

STATE OF MICHIGAN
COURT OF APPEALS

DELENER S. MCCAMEY,

Plaintiff-Appellee,

v

THE BOARD OF EDUCATION OF THE SCHOOL
DISTRICT OF THE CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED

April 22, 1997

No. 191671

Wayne Circuit Court

LC No. 93-328176

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin*, JJ.

PER CURIAM.

Defendant appeals as of right a default judgment entered in favor of plaintiff in the amount of \$80,000 following the non-attendance of the board members at a settlement conference ordered by the court. We affirm in part, reverse in part and remand.

First, defendant argues that if all of defendant's members had attended the settlement conference as the trial court had requested, it would have been a violation of the Open Meetings Act ("OMA"), MCL 15.261 *et seq.*; MSA 4.1800(11) *et seq.* We disagree. This Court interprets the OMA broadly, strictly construes the act's exemptions, and imposes on public bodies the burden of proving that an exemption exists. *Booth Newspapers, Inc v University of Michigan Board of Regents*, 444 Mich 211, 223; 507 NW2d 422 (1993). A public body is authorized to meet in closed sessions for several purposes, including:

(e) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. [MCL 15.268(e); MSA 4.1800(18)(e).]

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

This subsection, strictly construed, exempts from OMA requirements discussions of those matters in which a judgment has not yet been reached or in which a settlement agreement has not been accepted. *The Detroit News, Inc v City of Detroit*, 185 Mich App 296, 303; 460 NW2d 312 (1990). Had they attended the conference, defendant's members would have been discussing a matter in which a judgment had not been reached and in which a settlement had not been accepted. If defendant was concerned that the exemption would not apply if the consultation included individuals other than defendant's attorney, defendant could have requested that the members gather in a room and defendant's attorney could discuss the settlement negotiations with them privately. The board members' complete disregard of the court's mandate to attend is not excused by the OMA.

Next, defendant asserts that the trial court's entry of the default judgment in favor of plaintiff violated defendant's right to due process "in its zealous desire to settle the case." We disagree. MCR 2.401(G) and Wayne County LCR 2.401(A) afford a trial court the authority to compel those who can conduct meaningful negotiations, including the parties to the action, to attend the settlement conference. See also *Kiefer v The Great Atlantic & Pacific Tea Co, Inc*, 80 Mich App 590, 594; 264 NW2d 71 (1978). MCR 2.401(G) provides that "[f]ailure of a party or a party's attorney to attend a scheduled conference, *as directed by the court* constitutes a default to which MCR 2.603 is applicable." (Emphasis added.) No meaningful negotiations could have taken place in this case because defendant's general counsel did not have "unlimited authority and unfettered discretion to settle the case." See *Kornak v Auto Club Ins Ass'n*, 211 Mich App 416, 422; 536 NW2d 553 (1995). Defendant was not denied due process. It sacrificed its right to an opportunity to be heard on the merits of the case by defying the trial court's directive.

Defendant also disputes the characterization of the request as an "order" in the default judgment entered by the court. Defendant argues that there was no "order" requiring the presence of the board members and that the court's oral, off-the-record request did not have the force of law. We agree with plaintiffs that the characterization of the request as an order is immaterial. MCR 2.401(F) and (G) refer to "direct" (the court may direct . . .) and "directed" ("as directed by the court"), respectively. The term "order" is not used. Defendant was undoubtedly "directed" by the court and failed to comply with that directive. A written order was not required.

Finally, defendant maintains that the default judgment should not have been entered without first allowing defendant to contest the amount of damages. We agree. A defaulting party has a right to participate if further proceedings are necessary to determine the amount of damages. *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). The holding of further proceedings on the question of damages is within the discretion of the trial court. *Id.* at 585. The complaint in this case sought damages for "anxiety, humiliation, embarrassment, and frustration" as well as lost wages, fringe benefits and pension. Because the damages sought by plaintiff were not capable of precise ascertainment, based on pleadings or affidavits submitted by plaintiff, the trial court should have conducted further proceedings on the issue of damages. See 2 Martin, Dean & Webster, Michigan Court Rules Practice, p 383. Failure to do so in these circumstances was an abuse of discretion. Thus, although defendant was not entitled to a jury trial on the issue of damages because it never preserved its right to a jury trial, *Equico Lessors, Inc v Original Buscemi's, Inc*, 140 Mich App 532, 536; 364 NW2d 373 (1985),

defendant retained the right to contest the issue of damages in a hearing or a bench trial. *Id*; *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 512-513; 303 NW2d 234 (1981). We remand for the trial court to conduct a hearing or a bench trial on the issue of plaintiff's damages.

Accordingly, we affirm the entry of default, but reverse the entry of judgment by default and remand for an evidentiary hearing or bench trial on the issue of damages. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin