STATE OF MICHIGAN

COURT OF APPEALS

MERRILL COMMUNITY SCHOOL DISTRICT,

Plaintiff-Appellant,

v

EVERETT CRAGG & SONS WELL DRILLING, INC,

Defendant-Non-party,

and

AETNA CASUALTY AND SURETY COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
April 16, 1996

No. 177611
LC No. 93-055592-CZ

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order setting aside a garnishment default and granting summary disposition for garnishee defendant Aetna Casualty and Surety Company pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff contracted with Everett Cragg and Sons Drilling, Inc., to drill a potable water well at Merrill Elementary School. Cragg drilled through an underground storage tank at the site, which resulted in an unexpected and sudden discharge of fuel oil into surrounding soils. The contaminated soil was removed and disposed of in accordance with state environmental laws and regulations and the requirements of the Department of Natural Resources. Garnishee defendant Aetna was Cragg's liability insurer. Plaintiff obtained a valid default judgment against Cragg. On October 8, 1993, plaintiff filed a writ of garnishment against Aetna. Aetna filed a garnishee disclosure on November 2, 1993, and denied liability. On November 15, 1993, plaintiff filed a default against Aetna on the ground that Aetna

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* Circuit judge, sitting on the Court of Appeals by assignment.

did not file its disclosure within seven days after being served the writ of garnishment as required by MCR 3.101(H).[1]

The trial court set aside the default on the ground that plaintiff did not take a default against Aetna before the filing of Aetna's disclosure. The court then granted summary disposition for defendant based on its finding that the liability policy excluded coverage for contamination caused by pollutants.

Plaintiff first argues that the trial court erred in granting summary disposition for defendant. We disagree.

Section 2.e(2) of the liability policy excludes from coverage any loss, cost, or expense arising out of any:

> (a) Request, demand or order that any insured or others test for, monitor, *clean up, remove,* contain, treat, detoxify or neutralize *or in any way respond to,* or assess the effects of pollutants.
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants. [Emphasis added.]

This provision also defines pollutants:

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

In construing insurance contract language, the courts are required to give the language its plain and ordinary meaning and avoid technical and strained constructions. *South Macomb Disposal Authority v Michigan Municipal Risk Management Authority*, 207 Mich App 475, 477-478; 526 NW2d 3 (1994). In *South Macomb*, this Court considered language that excluded from loss protection "occurrences resulting from . . . contaminants or pollutants liability." This language was interpreted as barring coverage for any liability resulting from contamination or pollution occurrences. *Id*. At 478. Similarly, § 2.e(2) excludes from coverage any loss, cost, or expense incurred from responding to the effects of pollutants. The language of the exclusion must be fairly understood to exclude any coverage for damages or costs due to response to the effects of pollutants. Consequently, plaintiff's damages are excluded from coverage. The trial court properly granted summary disposition for Aetna.

Plaintiff also contends that the trial court erred in setting aside the garnishment default because Aetna did not timely file its disclosure as required by MCR 3.101(H). The decision whether to set

aside a default will not be disturbed absent an abuse of discretion. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358; 514 NW2d 257 (1994).

A motion to set aside a default shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1). Good cause sufficient to warrant setting aside a default includes a showing that manifest injustice would result if the default were allowed to stand. *Harvey Cadillac, supra* at 358. As noted above, the language of the insurance policy provided Aetna with a meritorious defense. Allowing the default to stand would constitute manifest injustice. Accordingly, the trial court did not abuse its discretion in setting aside the default.

On an alternative ground, we also find that the trial court did not err in its determination that the default should never have been entered. MCR 3.101(H) provided in pertinent part:

> The garnishee defendant must file and serve on the plaintiff and the principal defendant a disclosure under oath within 7 days after being served with the writ.

While Aetna's disclosure was late, the remedy provided by court rule is that plaintiff *may* take a default against the garnishee defendant *as in other civil actions*. MCR 3.101(R)(1);[2] *Alyas v Illinois Employers Ins of Wausau*, 208 Mich App 324, 327; 527 NW2d 548 (1995), lv pending.[3] Plaintiff, however, did not take a default against Aetna before the filing of Aetna's disclosure. Pursuant to MCR 2.603(A), which governs civil actions:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

In a disputed garnishment action, the disclosure serves as the answer to a plaintiff's garnishment affidavit, which serves as the complaint. *LeDuff v Auto Club Ins Ass'n*, 212 Mich App 13, 17; 536 NW2d 812 (1995). Here, Aetna filed a disclosure before plaintiff filed its default and, therefore, had not "failed to plead." Therefore, MCR 2.603(A) did not mandate entry of default. We agree with the trial court that the taking of a default was improper where, as here, the filing of the disclosure precedes the taking of a default against the garnishee defendant. This is particularly true in light of the policy of this state generally favoring the meritorious determination of issues. *Harvey Cadillac, supra* at 358.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Chad C. Schmucker

[1] All references in this opinion to MCR 3.101 refer to the version of the court rule that was in effect in October 1993 when plaintiff filed the writ of garnishment.

[2] Now MCR 3.101(S)(1).

[3] Judge Fitzgerald dissented in *Alyas* on grounds that are not relevant to the issue presented in the present case.