

STATE OF MICHIGAN
COURT OF APPEALS

NEW RIVER CONSTRUCTION, LLC,

Plaintiff-Appellee,

v

NATIONAL MANAGEMENT &
PRESERVATION SERVICES, LLC, doing
business as NATIONAL FIELD NETWORK,

Defendant-Appellant.

UNPUBLISHED
July 21, 2015

No. 324465
St. Clair Circuit Court
LC No. 2014-001802-CK

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals a default judgment entered in favor of plaintiff. For the reasons stated below, we reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In March 2012, defendant National Field Network (NFN), a property management company, hired plaintiff New River Construction, LLC (New River) to conduct field service, inspections, and property preservation on real estate in Michigan. At the outset of their business relationship, the parties signed an agreement, governed by the laws of New Jersey,¹ which detailed the obligations of each party. The contract bound New River to perform the work requested by NFN, and explained that NFN would pay New River only for the services that it reported and actually performed:

3. [New River] shall promptly and diligently perform within the time requirements requested, all services and duties, including property maintenance

¹ The contract explicitly stated:

12. The laws of the State of New Jersey shall govern the validity of this Agreement, the construction of this [sic] term and the interpretation of the rights and duties of the parties hereto.

and preservation work requested by NFN on such properties as are hereafter agreed upon from time to time by NFN and [New River].

* * *

8. [New River] and NFN agree upon a fee schedule for basic service. Other services provided by [New River] will be handled on a case-by-case basis depending upon bids provided by [New River] or agreed upon terms between the parties. NFN will issue payment for all work reported and performed within thirty five (35) calendar days from receipt of properly completed invoice package. Unless otherwise agreed upon, payment will not exceed the allowable prices as set forth in the fee schedule. [New River] understands and agrees that any work completed is subject to a 25% discount. NFN will pay [New River] for all services that are properly performed and submitted to NFN by their due date. NFN reserves the right to deduct 10% per day up to 50% of the job on work orders that are not completed by the scheduled due date.

The parties further specified that any disputes arising from the terms or interpretation of the contract “shall be settled in accordance with the rules of the American Arbitration Association, and the judgment award maybe [sic] entered in any court having jurisdiction thereof.”

Sometime in 2014, the business relationship between NFN and New River deteriorated. NFN believed New River submitted invoices, and was compensated for, work that it either did not complete or performed in a defective manner. As a result, NFN asked New River to provide a complete record of all services performed. New River refused and continued to demand payment for the services, which NFN refused to pay.

Because of this disagreement over whether (1) New River performed the services the contract required it to perform, and (2) NFN owed New River money for those services, NFN asked for arbitration, and informed New River of such, on July 11, 2014. Nonetheless, NFN continued to make partial payments to New River after it submitted this arbitral demand.

New River ignored NFN’s demand for arbitration, and, on July 18, 2014, filed this lawsuit in the St. Clair Circuit Court. In its complaint, New River alleged that NFN breached their contract and owed it \$728,740.89. New River’s complaint failed to mention that the contract included an agreement to arbitrate, or that it was involved in an ongoing arbitration proceeding.

On August 25, 2014, New River’s attorney, Ralph Musilli, contacted NFN’s New Jersey–based lawyers, Victor and Eric Deutch, to set a date for when NFN would file a response. A few days later, Eric allegedly spoke with Musilli and asked for a time extension, to which Musilli

purportedly agreed, setting the deadline as September 3, 2014.² NFN's counsel then retained local counsel in Michigan to file an appearance and answer in the proceeding. Local counsel went to the courthouse on September 3, 2014, and filed NFN's appearance, answer, and affirmative defenses.³

However, unbeknownst to NFN, New River's attorneys had entered a default and asked the court for a default judgment hours earlier.⁴ On September 4, 2014, the court entered a default judgment for \$578,688.71—approximately \$150,000 less than the amount New River claimed it was owed by NFN.

NFN promptly moved to set aside the default and default judgment on September 22, and explained to the trial court that: (1) it contested New River's claim for \$728,740.89, because it did not believe New River had performed the services for which it had charged; (2) the dispute was currently in arbitration; and (3) its New Jersey counsel had spoken with New River's attorneys and obtained an extension until September 3, 2014 to respond to New River's complaint.

After holding a hearing on the matter in late September, the trial court denied NFN's motion to set aside default. The court explained its reasoning as follows:

I've reviewed the competing briefs and issues presented here. It's perhaps a race to the courthouse, but the race was won by [New River] and at the time that [Musilli] filed the judgment the matter was properly in default. And the affidavits that have been filed here do not really challenge the claims in the form that truly,

² Musilli contests this version of events, and states that he told Victor and Eric that he would request a default on September 3, 2014.

³ NFN's Michigan-based counsel, Mark Davidson, spoke with Musilli on September 2, 2014 on the telephone to confirm the September 3, 2014 deadline and to request an extension. Musilli claims that he told Davidson he "did not have permission from his client to extend the default date, which was September 3, 2014, and accordingly suggested to . . . [Davidson] that he file either an appearance or a responsive pleading to avoid entry of default." Davidson agrees that Musilli did not grant an extension for filing an answer beyond September 3, 2014, and avers that he entered an appearance and filed responsive pleadings on that day.

Davidson also asserts that he called Musilli again on September 3, and left a voicemail stating that NFN would file responsive pleadings by the end of the day. It is unclear whether Musilli ever returned Davidson's call, and he filed New River's request for entry of default "around lunch time" on September 3.

⁴ NFN's lack of knowledge of the default is likely because of Musilli's actions. In the space provided for the name and address of defendant's counsel on the request for entry of default, Musilli wrote "N/A"—indicating that NFN did not have designated counsel, despite the fact that Musilli knew of Davidson's (and Deutch's) relationship with NFN.

in my opinion, defend the motion. The motion to set aside the default judgment is denied.

On appeal,⁵ NFN argues that the trial court abused its discretion when it refused to set aside the default judgment because: (1) NFN showed good cause to do so and filed affidavits that showed a meritorious defense; and (2) New River's failure to provide NFN with notice of New River's request for default judgment violated NFN's right to due process.⁶ New River asks us to uphold the ruling of the trial court.

II. STANDARD OF REVIEW

A trial court's decision to grant or deny a motion to set aside a default judgment is reviewed for an abuse of discretion. *Lawrence M Clarke, Inc, v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

III. ANALYSIS

Under MCR 2.603(D)(1), a motion to set aside the default judgment "shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." The concept of "good cause" is separate from an affidavit of facts showing a meritorious defense, and a party must have both good cause and an affidavit of meritorious defense to set aside a judgment of default. *Huntington*, 292 Mich App at 390. Though the Michigan Supreme Court has cautioned against confusing the two requirements, it has also instructed trial courts to "base the final result [of a motion to set aside default] on the totality of the circumstances." *Id.*

A. GOOD CAUSE

When it considers whether a party has shown good cause to set aside a default judgment, a court looks for the presence of many factors, including:

(1) whether the party completely failed to respond or simply missed the deadline to file;

⁵ Our Court initially dismissed defendant's appeal, but later reinstated it. See *New River Construction, LLC v National Mgt & Preservation Services*, unpublished order of the Court of Appeals, entered November 13, 2014 (Docket No. 324465); see also *New River Construction, LLC v National Mgt & Preservation Services*, unpublished order of the Court of Appeals, entered January 5, 2015 (Docket No. 324465).

⁶ New River says that the notice issue is unpreserved because NFN failed to raise it before the trial court. However, we may overlook preservation requirements if consideration of the issue is necessary for a proper determination of the case. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010).

- (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;
- (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4);
- (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and
- (9) if an insurer is involved, whether internal policies of the company were followed. [*Shawl v Spence Brothers, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008) (footnote omitted).]

Here, it is clear that NFN demonstrated good cause to set aside the default judgment. Both parties agree that NFN needed to file responsive pleadings by September 3, 2014. NFN filed responsive pleadings on that date. *Id.* As noted, NFN did not receive notice from New River or its counsel that New River had asked for, and been granted, a judgment of default.⁷ *Id.* After the entry of the default judgment, NFN promptly filed a motion to set aside the judgment on September 22, 2014. *Id.* In its motion and at the hearing, NFN explained the background to the dispute and its September 3 submission of responsive pleadings, which indicated that the default judgment arose in good faith as a result of miscommunication and misunderstanding between the parties' counsel. *Id.* And the size of the default judgment—over half a million dollars—is quite large. *Id.*

Accordingly, NFN has demonstrated that it has good cause to set aside the default judgment, and the trial court's holding to the contrary is simply incorrect.

B. AFFIDAVITS OF MERITORIOUS DEFENSE

When it determines whether a party moving to set aside a default judgment has submitted affidavits that contain a meritorious defense, a trial court ascertains whether the affidavits include evidence that:

⁷ See n 4, supra. See also *Brooks Williamson & Associates, Inc v Mayflower Construction Co*, 308 Mich App 18, 27; 863 NW2d 333 (2014) (holding that defaulting party's non-receipt of notice of request to enter default judgment pursuant to MCR 2.603(B)(1) "establish[es] good cause to set aside the default judgment").

- (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
- (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
- (3) the plaintiff's claim rests on evidence that is inadmissible. [*Shawl*, 280 Mich App at 238.]

Here, NFN's affidavits and other documents demonstrate that it would have been entitled to summary disposition pursuant to MCR 2.116(C)(7), because New River was contractually required to arbitrate any disputes arising from NFN and New River's business relationship. Again, in the contract, the parties stipulated that "[t]he laws of the state of New Jersey shall govern the validity of this [a]greement . . . and the interpretation of the rights and duties of the parties hereto." Because Michigan favors the enforcement of choice-of-law provisions,⁸ we analyze the proffered defenses to New River's claims under New Jersey law.

"New Jersey law favors arbitration agreements." *Waskevich v Herold Law, PA*, 431 NJ Super 293, 298; 69 A3d 127 (2013). "[C]ourts place arbitration agreements on an equal footing with other contracts, and enforce them according to their term. . . . Because an agreement to arbitrate is a contract, only those issues may be arbitrated which the parties have agreed shall be. Thus, courts examine arbitration provisions on a case-by-case basis." *Id.* (citations omitted). "In the interpretation of an agreement to arbitrate, the duty to arbitrate rests solely on the parties' intentions as set forth in the writing." *Martindale v Sandvik, Inc.*, 173 NJ 76, 92; 800 A2d 872 (2002).

Here, as noted, the relevant provision of the contract states:

13. Any controversies arising out of the terms or its [sic] interpretation shall be settled in accordance with the rules of the American Arbitration Association, and the judgment award maybe [sic] entered in any court having jurisdiction thereof.

New River's claim for breach of contract and demand for payment falls within the scope of the arbitration clause. New Jersey "courts have generally read the terms 'arising out of' or 'relating to' . . . as indicative of an 'extremely broad' agreement to arbitrate any dispute relating in any way to the contract." *Curtis v Cellco Partnership*, 413 NJ Super 26, 37-38; 992 A2d 795 (2010) (citation omitted). New River's assertion that its contract claim "do[es] not involve the terms of the agreement or the interpretation of those terms," but rather only involves "[NFN's] failure to pay" for its services, is without merit. NFN's obligation to pay is itself embodied in the terms of the contractor agreement and, thus, an alleged failure to pay is necessarily a controversy arising out of the terms of the agreement. *Curtis*, 413 NJ Super at 38-39.

⁸ *Turcheck v Amerifund Financial, Inc.*, 272 Mich App 341, 345; 725 NW2d 684 (2006).

As such, New River is bound to arbitrate its breach of contract claim and demand for payment, and NFN would have been entitled to summary disposition on these matters pursuant MCR 2.116(C)(7).

Accordingly, after considering the “totality of the circumstances” present in this case, the trial court abused its discretion when it denied NFN’s motion to set aside the default judgment.⁹ *Huntington*, 292 Mich App at 390. We reverse and remand for entry of an order that: (1) sets aside the default judgment; and (2) permits NFN to file a response to New River’s complaint and allegations. We do not retain jurisdiction.

Reversed and remanded.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan

⁹ Because NFN showed good cause and a meritorious defense to set aside the default judgment, we need not analyze NFN’s claims that its right to due process was violated by New River’s failure to inform it of New River’s request for default judgment.