

STATE OF MICHIGAN
COURT OF APPEALS

FIRST AMERICAN TITLE INSURANCE CO.,
Plaintiff-Appellee,

UNPUBLISHED
December 18, 2012

v

No. 306290
Kent Circuit Court
LC No. 11-001075-CZ

CLARK D. HARRINGTON and JOHN H.
AGGELER,

Defendants,

and

DEUTSCHE BANK NATIONAL TRUST CO.,
Defendant-Appellant.

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant, Deutsche Bank National Trust Co., appeals as of right the trial court's entry of a default and default judgment. We reverse the trial court order denying Deutsche Bank's motion to set aside the default, vacate the default judgment, and remand for further proceedings.

I. INTRODUCTION

This case arises from the failure of Deutsche Bank to answer a complaint filed by plaintiff First American Title Insurance Co., in which First American alleged an invalid foreclosure by Deutsche Bank on property commonly known as 6751 Glen Hollow Drive, S.E., Caledonia, Michigan 49316 (the "Property"). Deutsche Bank's failure to timely respond to the complaint eventually led to the entry of default against Deutsche Bank, and a subsequent entry of default judgment.

Deutsche Bank, as the note holder of a mortgage taken on the Property, obtained quiet title to the Property pursuant to court order. Deutsche Bank commenced foreclosure by advertisement proceedings on the Property, as the mortgagor failed or refused to make payments. On January 7, 2009, Deutsche Bank purchased the Property through a sheriff's sale for the recorded sum of \$195,700.85. Following Deutsche Bank's foreclosure by advertisement, OneWest, a subsequent mortgagee, attempted to foreclose on the Property when its mortgagor

failed or refused to make payments. OneWest discovered that its interest in the Property had been extinguished by Deutsche Bank's prior foreclosure, purchase, and sale of the Property. OneWest then filed a claim with the company providing title insurance under their mortgage, First American, who settled this claim by making payment to OneWest in the amount of \$155,000.

On February 3, 2011, First American filed a complaint alleging, among other counts,¹ an invalid foreclosure against Deutsche Bank in that Deutsche Bank failed to acquire its interest in the Property before a publication of the notice of foreclosure in violation of MCL 600.3204. First American also alleged that Deutsche Bank did not acquire a record chain of title as required by MCL 600.3204 where the party foreclosing a mortgage by advertisement is not the original mortgagee. Additionally, First American alleged that Deutsche Bank failed to provide proper notice of the court ordered adjournment of the foreclosure sale as required by MCL 600.3220. First American requested as damages the amount of the settlement with OneWest, specifically \$155,000 plus costs.

On February 10, 2011, Deutsche Bank was served the summons and complaint by certified mail in California, providing notice of the impending litigation. Deutsche Bank failed to respond to the complaint within the 28 allotted days as provided by MCR 2.108(A)(2), and on March 17, 2011, the trial court entered a default against Deutsche Bank.

Less than one month later, Deutsche Bank filed a motion to set aside the default pursuant to MCR 2.603(D)(1). Deutsche Bank submitted the affidavit of Michael Bandi² proffering various meritorious defenses as required under MCR 2.603(D)(1). The trial court denied this motion stating "the analysis employed in this case stops at the question of whether there is good cause" and "[i]t's quite clear the negligence or mistake in failing to answer a complaint does not suffice to establish good cause."

Thereafter, First American filed a proposed civil order judgment with the trial court pursuant to MCR 2.602(B)(3). On June 27, 2011, the trial court, pursuant to MCR 2.603(B)(2), entered judgment in favor of First American in the amount of \$155,239.47.

Deutsche Bank then filed a motion to set aside the default judgment. The trial court denied this motion finding that MCR 2.603(B)(2) was the correct court rule and that First American's submission to the court, rather than the clerk, did not render the default judgment void. The remaining defendants were dismissed without prejudice and without costs. Deutsche Bank now appeals as of right to this Court.

II. ANALYSIS

¹ First American's complaint alleged four additional counts against three separate defendants not relevant to this appeal.

² Bandi is a Litigation Specialist employed by BAC Home Loan Servicing, LP ("BAC"). BAC was responsible for servicing this mortgage for Deutsche Bank.

A. ENTRY OF DEFAULT

Deutsche Bank argues that the trial court abused its discretion in failing to set aside the entry of default. See *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes.³ *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220-221; 760 NW2d 674 (2008).

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, can only be granted if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). The strength of the meritorious defense will affect the good cause showing that is necessary. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). "If a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required . . . in order to prevent a manifest injustice." *Id.* at 233-234 (footnote omitted).

A "totality of the circumstances" test has been developed by this Court that provides a non-exhaustive list of factors to consider when determining if a meritorious defense has been shown. The 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." *Shawl*, 280 Mich App at 238.

Sufficient "good cause" can be shown by (1) a defect or irregularity in the proceedings upon which the default was based, or (2) a reasonable excuse for failure to comply with the requirements which created the default. *Bullington v Corbell*, 293 Mich App 549, 560-561; 809 NW2d 657 (2011). Under the "totality of the circumstances" test developed in *Shawl*, this Court looks to the following factors in determining whether "good cause" has been shown:

- (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 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);

³ Deutsche Bank erroneously cites to *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), as that case sets forth the even more deferential abuse of discretion standard still utilized in review of divorce judgments.

- (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*, 280 Mich App at 238 (footnote omitted).]

As discussed below, the trial court abused its discretion by failing to apply both the good cause and meritorious defense standards within MCR 2.603(D)(1) as explained in *Shawl*.

1. MERITORIOUS DEFENSE

Establishing a meritorious defense requires an affidavit of facts signed by an affiant with personal knowledge of the facts. It must “state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit.” *Huntington Nat’l Bank*, 292 Mich App at 392. The affidavit of Bandi satisfied these requirements because Bandi, as an agent of Deutsche Bank, stated that he could “testify from his personal knowledge of the facts and business records of Deutsche Bank.” Likewise, Bandi’s affidavit stated admissible facts by providing a very brief history of the mortgage held by Deutsche Bank, the servicing of this mortgage, the date of the sheriff’s sale, the date the Property was sold to a third party, and a list of possible meritorious defenses. Finally, there is no reason for this Court to doubt that Bandi could testify competently to the facts set forth in the affidavit.

We now turn to whether Deutsche Bank has shown a meritorious defense. Deutsche Bank primarily argues that First American lacks standing to challenge the foreclosure sale. Upon expiration of the statutory redemption period, the purchaser of a sheriff’s deed is vested with “all the right, title, and interest” in the property. MCL 600.3236. Deutsche Bank purchased the Property on January 7, 2009. Thus, pursuant to MCL 600.3240(7), the redemption period expired on July 7, 2009. Therefore, Deutsche Bank held all interest and title in the Property on this date. First American filed the complaint on February 3, 2011, roughly 18 months after the redemption period had exhausted. By failing to take action during the redemption period, First American forfeited any claim against Deutsche Bank for an invalid foreclosure. See *Dingman v OneWest Bank, FSB*, 859 F Supp 2d 912, 917-918 (ED Mich, 2012); *Drew v Kemp-Brooks*, 802 F Supp 2d 889, 894 (ED Mich, 2011). Even assuming Deutsche Bank’s foreclosure of the Property was improper, First American would be barred from succeeding on this claim, *Dingman*, 859 F Supp 2d at 917-918, and because this defense would be “absolute if proven,” Deutsche Bank’s necessary showing of good cause is lower.⁴ *Alken-Ziegler*, 461 Mich at 233-234.

Alternatively, even if First American had the right to pursue this case, Deutsche Bank complied with MCL 600.3204(3).⁵ The plain language of MCL 600.3204(3) requires nothing

⁴ Whether viewing the issue as one of standing or simply that the complaint was brought too late, the facts presented would establish an absolute defense if proven.

⁵ MCL 600.3204(3) states, “[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist *prior to the date of sale* under section 3216

more than a record chain of title prior to the date of the sheriff's sale, and whether one existed at the time of the originally scheduled, but postponed, sheriff's sale is wholly immaterial. Additionally, because First American can show no prejudice from any alleged defect in Deutsche Bank's supposed failure to provide notice of the week-to-week court mandated adjournments, Deutsche Bank has shown yet another meritorious defense.⁶

In sum, Deutsche Bank proffered three meritorious defenses to the various claims of invalid foreclosure alleged by First American, and by challenging First American's standing Deutsche Bank has presented a defense which would be "absolute if proven." *Alken-Ziegler*, 461 Mich at 233-234. Therefore, a lesser showing of good cause is required in order to prevent a manifest injustice. *Id.*

2. GOOD CAUSE

In considering whether to set aside the default the trial court failed to consider whether Deutsche Bank had a meritorious defense, which in turn would have determined how strong a showing of good cause was necessary. This was an abuse of discretion. Additionally, under all the relevant factors, Deutsche Bank established good cause sufficient to set aside the default.

The first *Shawl* factor weighs slightly against Deutsche Bank in that an answer to the complaint was never filed. However, the default was entered by the trial court only six days after Deutsche Bank had missed the deadline to file an answer. Additionally, once the default was entered Deutsche Bank acted promptly in taking steps to defend the action, as the motion to set aside the default was filed only 16 days after the default had been entered. The fifth *Shawl* factor weighs slightly in favor of Deutsche Bank in that the file needed to answer the complaint was not easily located by BAC or Deutsche Bank. The inability to locate a file on the Property is reasonable given that the redemption period had exhausted 18 months prior to the complaint being served.⁷ The seventh *Shawl* factor weighs heavily in favor of Deutsche Bank, as the size of the judgment is \$155,239.47 plus judgment interest. This is a significant amount given the standing issue raised by Deutsche Bank, which seriously puts into question whether First American can even recover damages for the claim alleged. The eighth *Shawl* factor weighs in

evidencing the assignment of the mortgage to the party foreclosing the mortgage." (Emphasis added.)

⁶ This Court's holding in *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 502-503; 739 NW2d 656 (2007), is squarely on point with the current case. In *Sweet Air Investment*, the claim of inadequate notice was brought long after the redemption period had expired. Our Court held under the same circumstances that prejudice must be shown in order to void a foreclosure sale where the claim is premised on a defect in notice. *Id.* Likewise, First American is unable to show any prejudice in an alleged defective notice.

⁷ Deutsche Bank could have contacted opposing counsel and requested an extension to answer the complaint. However, given the facts presented in this case, the failure to do so is not proof of negligence.

favor of First American in that Deutsche Bank would not be responsible for any ongoing liability.⁸ See *Shawl*, 280 Mich App at 238.

Given the totality of the circumstances, Deutsche Bank has established “good cause” when considering that it has also raised facts supporting an “absolute if proven” meritorious defense. The threshold for a “good cause” showing is significantly reduced by Deutsche Bank’s proffered meritorious defense regarding standing. As we stated in *Shawl*, “trial courts should base the final result on the totality of the circumstances.” *Shawl*, 280 Mich App at 237. The trial court addressed only one relevant factor under *Shawl* and failed to even consider the possibility of an “absolute if proven” meritorious defense. The trial court’s analysis resulted in a decision that was outside the range of reasonable and principled outcomes.

B. DEFAULT JUDGMENT

Deutsche Bank also argues that the trial court erred in failing to set aside the default judgment. This Court reviews a trial court’s decision on a motion to set aside a default judgment for an abuse of discretion. *Huntington Nat’l Bank*, 292 Mich App at 383. Because the default underlying the default judgment must be set aside, the default judgment must also be set aside. See *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 53; 445 NW2d 186 (1989) (because this Court set aside an entry of default it declined to address any issue regarding the default judgment which had to be set aside if there was no default).

We reverse the trial court order denying Deutsche Bank’s motion to set aside the default, vacate the default judgment, and remand for further proceedings. We do not retain jurisdiction.

Deutsche Bank may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray

⁸ This Court has addressed only the relevant factors under *Shawl*. The second, fourth, sixth, and ninth factors enunciated in *Shawl*, 280 Mich App at 238, have no relevance to the current case, and thus, do not support either party’s position.