reached a settlement. Defendant responded denying that the parties had reached an agreement and arguing that plaintiff had not shown good cause or a meritorious defense so as to justify setting aside the default.

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[1] The trial court appears to be referring to the default, as it did not enter the default judgment until August 10, 2016.

[2] At a minimum, this date appears to be in error as the cause of action was not even filed until September 8, 2015. Furthermore, the lower court record contains no evidence of a settlement conference.

After a hearing on August 10, 2016, the trial court denied plaintiff's motion, stating in relevant part:

> Okay. Okay. All right, this Court entered a default judgment after a trial where dad did not show up. Dad claims that he didn't have notice. This Court grants motions to set aside default judgment only if a party shows to [sic] cause and files an affidavit of facts showing a meritorious defense.[3]
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> Good cause is [a] substantial irregularity in proceeding on which the default is based, reasonable excuse for failure to comply with requirements creating the default or other reasons showing manifest injustice would result if [sic] default was not set aside. Neglect of an attorney is not good cause and may be imputed to a party in a default, but it's – it – the Court does agree that neglect of the party himself is also not good cause.
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> This Court speaks through its written orders. This Court has two orders that says [sic] trial was to be July 11th. I don't know why [plaintiff] neglected to show up for this trial, but you haven't shown good cause. So, your motion to set aside the – the – set aside the default is denied.

Following the hearing, the trial court entered an order denying plaintiff's motion, and entered a default judgment of divorce. This appeal followed.

II. DENIAL OF PLAINTIFF'S MOTION TO SET ASIDE DEFAULT

Plaintiff argues that the trial court erred by concluding that he did not establish good cause and a meritorious defense to set aside the default. Specifically, plaintiff contends that he was able to demonstrate good cause by showing that he had a reasonable excuse for failing to appear at trial and that manifest injustice would occur if the default judgment was allowed to stand. Additionally, plaintiff contends that he had a meritorious defense because the parties had entered into a settlement agreement prior to trial and the terms of the default judgment of divorce are contrary to that agreement. We disagree.

We review a trial court's decision on a motion to set aside a default or a default judgment for an abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "'Moreover, although the law favors the determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered.'" *Shawl v Spence Bros*, 280 Mich App 213, 221; 760 NW2d 674 (2008), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600

[3] Again, it appears the trial court was referring to the default, as the default judgment had not yet been entered.

NW2d 638 (1999). "[A]ppellate review is sharply limited" unless there has been a "clear abuse of discretion." *Alken-Ziegler*, 461 Mich at 227.

In domestic relations cases, MCR 3.210(B)(3) provides:

> (3) *Setting Aside Default Before Entry of Default Judgment*. A motion to set aside a default, except when grounded on lack of jurisdiction over the defendant or subject matter, shall be granted only upon verified motion of the defaulted party showing good cause. [Compare MCR 3.210(B)(3) with MCR 2.603(D)(1) (providing the rule to set aside a default or default judgment in a regular proceeding).]

The burden to demonstrate good cause[4] to set aside the default falls on the defaulting party. *Id*. In order to show "good cause," the defaulting party must demonstrate: "(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, *or* (3) some other reason showing that manifest injustice would result from permitting the default to stand." *Shawl*, 280 Mich App at 221 (quotation marks and citations omitted; emphasis added).

Plaintiff contends that he had a reasonable excuse for failing to appear at the July 11, 2016 bench trial because: (1) he never received the July 6, 2016 order granting his attorney's motion to withdraw and indicating that trial would proceed as set, and (2) a judicial staff member erroneously informed him that his trial date had been moved to August 1, 2016. The trial court found both excuses meritless because at least two orders stated that trial was set for July 11, 2016, and plaintiff's counsel had signed both orders. Thus, the trial court concluded that counsel's negligence, if any, should be imputed to plaintiff.

The trial court properly concluded plaintiff failed to demonstrate a reasonable excuse in order to set aside the default. With respect to whether plaintiff received notice of the July 6, 2016 order allowing plaintiff's counsel to withdraw, a review of the lower court record does not reveal whether plaintiff received notice of that order. However, plaintiff admits that he was aware of the July 11, 2016 trial date when his attorney filed the motion to withdraw and

[4] Although both parties provide arguments on the issue of a meritorious defense, such a showing is not required. Because this is a domestic relations case, MCR 3.210 sets forth the applicable default and default judgment procedures. Accordingly, MCR 3.210(B)(3) does not require a party in default to show a meritorious defense to set aside the default. Instead, MCR 3.210(B)(3) merely requires a defaulting party to show good cause upon a verified motion to set aside the default. Even assuming that plaintiff was required to show a meritorious defense, he failed to do so. Although plaintiff submitted an affidavit and alleged settlement agreement to his motion to set aside the default, he failed to present facts establishing that the agreement was in the children's best interests. A trial court is not required to enforce an agreement that it finds contrary to the children's best interests. *Harvey v Harvey*, 470 Mich 186, 194; 680 NW2d 835 (2004).

counsel's signature is present on the order. If plaintiff's counsel failed to inform him that the trial would proceed as scheduled, or provide him with the July 6 order, such a failure would not constitute a reasonable excuse for plaintiff's failure to appear at trial because "[a]n attorney's negligence is attributable to the client and normally does not constitute grounds for setting aside a default []." *Park v American Cas Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996) (citation omitted). In other words, "[a] party is responsible for any action or inaction by the party or the party's agent." *Alken-Ziegler*, 461 Mich 219 at 224.[5] Further, the Michigan Rules of Professional Conduct provide that:

> Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. [MRPC 1.16.]

And in *Bye v Ferguson*, 138 Mich App 196, 206; 360 NW2d 175 (1984), this Court, quoting *People v Bruinsma*, 34 Mich App 167, 177; 191 NW2d 108 (1971), stated that "an attorney who represents a client cannot withdraw from a case in a manner which leaves his client without notice and without an adequate opportunity to seek other representation. Such conduct violates the canons of professional ethics and the established case law of this state."[6] (Quotation marks omitted). Therefore, plaintiff's counsel's representation did not truly end until plaintiff was provided with notice of the withdrawal, such as the Court's order. We therefore find no clear abuse of discretion in the trial court's conclusion that plaintiff's counsel's negligence may be imputed to plaintiff. *Alken-Ziegler*, 461 Mich at 227.

It is true that an attorney's abandonment of a client may constitute grounds for setting aside a default or default judgment. *Pascoe v Sova*, 209 Mich App 297, 300; 530 NW2d 781 (1995) (stating that while an attorney's negligence may be imputed to a client, the opposite is true in the event of the attorney abandoning the case). However, unlike the attorney in *Pascoe*, who asked to withdraw at the beginning of trial, leaving the defendant no opportunity to obtain other representation, here plaintiff's counsel filed a motion to withdraw nearly two weeks before trial was scheduled to begin, leaving plaintiff with opportunity to find other representation. *Id*. at 298. Additionally, even if a judicial staff member erroneously relayed an incorrect trial date to plaintiff on July 5, the error would be harmless and not inconsistent with substantial justice because the court subsequently (on July 6) issued an order indicating that trial would proceed as scheduled on July 11. See MCR 2.613(A) (stating that an error or defect in anything done or

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[5] Notably, however, plaintiff does not contend that he was unaware that the trial court had granted his attorney's motion to withdraw; to the contrary, on July 13, 2016, plaintiff filed (without counsel) a motion to enforce a settlement.

[6] The Court in *Bye* was referring to an early version of the disciplinary rule; as the *Pascoe* Court noted, "[t]he substance of that disciplinary rule, including the notice provision, has been incorporated into MRPC 1.16(d)." *Pascoe*, 209 Mich App at 299 n 2.

omitted by the court is not grounds for disturbing a judgment or order unless the error would be inconsistent with substantial justice). And although the court's register of actions does reflect a June 9 entry indicating a trial date set for August 1, 2016, entries made on June 7 list trial dates for both July 11, 2016 and August 10, 2016; read in context it appears that the August 1 date was for a second trial day, and that the June 9 entry merely revises or corrects that second trial date to August 1 (from August 10). Therefore, at best the trial court's register of actions lists dates for two days of trial.

In light of the trial court's July 6 order, we do not find a clear abuse of the trial court's discretion when it concluded that defendant did not demonstrate good cause for setting aside the default. See *Saffian*, 477 Mich at 12, 15.

III. ENFORCEABILITY OF SETTLEMENT

Plaintiff also argues that the trial court erred when it entered the default judgment of divorce over his objection because it did not conform to the terms of an alleged settlement between the parties. We disagree.

Under Michigan's Child Custody Act, MCL 722.21 *et seq*., "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. The record reveals that the trial court was not aware of the existence of the purported settlement until after plaintiff failed to appear at trial, resulting in the trial court entering a default against him. As such, plaintiff could not seek the enforcement of the agreement until the default was set aside. See MCR 3.210(B)(2)(c) (stating that after a default has been entered against a party, that party may not proceed in the action unless the default is set aside). The trial court denied plaintiff's motion to set aside the default. Accordingly, the trial court was under no obligation to address the merits of plaintiff's claim.

Affirmed. As prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Michael J. Talbot
/s/ Christopher M. Murray
/s/ Mark T. Boonstra