STATE OF MICHIGAN

COURT OF APPEALS

WEST BLOOMFIELD CHARTER TOWNSHIP,

Plaintiff-Appellee,

v

ADEL ALKATIB, FLORENCE ALKATIB, and REAL PROPERTY LOCATED AT 5542 GREER ROAD,

Defendants-Appellants.

UNPUBLISHED
December 16, 2021

No. 355370
Oakland Circuit Court
LC No. 2020-181471-CE

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

Defendants, acting in *propria persona*, appeal as of right the order of default judgment entered in favor of plaintiff. On appeal, defendants argue the trial court erred in refusing to set aside the default judgment, and in granting plaintiff the right to demolish defendants' condemned property at defendants' expense. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case arises from various code violations, blight, and nuisance conditions of the property, rendering it dangerous and uninhabitable. Plaintiff condemned the property in 2016, and 2017, declaring the property unfit for habitation because the structures on the property had been vacant for years and "stripped down to the rough carpentry[,]" which rendered the structures on the property structurally compromised and at risk of collapse. In March 2017, defendants obtained a demolition permit to demolish the property but did not act, and allowed the permit to lapse, stating the reason they failed to do so was because they were not capable of paying for the demolition costs. As a result, the property remained uninhabitable and dangerous. Plaintiff repeatedly requested defendants register the property as vacant and repair the blighted conditions, which defendants ignored. Because, according to plaintiff, the cost of repairs exceeded the value of the property, plaintiff concluded repairing the structures on the property was unfeasible.

Plaintiff filed its complaint against defendants alleging the dangers posed by the property and its various code violations. Specifically, plaintiff alleged the property was improperly

maintained, violated various antiblight ordinances, was violative of international property maintenance code, had structures that constituted dangerous buildings, and constituted a nuisance per se. After defendants failed to answer within the 21-day period under MCR 2.108(A)(1), plaintiff requested entry of a default against defendants. Defendants submitted their answer about two weeks later, conceding the ordinance and code violations but asserting they should be permitted to demolish the property themselves.

The same day, defendants moved to set aside the default, arguing permitting plaintiff to handle the property's demolition would be more expensive than if defendants handled it, and that defendants believed the case would be adjourned to have the parties resolve the demolition issues out-of-court. Plaintiff did not file a response to defendants' motion. The trial court found the property amounted to a "nuisance per se[,]" stating plaintiff was "more than reasonable in their attempts to come to a resolution with the defendants that would make everybody safe, happy and financially whole." Accordingly, the trial court concluded it would "sign an order[.]"

After the trial court's denial of their motion, defendants filed objections to entry of a default judgment, arguing defendants met with "a higher up representative of Plaintiff" who told defendants that plaintiff would extend the time to answer the complaint, and defendants' failure to timely file an answer was in reliance on this assertion. In response, plaintiff denied any official told defendants they could have an extension to file their answer, alleging plaintiff's counsel informed defendants multiple times they would not receive an extension. The trial court entered a default judgment, ordering plaintiff to demolish the property and permitting plaintiff to recover costs for the demolition from defendants. Later, the trial court entered an order denying defendants' motion to set aside the default and defendants' objections, stating defendants did not establish "good cause or a meritorious defense" to set aside default judgment.

Defendants moved for reconsideration, arguing the trial court erred in denying defendants' objections to the entry of a default and motion to set aside the default, without a hearing. Defendants further alleged the trial court's decision to enter the default judgment constituted palpable error because it would impose excessive costs on defendants. In support of their motion, defendants submitted a demolition report from Property Waste, LLC (Property Waste), indicating a demolition price of $11,500, a copy of the check they wrote to Property Waste for demolition, and an Asbestos Laboratory Report by IMS Laboratory. Plaintiff did not seek permission to respond to defendants' motion for reconsideration.

About one month later, plaintiff posted a stop work order on defendants' property after defendants continued to work on the property despite the trial court's default judgment providing plaintiff with exclusive demolition rights. Defendants filed a supplement to their motion for reconsideration, alleging plaintiff was not entitled to post the stop work order because defendants' motion for reconsideration was still pending in the trial court, barring plaintiff's actions absent a final judgment under MCR 2.614. The trial court denied defendants' motion for reconsideration, noting defendants "presented the same issues ruled on previously" and did not meet their burden of demonstrating palpable error by the trial court. Defendants filed an appeal with this Court shortly thereafter, and moved for a stay, which this Court denied. *Charter Twp of West Bloomfield v Alkatib*, unpublished order of the Court of Appeals, issued December 2, 2020 (Docket No. 355370).

II. ANALYSIS

Defendants argue the trial court erred in granting a default judgment, denying defendants' motion to set aside the default, and allowing plaintiff to handle the demolition. We disagree.

"A trial court's decision regarding a motion to set aside a default judgment is reviewed for an abuse of discretion . . . . An abuse of discretion occurs when the court's decision results in an outcome that falls outside the range of principled outcomes." *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 528; 872 NW2d 412 (2015) (citation omitted). "[A]lthough 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." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (citation omitted). This Court reviews interpretations of court rules de novo. *Olin by Curtis v Mercy Health Hackley Campus*, 328 Mich App 337, 344; 937 NW2d 705 (2019). "If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed . . . . However, when reasonable minds can differ on the meaning of the language of the rule, then judicial construction is appropriate." *Id.* (citation omitted).

"Defaults are not favored and doubts generally should be resolved in favor of the defaulting party." *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 586; 321 NW2d 653 (1982). "[T]he sanction of default judgment is a drastic measure and should be used only with caution . . . . Generally, this sanction is to be imposed only where the conduct of the offending party has been inexcusable." *In re Forfeiture of One 1987 GMC Station Wagon*, 186 Mich App 540, 545; 465 NW2d 334 (1990). "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 Brothers, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008) (quotation marks, citation, and footnote omitted). "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 a statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109(D)(3), is filed." MCR 2.603(D)(1). The requirements for good cause and for a meritorious defense are "discrete inquiries[,]" and "a party seeking to set aside a default or a default judgment must *both* file an affidavit of meritorious defense and show good cause." *Alken-Ziegler*, 461 Mich at 232-233 (emphasis added).

Regardless of whether defendants have properly shown good cause, because both good cause and a properly verified meritorious defense must be asserted to set aside a default, defendants have not met their burden. Defendants conceded that demolition of the property was necessary. Defendants' only problem was with who would handle the demolition, asserting the cost of demolition if done by plaintiff would be unnecessarily costly compared to the cost if defendants handled the demolition. However, defendants provided no evidence in support of their contentions, relying solely on their own proposed costs with no reference to any actual costs that may be incurred if plaintiff were to handle the demolition. Because defendants offered no evidence in support of their claims and acknowledged the property's various code violations, defendants failed to establish a meritorious defense.

Because defendants have not established a meritorious defense, the issue of good cause need not be considered. However, even if defendants did assert a meritorious defense, defendants failed to show good cause for their failure to timely answer plaintiff's complaint. "[A] party may establish good cause by showing a substantial procedural irregularity or defect, a reasonable excuse for failure to comply with the requirements that created the default, or some other reason why a manifest injustice would result if the default judgment were not set aside." *Alken-Ziegler*, 461 Mich at 229-230 (quotation marks omitted). However, our Supreme Court noted the manifest injustice prong is not truly a prong for good cause, but instead one that demonstrates the interplay between a showing of good cause and a proper assertion of a meritorious defense, explaining:

> The difficulty has arisen because, properly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Alken-Ziegler*, 461 Mich at 233-234.]

This Court has provided a list of factors to help trial courts determine whether a party has shown good cause under the totality of the circumstances in *Shawl*. This nonexhaustive, nonexclusive list generally covers the improper procedure and reasonable excuse prongs, and includes:

> (1) whether the party completely failed to respond or simply missed the deadline to file;
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> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
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> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
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> (4) whether there was defective process or notice;
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> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);
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> (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and

(9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl*, 280 Mich App at 238 (footnote omitted).]

Prongs one through four cover instances of improper procedure. *Id.* Under prongs one and two of the *Shawl* factors, defendants in this case did eventually file their answer. However, this filing was about three weeks late. Prong three considers the duration between the entry of the default judgment and the motion to set aside the judgment. *Id.* at 238. Defendants filed their motion to set aside the default 14 days after the entry of default, but two days before the entry of the default judgment. Finally, there is no indication of any defective process or notice, under the fourth prong.

Prongs five through nine cover possible reasonable excuses. *Id.* According to defendants, their failure to timely file an answer was because of a misrepresentation by an unnamed township official that "lulled them into a false sense of security as to amicably resolving this matter[,]" by informing them the deadline for answering the complaint would be extended to permit the parties to come to an agreement out-of-court. Plaintiff, however, denies such an assertion ever occurred, and that it repeatedly warned defendants of its plans to move forward with the litigation and recommending defendants obtain legal counsel. Defendants do not provide any evidence of this alleged exchange to explain or substantiate their reliance. A review of the record indicates no evidence of plaintiff making any promise to extend the deadline to defendants, and defendants were properly served with the complaint and had knowledge of the time within which they were required to answer under prong six. *Shawl*, 280 Mich App at 238. Prong seven does not help defendants either. *Id.* While the size of the judgment and costs are what defendants' main issue is, defendants failed to introduce evidence of the proposed differences in costs they asserted. Defendants provided a demolition report from Property Waste, quoting a demolition price of $11,500, but have introduced no proofs as to how much the demolition will cost if done by plaintiff. Prongs eight and nine are irrelevant to the circumstances of this case. *Id.*

Finally, defendants' argument the trial court erred in failing to consider lesser sanctions is misplaced. As stated, the entry of a default is "a drastic measure and should be used with caution." *Draggoo v Draggoo*, 223 Mich App 415, 423; 566 NW2d 642 (1997) (citation omitted). On this basis, before entering a default, "[t]he court must also evaluate on the record other available options [.]" *Id*. at 423-424 (citation omitted). Generally, a court abuses its discretion when it fails to evaluate other available options on the record. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995). Specifically, MCR 2.603(B)(3)(b) requires a trial court to "(i) take an account, (ii) determine the amount of damages, (iii) establish the truth of an allegation by evidence, or (iv) investigate any other matter," to enter a default judgment or to carry it into effect. MCR 2.603(B)(3)(b). Defendants rely on *Gawlik v Rengachary*, 270 Mich App 1, 9; 714 NW2d 386 (2006), arguing "a trial court abuses its discretion by employing default as a sanction without determining, on the record, whether less drastic alternative sanctions are appropriate." However, defendants' reliance on *Gawlik*, and the caselaw it cites: *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 631; 420 NW2d 835 (1987), and *Kowalski v Fiutowski*, 247 Mich App 156; 635 NW2d 502 (2001), is not supported. This Court's decision in *Houston* considered dismissal, not default. *Houston*, 166 Mich App at 631. In addition, the *Kowalski* Court did not require a trial court to consider lesser sanctions on the record, only that it must "exercise discretion in entering the default and . . . consider the possibility of any other remedies[.]" *Kowalski*, 247 Mich App at 166. The trial court in *Kowalski* "erroneously believed that it was required by statute to enter a

default and that it had no discretion to fashion any other appropriate sanction." *Id.* at 165-166. The trial court in this case, however, expressed no such erroneous belief. The trial court, in its discretion, decided default was the appropriate sanction for defendants, noting at the motion hearing:

> [I]t's clear that the defendants' efforts and intent with this going back to 2017 when they pulled the permit to demolish this property and they did not follow through with that, and, in fact, allowed the permit to lapse, and the fact that they have not replied to this lawsuit demonstrates that they are disingenuous.

The trial court did not mistakenly believe it lacked discretion, and its decision to enter a default on the basis of defendants' behavior, was not outside the range of principled outcomes. *Epps*, 498 Mich at 428. Because defendants have not properly asserted either a procedural irregularity or a reasonable excuse for their failure to timely file their answer, they have not satisfied the good cause requirement of MCR 2.603(D)(1).

Finally, we note that on appeal, plaintiff has requested it be awarded costs and fees incurred for defendants' vexatious behavior. "Damages may be awarded or other disciplinary action may be taken when an appeal or proceedings in an appeal are determined to be vexatious. MCR 7.216(C). Such a determination may be made at the Court's own initiative 'or on the motion of any party filed under MCR 7.211(C)(8). . . .' " *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 78; 755 NW2d 563 (2008), citing MCR 7.216(C)(1). However, "[a] party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule." *Citizens Ins Co*, 279 Mich App at 78, quoting MCR 7.211(C)(8). Because plaintiff's request to impose sanctions or award fees and costs is merely included in its appellate brief, filed under MCR 7.212, it does not constitute a motion as necessitated by the applicable court rule to obtain the requested recoupment for fees and costs incurred on appeal.

III. CONCLUSION

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford