

STATE OF MICHIGAN
COURT OF APPEALS

ELISA ALLISON, as Personal Representative of the
Estate of CLIFFORD ALLISON,

UNPUBLISHED
June 20, 1997

Plaintiff-Appellee,

v

No. 193966
Lenawee Circuit Court
LC No. 95-006642-NP

OWENS RACING, INC., BARRY OWENS,
NATIONAL ASSOCIATION FOR STOCK CAR
AUTO RACING, INC., a/k/a NASCAR,
MICHIGAN INTERNATIONAL SPEEDWAY, a/k/a
PENSKE SPEEDWAY, INC., and SIMPSON
RACE PRODUCTS, INC.,

Defendants,

and

SIMPSON HELMET CORPORATION,

Defendant-Appellant,

and

BUTLER SPECIALTIES, INC., d/b/a BUTLER
BUILT MOTOR SPORTS EQUIPMENT,

Defendant-Appellee.

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant, Simpson Helmet Corporation (“Simpson Helmet”), appeals by leave granted an order denying its motion to set aside an entry of default in favor of plaintiff, Elisa Allison, personal representative of the estate of Clifford Allison. We reverse and remand for further proceedings.

On August 13, 1992, Clifford Allison was killed in a high-speed accident at Michigan International Speedway (“MIS”), when the race car he was driving crashed into a concrete retaining wall. Plaintiff filed suit on September 12, 1995, against numerous defendants, alleging that several of the vehicle’s safety components were defective. Plaintiff’s complaint alleged the following claims against Simpson Helmet and Butler: negligent failure to inspect or warn, negligent design, negligent manufacture, and breach of implied warranty. On December 5, 1995, defaults were entered against both Simpson Helmet and Butler after they failed to timely answer plaintiff’s complaint. Simpson Helmet and Butler filed motions to set aside the entries of default on January 12, 1996, which were denied by the trial court in a single order. The trial court also denied, again in the same order, the motions of Simpson Helmet and Butler for reconsideration. This Court granted defendants’ applications for leave to appeal and for immediate consideration.

On appeal, Simpson Helmet, raises one issue, namely, whether the trial court erred in refusing to set aside the entry of default against it. 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 proceeding on which the default was based, (2) a reasonable excuse for the failure to comply with the requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default or default judgment were allowed to stand.” *Park v American Casualty Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996). The decision whether to set aside an entry of default is within the sound discretion of the trial court, and will not be disturbed on appeal absent a clear abuse of that discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992).

With regard to the good cause requirement, as Simpson Helmet concedes, there was no substantive defect or irregularity in the proceedings upon which its default was based. Moreover, there was no reasonable excuse proffered for the failure to timely respond to the complaint.

Although Simpson Helmet was served with the complaint on August 21, 1995, its New Jersey corporate counsel waited until October 18, 1995, to contact plaintiff’s counsel and obtain a thirty-day extension for filing its answer. Then, despite the extension, still no action was taken to answer or otherwise defend the lawsuit. In addition, Simpson Helmet did not proffer any explanation for why it was unable to answer the complaint by the expiration of the thirty-day extension, other than counsel’s bare assertions of his inability to obtain information or retain Michigan counsel, and counsel’s own work schedule and caseload. “[A] busy schedule and a heavy caseload do not constitute a reasonable excuse for failure to file a timely answer.” *Daugherty v Mich (After Rem)*, 133 Mich App 593, 598; 350 NW2d 291 (1984). By the same token, “[a]n attorney’s negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment.” *Park, supra* at 67.

Despite the absence of any reasonable excuse for Simpson Helmet's failure to have complied with the requirements which created the default, we conclude that good cause to set aside the default has been established because manifest injustice would result if the default were allowed to stand. *Id.* The refusal to set aside a default has been held to constitute manifest injustice where (1) the defendant established the existence of a meritorious defense and raised questions of fact that should be determined at a trial on the merits; (2) there was no evidence that the defendant intentionally attempted to delay the matter; (3) the plaintiff was not prejudiced by the defendant's default; and (4) the period of time in which the defendant was inactive in pursuing his defense was not unreasonably long. *Daugherty, supra* at 598-600.

First, Simpson Helmet has established the existence of a meritorious defense and raised serious factual issues for trial. Simpson Helmet's argument that, as a promoter, sponsor, or advertiser, the release signed by Clifford Allison releases it from liability, if factually supported, would insulate Simpson Helmet from liability altogether. See *Kircos v Goodyear Tire Co*, 108 Mich App 781; 311 NW2d 139 (1981). This meritorious defense, together with the additional factual issues raised regarding breach and causation, are deserving of factual development at trial. Furthermore, there is no evidence that Simpson Helmet intentionally refused to timely file an answer to plaintiff's complaint or that Simpson Helmet was attempting to delay the adjudication of plaintiff's claims. The uncontradicted affidavit of Simpson Helmet's corporate attorney indicates that Simpson Helmet immediately forwarded the complaint to him, and that no answer was filed because of counsel's difficulty in obtaining information about the accident and in retaining Michigan counsel.

Similarly, the period in which Simpson Helmet was inactive in pursuing its defense was not unreasonably long. While Simpson Helmet did not file its motion to set aside the December 5, 1995, default until January 12, 1996, the motion was filed within three days of the first discovery conducted in the case. Moreover, Simpson Helmet's newly retained Michigan counsel immediately requested that plaintiff stipulate to setting aside the default.

Finally, we do not perceive that plaintiff has been prejudiced by Simpson Helmet's default. No discovery had yet taken place at the time the default was entered and, because Simpson Helmet's position in relation to plaintiff's claim has been revealed, plaintiff's ability to prepare her case has not been disadvantaged. Consequently, the trial court abused its discretion in refusing to set aside the entry of default.

Accordingly, we reverse the trial court's order denying Simpson Helmet's motion to set aside the December 5, 1995, entry of default, and remand the case for the assessment of costs pursuant to MCR 2.603(D)(4) and for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

