STATE OF MICHIGAN

COURT OF APPEALS

REMINGTON CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

DEPENDABLE CONCRETE INC. and MATTHEW STAFFORD,

Defendants,

and

LASALLE GROUP INC., WAL-MART STORES INC., STEVE PALERMO, SCOTT NEMECEK, RANDY PALERMO, JASON BEDFORD, CHET JABLONSKI, and WES GERECKE, d/b/a LASALLE INC.,

Defendants-Appellees.

UNPUBLISHED
December 19, 2013

No. 312101
Van Buren Circuit Court
LC No. 11-610638-CZ

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff Remington Construction Company was hired by the cement-work subcontractor for a large Wal-Mart store construction project. When Remington was shorted approximately $80,000 for its work, it sued not only the subcontractor, but also the project's general contractor and Wal-Mart. Remington secured a default judgment against the cement-work subcontractor. The circuit court thereafter summarily dismissed Remington's claims against the general contractor and Wal-Mart because the subcontractor had a contractual duty to pay Remington and that subcontractor was the correct party to pursue for collection. We affirm that decision.

I. BACKGROUND

This case revolves around the construction of a Wal-Mart in Pittsfield Township. Wal-Mart hired The LaSalle Group, Inc. (LaSalle Group)[1] to serve as the general contractor on the project. The LaSalle Group is owned and operated by individuals Steve Palermo, Scott Nemecek, Randy Palermo, Jason Bedford, Chet Jablonski, and Wes Gerecke (collectively the LaSalle defendants). The LaSalle Group hired Dependable Concrete, Inc. (Dependable), which is owned by Matthew Stafford, to serve as the subcontractor in charge of cement work at the site. Dependable, in turn, hired Remington to provide materials and labor for the job.

According to Remington, Wal-Mart and the LaSalle Group provided specifications of the site and the work details. At some point, Wal-Mart and the LaSalle Group provided revised job specifications requiring a significant increase in concrete work. Remington claims that Wal-Mart and the LaSalle Group wanted the work to continue toward completion in a timely manner and orally instructed both Dependable and Remington to fulfill the additional job requirements with a promise of payment for the work. Remington alleges that Wal-Mart and the LaSalle Group thereafter refused to sign the change order for the additional work and then refused to pay Dependable and Remington for the work completed based on their oral agreement.

Remington filed suit against Dependable, Wal-Mart and the LaSalle defendants seeking to collect its outstanding invoices. Having no contract with Wal-Mart or the LaSalle defendants, Remington asserted various claims under other theories: open account, fraud, violation of the Michigan Builder's Trust Fund Act, unjust enrichment, conversion, negligence and breach of the implied warranty of suitability (referring to the project plans and specifications). Remington sought treble damages for the $80,654.50 due and owing.

Remington secured a default judgment against Dependable and Stafford. The subcontractor never sought to set aside that default and is now liable to Remington for the full judgment amount. That judgment is not at issue in this appeal.

Remington also filed defaults against Wal-Mart and some of the LaSalle defendants based on their failure to timely respond to the complaint. Over Remington's objection, the circuit court set aside those defaults and permitted the matter to proceed toward trial. Defense counsel did not seek to set aside the default or subsequent default judgment against LaSalle, Inc., however. Counsel contended that LaSalle, Inc. was not an actual entity, just a misnomer sometimes used by the LaSalle Group defendants to refer to their company. LaSalle, Inc. was therefore not her client, counsel stated.

Armed with a default judgment against LaSalle, Inc., Remington secured a garnishment order for a bank account from which the LaSalle Group issued checks printed with "LaSalle, Inc." on the payor line. Remington refused to cease its collection efforts after defense counsel presented a bank document indicating the account's true ownership. On the eve of a hearing at

[1] Remington believes that LaSalle, Inc. is an alter ego for the LaSalle Group and therefore named it as a defendant in these proceedings.

which the circuit court was threatening to impose sanctions, Remington signed a stipulation releasing its garnishment order and dismissing LaSalle, Inc. as a defendant without prejudice until it could prove the incorporated defendant's existence.

Wal-Mart and the LaSalle defendants then sought summary dismissal of Remington's various claims against them. Defendants argued that Remington had a contractual relationship with Dependable and should pursue collection efforts against Dependable alone. Defendants further argued that Remington had not created a factual question of liability or stated legal claims upon which relief could be granted. The circuit court agreed and dismissed Remington's claims against Wal-Mart and the LaSalle defendants, rejecting Remington's motion to first compel further discovery. This appeal followed.

II. SUMMARY DISPOSITION

Remington challenges the circuit court's summary dismissal of its claims against Wal-Mart and the LaSalle defendants. Remington questions the legal basis for the court's decision and claims that dismissal was premature as the court had yet to compel requested discovery. Yet, the proffered evidence establishes that Remington had a relationship and contacts only with Dependable, the subcontractor with which it contracted, negating any question of material fact warranting a trial. In relation to the counts of implied warranty and negligence and fraudulent retention and use, Remington did not state a claim upon which relief could be granted. Moreover, Remington merely speculates that further discovery could have supported its claims. Accordingly, the circuit court did not err in dismissing Remington's claims when it did.

A. Standard of Review

"We review a trial court's decision on a motion for summary disposition de novo." *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted." We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. The motion should be granted only if no factual development could possibly justify recovery.
>
> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." [*Id.* at 139-140 (citations omitted).]

As this Court has recently stated:

> Because a motion under MCR 2.116(C)(10) tests a party's ability to factually support a claim, a trial court should not decide the motion where the parties have not yet had an opportunity to conduct discovery. Whether a motion for summary disposition under this rule would be premature depends on whether further discovery stands a fair chance of uncovering factual support for the litigant's position. [*Thomai v MIBA Hydamechanica Corp*, ___ Mich App ___; ___ NW2d ___ (Docket No. 310755, issued November 14, 2013), slip op at 9 (quotation marks and citations omitted).]

"This Court reviews a trial court's decision to limit discovery for an abuse of discretion. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* (citations omitted).

B. Open Account

In Count I of its complaint, Remington charged that it "sold and delivered to Defendants certain goods and/or services on open account and on Defendants' promise to pay for them." Remington conducted its work in reliance on Wal-Mart and the LaSalle defendants' promises, but payment was not forthcoming.

An "open account" is "an unpaid or unsettled account" or "an account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single liability." An "open account" "consists of a series of transactions and is continuous or current, and not closed or stated." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553-554; 837 NW2d 244 (2013) (quotation marks, citations and alterations omitted). As defined by the Supreme Court, an open account action is rooted in assumpsit and requires "[a]n express or implied promise" to pay and a breach of that promise. *Id.* at 563-564 (quotation marks and citation omitted).

Remington presented no evidence actually supporting this claim. Although Remington asserted in a July 16, 2012 affidavit that it "sent statements and invoices directly to LaSalle Group by facsimile and an email requesting that [it] be paid for the work performed," the invoices presented into the record are addressed only to Dependable. Remington never indicated the dates on which it sent the facsimiles or provided a fax receipt evidencing the transmissions. Remington failed to assert in the affidavit that it sent its invoices to Wal-Mart at all. And Remington did not provide a copy of the email message it allegedly sent to the LaSalle Group seeking payment. Remington did present an April 16, 2010 *letter* that it sent to the LaSalle Group as a last ditch effort to collect on its additional work. This single letter does not support on ongoing relationship between the general contractor and the sub-subcontractor.[2] While Remington additionally cites a July 19, 2010 e-mail string as support for its ongoing negotiations with Wal-Mart and the LaSalle Group, there is no indication within the emails that Remington was involved in those conversations. Contrary to Remington's claim in its appellate brief,

[2] In the letter, Remington did request "copies of change orders, sworn statements and close out documentation for [the] project" as stated in Remington's affidavit.

neither Wal-Mart nor the LaSalle Group promised in these e-mails to sign change order #9 for the disputed work. Rather, an e-mail from Jablonski to a Wal-Mart representative provided: "Through change order #8 Dependable's approved contract is $1,260,652.13 of which we have paid them a total of $1,144,856.09 which is backed up by the partial unconditional waiver from them leaving a balance owed of $115,796.04. Our intent is to pay them this balance owed . . . ." "[T]he final change order," as acknowledged in the e-mail, was "still being negotiated." Remington swore in its affidavit that "LaSalle Group and Wal-Mart knew I was working on the Pittsfield Township Project. They requested that we continue working . . . ." However, Remington never actually swore under oath that it had direct communication with the LaSalle Group or Wal-Mart in this regard and provided no details to bolster its claim that an oral promise was made.

While Remington contends that further discovery would have supported its claim, it identifies no individual who would be deposed to place Remington at the table during these discussions. Although Michigan permits "open and far-reaching discovery," we do not permit "fishing expeditions" based solely on a party's conjecture that further discovery would reveal the smoking gun. *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). Accordingly, the circuit court properly dismissed Remington's open account claim when it did.

C. Personal Liability of the Individual LaSalle Defendants

Remington complained that Sal Palermo, Nemecek, Randy Palermo, Bedford, Jablonski and Gerecke used the LaSalle Group and LaSalle, Inc. as conduits to take payments due and owing to Remington "to satisfy obligations of other companies or themselves." Remington also accused the individuals of inadequately capitalizing the LaSalle Group and LaSalle, Inc. and of failing "to maintain adequate and complete financial records of the company activities." Accordingly, Remington sought to pierce the corporate veils of the LaSalle Group and LaSalle, Inc. to hold the individuals liable "based on their financial and business arrangements and practices."

"As a general proposition, the law treats a corporation as an entirely separate entity from its stockholders." *Foodland Distribs v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). To reach the stockholders and hold them liable, a plaintiff must "pierce the corporate veil." *Id.* "There is no single rule" governing when a court may circumvent the corporate form. *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 510; 802 NW2d 712 (2010). However, "[p]iercing the corporate veil requires the following elements: (1) the corporate entity is a mere instrumentality of another individual or entity, (2) the corporate entity was used to commit a wrong or fraud, and (3) there was an unjust injury or loss to the plaintiff." *Id.* This doctrine is traditionally employed "to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations." *Foodland Distribs*, 220 Mich App at 456.

Remington presented evidence that the members of the LaSalle Group use the name "LaSalle, Inc." to refer to their corporation. This misnomer was used on invoices, contracts, checks, and the company's website. The LaSalle defendants admit the error of their ways in this regard.

However, Remington never specifically alleged how these defendants used LaSalle, Inc. or the LaSalle Group to defraud Remington or to wrongfully take funds due and owing to it. The company's checks included the title LaSalle, Inc. but the bank account was owned by the LaSalle Group. Remington presented no evidence that the LaSalle defendants moved funds between accounts or attempted to hide any funds. Within the July 19, 2010 e-mail string presented by Remington, Jablonski admitted that the LaSalle Group owed Dependable $115,796.04. Remington presented no evidence, however, connecting the amount the LaSalle Group owed to Dependable to any amount Dependable owed to Remington. Even if the amounts matched perfectly, the LaSalle Group did not owe anything to Remington, only Dependable did. While Dependable's late-filed answers to requests for admissions indicate that LaSalle did not pay it in full, Dependable did not file a cross-claim against the LaSalle defendants and there is no record indication that Dependable has filed a separate lawsuit. Basically, this claim fails because Remington is going after the wrong party.

Moreover, while Remington attacks the financial record-keeping and inner workings of the LaSalle defendants, it presented no evidence in support and never clarified its allegations. Remington did ask the LaSalle defendants to produce during discovery an accounting of the entire Pittsfield Township Wal-Mart project, as well as all contracts and records regarding the disbursement of funds. The LaSalle defendants agreed to make all existing documents available at its attorney's office for Remington's review, but objected to the burden of preparing an accounting statement for this litigation. Remington did not use the opportunity to review any records or documents at defense counsel's office and did not file a motion to compel any specific item such as the project accounting. Remington cannot complain that the court did not give it discovery when it failed to make use of the opportunity when given.

D. Fraudulent Retention and Use

Remington accused Wal-Mart and the LaSalle defendants of retaining funds due and owing to it. Remington alleged that the retention of these funds violated the Michigan Builder's Trust Fund Act, MCL 750.151 *et seq.*

MCL 570.151 provides:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

MCL 570.152 provides:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, *engaged by him* to perform labor or furnish material for the specific improvement, shall be guilty of a felony in

> appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid . . . . [Emphasis added.]

The purpose of the act is to "'afford protection to the suppliers of labor or materials'" in the construction industry in addition to the protection afforded by mechanics' liens. *Nat'l Bank of Detroit v Eames & Brown, Inc*, 396 Mich 611, 620; 242 NW2d 412 (1976), quoting *Gen Ins Co of America v Lamar Corp*, 482 F2d 856, 860 (CA 6, 1973). "[T]he design of the act is to prevent contractors from juggling funds between unrelated projects. By imposing a trust as to monies paid the contractor, the statute ensures that funds for a particular project will be used for that project alone." *People v Miller*, 78 Mich App 336, 342; 259 NW2d 877 (1977).

As stated in *KMH Equip Co v Chas J Rogers, Inc*, 104 Mich App 563, 567-568; 305 NW2d 266 (1981), the act applies only to claims filed against the entity that hired the plaintiff:

> Even if we assume that plaintiff could qualify as one who furnished materials, plaintiff's protection under the building contract fund act applies to Chas. J. Rogers, Inc., the subcontractor who engaged plaintiff. Defendant general contractors' statutory fiduciary duty is to pay those subcontractors, laborers, and materialmen who were engaged by them, including subcontractor Chas. J. Rogers, Inc. Defendant general contractors' obligation under the building contract fund act is not to pay persons engaged by someone else. We cannot assume that the words "engaged by him" have no meaning.

It is undisputed that Dependable engaged Remington. Wal-Mart and the LaSalle Group did not engage Remington. According to *KMH* and the plain language of the statutes, Remington can have no fraudulent retention and use claim against Wal-Mart or the LaSalle Group in connection with funds owed to it by Dependable. No development of the evidence could support this claim.

E. Fraud

In its fraud claim, Remington's allegations are based on its contention that it was directly involved in conversations with Wal-Mart and the LaSalle Group and the promises defendants allegedly made. As noted, Remington presented no proof of that it was involved in negotiations with Wal-Mart or the LaSalle Group and does not identify where such information could be uncovered in further discovery. Accordingly, the circuit court properly dismissed this claim before trial.

F. Unjust Enrichment

Remington asserts that Wal-Mart and the LaSalle defendants were unjustly enriched by Remington's provision of labor and materials without payment.

> Unjust enrichment is defined as the unjust retention of money or benefits "'which in justice and equity belong to another.'" *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (citation omitted). "No person is unjustly enriched unless the retention of the benefit would be unjust." *Buell v Orion State Bank*,

> 327 Mich 43, 56; 41 NW2d 472 (1950). *Buell* also explained: "'One is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution.'" *Id.* (citation omitted). [*Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010).]

As described by this Court:

> The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. In such instances, the law operates to imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter. [*Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993) (citations omitted).]

Wal-Mart presented unrefuted evidence that it paid the LaSalle Group in full for the work completed and that the LaSalle Group agreed to accept liability for any remaining claims by Dependable. As Wal-Mart paid for the work completed, it cannot be deemed unjustly enriched.

The circuit court found that the LaSalle Group had paid Dependable in full. Although filed late, Dependable indicated in its answers to a request for admissions that the LaSalle Group did not pay it in full. Jablonski's July 19, 2010 e-mail to a Wal-Mart representative indicates the LaSalle Group's intent to pay Dependable in full for expenses through change order #8 and to negotiate the amount requested under proposed change order #9. As noted by the circuit court, however, these e-mails only support a potential claim by Dependable against the LaSalle Group. If the LaSalle Group withheld funds, they could only be funds due to Dependable given the contractual relationships of the parties. Again, Remington's claim for payment is against Dependable alone.

G. Conversion

Remington brought claims for both statutory and common-law conversion. A statutory conversion claim is governed by MCL 600.2919a, which provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

"Common law conversion . . . consists of any 'distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.'" *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 13-14; 779 NW2d 237 (2010), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

Remington alleged that Wal-Mart and the LaSalle defendants converted Remington's money that they held in trust for Remington. Unfortunately for Remington, neither Wal-Mart nor the LaSalle defendants held any funds in trust for Remington because they did not engage Remington. Again, Remington's sole resort for this action would be against Dependable.

H. Implied Warranty and Negligence

Remington claims that the project plans carried with them an implied warranty of suitability that they accurately reflected the needs of the project. The only case Remington has cited in support of this proposition is *Hersey Gravel Co v State Hwy Dep't*, 305 Mich 333; 9 NW2d 567 (1943). In *Hersey*, the state invited bids for a highway construction project. The state-produced blueprints for the project included "notations of soil conditions" upon which the plaintiff relied in calculating its bid. *Id*. at 335. The parties disputed whether these notations were accurate. *Id.* at 338. The state further contended that it made no warranty of the soil conditions as the project advertisement specifically warned bidders to examine the site and the actual soil conditions for themselves before entering a bid. *Id.* at 340.

The *Hersey* Court did not resolve the plaintiff's claims on implied warranty grounds. Rather, the Court held that the defendant had access to more information than the plaintiff, and conducted an extensive soil analysis and then provided only limited information to bidders. *Id.* In fact, the Court upheld the trial court's rejection of the plaintiff's narrow implied warranty claim based on the evidence. *Id.* at 343.

Remington's claim is legally unsound. In any given construction project, especially a large project like this one, there will be numerous changes to the original plans. In relation to the cement work alone, there were eight approved change orders. The need to issue change orders does not mean that the original plans were defective or breached a potential warranty. Absent any caselaw actually supporting Remington's position, we discern no error in the circuit court's dismissal of this claim.

III. DEFAULTS AND DEFAULT JUDGMENTS

Defendant challenges the circuit court's decision to set aside the defaults and default judgments it had secured against Wal-Mart and some of the LaSalle defendants. It also challenges the circuit court's refusal to strike Wal-Mart's supplemental brief in support of its motion to set aside the default and the circuit court's refusal to reconsider its orders. Yet, Remington rushed to enter defaults and default judgments. It served defendants by various methods at different times and knew defendants were represented by a single attorney who would want to file one answer. Defendants' confusion about the timeline was understandable.

Defendants also asserted meritorious defenses before the court, warranting the setting aside of the defaults.

We review for an abuse of discretion a circuit court's decision to set aside a default judgment, to deny a motion for reconsideration, and to strike a pleading. *Bullington v Corbell*, 293 Mich App 549, 554-555; 809 NW2d 657 (2011); *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Setting aside the entry of a default or default judgment is governed by court rule. MCR 2.603(D)(1) provides: "A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."

Good cause to set aside a default "may be satisfied by demonstrating a procedural irregularity or defect or a reasonable excuse for failing to comply with the requirements that led to the default judgment." *Bullington*, 293 Mich App at 560-561 (quotation marks and citation omitted). "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999). The court's decision should be based on "the totality of the circumstances" and our Court has provided a list of factors to guide a lower court's consideration. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 237; 760 NW2d 674 (2008).

> In determining whether a party has shown good cause, the trial court should consider the following factors:
>
> (1) whether the party completely failed to respond or simply missed the deadline to file;
>
> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
>
> (4) whether there was defective process or notice;
>
> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> * * *
>
> In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that:
>
> * * *

(2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or

* * *

Neither of these lists is intended to be exhaustive or exclusive. Additionally, as with the factors provided in other contexts, the trial court should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive. [*Id.* at 238-239.]

Here, none of the defaulted defendants completely failed to respond. Wal-Mart served its answer one day late and Nemecek, Randy Palermo, and Jablonski served their answers five days late. Defendants filed their motions for relief as soon as they learned of the defaults. Defense counsel's failure to timely file answers for her clients does not appear to be "knowing or intentional." Rather, defense counsel was representing eight defendants who had been served in different ways at various times. Counsel wanted to file one answer for all defendants and miscalculated the timing. See *Shawl*, 280 Mich App at 238. Considering the totality of the circumstances, the circuit court acted within its discretion in finding good cause to set aside the defaults.

Defendants also established that they were entitled to notice before Remington filed the default *judgments*. Pursuant to MCR 2.603(B)(1)(a)(*i*), a plaintiff is required to notify a defendant before filing the default judgment if "the party against whom the default judgment is sought has appeared in the action." Clearly, Remington knew that counsel was representing the LaSalle defendants as he served notice to her on behalf of certain of those defendants. By the time the default judgments were entered, defense counsel had filed an appearance in the action, attempted to file an answer, and had filed a motion to set aside the defaults entered with the clerk of court. Remington was therefore required to provide notice under subpart (*i*).[3]

Defendants stated a meritorious defense for setting aside the defaults as required by MCR 2.603(D)(1). As noted, defendants successfully established their entitlement to summary dismissal of all of Remington's claims. In their brief attached to their motions to set aside the defaults, defendants expounded at length on these grounds. And all defendants filed affidavits of meritorious defense by the time of the hearing on the motion.

Based on our Supreme Court's opinion in *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265; 803 NW2d 151 (2011), the failure to include the defenses within the affidavits or to file all affidavits with the initial motion was not fatal. In *Lawrence M Clarke*, the defendants filed a motion for relief from the default judgments under MCR 2.603 and MCR 2.612. The defendants did not attach their affidavits of meritorious defense to their motion, waiting until the circuit court hearing to present them. *Id.* at 271. The circuit court granted the motion to set aside the defaults based on MCR 2.612, which does not require an affidavit of meritorious defense. As

[3] Defendants' other claims of procedural error related to Remington's acquisition of defaults against them lack merit.

such, the timing issue was not necessary to the resolution of the case. *Id.* at 273. The Court did note, however, that setting aside the default judgments despite the late affidavits was "consistent . . . with the general principle that '[d]efaults are not favored and doubts generally should be resolved in favor of the defaulting party.'" *Id.* at 273 n 3, quoting *Wood v DAIIE*, 413 Mich 573, 586; 321 NW2d 653 (1982). Given Wal-Mart and the LaSalle defendants' showing of good cause and presentation of strong meritorious defenses, the circuit court was within its discretion to set aside the defaults and default judgments.

IV. GARNISHMENT

Finally, Remington complains that the circuit court improperly set aside its garnishment order against LaSalle, Inc. We review the circuit court's decision for an abuse of discretion. *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 19; 69 NW2d 176 (1955).

Remington secured a default judgment against LaSalle, Inc. for the full amount of trebled damages it sought in the complaint. Because the LaSalle defendants denied the existence of LaSalle, Inc., defense counsel never filed an appearance on behalf of that defendant or moved to set aside the default or default judgment. During the Wal-Mart construction project, the LaSalle Group had issued checks for payment identifying LaSalle, Inc. as the payor. Remington secured a garnishment order for the account listed on those checks. The LaSalle Group objected to the garnishment and presented an account cover sheet indicating that it was the actual account owner. The garnished account was a "sweep account" through which the LaSalle Group paid its debts. The LaSalle Group also owned other accounts at Comerica and transferred funds into the garnished account to make necessary pay outs. Remington sought discovery from Comerica and the LaSalle defendants about the other accounts in an attempt to establish that the LaSalle Group was operating some sort of shell game, but the discovery was never provided. Remington was unable to compel the discovery because the circuit court issued an order stalling all motion traffic until the hearing on the summary disposition motions.

Ultimately, the circuit court determined that only Dependable could be liable to Remington. Therefore, any garnishment order against any LaSalle defendant would have been improper. Moreover, at the time the garnishment order was set aside, there was no evidence that LaSalle, Inc. was an actual corporation or that anyone other than the LaSalle Group owned the garnished account. And, given the stipulated dismissal of LaSalle, Inc. as a defendant, there was no longer a default judgment to collect upon. The circuit court acted within its discretion in setting aside the garnishment order until Remington could prove that LaSalle, Inc. existed and owned the account.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher