STATE OF MICHIGAN

COURT OF APPEALS

MAURICE R. GRIGGS,

Plaintiff-Appellant,

v

TAMAROFF MOTORS, INC. and JEFFREY TAMAROFF,

Defendants-Appellees.

UNPUBLISHED
December 26, 2019

No. 345922
Oakland Circuit Court
LC No. 2017-156637-CZ

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). Although plaintiff filed this appeal from the trial court's final order dismissing all of plaintiff's claims, plaintiff's appeal substantively involves the prior order of the court setting aside a default and default judgment against defendants.[1] We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

A. FACTUAL HISTORY

This case arises out of plaintiff's purchase of a 2015 Honda Accord from defendant Tamaroff Motors, Inc. On November 28, 2014, plaintiff signed and entered into an initial purchase agreement with defendants. That purchase agreement reflected a vehicle selling price of $31,917.00, plus a document and license fee for a total cash price of $32,151.00. A nearly-illegible notation about a rebate of $500.00 brought its total amount to $31,651.00. Plaintiff

[1] At no time did plaintiff allege any facts that would implicate defendant Jeffrey Tamaroff. In his amended complaint, plaintiff states that he never directly dealt with Jeffrey. We will nevertheless refer to defendants collectively.

alleges that he was induced to enter into this purchase agreement because he was told that it was at "dealer's cost" and that defendants would include tire, wheel, and paint protection at no additional cost.

At some point thereafter, plaintiff discovered that he was qualified for a $500 military veteran discount and requested that defendants honor it. Defendants allegedly agreed to honor plaintiff's discount request. The parties entered into a modified purchase agreement, which, confusingly, is also dated November 28, 2014. This modified purchase agreement reflects a slightly reduced vehicle selling price of $31,766.00, plus license and title fees, and an additional $2,329.00 "extended service plan," for a total cash price of $34,329.00. It also lists a $500 rebate, for a total amount to be financed of $33,829.00. Plaintiff was aware when he signed the modified agreement that it reflected an increased price, but allegedly was unconcerned by that increase because he still thought he was receiving the vehicle at "dealer's cost."

In April 2016, approximately 17 months after the original purchase, plaintiff returned to defendants to inquire about purchasing another vehicle. During that visit, plaintiff started to question whether his prior purchase had actually been at "dealer's cost." Plaintiff was unsatisfied with the responses he received, and so he filed his initial complaint on January 4, 2017.

B. PROCEDURAL HISTORY

Defendants initially participated vigorously in this proceeding. In relevant part, defendants responded to plaintiff's initial complaint with a motion for a more definite statement. The trial court ordered plaintiff to file an amended complaint. Plaintiff submitted a pleading purporting to be "a more definite statement," to which defendants filed an answer clearly treating the "more definite statement" as if it was an amended complaint. Plaintiff filed a motion for leave to file another amended complaint, approximately contemporaneously with defendants filing a motion for summary disposition. The trial court held that defendants were entitled to summary disposition on several counts, but at oral arguments on defendants' motion, it gave plaintiff 14 days to amend his complaint. On August 30, 2017, plaintiff filed the amended complaint at issue in this appeal.

Plaintiff's August 30 complaint alleged five counts: fraudulent inducement and mistake, breach of contract, innocent misrepresentation, non-disclosure silent fraud, and unjust enrichment. In his request for relief, he asked the court to "enter equitable judgment against Defendants to rescind the vehicle purchase agreement and restore the parties to their respective precontractual conditions; Or enter an Order against Defendants in an amount that exceeds $33,829.00 with respect to each claim set forth in this complaint, with attorney fees, costs, losses, punitive damages and any other amounts this Court deems justified." In his requests for relief[2] as to the individual counts, he seeks equitable rescission of the contract and unspecified

[2] None of the individual allegations in plaintiff's complaint explicitly ask for any relief, but they can be reasonably fairly construed as requests for relief. We will not punish plaintiff for mere

punitive damages, and in several he either (or also) asks for costs, fees, "to return the parties to their precontractual positions," or for the court simply to grant what it deems appropriate relief.

Defendants sent their answer to the August 30 complaint directly to plaintiff via e-mail and regular postal mail. However, defendants failed to file their answer with the trial court, even though plaintiff responded to defense counsel's e-mail and specifically asked if he had filed the answer with the court. Accordingly, on September 25, 2017, plaintiff filed a request for default and a default judgment for a sum certain with the trial court. In the affidavit attached to his request, plaintiff averred that the claim against defendants was for a "sum certain or for a sum, which by computation can be made certain." Specifically, plaintiff requested $33,829.00 in damages, plus $260.00 in costs, for a total of $34,089.00. The clerk thereafter entered the default and a default judgment for $34,089.00.

Defendants moved for relief from that judgment under MCR 2.612. The trial court remarked on the fact that plaintiff would be receiving essentially a complete refund on his vehicle, but it nevertheless denied the motion, finding defendants ineligible. However, on reconsideration, the trial court accepted defendants' argument that the default had been improperly entered because the damages sought in the August 30 complaint were *not* for a sum certain, nor could they be readily calculated. The trial court additionally ruled that plaintiff's August 30 complaint was in violation of MCR 2.113(F)(1), because plaintiff's claim was based on written instruments, and he had not attached copies of the purchase agreements to that complaint.[3]

Subsequently, defendants moved for summary disposition under MCR 2.116(C)(7). Defendants argued that plaintiff's claims were barred because the sales contracts required plaintiff to file any claims arising out of the sale of the vehicle within one year after the sale, which occurred in November 2014. Plaintiff filed his initial complaint in January 2017, more than one year after the sale. The trial court agreed with defendants and granted the motion. This appeal followed.

II. STANDARD OF REVIEW

We note as an initial matter that although plaintiff implicitly distinguishes between the default and the default judgment in his statement of questions presented, his arguments substantively appear to confuse the two. This Court reviews a trial court's decision to set aside both a default and a default judgment for an abuse of discretion. See *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). Likewise, a trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *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." *Huntington Nat'l Bank*,

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inartful pleading. See *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

[3] We note that plaintiff had attached copies of the agreements to his initial complaint.

292 Mich App at 383. However, issues of law, such as the interpretation and application of court rules, are reviewed de novo. *Id*. Michigan jurisprudence heavily disfavors defaults, especially defaults based on technicalities. See *Wood v DAIIE*, 413 Mich 573, 586; 321 NW2d 653 (1982); *Marposs Corp v Autocam Corp*, 183 Mich App 166, 168-170; 454 NW2d 194 (1990). However, Michigan jurisprudence also heavily disfavors setting aside properly entered defaults and default judgments. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

III. SETTING ASIDE THE DEFAULT JUDGMENT

We first address the default judgment. Under MCR 2.603(B)(2), the clerk may sign and enter default judgment in the amount requested by the plaintiff, as supported in his affidavit, provided that "the plaintiff's claim against defendant is for a sum certain or for a sum that can by computation be made certain." However, the trial court may set aside an order or judgment, including a default judgment, on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect" or "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(a) and (f). The "any other reason" provision requires extraordinary circumstances and serious demands of justice, often entailing misconduct by the benefitted party. *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999). Furthermore, it must be subordinate to the "good cause" requirement for setting aside a default or default judgment under MCR 2.603(D). *Alken-Ziegler*, 461 Mich at 234 n 7. However, the more meritorious a defense the defaulted party can demonstrate, the less showing of "good cause" will be required. *Id*. at 233-234.

Here, the trial court found that the default judgment had been improperly entered because the requirements of MCR 2.603(B)(2)(a) had not been satisfied. Specifically, the trial court found that plaintiff's damages were not for a sum certain and that plaintiff's amended complaint did not provide a means to calculate the damages with certainty. We note that the disfavor in which setting aside default judgments is held only applies to *properly entered* default judgments. *Alken-Ziegler*, 461 Mich at 229. Thus, if the trial court properly found the default judgment improperly entered, the trial court has significantly greater discretion to set it aside.

No published case law has addressed the meaning of a "sum certain" in the context of MCR 2.603. However, we find the term "sum certain" to be self-explanatory, because both MCR 2.111(B)(2) and 2.603(B)(2)(a) use the term "a sum that can by computation be made certain" as a synonym. Thus, they clearly indicate that a "sum certain" means an amount that can be calculated precisely. Furthermore, in the context of offers of judgment under MCR 2.405, a specifically defined and specific amount of money, with a specific interest amount to be applied, has been deemed a "sum certain." *Central Cartage Co v Fewless*, 232 Mich App 517, 532; 591 NW2d 422 (1998). In contrast, a division of property of uncertain or variable value cannot constitute a "sum certain." *Hessel v Hessel*, 168 Mich App 390, 394-396; 424 NW2d 59 (1988). The imposition of conditions or the requirement of some action precludes an offer from being a "sum certain." *Best Financial Corp v Lake States Ins Co*, 245 Mich App 383, 386-388; 628 NW2d 76 (2001); see also *Knue v Smith*, 478 Mich 88, 93-94, 97; 731 NW2d 686 (2007). We also note that according to 46 Am Jur 2d, Judgments, § 260, "the term 'sum certain' contemplates a situation where the amount due cannot be reasonably disputed, is settled with respect to amount, ascertained and agreed upon by the parties, or fixed by operation of law."

It is obvious that if plaintiff had strictly asked for an exact refund of the purchase price of his vehicle and nothing more, save perhaps interest, then his complaint would have sought a sum certain. As noted above, plaintiff's August 30 complaint *included* a request for a particular amount of money. However, it sought that sum as a minimum amount; it also included requests for totally undefined additional sums such as punitive damages, vague references to amounts the court deemed appropriate, and equitable relief such as placing the parties in their pre-contractual positions. We note that we cannot imagine how doing so is even possible in light of the fact that plaintiff has enjoyed the use of an apparently perfectly good vehicle for several years, and the well-known effect such use has on the value of a vehicle. Many of plaintiff's claims would require, at a minimum, some determination of the value to him of his use of the vehicle, so they cannot be reasonably calculated with any certainty. Even if it is difficult to determine with precision what does or does not constitute a "sum certain," plaintiff's August 30 complaint unambiguously does not seek a "sum certain," notwithstanding its *inclusion of* a request for a specified sum. Therefore, trial court therefore correctly determined that the default judgment should not have been entered.

IV. SETTING ASIDE THE DEFAULT

In contrast, we conclude that the trial court improperly set aside the default. In part, the trial court's order granting reconsideration strongly suggests that the trial court failed to recognize any distinction between a default and a default judgment. Furthermore, at oral argument, defendants' counsel effectively conceded the propriety of the default. We are therefore constrained to find that the trial court had no basis for setting aside the default.

We first agree with plaintiff that the trial court erred when it determined that plaintiff's amended complaint did not comply with MCR 2.113(F)(1).[4] The trial court correctly stated that plaintiff had not attached copies of the purchase agreements to his August 30 complaint. "When an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). However, under MCR 2.113(F)(1)(b), "[i]f a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless the instrument is . . . in the possession of the adverse party and the pleading so states." In his August 30 complaint, plaintiff stated, "[a]ny claim asserted in this Complaint that is based on a written Exhibit or instrument is available to Defendants as intended by the Court rules. MCR 2.113(F)(1)(a)-(b)." Although inartful, we believe plaintiff adequately stated, for purposes of MCR 2.113(F)(1)(b), that the purchase agreements were in defendants' possession. The trial court erred in ruling that plaintiff's August 30 complaint was defective for failing to attach copies of the purchase agreements.

In principle, a trial court could find good cause to set aside a default based on such considerations as the substantive meritoriousness of a defense and the propriety of a party's

[4] MCR 2.113 has been amended, effective September 1, 2018, such that subsection (F) is now codified as subsection (C). We will continue to refer to the prior version in effect at the pertinent time, which is what the parties and the court cited.

conduct. *Heugel*, 237 Mich App at 478-479; *Alken-Ziegler*, 461 Mich at 233-234. Defendants vigorously participated in and defended the action prior to their failure to timely file their answer to the August 30 complaint. Furthermore, plaintiff cannot claim any practical prejudice, because he was properly and timely served with a copy of defendants' answer to the August 30 complaint. Finally, defendants have a straightforward and absolute defense in this matter,[5] whereas the merits of plaintiff's claims in this matter are significantly less obvious. Nevertheless, aside from incorrectly holding that plaintiff's complaint violated MCR 2.113 and correctly setting forth proper reasons for setting aside the default *judgment*; the trial court provided no reasoning, explanation, or any other grounds for setting aside the default. As discussed, defendant's counsel conceded that the default had been properly entered pursuant to MCR 2.603(A).[6] Setting aside a properly entered default is disfavored. See *Alken-Ziegler*, 461 Mich at 229. Therefore, in the absence of any argument or reasoning that the default had been improperly entered or that good cause existed for setting it aside, we conclude that the trial court abused its discretion by setting aside the default.[7]

V. CONCLUSION

We affirm the trial court's order setting aside the default judgment. We reverse the trial court's orders setting aside the default and granting summary disposition in favor of defendants. We remand the matter to the trial court for a hearing on plaintiff's damages and any other proceedings as the trial court deems appropriate. We do not retain jurisdiction. Neither party may tax costs, because neither party has prevailed in full. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro

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[5] Although rendered moot by our resolution of this appeal, we note that plaintiff never attempted on appeal to dispute the substantive basis for the trial court's grant of summary disposition in favor of defendants based on the one-year limitations period set forth in the purchase agreement.

[6] MCR 2.603(A) governs the entry of a default and states that "[i]f a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party."

[7] Consequently, we need not address plaintiff's remaining arguments on appeal.