# STATE OF MICHIGAN

# COURT OF APPEALS

KENNETH ALEXANDER,

Plaintiff-Appellee,

v

SOUTHEASTERN TILE, L.L.C., and DAVID HARVEY,

Defendants-Appellants.

UNPUBLISHED
July 17, 2007

No. 268565
Oakland Circuit Court
LC No. 2004-058134-NO

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendants appeal as of right from a default judgment awarding plaintiff $125,000 against each defendant, for a total of $250,000. We affirm in part, reverse in part, and remand.

I

Defendants first argue that the trial court erred in denying their motion to set aside the order of default.[1] We disagree.

The decision whether to set aside an entry of default is committed to the trial court's discretion and will not be set aside absent a clear abuse of that discretion. *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996); *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992), overruled on other grounds by *Allied Electric Supply Co, Inc v Tenaglia*, 461 Mich 285; 602 NW2d 572 (1999). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Our Supreme Court

[1] Contrary to what plaintiff argues, defendants may challenge all prior rulings of the trial court as part of this appeal and this Court has jurisdiction to consider such challenges. See *Tomkiw v Sauceda*, 374 Mich 381, 385; 132 NW2d 125 (1965); *Attorney Gen v Pub Service Comm*, 237 Mich App 27, 39-40; 602 NW2d 207 (1999). Defendants are not limited to only challenging the trial court's award of damages.

historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. For example the Court stated in *Scripps v Reilly*, 35 Mich 371, 387 (1877):

> "It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been."

* * *

> 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. [*Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228-229; 600 NW2d 638 (1999).]

MCR 2.603(D)(1) provides:

> 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 an affidavit of facts showing a meritorious defense is filed.

The requirements of good cause and a meritorious defense are distinct inquiries. *Alken-Ziegler, supra* at 232-233. A meritorious defense is one which, "[i]f proven at trial, . . . would preclude liability on plaintiff's claims." *Gavulic*, *supra* at 26. Good cause warranting the setting aside of a default or default judgment can be shown by: (1) a substantial defect or irregularity in the proceeding on which the default was based, or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, supra* at 233. Once a trial court determines that the party has satisfied the "good cause" and "meritorious defense" requirements, it must also consider whether its failure to set aside the default will result in manifest injustice. *Id.* "[P]roperly 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." *Id.* Thus,

> [w]hen 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 manifest injustice. [*Id*. at 233-234.]

In weighing these factors, the distinction between the concepts of "good cause" and a "meritorious defense" should not be blurred. *Id*. at 234.

Defendants have failed to show "a substantial defect or irregularity in the proceeding on which the default was based." Contrary to their arguments, all the pertinent documents contain proofs of service indicating that defendants were served at their business address. No other defect is alleged. The fact that plaintiff failed to provide copies of the pleadings to new counsel is irrelevant because, by the time new counsel entered an appearance, "the proceeding on which the default was based" had already occurred and plaintiff had no duty to provide new counsel with a copy of pleadings filed before his appearance in the case. Thus, defendants cannot show good cause under the substantial defect prong.

Nor do we believe that defendants have shown a reasonable excuse for not appearing for depositions by March 2, 2005, or for failing to participate in the drafting of the final pretrial order by that same date, contrary to the trial court's orders. Defendants were served with the court's orders compelling these actions, and they received correspondence from plaintiff's counsel enclosing the order compelling depositions and requesting that defendants' new counsel contact him to schedule the depositions. Defendants did not respond to this correspondence and their new counsel did not serve plaintiff's counsel with his appearance or otherwise contact plaintiff's counsel until after defendants were served with plaintiff's motion for default judgment.

In the absence of any showing of a substantial defect or irregularity in the proceeding on which the default was based or of a reasonable excuse for the failure to comply with the trial court's orders, the trial court's denial of defendants' motion to set aside the default was not outside the range of principled outcomes.[2] Therefore, the trial court did not abuse its discretion in denying defendants' motion.

II

Defendants also argue that they were entitled to a jury determination on the question of damages. We agree.

MCR 2.603(B)(3)(b) states:

> (b) If, in order for the court to enter a default judgment or to carry it into effect, it is necessary to
>
> (i) take an account,

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[2] Because we conclude that defendants have failed to establish good cause to set aside the default, we need not address whether they established a meritorious defense to the claims against them, or whether the failure to set aside the default will result in manifest injustice. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001); *Alken-Zeigler, supra* at 229-234.

(ii) determine the amount of damages,

(iii) establish the truth of an allegation by evidence, or

(iv) investigate any other matter,

the court may conduct hearings or order references it deems necessary and proper, and *shall accord a right of trial by jury to the parties* to the extent required by the constitution. [Emphasis added.]

Once a court determines that a hearing is necessary to determine the amount of damages, it is obligated to afford the defendant its properly preserved right to a jury trial. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554-555; 620 NW2d 646 (2001).

It is clear that the trial court was required to determine the amount of plaintiff's damages in order to enter the default judgment and the trial court repeatedly indicated that it would hold a hearing before making that determination. Plaintiff's complaint included a jury demand, which was never withdrawn and on which defendants were entitled to rely. See MCR 2.508(D)(3). Defendants consistently disputed the amount of plaintiff's damages, arguing that the amount of any such damages was reduced by plaintiff's receipt of unemployment benefits and other employment, and by the fact that plaintiff was a construction trades hiring hall employee, with no certainty of continued employment beyond each specific project for which he was hired. Thus, there were factual issues to be resolved by the trier of fact when determining the amount of plaintiff's damages.

The trial court took testimony from plaintiff on April 13, 2005. However, defendants did not have prior notice that testimony would be taken on that date and they were not afforded the opportunity to cross-examine plaintiff at that time. In fact, the hearing was not for the purpose of determining damages, but rather, concerned only plaintiff's motion for entry of a default judgment; indeed, the trial court expressly stated that the determination of damages was to be made at a subsequent hearing, scheduled for September 7, 2005. On September 7, 2005, the parties appeared, with witnesses, for an evidentiary hearing on the issue of damages. However, the trial court did not conduct a hearing, but instead asked for a copy of the April 13, 2005, transcript and set another hearing date. Then, on December 14, 2005, the court determined the amount of damages, without an evidentiary hearing or a jury, and without addressing the substantive issues raised by defendants concerning plaintiff's damages.

Clearly, defendants raised questions of fact that made it necessary to hold an evidentiary hearing on the issue of damages. The trial court, having determined that a hearing was necessary to determine the proper amount of plaintiff's damages, was required to accord defendants their properly preserved right to a jury trial on that issue. *Zaiter, supra* at 555-556. A hearing of sorts was held, but without proper notice and without a jury, despite the clear and unambiguous language of MCR 2.603(B)(3)(b). Therefore, we must vacate the trial court's damages award and remand this case for a jury trial on the issue of damages. *Zaiter, supra* at 556-557.

We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood