

STATE OF MICHIGAN
COURT OF APPEALS

LOMAS BROWN,

Plaintiff/Counter-Defendant,

v

NATIONAL CITY BANK,

Defendant/Cross-Plaintiff/Third-
Party Plaintiff/Counter-Plaintiff-
Appellee,

v

SEAN JORDAN,

Defendant/Cross-Defendant-
Appellant,

and

MARK CLARK,

Defendant/Cross-Defendant,

and

HERMAN MOORE,

Third-Party Defendant.

UNPUBLISHED

October 16, 2012

No. 304939

Wayne Circuit Court

LC No. 07-724656-CZ

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Sean Jordan appeals as of right an order denying his motion to set aside the default judgment in favor of National City Bank (“National City”) in this case involving conversion and breach of fiduciary duty. We reverse in part and remand for further proceedings.¹

Jordan argues that the trial court erred when it denied his motion to set aside the entry of default and default judgment. We agree that the trial court improperly refused to set aside the default judgment, but disagree that the trial court erred by failing to set aside the default.

“We review for an abuse of discretion a trial court’s decision on a motion to set aside a default[.]”² Similarly, this Court reviews both a trial court’s failure to set aside a default judgment and its ultimate decision to deny relief from judgment for an abuse of discretion.³ “A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes.”⁴ This Court reviews de novo issues regarding application of a court rule.⁵

As a general rule, “[a] defendant must serve and file an answer or take other action permitted by law or [the Michigan Court Rules] within 21 days after being served with the summons and a copy of the complaint.”⁶ MCR 2.603(A)(1) requires a court clerk to enter a default of a defendant when the defendant fails “to plead or otherwise defend as provided by [the Michigan Court Rules].”⁷

¹ National City’s argument that this Court lacks jurisdiction is unpersuasive. Jordan filed the claim of appeal on July 1, 2011, within 21 days after entry of an order denying Jordan’s motion to set aside default judgment. National City asserts that the claim of appeal was untimely because Jordan’s motion to set aside default judgment was not filed within 21 days after entry of the default judgment as required under MCR 7.204(A)(1)(b), the default judgment having been entered April 19, 2010, and the motion to set aside the default judgment not having been filed until June 10, 2010. A motion for post-judgment relief must be filed “within the initial 21-day appeal period.” MCR 7.204(A)(1)(b). We find that because the default judgment contained a provision reserving National City’s right to file a counterclaim, the first final order that disposed of all the claims of the parties in this case, as defined by MCR 7.202(6)(a)(i), was the July 23, 2010, order dismissing National City’s counter-complaint against Lomas Brown. Thus, the 21-day period for filing a claim of appeal did not begin to run until the July 23, 2010, order was entered. As a result, the motion to set aside the default judgment filed on June 10, 2010, was timely filed within the initial 21-day appeal period.

² *Huntington Nat’l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

³ *Bullington v Corbell*, 293 Mich App 549, 554-555; 809 NW2d 657 (2011).

⁴ *Huntington Nat’l Bank*, 292 Mich App at 383.

⁵ *Bullington*, 293 Mich App at 554.

⁶ MCR 2.108(A)(1).

⁷ *Huntington Nat’l Bank*, 292 Mich App at 381.

“Although the law favors a determination of a claim on the basis of its merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered.”⁸

A trial court should only grant a motion to set aside a default or default judgment “if good cause is shown and an affidavit of facts showing a meritorious defense is filed.”⁹ “[G]ood cause’ and a ‘meritorious defense’ are separate requirements[.]”¹⁰

Good cause can be shown by: (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.¹¹

Jordan’s assertion that there was good cause to set aside the default because he did not receive personal service of either the cross-claim, or National City’s motion for entry of default lacks merit.

National City properly served Jordan with notice of its cross-claim. Pursuant to case law and the court rules, a trial court may order that service of process be made in a manner intended to inform a defendant of the action “‘by the best means available under the circumstances.’”¹² Constructive service is permitted when personal service is not possible.¹³ National City’s process server attempted to serve Jordan with the cross-claim four times. National City made an official inquiry with the Postmaster to determine if Jordan had a forwarding address. Jordan did not leave a forwarding address. The trial court allowed National City to serve Jordan by publication. National City properly submitted an affidavit attesting to Jordan’s service by publication. Furthermore, Jordan, at some point, received actual notice of the pending action because he attended the default proceeding. Despite this proper service of process, Jordan did not respond in any manner until the default hearing.

National City attempted to serve Jordan with notice of its motion for entry of default. National City filed the motion for entry of default along with an affidavit stating that Jordan had failed to answer the cross-complaint. The motion included a proof of service in which National

⁸ *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

⁹ *Huntington Nat’l Bank*, 292 Mich App at 390, quoting MCR 2.603(D)(1) (quotation marks omitted).

¹⁰ *Huntington Nat’l Bank*, 292 Mich App at 390 (citation and quotation marks omitted).

¹¹ *Id* (quotation marks omitted).

¹² *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 274; 803 NW2d 151 (2011), quoting MCR 2.105(J)(1).

¹³ *Lawrence M Clarke*, 489 Mich at 274-275, citing *Krueger v Williams*, 410 Mich 144, 156; 300 NW2d 910 (1981).

City stated it mailed a copy of the motion for default to Jordan's former address in Royal Oak. At this point in the litigation, National City did not have any other address for Jordan.

National City also properly filed a proof of service with the trial court stating that it sent the order of entry of default to Jordan at a Birmingham, Michigan address.¹⁴ Jordan presumably gave this address to the court during the default hearing. Therefore, National City complied with the requirements of the applicable court rule,¹⁵ and the court properly denied Jordan's motion to set aside the entry of default.

Jordan correctly asserts that there was a lack of notice of National City's request for entry of default judgment.

"A party requesting a default judgment must give notice of the request to the defaulted party, if" "the party against whom the default judgment is sought has appeared in the action[.]"¹⁶ "If the defaulted party has appeared, the notice may be given in the manner provided by MCR 2.107."¹⁷ "If the default is entered for failure to appear for a scheduled trial, notice under this subrule is not required."¹⁸ "[A]fter a default is entered against a party, further service of papers need not be made on that party unless he or she has filed an appearance or a written demand for service of papers."¹⁹

Despite Jordan's failure to attend the trial, National City was still obligated to give Jordan notice of a request to enter default judgment.²⁰ First, Jordan was not involved in the trial proceedings. The trial date was set to determine Herman Moore's liability. National City acknowledged that the only necessary parties at the trial were National City and Moore. Second, the date scheduled for trial became a hearing where National City and Moore placed their settlement on the record, rather than a trial. Third, since the trial court had already entered a default against Jordan, he would not have been able to participate in any of the proceedings until the default was set aside.²¹ Moreover, on the date of the scheduled trial, National City stated that it planned to file a motion for entry of default judgment against Jordan, but it never did.

National City failed to file a motion for entry of default judgment or give notice to Jordan that it was requesting entry of default judgment. National City, however, clearly intended to request entry of default judgment against Jordan because it stated that it planned to do so at the

¹⁴ MCR 2.603(A)(2)(b).

¹⁵ MCR 2.603.

¹⁶ MCR 2.603(B)(1)(a)(i).

¹⁷ MCR 2.603(B)(1)(c).

¹⁸ MCR 2.603(B)(1)(d).

¹⁹ MCR 2.107(A)(2).

²⁰ MCR 2.603(B)(1)(a).

²¹ MCR 2.603(A)(3).

scheduled trial. Although National City was required to give Jordan notice of its request for entry of default judgment,²² there is no record that Jordan ever received notice. Accordingly, good cause exists to set aside the default judgment.²³

Moreover, Jordan presented a meritorious defense.

In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that: (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.²⁴

"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."²⁵ "Merely contesting the amount of liability does not establish a meritorious defense."²⁶

Here, Jordan's affidavit states that "[a]ll of Mr. Brown's allegations against me are completely untrue," and that he "did not perform any improper withdrawals." These are both general denials that do not state with particularity the facts that support this defense. Jordan's affidavit, however, also states that "Brown truthfully stated in his deposition . . . [Brown] only asked me why the bank loaned him money against a line of credit and did not raise any questions regarding any alleged improper withdrawals." Therefore, Jordan swore to particular facts that support his defense. Because good cause and the meritorious defense requirements are satisfied, reversal of the trial court's denial of Jordan's motion to set aside the default judgment is proper.

Next, Jordan argues that if this Court determines that only the default judgment should be set aside, this Court should remand the matter to the trial court for a hearing or trial regarding the amount of damages. We agree. "[A]n award of damages is reviewed on appeal pursuant to the clearly erroneous standard."²⁷ "While the question of a defendant's liability is cemented by a default, a defendant has a right to participate where further proceedings are necessary to

²² MCR 2.603(B)(1)(a)(i).

²³ *Huntington Nat'l Bank*, 292 Mich App at 390.

²⁴ *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008).

²⁵ *Huntington Nat'l Bank*, 292 Mich App at 392.

²⁶ *Id.* at 393.

²⁷ *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

determine the amount of damages.”²⁸ It is within the discretion of the trial court to determine whether to hold a hearing or jury trial on damages for a default judgment.²⁹ This Court would only then review the trial court’s award for clear error.³⁰ For the purposes of judicial economy, however, this Court remands for an evidentiary hearing on damages.

Reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

²⁸ *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 79; 618 NW2d 66 (2000), quoting *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Mich*, 119 Mich App 671, 675; 326 NW2d 599 (1982) (quotation marks omitted).

²⁹ MCR 2.603(B)(3)(b)(iv) (“the court may conduct a hearing or order references it deems necessary and proper[.]”)

³⁰ *Triple E Produce Corp*, 209 Mich App at 177.