STATE OF MICHIGAN

COURT OF APPEALS

ALL PHASE CONSTRUCTION CO, LLC,

Plaintiff-Appellee,

v

ANNE E. CARMIEN,

Defendant-Appellant,

and

CITIMORTGAGE, INC,

Defendant.

UNPUBLISHED
October 19, 2017

No. 334897
Cass Circuit Court
LC No. 15-000702-CK

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant Anne E. Carmien (Carmien) appeals on leave granted the order of the trial court denying her motion for relief from a default judgment entered against her on February 23, 2016, in favor of plaintiff All Phase Construction Co, LLC. We reverse and remand.

FACTS

Carmien owns a rental house in Cassopolis, Michigan. On May 2, 2014, Carmien hired plaintiff to repair water damage at the rental house. The parties agreed that Carmien would pay plaintiff $32,000 for the construction work; Carmien paid plaintiff $12,000 at the outset, with the remaining balance to be paid during and upon completion of the work.

Carmien lives in California. According to Carmien, at all times relevant to the parties' contract she lived in Valencia, California. Before contracting with plaintiff, she lived in San Pedro, California, but moved from that address before contracting with plaintiff. Although plaintiff was aware of both addresses, the parties agree that they typically contacted each other by email.

According to Carmien, she fired plaintiff in July 2014 after learning that plaintiff had failed to perform some of the work and had poorly performed other aspects of the work. Carmien contends that she reconsidered and agreed to let plaintiff stay on the job after plaintiff's

owner, Darren J. Etzel, begged to remain on the job. On August 20, 2014, plaintiff emailed Carmien two invoices for completed work. The next day, Carmien emailed plaintiff disputing the invoices and asking that someone at plaintiff contact her by telephone. After plaintiff failed to respond to defendant's August 21, 2014 email, Carmien again fired plaintiff. According to Carmien, the last work plaintiff performed on the rental house was the work reflected in the August 20, 2014 invoices.

According to plaintiff, it mailed a Notice of Furnishing to Carmien on February 4, 2015, at the San Pedro address. Plaintiff thereafter filed a claim of lien with the Cass County Register of Deeds on March 11, 2015, stating a lien in the amount of $20,900. Plaintiff mailed the claim of lien by certified mail to Carmien at her Valencia address. Carmien acknowledges that she received the claim of lien, but did not believe that the claim of lien was valid.

On November 30, 2015, plaintiff filed a complaint naming Carmien and her mortgage company, defendant CitiMortgage, Inc (CitiMortgage), as defendants. In the complaint, plaintiff states that Carmien "is an individual whose principal place of business is [the San Pedro address]." The complaint alleges that plaintiff perfected a lien on the rental house, and requests that the trial court enter an order acknowledging that the lien had been perfected and ordering that the rental house be sold to satisfy the lien. The complaint also alleges breach of contract and seeks damages in the amount of $20,900.

Plaintiff attempted to serve the complaint upon Carmien at the San Pedro address, but was unable to do so. Thereafter, upon motion by plaintiff, the trial court permitted plaintiff to serve the summons and complaint via alternate service by posting. Plaintiff moved for a default judgment on February 19, 2016, alleging that it had served the summons and complaint by posting at Harding's Market in Cassopolis, the Law & Courts Building in Cassopolis, the U.S. Post Office in Cassopolis, and on the rental house.

The trial court granted plaintiff's motion for default judgment and awarded plaintiff contract damages of $20,900, costs of $335, and attorney fees of $5,080. Plaintiff mailed a copy of the default judgment to defendant at the San Pedro address. The trial court subsequently granted plaintiff's motion to sell the rental property to satisfy the judgment. The trial court record does not include proof of service on the defendants of plaintiff's motion to sell the property or the trial court's order granting the motion.

On July 1, 2016, defendant CitiMortgage filed its appearance with the trial court. Carmien contends that she first learned of the lawsuit in early July 2016 when she contacted CitiMortgage on another matter. She thereafter retained counsel and filed an appearance and a motion for relief from the default judgment pursuant to MCR 2.612. In her motion, Carmien argued that plaintiff had been aware of her correct address in Valencia, but chose to use her former address in San Pedro, and further failed to contact her by email though plaintiff was aware of her email address. The trial court denied Carmien's motion for relief from judgment. Carmien thereafter sought and was granted leave to appeal to this Court.

DISCUSSION

Carmien contends that the trial court erred and abused its discretion when it denied her motion for relief from the default judgment. We agree. This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). This Court also reviews a trial court's decision on a motion to set aside a default judgment for an abuse of discretion. *Lawrence M. Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). When its decision falls outside the range of principled outcomes a trial court has abused its discretion. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). In addition, an error of law constitutes an abuse of the trial court's discretion. *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

To adjudicate an in personam controversy, the trial court must acquire jurisdiction over the defendant by service of process. *Lawrence M. Clarke, Inc*, 489 Mich at 274, citing *Eisner v Williams*, 298 Mich 215, 220; 298 NW 507 (1941). MCR 2.105(J)(1) requires a court to obtain personal jurisdiction over a defendant to "satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." The fundamental due process right to be heard "has little reality or worth unless one is informed that the matter is pending . . . ." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950).

When personal service pursuant to MCR 2.105 cannot be achieved, the trial court may permit service of process to be made "in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard." MCR 2.105(I)(1). But though personal service is not always required, "[t]he requirement of notice so as to afford an opportunity to be heard is clearly the heart" of MCR 2.105(I). *Lawrence M. Clarke, Inc*, 489 Mich at 275, citing *Krueger v Williams,* 410 Mich 144, 168; 300 NW2d 910 (1981). The method of substituted service must be "reasonably certain to inform those affected" and "must be means that one who actually desires to inform the interested parties might reasonably employ to accomplish actual notice." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509-510; 751 NW2d 453 (2008), quoting *Mullane*, 339 US at 315.

When a judgment has been entered against a defendant without that defendant being personally notified, MCR 2.612(B) provides a mechanism for relief from that judgment. MCR 2.612 provides, in relevant part:

> **(B) Defendant Not Personally Notified.**
>
> A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

Thus, MCR 2.612(B) permits a defendant to seek relief from a default judgment when the defendant "did not in fact have knowledge" of the pending action. *Lawrence M. Clarke, Inc*, 489 Mich at 275-276. Under MCR 2.612(B), a trial court may[1] grant relief from judgment when a defendant was not personally notified of the action pending against the defendant, and if certain other factors are met, being (1) personal jurisdiction over the defendant was necessary and acquired, (2) the defendant in fact had no knowledge of the pending action, (3) the defendant enters an appearance within 1 year after the final judgment, (4) the defendant shows a reason justifying relief from the judgment, and (5) innocent third persons will not be prejudiced by the trial court granting relief from the default judgment. In this case, Carmien met all the requirements of MCR 2.612(B).

The first factor is that personal jurisdiction over the defendant was necessary and acquired. In this case, because Carmien was a defendant personal jurisdiction over her was

[1] Although MCR 2.612(B) provides that a defendant *may* be entitled to relief under that court rule if all the factors are met (emphasis added), our Supreme Court in *Lawrence M. Clarke, Inc* determined that because the defendants in that case had met all the requirements of MCR 2.612(B), it was an abuse discretion for the trial court to deny their motion for relief from judgment.

necessary to satisfy due process, and was acquired by plaintiff's efforts to serve her,[2] thus meeting the first factor. See *Lawrence M. Clarke, Inc*, 489 Mich at 274-275.

The second factor is whether Carmien "did not in fact have knowledge of the pendency of the action. . . ." In *Lawrence M. Clarke, Inc*, our Supreme Court determined that this factor had been met when the defendants had not been personally served with the summons and complaint, had provided an affidavit stating that they only became aware of the action when their personal property was seized, and the method of substituted service was inadequate to provide the defendants with actual knowledge of the action against them. Our Supreme Court, quoting *Krueger*, stated that "[a] truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service[.]" *Lawrence M. Clarke, Inc*, 489 Mich at 278, quoting *Kruger*, 410 Mich at 168.

In *Lawrence M. Clarke, Inc*, the method of substituted service involved mailing service to an address that the plaintiff and the trial court in that case already knew was not a current address for the defendant, and publishing in a local newspaper that was unlikely to be seen by the defendants, who lived in a different county. Our Supreme Court in *Lawrence M. Clarke, Inc* concluded that although those substituted service methods may have been sufficient to provide constructive knowledge of the action under MCR 2.105(I)(1), those efforts were not adequate to provide the defendant with actual knowledge under MCR 2.612(B), and thus this factor for relief from judgment was satisfied.

This factor is similarly met in this case. Carmien was not actually served with the summons and complaint, which was mailed to an address that plaintiff had reason to know was not the correct address for Carmien (plaintiff had earlier used the correct address to mail the claim of lien to Carmien). She provided an affidavit to the trial court stating that she only became aware of the action after entry of the judgment when she learned of the judgment from her mortgage company. Further, the substituted service was unlikely to provide her with actual notice given that the four postings occurred in Cassopolis, Michigan, when plaintiff and the trial court were aware that Carmien lived in California. Moreover, plaintiff could have attempted to reach Carmien by email, having communicated with her regularly by this method previously, or by telephone, given that the emails imply that the parties had contacted each other previously by telephone. It therefore cannot be said that plaintiff conducted "a truly diligent search" for Carmien as is necessary to justify resort to substitute service.

The third factor under MCR 2.612(B) requires that the defendant enter an appearance within one year after the final judgment. In this case, the default judgment was entered on February 23, 2016, and Carmien filed her appearance and motion for relief from judgment on July 15, 2016, well within the one-year period.

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[2] As in *Lawrence M. Clarke, Inc*, there may be in this case a valid argument that the trial court failed to acquire personal jurisdiction over Carmien because plaintiff's efforts to provide her with notice were so lacking. Following the example set by our Supreme Court in *Lawrence M. Clarke, Inc*, however, we decline to reach that constitutional issue and instead resolve this case by concluding that Carmien is entitled to relief from judgment under MCR 2.612(B).

The fourth factor is that the defendant must show a reason justifying relief from judgment. A defendant may satisfy this requirement by showing that the defendant (a) did not have actual notice of the action, and (b) has a meritorious defense. *Lawrence M. Clarke, Inc*, 489 Mich at 281-282. As previously discussed, in this case Carmien presented evidence that she did not have actual notice of the action. She further presented facts indicating a meritorious defense to plaintiff's breach of contract claim, which if proven would likely defeat plaintiff's claim and justify relief from judgment. Carmien therefore satisfied factor four.

The fifth factor is that the defendant must show that if the default judgment is set aside, innocent third persons will not be prejudiced. In this case there is no evidence that any third parties have an interest in this case, so this factor has been met. See *Lawrence M. Clarke, Inc*, 489 Mich at 285. Carmien, therefore, met all the factors required for relief from judgment under MCR 2.612(B). See *id.*

In this case, although Carmien filed her motion for relief from judgment under MCR 2.612(B), the trial court treated the motion as a motion to set aside the default judgment under MCR 2.603. At the hearing on the motion for relief from judgment, the trial court stated:

> All right. Well, let's talk about the law, first of all. The Court rule specifies the standard to be employed by the Court in judging or deciding a motion to set aside the default, and that's MCR 2.603, subsection D, and it does require that there be good cause shown for the failure to respond, and a meritorious defense.
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> I don't think the issue in this case really boils down to whether or not there's a meritorious defense. The question is has good cause been shown, and in that respect, as Mr. Cummings correctly points out, the whole issue is service of process, and that boils down to whether or not the efforts the Plaintiff made were reasonably calculated to provide notice to the Defendant.
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> I don't think that the fact that the Defendant shows she may have been using a different address is necessarily the proper focus. The focus is, rather, what efforts the postings, the mailings made by the Plaintiff, and whether or not they are sufficient to apprise her of the pending action, and so I think that's the focus; were those efforts reasonably calculated. Well, what did they do? You can see from the motion regarding – requesting alternate service, they took the address that was on the property records, they also, when that did not accomplish service, and that was an address that the Defendant had actually been using, then they asked for alternate service by posting, and they posted the property in question, and they posted the posting at Harding's market, the Post Office, courthouse, and around town.
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> So, my determination is good cause has not been shown; the efforts by the Plaintiff were reasonably calculated to provide notice, and I think the fact that she may have employed a different address or different addresses is not critical. What's critical is what were the efforts they did use, and those efforts, I determine, were adequate, and consequently, the motion to set aside the default is

> denied. And in terms of the motion for relief from judgment under the Court rule 612, you've not established that there's been any fraud or misrepresentation to justify relief from the judgment.
>
> So, my decision is the motion to set aside default is denied, and, Mr. Thomas, you can prepare an order and submit it that rules against them and denies the motion to set aside the default.

The trial court appears to have denied the motion for two reasons, being (1) Carmien did not show good cause[3] as required by MCR 2.603, and (2) Carmien did not establish fraud or misrepresentation as required by MCR 2.612(C). The trial court is incorrect as a matter of law on both of these conclusions.

First, the trial court treated Carmien's motion for relief from judgment under MCR 2.612 as a motion to set aside the default judgment under MCR 2.603(D). That Court rule provides, in relevant part:

> **(D) Setting Aside Default or Default Judgment**
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> (1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.
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> (2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may be set aside only if the motion is filed
>
> (a) before entry of a default judgment, or
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> (b) if a default judgment has been entered, within 21 days after the default judgment was entered.
>
> (3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612. [MCR 2.603.]

Thus, MCR 2.603(D)(1) permits a trial court to grant relief from a default judgment when the movant shows good cause and also files an affidavit of facts showing a meritorious defense. MCR 2.603. But this rule also explicitly permits a defaulted party to proceed to set aside the default judgment "in accordance with MCR 2.612." MCR 2.603(D)(3). A motion for relief from judgment under MCR 2.612(B) requires only that the movant meet the five factors of MCR

[3] The trial court appears to have based its decision, in part, on the conclusion that Carmien used various addresses in her dealings with plaintiff. But the record suggests that plaintiff only learned of Carmien's prior San Pedro address because that address appeared on an insurance document that predated the parties' May 2014 contract.

2.612 discussed above (one of which includes showing a meritorious defense). *Lawrence M. Clarke, Inc*, 489 Mich at 273. Our Supreme Court in *Lawrence M. Clarke, Inc* concluded that because the defendants filed a motion for relief from judgment under MCR 2.612(B), and met all the requirements for relief under that court rule, the trial court could not deny the motion under MCR 2.603 by imposing the additional requirement of an affidavit of meritorious defense, which is required by MCR 2.603 but not by MCR 2.612. Our Supreme Court additionally concluded that a defendant moving for relief under MCR 2.612 need not also meet the requirements of MCR 2.603, noting that "MCR 2.603(D) states twice that MCR 2.612 provides an exception to its requirements for setting aside a default judgment." *Lawrence M. Clarke, Inc*, 489 Mich at 282. In this case, just as in *Lawrence M. Clarke, Inc*, the trial court made an error of law by requiring Carmien to meet an element of MCR 2.603 (here, a showing of good cause) when Carmien had met the requirements of MCR 2.612(B).

The trial court also erred when it determined that Carmien was required to show fraud or misrepresentation to be entitled to relief from judgment under MCR 2.612. In her motion for relief from judgment before the trial court, Carmien argued that she was entitled to relief under MCR 2.612(B). As discussed, the trial court should have granted her motion on that ground. Carmien's motion before the trial court also argued that she was entitled to relief from judgment under MCR 2.612(C), arguing essentially that the judgment was void and that plaintiff had intentionally failed to serve her with the summons and complaint. The trial court determined that Carmien was not entitled to relief from judgment under MCR 2.612 because she had not demonstrated fraud or misrepresentation.

According to our Supreme Court in *Lawrence M. Clarke, Inc*, a party seeking relief from judgment under MCR 2.612(B) is not obligated to demonstrate any of the grounds required for relief under MCR 2.612(C). *Lawrence M. Clarke, Inc*, 489 Mich at 281. In discussing whether the defendants in that case had met the five factors of MCR 2.612(B), the Court stated:

> [I]t is clear that a defendant seeking relief under MR 2.612(B) need not show mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party because MCR 2.612(C) provides for relief from judgment on those grounds. Indeed, MCR 2.612(C)(3) expressly states that subrule (C) "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; [or] to grant relief to a defendant not actually personally notified as provided in subrule (B). . . ." [*Lawrence M. Clarke, Inc*, 489 Mich at 281.]

Because Carmien met the five requirements of MCR 2.612(B), she was not required to also show a ground for relief under MCR 2.612(C)[4]. *Lawrence M. Clarke, Inc*, 489 Mich at 281.

[4] It is arguable that Carmien in this case also sufficiently established grounds for relief from judgment under MCR 2.612(C), and Carmien briefly argues this in her brief on appeal. But given that Carmien has established entitlement to relief from judgment under MCR 2.612(B), the trial court abused its discretion by requiring Carmien also to demonstrate entitlement to relief from judgment under MCR 2.612(C).

It was, therefore, an abuse of the trial court's discretion to deny Carmien's motion for relief from judgment when Carmien met the requirements of MCR 2.612(B). We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola