STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA A. CROSS,

Plaintiff-Appellee,

v

JOSEPH H. GORODENSKI,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 194929
Barry Circuit Court
LC No. 95-000357-CH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendant in pro se appeals as of right from a default judgment entered against him. We reverse and remand.

In February, 1994, plaintiff and defendant, as buyers, entered into a land contract for the purchase of real property located in Barry County. In June, 1995, plaintiff filed a complaint for partition, requesting that she be awarded the property or the proceeds from the sale of the property. The complaint alleged that plaintiff and defendant had agreed to equally share the acquisition cost of the property. The complaint further alleged in paragraph ten that plaintiff had "made all of the land contract payments, including the down payment, required under the terms of the land contract, without any contribution whatsoever from" defendant. The complaint alleged that defendant was currently incarcerated with the Michigan Department of Corrections. The summons accompanying the complaint listed defendant's address as "48401 Five Mile Road, Plymouth, MI 48170."

On July 18, 1995, defendant in pro se filed a document entitled "Motion In Opposition To Plaintiff's Complaint For Partition." (We note that defendant has represented himself throughout these entire proceedings). This motion listed the Plymouth Road address as defendant's address and further indicated that this address was the Western Wayne Correctional Facility. In the motion, defendant denied the allegations contained in paragraph ten of the complaint and further alleged that he had

> refurbished the property at a cost of over $10,000 which was paid exclusively by him, and that he has continued to make regular monthly payments as indicated by the enclosed 'Mortgage Payment Statement(s).'[1]

On November 14, 1995, plaintiff filed a demand that a pretrial conference be scheduled. On November 15, 1995, a copy of plaintiff's demand was mailed to defendant at the Western Wayne Correctional Facility. On November 27, 1995, an order directing defendant to appear at a December 15, 1995, scheduling conference was mailed to defendant at the same address. Defendant did not appear at this conference.

On January 2, 1996, defendant wrote a letter to the trial court stating that he had just that day received the order to appear at the scheduling conference. Defendant asserted that the order had been postmarked twice, November 28 and December 13, 1995, and that he had had a corrections officer make a log of the January 2, 1996, date that he actually received the order. Defendant's January 2, 1996, letter to the court listed defendant's address as the Adrian Correctional Facility in Adrian, Michigan.

On February 1, 1996, and pursuant to plaintiff's request, the court clerk entered a default against defendant premised on defendant's "failure to appear, plead, or otherwise defend . . . ."[2] On February 2, 1996, plaintiff served defendant with a copy of the default, a notice of a February 8, 1996, hearing on plaintiff's request for the entry of a default judgment, and a proposed judgment. Service was accomplished by first-class mail sent to the Adrian Correctional Facility.

Defendant did not appear at the February 8, 1996, hearing. At that hearing, plaintiff's counsel informed the court that counsel had received from defendant that day a motion to set aside the default. (Defendant's motion to set aside the default was dated February 5, 1996, and was filed with the court February 8, 1996.). Counsel informed the court, who had not seen the motion, that the motion requested the court set aside the default, in part, because defendant did not have control over his ability to be at the scheduling conference and because defendant had not received notice of the December 15, 1995, pretrial conference until January 2, 1996. The court replied that "the notice was given in accordance with the court rules." After briefly perusing defendant's motion to set aside the default, the court further stated that defendant had not "shown me anything yet that shows he has a meritorious defense." The court also perused defendant's July, 18, 1995, motion in opposition to defendant's complaint for partition and concluded that this motion, likewise, failed to set forth a meritorious defense. The court then stated that plaintiff could proceed with her proofs. Following plaintiff's testimony, which included testimony that defendant had not contributed to the downpayment or regular monthly payments on the property, the court ordered that a default judgment be entered. The trial court subsequently denied defendant's motion for relief from the default judgment.

In his first issue on appeal, defendant raises a host of issues. However, it is clear that defendant is challenging the entry of both the default and the default judgment.

As explained in *Park v American Casualty Ins Co*, 219 Mich App 62; 555 NW2d 720 (1996):

> The question whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. . . . Except when grounded on lack of jurisdiction over

> the defendant, a motion to set aside a default or a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. . . . Good cause sufficient to warrant setting aside a default or a 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 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. . . . An attorney's negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment. [*Id*. at 66-67 (citations omitted).]

In this case, defendant strenuously argues that the fact that he was not timely notified of the scheduling conference until approximately eighteen days after the conference was held establishes a substantial defect in the proceedings, a reasonable excuse and manifest injustice. It is true, as contended by defendant by analogy, that the "failure to notify a party entitled to notice of the impending entry of a default judgment constitutes a substantial defect in the proceedings and, accordingly, good cause." *Gavulic v Boyer*, 195 Mich App 20, 25; 489 NW2d 124 (1992). However, in this case, the trial court found that defendant was given notice of the scheduling conference in accordance with the court rules. Defendant does not contest that notice was not given in accordance with the court rules. Defendant, instead, relies on the fact that he did not timely receive notice of the conference. Thus, it appears that the issue is raised whether properly given, although untimely received, notice constitutes good cause to set aside a default. However, we need not address this issue because we find persuasive another argument raised by defendant that addresses the ground on which the trial court refused to set aside the default—defendant's failure to present a meritorious defense.

Specifically, defendant notes that in his July, 1995, motion in opposition to plaintiff's complaint for partition he swore before a notary that he had

> refurbished the property at a cost of over $10,000 which was paid exclusively by him, and that he has continued to make regular monthly payments as indicated by the enclosed 'Mortgage Payment Statement(s).'

However, in order to grant a motion to set aside a default or default judgment, the meritorious defense must be shown by affidavit. MCR 2.603(D)(1). In this case, defendant's July, 1995, motion, although sworn before a notary, does not appear in affidavit form, but rather appears to simply be verified. See MCR 2.114; MCR 2.119(B).

In *Miller v Rondeau*, 174 Mich App 483; 436 NW2d 393 (1988), the trial court denied the defendants' motion to set aside the entry of a default on the grounds that the defendants had failed both to file an affidavit in support of their motion and to present a meritorious defense. *Id*. at 484-485. On appeal, although conceding that they had not filed an affidavit in support of their motion as required by MCR 2.603(D)(1), the defendants argued that the verified pleadings they had filed before the denial of their motion were sufficient to satisfy the affidavit requirement. This Court rejected this argument:

> [T]he requirements regarding the form of verification for a pleading and the form of an affidavit are significantly different. For example, a pleading may be verified merely by the declaration that the statements in the pleading are true and accurate to the best of the signer's information, knowledge and belief, MCR 2.114(A)(1)(b), whereas an affidavit filed in support of a motion must be made on personal knowledge, stating with particularity facts admissible as evidence establishing the grounds stated in the motion and showing affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit, MCR 2.119(B)(1). *The verified pleadings relied upon by defendants in this case contain no statements sufficient to satisfy the criteria applicable to affidavits filed in support of a motion*. [*Miller, supra* at 487 (emphasis supplied).]
>
> Even if we were to accept defendant's argument that the verification of their pleadings was sufficient to fulfill the affidavit requirement in MCR 2.603(D)(1), we would not find it necessary to reverse the trial court's denial of defendant's motion to set aside the entry of default because the court did not abuse its discretion in determining that defendants were unsuccessful in presenting a meritorious defense . . . . [*Miller, supra* at 487-488 (emphasis supplied).]

However, this Court has also held that the failure of an affidavit to comply with the court rules is harmless absent a showing of prejudice resulting from the noncompliance with the court rules. *Baker v DEC International*, 218 Mich App 248, 261-262; 553 NW2d 667 (1996). In *Baker*, this Court held that the failure of several affidavits submitted in opposition to a motion for summary disposition to comply with MCR 2.119(B)(1)(a) and (c) was harmless error where the contents of the purported affidavits established "that the affiants had first-hand knowledge of the alleged facts and would be competent to testify regarding those facts." *Id*.

In this case, the trial court reviewed defendant's July, 1995, motion at the February, 1996, hearing on the entry of the default judgment. The court did not reject the July motion because it was not in affidavit form, but rather found that the July motion did not establish a meritorious defense. However, in the July motion, defendant alleged that he had contributed to the acquisition of the property. This fact, if proven at trial, would negate the basis for plaintiff's complaint for partition, i.e., that defendant did not contribute to the acquisition of the property. Thus, we conclude that defendant's July motion established a meritorious defense. Cf. *Gavulic, supra* at 26; *Miller, supra* at 488. The trial court erred in concluding otherwise.

The July motion states "with particularity facts admissible as evidence establishing or denying the grounds stated in the motion." MCR 2.119(B)(1)(b). Moreover, unlike *Miller*, the contents of the July motion, including the verification, show that defendant "had first-hand knowledge of the alleged facts and would be competent to testify regarding those facts." *Baker, supra*. Accordingly, where the trial court specifically considered the July motion when considering defendant's February, 1996, motion to set aside the default, we conclude that any error in the failure of the July motion to comply with the affidavit requirements of MCR 2.119(B) was harmless. *Id*.

Finally, we conclude that good cause to set aside the default was established below. See, generally, *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 51; 445 NW2d 186 (1989). Specifically, defendant raised below a meritorious defense and factual issues for trial. *Id*. The "showing of a meritorious defense and factual issues for trial may, under certain circumstances, fulfill the good-cause requirement by way of constituting a reason evidencing that manifest injustice would result from permitting a default to stand." *Park, supra* (citing *Komejan, supra*). We discern no evidence in the record indicating that defendant intentionally refused to attend the pretrial conference or otherwise delay adjudication in this case. Although the showing of a meritorious defense by itself may not be sufficient in all cases to warrant setting aside a default, we conclude that in light of the facts presented in this case the trial court should have granted defendant's motion to set aside the entry of the default. *Komejan, supra* at 53. Accordingly, we set aside the default and default judgment entered in this case. In light of this disposition, we decline to consider defendant's constitutional challenges and his second issue on appeal. We remand the case for the assessment of costs against defendant pursuant to MCR 2.603(D)(4) and for further proceedings. *Komejan, supra*.

Reversed and remanded. We do not retain jurisdiction. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] We note that the record contains no "Mortgage Payment Statement(s)."

[2] MCR 2.401(G)(1) provides that the "[f]ailure of a party . . . to attend a scheduled conference, as directed by the court, constitutes a default to which MCR 2.603 is applicable . . . ."