

STATE OF MICHIGAN
COURT OF APPEALS

JESSIE M. PHELPS-ORR,

Plaintiff-Appellee,

v

HOWARD A. ORR,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 181547
LC No. 94-420305-DO

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Defendant appeals as of right a default judgment of divorce, the denial of his motion to set aside the default judgment, and the denial of his motion for reconsideration. We affirm.

On appeal, defendant first claims that the trial court abused its discretion in denying his motion to set aside the default judgment of divorce. Specifically, defendant argues that he was given improper notice of the entry of default judgment and that emergent circumstances prevented him from attending the hearing. We review a trial court's decision whether to set aside a default judgment for a clear abuse of discretion. *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170-171; 454 NW2d 194 (1990); *Perry v Perry*, 176 Mich App 762, 768-769; 440 NW2d 93 (1989).

The purpose of the notice requirement of MCR 2.603(B)(1) is to apprise the defaulting party of the possibility of entry of judgment so that the party has an opportunity to participate in any hearing necessary to ascertain the proper remedy. *Perry, supra* at 767. A default judgment may be set aside only where (1) good cause for failure to make a timely response is shown, (2) a meritorious defense is established, and (3) the showing of a meritorious defense is based on an affidavit of fact. *Id.* at 769. Good cause sufficient to justify setting aside a default judgment includes, inter alia, a substantial defect or irregularity in the proceedings on which the default is based. *Id.* Failure to give notice as required by MCR 2.603(B) constitutes good cause. *Id.* at 770.

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

In the present case, plaintiff moved the lower court for entry of default judgment on September 14, 1994, without filing notice of entry of default. Despite this procedural defect, defendant received a copy of the motion for entry of default judgment on September 15, 1994, and knew that the default hearing would occur on September 21, 1994. Therefore, we conclude that the irregularity caused by plaintiff's technical noncompliance with notice requirements did not substantially deprive defendant of his procedural rights. Indeed, defendant chose not to respond despite knowing that plaintiff filed for divorce and that he was in jeopardy of having a default entered against him. Furthermore, although defendant had a pressing personal issue at the time of the scheduled hearing, he was aware of the hearing and had ample time to hire an attorney or place his interests on record. Accordingly, defendant has failed to show good cause why the default judgment should be set aside, and the lower court did not abuse its discretion in refusing to do so. *Id.* at 768-770.

Next, defendant contends that the lower court erred reversibly in denying his motion for an evidentiary hearing concerning allegations that plaintiff fraudulently misrepresented facts to the lower court. We disagree. This Court reviews the lower court's denial of a motion for an evidentiary hearing for an abuse of discretion. *McNulty v Watry Industries, Inc.*, 442 Mich 883, 884; 500 NW2d 477 (1993); *Rapaport v Rapaport*, 185 Mich App 12, 16, 18; 460 NW2d 588 (1990).

Defendant presented no evidence to support his claim that plaintiff lied to the court. Therefore, the trial court was within its discretion in deciding not to hold an evidentiary hearing. *Rapaport, supra* at 16-18. Moreover, despite knowing of the impending hearing for the entry of a default judgment of divorce, defendant made no effort to retain representation, file responsive pleadings, or communicate with plaintiff's attorney regarding either the divorce or the property settlement. As such, defendant is solely responsible for his failure to rebut plaintiff's factual allegations at the originally scheduled hearing.

Finally, defendant argues that the lower court inequitably distributed the parties' marital assets. The objective in a property settlement is to arrive at a division that is fair and equitable. *Steckley v Steckley*, 185 Mich App 19, 23-24; 460 NW2d 255 (1990). On appeal, this Court first reviews the lower court's factual findings for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Lacking clear factual error, we review the trial court's property division to determine if it is fair and equitable in light of the factual findings. *Sparks, supra* at 151-152; *Ianitelli v Ianitelli*, 199 Mich App 641, 642; 502 NW2d 691 (1993).

Applying these principles to the present case, we conclude that the property division was fair and equitable. The trial court awarded the marital home to plaintiff after learning that she paid the down payment on the home with her own funds prior to the marriage. The judgment requires that plaintiff assume all expenses on the home except for those debts (including unpaid utility bills, repair costs, and withdrawals on the parties' joint equity account) that defendant incurred and was responsible for during the period after the parties' separation when defendant

had sole possession of the home. Under these circumstances, and because the remainder of the property settlement is also fair and equitable, we affirm the trial court's judgment of divorce.

Affirmed.

/s/ Richard Allen Griffin

/s/ Meyer Warshawsky