STATE OF MICHIGAN

COURT OF APPEALS

ARMOND CASSIL COMPANY,

Plaintiff-Appellant,

v

EDWARD C. LEVY COMPANY, d/b/a CADILLAC ASPHALT PAVING CO., CADILLAC ASPHALT PAVING CO. and C.J. ROGERS, INC., a dissolved or inactive joint venture, AMERICAN HOME ASSURANCE COMPANY, and the ECONOMIC DEVELOPMENT CORPORATION OF DETROIT,

Defendant-Appellees.

UNPUBLISHED
February 18, 1997

No. 194028
Wayne Circuit Court
LC No. 95-532767 CK

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Plaintiff, Armond Cassil Co., appeals by right a March 6, 1996, order granting summary disposition in favor of defendants, Edward C. Levy Co., Cadillac Asphalt Paving Co. ("Cadillac"), a joint venture consisting of Cadillac and C.J. Rogers, Inc., American Home Assurance Co. ("American"), and the Economic Development Corp. of Detroit ("EDC"). We affirm.

Plaintiff first argues on appeal the trial court erred in setting aside the entry of default against American because American failed to show good cause and a meritorious defense. We disagree.

A motion to set aside a default or default judgment may 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 the setting aside of a default or default judgment includes: (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default and the resulting default judgment were allowed to stand." *Gavulic*

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

v Boyer, 195 Mich App 20, 24-25; 489 NW2d 124 (1992); *Park v American Casualty Ins Co*, ___Mich App___; ___NW2d___ (No. 171787, issued September 24, 1996), p 3.

With regard to the good cause requirement, plaintiff first argues American failed to show a substantial defect or irregularity in the proceedings because American's counsel, Reuben Waterman, never made an appearance under the court rules, and was therefore not entitled to be served with the amended complaint. American, on the other hand, responds that Waterman's presence at the hearing on the temporary restraining order constituted an appearance entitling him to service of the amended complaint, and plaintiff's failure to serve him constituted a substantial defect or irregularity in the proceeding sufficient to show good cause. Contrary to American's assertion, there was no irregularity in the default taking.

A civil action is considered to be commenced once a complaint has been filed with a court. MCR 2.101(B). A party may appear in the action either by filing a written appearance or by physically appearing before the court. MCR 2.117(A)(1). An attorney may appear on behalf of a party, again by filing a written appearance, or "by an act indicating that the attorney represents a party in the action." MCR 2.117(B)(1). "Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings; and (2) an intent to appear." *Penny v ABA Pharmaceutical Co*, 203 Mich App 178, 182; 511 NW2d 896 (1993). Once an attorney has made an appearance on behalf of a party, he must be served with pleadings and other papers. MCR 2.117(B)(2)(b).

In the present case, Waterman attended the hearing on the motion for a temporary restraining order on behalf of American. This action indicates counsel's knowledge of the pending proceedings. However, as evidenced by Waterman's letter to plaintiff's counsel, Waterman did not intend his presence at the hearing as a general appearance for the purpose of contesting plaintiff's claims on the merits. Rather, Waterman's presence was limited to the purpose of arguing the motion. In fact, Waterman expressly indicated that his taking of a copy of the original complaint did not mean that he was accepting service on behalf of American. Therefore, we find Waterman's actions indicate that he did not intend to make an appearance in the action, and he was therefore not entitled to service of the amended complaint.

We also find that MCR 2.107 is controlling. MCR 2.107 provides:

> (1) Service required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney except as follows:
>
> (a) The original service of the summons and complaint must be made on the party as provided by MCR 2.105.

Since the original complaint was never served on American, the service of the amended complaint was therefore an "original service" that was required to be made on American personally, not its counsel. MCR 2.105; MCR 2.107(B)(1)(a). Consequently, we find even if Waterman had made an appearance on American's behalf, plaintiff would not have been obligated to serve him with the amended complaint.

Despite the fact American failed to show a substantial defect or irregularity in the proceedings, we nevertheless find that good cause to set aside the default existed because American had a reasonable excuse for failing to timely respond to the amended complaint, and because manifest injustice would have resulted if the default was allowed to stand.

Beginning in 1992, the parties had been filing timely pleadings and motions, and had appeared together in court numerous times. There was nothing to indicate that American intentionally or in bad faith delayed filing an answer to the amended complaint. Moreover, plaintiff's request for injunctive relief had already been denied by the trial court. In fact, plaintiff never served American with a complaint at that time, and apparently made no indication it planned to file an amended complaint seeking essentially the same relief.

Additionally, although plaintiff admittedly did not send a copy of the amended complaint to American's counsel directly, plaintiff did not file the return of service for American until December 28, 1995, in the middle of the holiday season and merely a week before the default was entered. Plaintiff may not have been obligated to send a copy of the complaint directly to American's counsel, but, in light of the parties' prior dealings, it certainly would have been reasonable to expect as a matter of courtesy. Finally, a default judgment against American on the very issues that were already the subject of separate litigation would have been unduly severe. Plaintiff's lawsuit arose out of the same set of facts, involving the EDC construction project and related bond and endorsement, that the parties had been litigating since 1992. American demonstrated good cause sufficient to warrant setting aside the entry of default.

In addition to showing good cause, MCR 2.603(D) requires the defaulted party to file an affidavit of facts showing a meritorious defense. Upon review of the affidavit filed by American, we conclude American has shown it possessed a meritorious defense to plaintiff's underlying fraud claim. American's argument that plaintiff's claim was barred based on the pending 1992 litigation, involving the same parties and the same claims, if successful, would have terminated plaintiff's lawsuit entirely. MCR 2.116(C)(6). The trial court did not abuse its discretion in setting aside the entry of default.

Plaintiff's next claim of error is the trial court erred in granting summary disposition based on the pending 1992 litigation. We disagree.

MCR 2.116(C)(6) provides that summary disposition is appropriate where "[a]nother action has been initiated between the same parties involving the same claim." However, MCR 2.116(C)(6) does not require that all the parties and all the issues be identical. *Candler Roofing v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986). Summary disposition is appropriate where "[r]esolution of either action will require examination of the same operative facts." *Id*.

When plaintiff's 1992 estoppel argument and its present fraud claim are compared, there is no significant difference. In each case, plaintiff made the same claim of misrepresentation. In the 1992 litigation, plaintiff argued American was estopped from relying on the notice requirements contained in MCL 129.207; MSA 5.2321(7) as a defense to plaintiff's claim on the bond because the bond endorsement specifically referenced MCL 570.102; MSA 26.322. Plaintiff's first amended complaint

in the present case raised a similar claim, in that it alleged that American falsely represented MCL 570.102; MSA 26.322, in the very same bond endorsement, as being the controlling provision for claims submitted by subcontractors against the bond itself, and that plaintiff may suffer damages as a result. Therefore, the resolution of either of plaintiff's claims required examination of the same operative facts. *Candler*, *supra*. MCR 2.116(C)(6) was properly applied.

However, plaintiff also argues summary disposition was inappropriate because plaintiff added the joint venture and the EDC as defendants in the second lawsuit. This argument is without merit. The parties do not dispute the fact that the joint venture was entered into between Cadillac and another company known as C.J. Rogers, Inc., and that Cadillac was a party in both suits. Since Cadillac was a defendant in both lawsuits, the fact that plaintiff separately named the joint venture itself did not change the essential identity of those parties. Likewise, the addition of the EDC as a defendant in the second lawsuit did not change the basic nature of the factual and legal issues in dispute. The basis of plaintiff's estoppel argument in the first suit, as well as its fraud claim in the second suit, was the alleged misrepresentation on the bond endorsement. This issue was already pending before the court in the 1992 litigation. Therefore, under the circumstances of this case, plaintiff's right to a determination of the misrepresentation issue, and its corresponding right to recover on the bond, did not depend on whether the EDC was a party. In other words, the EDC's mere presence as a party "[did] not inject new theories of standing, new claims, or new defenses." *First Bank of Cadillac v Benson*, 81 Mich App 550, 599; 265 NW2d 413 (1978). The addition of the EDC as a party did not preclude the application of MCR 2.116(C)(6). The trial court properly granted summary disposition on the second lawsuit.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Richard A. Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson