STATE OF MICHIGAN

COURT OF APPEALS

BARBARA J. APSEY,

Plaintiff-Appellee,

v

DELBERT W. APSEY,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 181542
LC No. 93-008674-DO

Before: Smolenski, P.J., and Holbrook, Jr. and F.D. Brouillette,* JJ.

PER CURIAM.

Defendant appeals as of right an October 24, 1994 default judgment of divorce. We reverse and remand.

In this case, the court's April 28, 1994 pretrial conference summary of the April 25, 1994 pretrial conference stated in relevant part as follows:

> Mr. Plank [defendant's counsel] further requested, with the consent of Mr. Werth [plaintiff's counsel], that the matter be remanded to the Friend of the Court for purposes of making recommendations as to alimony. The matter is so remanded.

At the June 27, 1994 pretrial hearing, plaintiff's counsel informed the court that the friend of the court had not yet prepared a recommendation concerning alimony. The court inquired whether the parties had gotten "in to the Friend of the Court's office to give them the information necessary to make such recommendation?" Upon being advised by counsel that neither party had done so, the court stated that "I guess also you should direct your clients to contact Mr. Fancher and get the – to give him the necessary information so as to make that recommendation." Before continuing the hearing to August 22, 1994, the court again reminded counsel to "[a]dvise your clients to contact the Friend of the Court's office."

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* Circuit judge, sitting on the Court of Appeals by assignment.

At the August 22, 1994 pretrial hearing, plaintiff's counsel stated that there was still no recommendation from the friend of the court concerning alimony because "[a]pparently [defendant] has not presented the Friend of the Court with information or done anything since we were here in June, and therefore two months have gone by and we don't have any progress." After hearing counsel's explanation, the court said that a default could enter because the court had "two indications here where [defendant] was told to report and he didn't report." The following default was subsequently entered:

> This matter having come before the Court for an adjourned status conference and the Court having noted that the Defendant has failed and neglected to provide certain information to the Friend of the Court as directed by the Court on June 27, 1994, the Default of the Defendant, Delbert W. Apsey, is hereby entered pursuant to MCR 2.603.

After proper notice, a default judgment of divorce was entered.

On appeal, defendant argues that the trial court improperly entered the default against him.

A trial court's authority to enter a default against a party must fall within the parameters of the authority conferred under the court rules. *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 420; 536 NW2d 553 (1995). MCR 3.210(B)(1) provides that in a divorce action "[d]efault cases are governed by MCR 2.603." MCR 2.603 provides as follows:

> If a party against whom a 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. [MCR 2.603(A)(1).]

The phrase "otherwise defend as provided by these rules" has been explained as follows:

> Default may be entered when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules. The terminology "failed to plead or otherwise defend" is broader than the traditional definition limiting default to a failure to appear or plead. Thus, a party who has "appeared" . . . may still be defaulted for failure to plead or otherwise defend.
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> Failure to comply with a discovery order may be grounds for default, MCR 2.313, as may be the failure to attend or refusal to testify at the trial, MCR 2.506(F)(6). Failure to appear for pretrial conference, MCR 2.401, is a failure to defend within the meaning of MCR 2.603(A), and, thus, grounds for default. Broadly speaking, the failure to appear at trial, the failure of the defending party to take defensive action in the time prescribed by these rules or court order may be deemed a failure to defend within the meaning of this rule. Thus, the court's power to default the defendant under this

provision is co-extensive with the court's power of dismissal as applied to the plaintiff for failure to comply with these rules or any order of court under MCR 2.504(B).

A default may be forestalled by either pleading or otherwise defending as provided by the rules. [3 Martin, Dean & Webster, Michigan Court Rules Practice, pp 376-377.]

In this case, our research does not reveal nor have we been directed to any state or local court rule providing that a party to a divorce action matter must report and provide information to the friend of the court. MCR 3.203(B) provides that if "spousal support is requested, the parties must provide the friend of the court with a copy of all pleadings and other papers filed in the action." However, defendant was not defaulted in this case for failing to provide the friend of the court with a copy of the pleadings and other papers filed in this action. Rather, defendant was defaulted for failing to contact and provide the friend of the court with "certain information.

There is no question that at the June 27, 1994 pretrial hearing the court directed that both parties should contact the friend of the court for the purpose of providing the information that would enable the friend of the court to make a recommendation concerning alimony. However, no order or pretrial conference summary was ever entered ordering the parties to do so. Cf. *Washburn v Lake Diane, Inc*, 17 Mich App 704; 170 NW2d 298 (1969). A court speaks through its written orders rather than its oral statements or written opinions. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Accordingly, we cannot say that defendant failed to comply with a court order when he failed to contact and provide certain information to the friend of the court.

Plaintiff argues that the default in this case was properly entered because the court's June 27, 1994 directive was analogous to discovery and that sanctions for a party's failure to provide discovery, which may include judgment by default, have been upheld even in cases where no specific order compelling discovery has been entered. However, the case relied on by plaintiff for this argument is distinguishable from this case. In *LaCourse v Gupta*, 181 Mich App 293; 448 NW2d 827 (1989), this Court affirmed the trial court's grant of summary disposition in favor of the defendant on the ground that although no order compelling discovery had been entered the court had properly precluded the plaintiff's use of expert evidence as a sanction for the plaintiff's failure to supplement her answers to the defendant's interrogatories because the court rules specifically provided for such sanctions for this failure even in the absence of an order. In this case, as indicated previously, we have found no court rule providing for the entry of a default as a sanction for a party's failure to report and provide information to the friend of the court

We conclude that the trial court did not have the authority to enter a default against defendant. See, e.g., *Kornak, supra; In re Forfeiture of One 1987 GMC Station Wagon*, 186 Mich App 540; 465 NW2d 334 (1990); *McGee v Macambo Lounge, Inc*, 158 Mich App 282; 404 NW2d 242 (1987). Generally, we would reverse not only the entry of the default but also the judgment entered on the default. See, e.g., *Kornak, supra* at 420, 422. However, a default settles the question of liability,

i.e., in this case, whether "there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." MCL 552.6(3); MSA 25.86(3); *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 578; 321 NW2d 653 (1982). Defendant does not contest and has not raised any issue concerning that provision of the default judgment of divorce dissolving the marriage.. Thus, with respect to the dissolution of the parties' marriage, we conclude that our refusal to vacate or reverse this provision would not be inconsistent with substantial justice.. MCR 2.613(A); MCR 3.201(C).

Rather, defendant has only contested, both below and on appeal, the provisions of the judgment concerning alimony and property. A default does not necessarily settle the question of damages or the nature of the relief demanded. *Wood, supra*; Martin, Dean & Webster, pp 380, 383. In this case, the trial court precluded defendant from participating in the October 24, 1994 hearing during which proofs were taken on the default judgment of divorce, including proofs relating to property and alimony. This was error. "[B]ecause the default judgment contained provisions different in kind and amount from the relief demanded in the pleading, defendant, even though in default, was entitled to participate in the adjudication of the property distribution." *Perry v Perry*, 176 Mich App 762, 768; 440 NW2d 93 (1989); see also Martin, Dean & Webster, p 383, supplement, p 75. We conclude that our refusal to vacate or reverse those provisions of the judgment concerning alimony and property distribution would be inconsistent with substantial justice. MCR 2.613(A). Accordingly, we vacate only those provisions of the default judgment of divorce concerning alimony and property distribution. We affirm the judgment in all other respects. We remand to the trial court for a full hearing on the issues of property and alimony following which the court, after considering the appropriate factors, shall make findings of fact and conclusions of law. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Ianitelli v Ianitelli*, 199 Mich App 641, 643; 502 NW2d 691 (1993). Defendant shall be entitled to participate in this hearing. We do not retain jurisdiction.

Reversed and remanded.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette