STATE OF MICHIGAN

COURT OF APPEALS

MABLE C. AUSTIN, STEPHANIE AUSTIN, NELLIE M. DUKE, DOLORES MCELREATH, ALFRED H. PHILLIPS, VAL JEAN PHILLIPS, QUETA L. SIEFKER, ATORA TODESCHINI, and DOROTHY TODESCHINI,

Plaintiffs-Appellees,

v

MICHAEL EUGENE KELLY,

Defendant-Appellant.

UNPUBLISHED
February 26, 2009

No. 282583
Oakland Circuit Court
LC No. 2007-080339-CZ

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's order entering default judgment in plaintiffs' favor. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs sued defendant for various fraud claims. Plaintiffs effected personal service of their complaint on defendant on February 14, 2007. On March 20, 2007, defense counsel filed his appearance. The next day, plaintiffs requested entry of default; the default entered on March 22, 2007. Defendant filed an answer, raising affirmative defenses, on March 27, 2007, and on April 4, 2007, he moved to set aside the default. The trial court denied the motion, finding no good cause for defendant's failure to answer the complaint.

Plaintiffs moved for entry of default judgment; the motion was heard and granted on November 21, 2007. The trial court found the amounts averred to in plaintiffs' affidavits presented merely "ministerial and clerical" calculations and that no evidence was presented to rebut those figures. Judgment was entered in the amount of $2,361,411.50.

In this Court, defendant argues that the default should have been set aside for three reasons: (1) public policy favors a decision on the merits, especially where plaintiffs knew of defendant's intent to defend; (2) plaintiffs' counsel improperly filed a second action instead of requesting that the trial court extend the first summons when service could not be timely effected and waited over 30 days to file proof of service after defendant was served; and (3) the trial court

entered the default and denied defendant's two motions to stay while a parallel, criminal proceeding against defendant was ongoing.

Whether a default should be set aside is within the sound discretion of the trial court, and will not be reversed on appeal absent a clear abuse of that discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003); *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 628; 750 NW2d 228 (2008). Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223; 600 NW2d 638 (1999); *Woods, supra*. An abuse of discretion does not occur when the decision is within the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

Defendant's arguments are without merit. Public policy favors setting aside defaults only when they are improperly entered. *Alken-Ziegler, Inc, supra* at 229. A defendant must respond to a complaint within 21 days after being served. MCR 2.108(A)(1). Defendant was served on February 14, 2007, and failed to take any action for over a month. Thus, the clerk properly entered a default under MCR 2.603(A)(1) ("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").

The trial court could then set aside the default "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). It should be noted that these are two separate requirements. *Alken-Ziegler, Inc, supra* at 229. Defendant's "good cause" argument is premised on plaintiffs' filing a second action rather than extending the summons of the first; plaintiffs' failure to timely file the proof of service; and the fact that plaintiffs' counsel refused to communicate with defense counsel and requested the default despite knowing defense counsel filed his appearance one day earlier. Defendant does not explain how filing a second action caused him to delay answering the complaint; the first action was never served on him and was automatically dismissed without prejudice. Nor did the trial court err in finding that plaintiffs' late filing of the proof of service was good cause: defendant was personally served with the summons and thus there was no question regarding when service occurred. The trial court correctly cited case law holding that negligence by defendant or his counsel is not a sufficient reason to set aside the default. *Badalow v Evenson*, 62 Mich App 750, 754; 233 NW2d 708 (1975); *Alken-Ziegler, Inc, supra* at 224-225. In the case cited by defendant, *Beltinck v Quinn*, unpublished opinion per curiam of the Court of Appeals, issued November 14, 2006 (Docket No. 270361), this Court found no abuse of discretion where the trial court set aside a default under similar (though not identical) facts. In that case, however, the defendants met the second prong of the test—they showed they had a meritorious defense—and so it affirmed the decision. *Id.*, slip op at 4.

The outcome in this case is also within the range of principled outcomes. Defendant has not even attempted to argue in this Court that he has a meritorious defense, nor does he show that anything other than his own failure to timely answer was the cause of his delay.

Affirmed. Plaintiffs, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Donald S. Owens