

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE COLLINS,

Plaintiff-Appellee,

v

ANCHOR SENIOR MEDICAL SERVICES
PLLC,

Defendant,

and

VASAN H DESHIKACHAR,

Defendant-Appellant

UNPUBLISHED

April 17, 2012

No. 302503

Wayne Circuit Court

LC No. 06-633062 CD

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

In this case, defendant¹ appeals by right from the order of the Wayne Circuit Court granting a default judgment of \$500,000 in favor of plaintiff. We affirm in part because defendant repeatedly violated the trial court's orders, even after being fined and warned that further violations would result in a default judgment. However, we also reverse in part and remand because defendant did not waive his right to a jury trial and thus is still entitled to a trial to determine the amount of damages.

¹ Because Anchor Senior Medical Services is not involved in this appeal, we use the term defendant to refer exclusively to Vasan Deshikachar.

I. FACTS

Plaintiff originally filed this sexual harassment suit against defendant and his corporation, Anchor Senior Medical Services (Anchor), in 2006. In an order dated November 28, 2007,² the trial court found that defendant had not provided answers to plaintiff's discovery requests. The court ordered defendant to respond fully and produce certain witnesses for depositions, and warned that failure to do so would result in a default order being entered against defendant. On January 11, 2008, the court found that defendant had not complied with the November 28, 2007 order. The court nonetheless denied plaintiff's motion for a default judgment, instead imposing sanctions of \$1,000 each against defendant and Anchor. The order stated that plaintiff could file another motion if any further discovery disputes arose. On March 7, 2008, the court issued an order regarding case evaluation and appended the statement, "if Mr. Deshikachar violates one more Court order, this Court will enter a judgment of default against him, in favor of Plaintiff for one-half of a million dollars."

The case went to trial in January of 2009 against Anchor alone, because defendant filed for bankruptcy protection shortly before the trial was scheduled to begin. Plaintiff and Anchor reached a settlement before the end of the trial, and the court entered a consent judgment against Anchor. During the trial plaintiff sought a default judgment against Anchor after it became apparent that defendant intended to give substantially different testimony at trial compared to his earlier deposition testimony. The trial court denied the motion without prejudice, but ordered that Anchor pay the \$1,000 sanction originally imposed on November 28, 2007. The court stated, "If [defendant] fails to do that at this point, because he has violated so many other court orders, I may put . . . Dr. Deshikachar in custody and lock 'em up as a penalty because apparently the fines aren't doing it, so I may give him some time." However, the court also encouraged plaintiff and Anchor to settle the matter, which they did.

The case against defendant was reopened in October 2009, after the bankruptcy litigation stay was lifted. A trial was eventually scheduled for January 24, 2011. Instead of proceeding to trial, however, plaintiff renewed her motion seeking a default judgment. The trial court found that one of the \$1,000 fines still had not been paid. The court found that the discovery orders had been violated by defendant failing to produce certain emails until just before the 2009 trial which could have been produced at any time. The court found that defendant failed to answer questions and provide documents at his deposition regarding his financial situation.³ The court found that all of these violations took place after the March 7, 2008 order warning defendant that

² It appears that the hearing on these motions took place on November 15, 2007, but the order was not entered immediately. The order directed that certain depositions begin by November 26, which was two days before the order was actually entered.

³ Defendant's and Anchor's finances were relevant because defendant claimed that plaintiff was fired because he could not afford to keep employing her.

future violations would result in a default judgment.⁴ Defendant raised the defense of laches, but the trial court rejected this argument, finding that defendant was not prejudiced by any delay.

II. ANALYSIS

We review for an abuse of discretion a trial court's decision to grant a default judgment. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). A trial court's findings of fact are reviewed for clear error. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995); MCR 2.613(C).

Before imposing the sanction of 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 [caused by the violations], and whether wilfulness has been shown. [*Id.* at 632-633].

"The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994).

In this case, the trial court found that defendant failed to respond to discovery requests over a substantial period of time and that several court orders were violated. The court further stated, "there was clearly a pattern of failure to comply with the Court's orders . . . and efforts on [defendant's] part to kind of manipulate the system." We read this statement to be equivalent to a finding of willfulness. The court also found that the amount of time elapsed was not too great to prevent it from granting a default judgment. The court made no explicit findings of prejudice to plaintiff caused by defendant's conduct, but refusing to provide information until the eve of trial certainly impacted plaintiff's trial preparation.

Defendant argues that in fact a great deal of time had elapsed, as around two years passed between the trial against Anchor and the renewed motion seeking a default judgment against defendant. However, a substantial portion of this delay was caused by defendant declaring bankruptcy. Further, all of the other factors weigh in favor of the trial court's decision to grant the default judgment.⁵ Defendant does not challenge the court's factual findings on the other factors, nor do we conclude that those findings were clearly erroneous. The record makes clear that defendant acted with no regard for discovery requirements or the orders of the trial court.

⁴ The court did not rely on plaintiff's claims that defendant was going to commit perjury at the 2009 trial or had already done so at his deposition, in part because the settlement with Anchor occurred before defendant was called to testify.

⁵ Defendant also objects that the trial court's decision was based on hearsay evidence that defendant intended to change his testimony at trial. However, the trial court explicitly did *not* base its decision on plaintiff's allegations of perjury.

Further, the trial court warned defendant on multiple occasions of the possible consequences of continued noncompliance with court orders, and imposed lesser sanctions prior to granting the default judgment. Under these circumstances, it was not an abuse of discretion to grant default judgment in favor of plaintiff.

Defendant argues that the doctrine of laches should have precluded plaintiff from seeking a default judgment. Laches “is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.” *Public Health Dep’t v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Defendant claims he was prejudiced by the delay in this case because his financial situation deteriorated and he can no longer afford an attorney to help defend him. However, there would have been no delay if defendant had not filed for bankruptcy and interrupted the case. We also agree with the trial court that defendant suffered no genuine prejudice from the delay.

Defendant also argues that even if the default judgment was appropriate, he is still entitled to a trial to determine the amount of plaintiff’s damages. Defendant is correct. The case of *Mink v Masters*, 204 Mich App 242; 514 NW2d 235 (1994) is directly on point. In that case, as in this one, the defendant committed a number of discovery violations and the trial court granted a default judgment in favor of the plaintiff and awarded damages. However, “A default does not constitute a waiver of a jury trial in a civil action. Thus, where it is necessary for the trial court to hold a hearing on the issue of damages, the defendant has a right to a jury trial if that right has been preserved even though the defendant has defaulted.” *Id.* at 246 (internal citation omitted). Further, “once one party has filed a jury demand, all other parties may rely on that jury demand and need not independently file their own demand for a jury trial.” *Id.* In this case, plaintiff filed a jury demand and defendant has not affirmatively waived his right to a jury trial. Therefore, defendant has a right to a trial to determine plaintiff’s damages. *Id.* at 246-247.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro