STATE OF MICHIGAN

COURT OF APPEALS

JAMES P. WILSON, and JP WILSON FAMILY, LLC,

Plaintiffs,

v

ROBERT SHUMAKE,

Defendant-Appellant,

and

JASON Q. WILSON,

Defendant-Appellee,

and

BLUE MAGIC ENTERTAINMENT, LLC, d/b/a BLUE MAGIC GAMING,

Defendant.

UNPUBLISHED
August 13, 2020

No. 350225
Oakland Circuit Court
LC No. 18-165169-CB

Before: RONAYNE KRAUSE, P.J., AND SAWYER AND BOONSTRA, JJ.

PER CURIAM

Defendant Robert Shumake (Shumake) appeals by right the default judgment entered against him and the trial court's denial of his motion to set aside the default judgment. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In 2012, defendant Jason Q. Wilson (Jason) formed defendant Blue Magic Entertainment, LLC (Blue Magic). Jason and Shumake hold ownership interests in Blue Magic. According to

plaintiffs, Shumake and Jason met with Jason's father, plaintiff James Wilson (James), in 2016 to discuss an investment by James or his company, plaintiff JP Wilson Family, LLC (JPW), in Blue Magic. The investment was to enable Blue Magic to operate a gaming enterprise in Kenya. Plaintiffs alleged that JPW agreed to provide a six-month loan of $250,000 to Blue Magic in return for a 3% ownership interest in Blue Magic.[1] The funds would be placed in escrow with a bank in Nairobi, and defendants would then use the funds to secure a bond from the bank. According to plaintiffs, James used a personal line of credit to obtain the funds, and plaintiffs transferred the funds to Nairobi. However, according to plaintiffs, the funds were never deposited in the bank, a bond was never secured, and the funds were never repaid.

In April 2018, plaintiffs filed suit against Shumake, Jason, and Blue Magic, alleging that the $250,000 had not been repaid, that defendants had never provided proof that the money was deposited with the Nairobi bank, and that defendants had spent the money on their own personal expenses. The complaint alleged breach of contract, fraud and misrepresentation, unjust enrichment, and common law and statutory conversion, and also sought to hold Shumake and Jason personally liable under a corporate veil-piercing and alter ego theory.

Despite hiring a private investigator and locating residential and mailing addresses for Shumake, plaintiffs were unable to serve him with the initial summons and complaint. Plaintiffs then moved the trial court for alternate service, and the trial court permitted plaintiffs to serve Shumake by mail at both addresses and by posting and publication. Although Jason and Blue Magic answered the complaint, Shumake never did. On September 26, 2018, a default was entered against Shumake; the notice of default was served by mail to the residential and mailing addresses located by the investigator. On February 13, 2019, plaintiffs moved for the entry of a default judgment against Shumake, and served the motion and a notice of hearing in the same manner. After a hearing on February 28, 2019, at which Shumake did not appear, the trial court entered a default judgment against Shumake in the amount of $750,000, representing triple damages.

On May 1, 2019, Shumake filed a motion to set aside the default judgment. Although the motion asserted that Shumake had never received actual notice of the complaint, it also stated that Jason, "a Michigan Licensed Attorney,"[2] had "verbally" informed him of the complaint, that Jason had represented that the complaint was a "family matter" that he would "handle," and that Shumake did not need to respond to the complaint. The motion, supported by an affidavit from Shumake, also asserted that Shumake possessed a meritorious defense, i.e., that Jason had structured the deal with plaintiffs and that Shumake had no control over the bank account in which the $250,000 was deposited. Shumake did not specify when he was "verbally" informed of the complaint. Jason filed a response to the motion, and denied telling Shumake that "he would both handle the matter and that Defendant, Robert Shumake need not respond to the Complaint." Plaintiffs responded as well, stating that Shumake had actual notice of the complaint and had, in

[1] These and other terms are reflected in a July 18, 2016 Letter of Intent signed by James on behalf of JPW and by Shumake on behalf of Blue Magic.

[2] The record reflects that Jason is a member of the State Bar of Michigan.

fact, personally called the office of their legal counsel on September 7, 2018 to ask them for an extension of time to file an answer.

A hearing was held on Shumake's motion on May 29, 2019. At the hearing, Shumake's counsel affirmed that Shumake had known about the suit and had "actually called the plaintiff's [sic] office and said, I know about this lawsuit." Shumake's counsel stated that plaintiffs had asked Shumake if he was going to answer the complaint, to which Shumake had replied that he was "having an attorney" answer the complaint, believing that Jason would be answering the complaint on his behalf. Shumake's counsel specifically stated that "[h]is attorney was Jason." Counsel for plaintiffs confirmed that Shumake had called the office, but stated that Shumake had asked for an extension of time to file an answer and had stated that he was attempting to get an attorney.

The trial court denied the motion to set aside the default judgment, finding that Shumake had known of the lawsuit and that, even assuming that Jason had represented that Shumake did not need to answer the complaint, "that is not either good cause or a meritorious defense, because no one should rely on someone else to take care of their business." The trial court also confirmed that the $750,000 amount of the judgment represented the prayed-for treble damages for statutory conversion. Shumake moved the trial court for reconsideration; while the trial court never explicitly ruled on that motion, it subsequently entered a final order closing the case.

This appeal followed.[3]

II. DENIAL OF MOTION TO SET ASIDE DEFAULT JUDGMENT

Shumake argues that the trial court erred by denying his motion to set aside the default judgment, because he had both good cause and a meritorious defense. We disagree. We review for an abuse of discretion a trial court's decision on a motion to set aside a default judgment. See *Shawl v Spence Bros*, 280 Mich App 213, 218; 760 NW2d 674 (2008). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.603(A)(1) provides that a default may be entered against a party who has "failed to plead or otherwise defend" as required by the court rules. "Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court" in accordance with MCR 2.603(D) or MCR 2.612. MCR 2.603(A)(3).

A defaulted party may move to set aside the default before entry of a default judgment, or to set aside a default judgment within 21 days after the default judgment was entered. MCR 2.603(D)(1) and (2); *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 528, 530; 672 NW2d 181 (2003). An order granting a default judgment is a final judgment, MCR 7.202(6)(a)(i); *Allied Electric Supply Co v Tenaglia*, 461 Mich 285, 288; 602 NW2d 572 (1999), and relief from that

[3] Plaintiffs reached a settlement with Jason and Blue Magic. The terms of the settlement specified that plaintiffs would assign to Jason their rights with respect to the trial court's judgment against Shumake; therefore, although Jason was a named defendant in the action, he now stands in the shoes of plaintiffs for purposes of this appeal.

judgment may also be sought under MCR 2.612(C) after the judgment is entered. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 234 n 7; 600 NW2d 638 (1999).

A motion to set aside a default or default judgment shall be granted only for (1) lack of personal jurisdiction or (2) a showing of good cause and the filing of an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1); *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 628; 750 NW2d 228 (2008). The moving party bears the burden of demonstrating good cause and a meritorious defense. *Saffian*, 477 Mich at 14. Shumake does not argue that the trial court lacked personal jurisdiction over him, but rather argues that good cause exists to set aside the default judgment and that he has a meritorious defense to the claims against him.

Good cause sufficient to warrant setting aside a default or a default judgment can be shown by: (1) a substantial procedural defect or irregularity in the proceedings, (2) a reasonable excuse for the failure to comply with requirements that created the default; or (3) another reason showing that manifest injustice would result from permitting the default to stand. *Alken-Ziegler*, 461 Mich at 233; *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 390; 808 NW2d 511 (2011).

An affidavit of meritorious defense "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." *Huntington Nat'l Bank*, 292 Mich App at 390. Factors relevant to the existence of a meritorious defense include whether there is 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; and (3) the plaintiff's claim rests on inadmissible evidence. *Shawl*, 280 Mich App at 238.

In determining whether there is a meritorious defense and good cause for setting aside a default, a trial court should consider the totality of the circumstances. *Id*. at 236-237.

Shumake argues that, although he had notice of the lawsuit, he relied on Jason's representation that he would "handle" it and that Shumaker did not need to file an answer. Jason denied ever making such a representation. We agree with the trial court that, even if such a representation was made, Shumaker's reliance on it does not constitute good cause to set aside the default judgment. Shumaker's own affidavit indicates that he understood that a defendant is required to answer a lawsuit. Although he states that he believed Jason when he was told that Jason was going to answer on his behalf, there is no evidence that he ever followed up to see if this was actually done. Jason's answer, filed nearly a month before Shumaker was defaulted, is devoid of any references to Shumake and cannot reasonably be read as also constituting an answer on Shumake's behalf. Moreover, the default judgment was not entered until an additional three months had passed, and Shumake did not move to set aside the judgment until *another* three months had passed. During this time, there is no evidence that Shumake gave any attention to the progress of the lawsuit in which he was named as a defendant. If, as Shumake claims, he believed that Jason, another defendant in the case, was acting as his attorney and representing his interests in the case, he has provided no evidence that this was a reasonable belief. For example, he has not provided any evidence of any sort of retainer agreement, billing, or even consultation with Jason about the case apart from the initial phone call in which he received notice of the case. Moreover, the trial court was presented with an affidavit from plaintiffs' attorney stating that Shumake had called his office on September 7, 2018 and stated that he had "just received some papers and was

retaining a lawyer to represent him and wanted an extension to respond to the papers." This was supported by a contemporaneous email sent from plaintiffs' counsel to another attorney at his firm. In other words, the evidence before the trial court supported the conclusion that Shumake was aware of the lawsuit and his need to answer it, and was still searching for representation approximately three weeks before the default was entered. Under these circumstances, the trial court did not err by declining to accept Shumake's contention that he was misinformed or misled about the need to file an answer. *Shawl*, 280 Mich App at 238. Even if Jason was in fact representing Shumake as an attorney, mistakes of counsel are attributed to the client. Thus, Shumake might have a legal malpractice claim against Jason, but any misfeasance by Jason would still not be grounds for setting aside the default.

Apart from the argument that he was misled by Jason, Shumake presents little argument as to why he did not receive notice of the complaint via service or publication, of the default, or of any other filings in the case; he merely states that he did not receive such notice. At the motion hearing, his counsel stated that Shumake had moved from the address to which the complaint was mailed in 2011 and did not own the post office box that was listed as his mailing address. Yet the trial court was presented with evidence, obtained by plaintiff's investigator, that these addresses remained on file with the Secretary of State as Shumake's current residential and mailing addresses.[4] And again, the evidence provided by plaintiff's counsel was that Shumake had "received some papers" several weeks before the deadline and wanted additional time to answer the lawsuit. Thus, even if service had not been technically properly effectuated, Shumake is not entitled to relief where he did actually receive a copy of the summons and complaint before the summons expires. MCR 2.105(J)(3); *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 747 (1987). Under these circumstances, the trial court did not abuse its discretion by finding that Shumake had not carried his burden of showing good cause to set aside the default judgment. *Saffian*, 477 Mich at 14; *Shawl*, 280 Mich App at 218.

Again, good cause *and* a meritorious defense are generally required to warrant setting aside a default judgment. MCR 2.603(D)(1); *Woods*, 277 Mich App at 628. However, a strong meritorious defense will require a lesser showing of good cause than if the defense were weaker. See *Alken-Ziegler, Inc*, 461 Mich at 233-234. As discussed, we hold that Shumake did not made an adequate showing of good cause. We also hold that, contrary to Shumake's contention, his affidavit does not establish a strong meritorious defense to the claims against him. *Shawl*, 280 Mich App at 238. The statements in Shumake's affidavit are either irrelevant or insufficient to demonstrate such a defense. For example, Shumake's affidavit states that his meritorious defense is based in part on his allegation that Jason had told him that he need not file an answer to the complaint—these statements relate to the good cause element, but are irrelevant to whether he possesses a meritorious defense to plaintiffs' claims. Further, although Shumake states in his affidavit that he did not prepare the letter of intent memorializing the parties' agreement concerning the loan of $250,000, he admits that he signed it. And although Shumake asserts in

[4] The private investigator's search of Secretary of State records revealed an address in Bloomfield Hills as Shumake's residential address and an address in Grosse Pointe Farms as his mailing address; the parties agreed at the motion hearing that the Grosse Pointe Farms address was a "box" at a UPS store that functioned in a manner similar to a post office box.

his affidavit that he did not "control" the bank account at the Nairobi bank "into which the $250,000 that is [sic] subject of the lawsuit was deposited," plaintiffs' complaint alleges that the money was *not* deposited in that account, but was instead spent by defendants for their personal use.

In sum, Shumake's affidavit does not establish that he can disprove any elements of plaintiffs' claims, that those claims are based on inadmissible evidence, or that he is entitled to summary disposition of any or all of defendants claims. *Shawl*, 280 Mich App at 238. Therefore, in light of Shumake's failure to show good cause or that he has a meritorious defense, the trial court did not err by denying Shumake's motion to set aside the default judgment.[5]

Affirmed.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Mark T. Boonstra

[5] Shumake also argues that the amount of the default judgment was erroneous and, at a minimum, that the judgment amount should be reduced to $250,000. This argument was not raised before the trial court and, because we are affirming the trial court's denial of the motion to set aside the default judgment, we need not consider it on appeal. See MCR 2.603(A)(3) ("After the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court . . . ."). And because we find no error in the trial court's denial of his motion to set aside the default judgment, we find any error in the trial court's failure to explicitly rule on Shumake's motion for reconsideration to be harmless and not inconsistent with substantial justice. See MCR 2.613(A).