STATE OF MICHIGAN

COURT OF APPEALS

PAVEL LEONTE,

Plaintiff-Appellee,

v

CARMEN LEONTE,

Defendant-Appellant.

UNPUBLISHED
October 22, 2013

No. 309914
Washtenaw Circuit Court
LC No. 09-001251-DM

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

In this divorce action, defendant Carmen Leonte appeals as of right the trial court's order denying her motion to set aside a default and reinstating the default and default judgment of divorce entered in favor of plaintiff Pavel Leonte. We vacate the default and default judgment of divorce and remand this case for further proceedings.

Before the first appeal in this case, the trial court entered a default and default judgment against defendant because she failed to comply with discovery requests. However, this Court found that the trial court "should have addressed defendant's motion to set aside the default. By failing to exercise its discretion to adjourn the hearing for entry of the default judgment until after defendant's motion to set aside the default was heard, or otherwise address the timely motion to set aside the default, the court abused its discretion." *Leonte v Leonte*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 296602), slip op at 3.

During the evidentiary hearing after remand, defendant testified that she dismissed her attorney and her personal protection order (PPO) against plaintiff based on his assurances that they were going to reconcile. Additionally, allegedly based on plaintiff's assurances, defendant ceased responding to discovery requests. Thereafter, in early September 2009, the couple went to Traverse City on a retreat and resumed marital relations. Defendant testified that, about three days after they returned, plaintiff stated that he wanted defendant to give him a majority interest in their business in exchange for staying married. Defendant testified that plaintiff gave her "an ultimatum" concerning this issue. However, despite this "ultimatum" and evident disagreement, defendant testified that on September 21, 2009, one day before the scheduled hearing on plaintiff's August 17, 2009, motion to compel discovery, plaintiff "led [her] to believe" that he was going to court the next day to dismiss the divorce action. Defendant testified that plaintiff

said that he would call her after the hearing was over and that they would meet for lunch and celebrate. Defendant testified that she asked plaintiff if she should attend the hearing and that plaintiff said "No."

Thereafter, defendant did not attend the September 22, 2009, hearing and the trial court entered an order requiring defendant to provide complete answers to all discovery requests within five days. Defendant testified that she found out about the order a few days later, on or about September 25, 2009, when she obtained a copy in the mail. Within two weeks, defendant rehired her attorney and informed her attorney that she had been "duped." However, plaintiff had already filed a motion for default. Defendant's attorney testified that she attempted to communicate with plaintiff's attorney regarding discovery requests but that plaintiff's attorney did not respond.

Plaintiff also testified at the hearing after remand, stating that he went up north with defendant to discuss their problems and found that they did not agree. Plaintiff agreed that, while in Traverse City, he stayed in the same bed with defendant and resumed marital relations with her. Plaintiff also agreed that he told defendant that he would meet her for lunch on September 22, 2009, after he "got out of court," and that he did not tell defendant about what happened in court on that date. However, plaintiff denied telling defendant that she did not have to attend the hearing or that he was going to dismiss the divorce action.

Additionally, around the time that the discovery requests were due, defendant testified, her computer ceased functioning properly. Defendant testified that, after the computer malfunctioned, it only contained business data from before 2007. Defendant also testified that there was an illegal entry to her business and home and that, during the break-in, someone tampered with the telephone lines and this affected her ability to run the business and respond to discovery requests.

After the parties presented closing arguments, the trial court ruled from the bench, stating that the question before the trial court, as dictated by this Court's opinion, was whether there was "fraud involved so as to set aside the default." Thereafter, the trial court found that the delays were the fault of defendant and that, if plaintiff committed fraud, it did not cause the delays in producing discovery requests. Accordingly, the trial court reinstated the default and default judgment.

Defendant moved for reconsideration on March 5, 2012. The trial court denied this motion on March 22, 2012, and entered an order effectuating its opinion on April 18, 2012. Defendant then filed this appeal.

Defendant alleges several claims of error, including that the trial court abused its discretion in denying her motion to set aside the default, committed error requiring reversal by failing to follow this Court's remand directive, erred by denying her motion for reconsideration, and failed to consider less draconian sanctions.

With regard to the issue concerning whether the trial court followed this Court's remand directive, "[i]t is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v General Motors (On Remand)*, 204 Mich App 509,

514; 516 NW2d 105 (1994). Defendant asserts that the trial court erred in limiting the basis for setting aside the default to fraud and failed to consider other good cause. We agree. In remanding this case in the first appeal, this Court explicitly stated that that the trial court "should have addressed defendant's motion to set aside the default," which included arguments with regard to good cause to set aside the default and claims of fraud. *Leonte, supra*, slip op at 2-3. This Court went on to explain that the trial court's error was "*especially* apparent in light of the defendant's claim of fraud" (emphasis added); however, this Court did not limit the trial court's inquiry to whether plaintiff committed fraud. *Id*., slip op at 2-4.[1]

At the evidentiary hearing following remand, although the trial court began the hearing by stating that its inquiry was whether the "default was properly entered," by the end of the hearing, when the trial court made its ruling, it had reframed the question to be decided as whether there was evidence of fraud so as to set aside the default. Specifically, the trial court stated, "so that's what we have. Is there fraud involved so as to set aside the default[?]" Later in the opinion the trial court stated, "[t]he question is was there fraud." By erroneously limiting its inquiry contrary to the remand directive, the trial court did not consider other causes asserted by defendant for setting aside the default, such as computer and telephone problems that caused delays in responding to requests, and assertions by plaintiff, whether rising, in a legal sense, to the level of "fraud" or not, that caused defendant to dismiss her attorney and stop responding to discovery requests. Given the remand directive, the trial court's limited inquiry was an abuse of discretion. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 425-426; 807 NW2d 77 (2011) (finding an abuse of discretion where, after remand, the trial court failed to make findings consistent with this Court's earlier opinion).[2]

Defendant also argues that the trial court should not have entered a default judgment before considering less severe sanctions on the record. We agree. Trial courts are authorized to render a judgment by default for failures to comply with court orders. MCR 2.313(B)(2)(c). Nevertheless, a default judgment is a

> drastic measure and should be used with caution. *Equico Lessors, Inc v Original Buscemi's, Inc*, 140 Mich App 532, 534; 364 NW2d 373 (1985). When the

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[1] As noted earlier, the Court stated, "By failing to exercise its discretion to adjourn the hearing for entry of the default judgment until after defendant's motion to set aside the default was heard, or otherwise address the timely motion to set aside the default, the court abused its discretion." *Id*., slip op at 3.

[2] Defendant briefly argues that "even if fraud were the only basis claimed for setting aside the default, fraud was clearly proven." However, under the deferential abuse-of-discretion standard of review, see *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999), and *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), because there was evidence to support the trial court's decision that fraud was not the main cause of the discovery delays (for example, plaintiff had become aware of problems with the supposed reconciliation attempts by early September 2009 but took no discovery action at that time), we find no basis for disturbing the ruling concerning fraud.

> sanction of a default judgment is contemplated, the trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether wilfulness has been shown. *Id.* at 534-535. The court must also evaluate on the record other available options before concluding that a drastic sanction is warranted. *Hanks v SLB Management, Inc*, 188 Mich App 656, 658; 471 NW2d 621 (1991). The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary. *Equico Lessors, Inc*, 140 Mich App at 535. [*Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992).]

See also *Draggoo v Draggoo*, 223 Mich App 415, 423-424; 566 NW2d 642 (1997). Additionally, when crafting a discovery sanction, the court should consider the following factors:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

Here, the trial court did not consider less severe sanctions on the record. Accordingly, because case law instructs that the trial court "must also evaluate on the record other available options before concluding that a drastic sanction is warranted," *Frankenmuth Mut Ins Co*, 193 Mich App at 396-397, and the trial court failed to do so, it abused its discretion in granting the default judgment.

In sum, we find that the trial court abused its discretion by failing to follow this Court's remand directive and by failing to discuss alternative remedies on the record. We remand for a hearing concerning good cause and a meritorious defense, see MCR 2.603(D)(1), and for a determination on the record with regard to whether less drastic sanctions were warranted under the facts of this case.

We vacate the default and default judgment of divorce and remand this case for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio