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STATE OF MICHIGAN
COURT OF APPEALS

NALCOR, LLC, doing business as NALPAC,

Plaintiff-Appellee,

v

CONDOM SENSE, INC., doing business as
CONDOM SENSE #2, #3, #4, #5, #6, and #7, and
CONDOM SENSE NW 8, Inc.,

Defendants,

and

STEVEN KAHN

Defendant-Appellant.

UNPUBLISHED
January 21, 2021

No. 351764
Oakland Circuit Court
LC No. 2019-172859-CB

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant, Steven Kahn, appeals as of right the default judgment against him and in favor of plaintiff. We reverse, vacate the November 19, 2019 order denying defendant’s motion to set aside the default judgment, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On November 28, 2016, Condom Sense, Inc., doing business as Condom Sense #2, #3, #4, #5, #6, and #7, and Condom Sense NW 8, Inc. (Condom Sense), a now-defunct adult sex toy and novelty goods store, allegedly entered into a contract to purchase adult sex toys and novelty goods from plaintiff to sell at its stores. The contract included a personal guarantee provision which provided that Kahn, as the owner of Condom Sense, agreed “to be personally obligated and personally guaranties payment of any delinquent amounts plus the time-price differential and any reasonable attorney fees or collection costs should the amount become delinquent.” Between November 28, 2016, and April 20, 2017, Condom Sense submitted numerous purchase orders to

plaintiff. Plaintiff timely fulfilled each order and sent Condom Sense regular billing statements. Condom Sense never objected to the billing statements, but failed to pay. Each billing statement detailed the products which the store ordered and noted that 1.5% interest per month would be charged for all late payments. In total, Condom Sense owed plaintiff \$287,470.03 for orders which Condom Sense accepted delivery of, but never paid for.

On March 28, 2019, plaintiff filed a breach of contract and account stated action against Kahn and Condom Sense. On June 21, 2019, the trial court entered a default judgment against Condom Sense for failing to appear. On July 16, 2019, Kahn filed an answer to the complaint and denied the allegations therein. Kahn argued that neither he nor Condom Sense did business with plaintiff, and that he did not sign a contract that included a personal guarantee provision. Kahn asserted that he and his Condom Sense stores did business with the prior owner of plaintiff and that plaintiff was misrepresenting that it was the prior owner.

On September 20, 2019, plaintiff filed a motion for summary disposition. On October 30, 2019, a mediation was held and neither Kahn nor his trial counsel appeared, but Kahn filed a response to plaintiff's motion for summary disposition. On October 31, 2019, plaintiff filed a motion for entry of a default judgment because of plaintiff's failure to appear at the mediation. On November 4, 2019, a status conference was held and Kahn and his attorney failed to appear. Following a hearing on plaintiff's motion for entry of a default judgment, the trial court noted Kahn's lack of participation and entered a default judgment against Kahn totaling \$287,850.03. Kahn filed a motion to set aside the default judgment and, following a hearing on the motion, the trial court denied Kahn's motion to set aside the default judgment in an order dated November 19, 2019. This appeal followed.

II. MOTION TO SET ASIDE THE DEFAULT JUDGMENT

On appeal, Kahn argues that the trial court abused its discretion by denying his motion to set aside the default judgment because he presented good cause and a meritorious defense. We conclude that the trial court abused its discretion by failing to recognize Kahn had a potentially absolute defense to plaintiff's claim.

This Court reviews a trial court's decision on a motion to set aside a default judgment for an abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Id.*

“A motion to set aside a default or default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and a statement of facts showing a meritorious defense . . . is filed.” MCR 2.603(D)(1); *Brooks Williamson & Assoc, Inc, v Mayflower Constr Co*, 308 Mich App 18, 25; 863 NW2d 333 (2014). The moving party bears the burden to demonstrate good cause and a meritorious defense. *Saffian*, 477 Mich at 14. Additionally, good cause and a meritorious defense are “separate requirements” which must not be blurred. *Shawl v Spence Bros*, 280 Mich App 213, 223; 760 NW2d 674 (2008), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

To establish the good cause requirement, the moving party must demonstrate one of the following:

(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. [*Shawl*, 280 Mich App at 221.]

Factors relevant to the existence of good cause include:

- (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 the entry of the default judgment and the filing of the motion to set aside;
- (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 resulted 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. [*Id.* at 238.]

Kahn does not argue that the default judgment was based on a substantial defect or irregularity in the proceeding, and Kahn does not contest jurisdiction. Rather, Kahn argues that good cause to set aside the default judgment exists because his and his trial counsel's failure to appear at the mediation and status conference was inadvertent. Kahn claims that his trial counsel was retained just before the mediation and status conference and was not provided a copy of the scheduling order. As such, Kahn and his trial counsel failed to appear at the mediation and status conference because they were unaware that a mediation and status conference were scheduled.

The record demonstrates that Kahn, who was acting *in propria persona* for portions of this proceeding, and his attorneys were provided notice of the mediation and status conference. On July 10, 2019, the trial court entered a scheduling order which ordered the parties to participate in a mediation or facilitation by September 30, 2019, and noted that a status conference was scheduled on November 4, 2019. The scheduling order specified that all parties with the authority to settle and their attorneys must be present at the status conference.

On September 6, 2019, following the withdrawal of Kahn's first attorney, the trial court extended the deadline to engage in facilitation or mediation from September 20, 2019, to October 30, 2019, to allow Kahn time to retain new counsel. On September 16, 2019, Kahn was acting *in propria persona* and was served with notice that the mediation was scheduled on October 30, 2019. In mid-October, Kahn retained a new attorney. His new attorney did not file an appearance. On October 28, 2019, acting under the impression that Kahn still was proceeding *in propria persona*, plaintiff's counsel e-mailed Kahn to remind him that the mediation was scheduled on October 30, 2019, and informed him that if he failed to appear, a motion for entry of a default judgment would be filed. On October 30, 2019, Kahn and his trial counsel failed to appear at the mediation hearing, despite filing a response to plaintiff's motion for summary disposition on the same day and attaching a register of actions. The register of actions indicated that multiple scheduling orders and notices of hearings had been filed, and that a status conference was set for November 4, 2019. On November 4, 2019, neither Kahn or his trial counsel appeared at the status conference.

Default for failure to appear at a scheduled conference is governed by MCR 2.401(G). Under MCR 2.401(G), the failure of a party or the party's attorney to attend a scheduled conference "may constitute a default to which MCR 2.603 is applicable." However, the trial court may excuse the failure to appear, if it would result in "manifest injustice" or if the failure to appear "was not due to the culpable negligence of the party or the party's attorney." MCR 2.401(G)(2)(a) and (b). "[M]anifest injustice" occurs "if a default were to be allowed to stand where a party has satisfied the 'meritorious defense' and 'good cause' requirements of MCR 2.603(D)(1), which governs motion to set aside a default judgment." *Alken-Ziegler, Inc*, 461 Mich at 233.

After hearing Kahn's argument regarding good cause, the trial court concluded that Kahn failed to establish good cause to set aside the default judgment. The trial court explained that Kahn failed to participate in this action, ignored the court's orders, waited until the last minute to obtain counsel, and had "thumbed his nose at the system." As a result of Kahn's failure to timely obtain counsel, the attorney whom he retained in mid-October 2019, was uninformed of the status of the proceeding. However, the trial court noted that it was not plaintiff's "fault" that Kahn failed to timely obtain counsel and failed to inform his attorney, whom he retained in mid-October 2019, that a mediation and status conference were scheduled. Moreover, the register of actions should have put Kahn's attorney on notice that hearings had been scheduled in this matter and that, at a minimum, a status conference was scheduled on November 4, 2019. Generally, an attorney's negligence is imputed to the client and does not constitute a basis for setting aside a default judgment. *Pascoe v Sova*, 209 Mich App 297, 298-299; 530 NW2d 781 (1995). Therefore, it was not an abuse of discretion for the trial court to conclude that Kahn failed to establish good cause to set aside the default judgment.

However, a lesser showing of good cause is required if the moving party can demonstrate a strong meritorious defense. *Alken-Ziegler*, 461 Mich at 233-234. To satisfy the meritorious defense requirement, the moving party must file an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 390; 808 NW2d 511 (2011). "The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action." *Huntington Nat'l Bank*, 292 Mich App at 390. "Such an affidavit requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts

set forth in the affidavit.” *Id.* Factors relevant to the existence of a meritorious defense include “whether the affidavit contains evidence that: (1) the plaintiff cannot prove or the 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.

Despite Kahn’s argument on appeal, Kahn failed to submit an affidavit of facts establishing a meritorious defense to his motion to set aside the default judgment as is required by MCR 2.603(D)(1). Rather, Kahn simply asserted that he had a meritorious defense because he disputed the existence of a contract between him and plaintiff and, thus, his liability to plaintiff. In his motion to set aside the default judgment, Kahn argued that the trial court should set aside the default judgment because he established a meritorious defense through his amended answer to the complaint, affirmative defenses, and counteraffidavit to the account stated which he attached to his amended answer. Kahn failed to attach an affidavit of facts establishing a meritorious defense to his motion to set aside the default judgment and failed to present any evidence, other than his own unsupported assertion, that he could defend against plaintiff’s claim. See *Huntington Nat’l Bank*, 292 Mich App at 394 (concluding that, in the absence of an affidavit showing a meritorious defense, the defendant’s own unsupported assertion that he could defend against the plaintiff’s claim was insufficient to establish a meritorious defense).

Regardless, in all of his pleadings, motions, and responsive briefings, Kahn has maintained that plaintiff’s claim against him as an individual cannot be sustained because no signed guarantee exists. Indeed, in the record before us, a signed copy of a personal guarantee between plaintiff and Kahn does not exist. Accordingly, following oral argument in this case, we issued an order directing plaintiff to produce a *signed* copy of any such guarantee; plaintiff failed to produce any such document. See *Nalcor, LLC v Condom Sense, Inc*, unpublished order of the Court of Appeals, entered December 17, 2020 (Docket No. 351764).

To be clear, Kahn cannot be held personally liable for a corporate debt absent a signed guarantee. To allow the default judgment against Kahn as an individual to stand absent evidence of a signed guarantee constitutes a manifest injustice, and the trial court’s failure to set aside the default judgment against Kahn individually on this basis constituted an abuse of discretion. Although plaintiff may have an adequate response to Kahn’s potentially absolute defense, none has been offered to date.

Thus, we conclude that a remand is required to allow plaintiff the opportunity to offer a signed copy of Kahn’s personal guarantee, or any other evidence to establish that Kahn agreed to be personally liable for the corporate debt at issue. Only then can the trial court fairly determine whether or not to set aside the \$287,850.03 default judgment against Kahn. However, we caution Kahn that on remand, his active participation in this litigation is imperative to any potentially successful defense.

We reverse, vacate the November 19, 2019 order denying defendant's motion to set aside the default judgment, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro