

STATE OF MICHIGAN
COURT OF APPEALS

CHASE MANHATTAN MORTGAGE
CORPORATION,

Plaintiff-Appellee,

v

WAYNE COUNTY TREASURER,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

No. 256559
Court of Claims
LC No. 04-000027-MZ

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion to set aside a default entered in favor of plaintiff. We reverse and remand for entry of an order granting summary disposition in favor of defendant.

I. Basic Facts and Procedural History

In June 2001 defendant initiated tax foreclosure proceedings against property for which plaintiff held a recorded interest. As the result of those proceedings a judgment of foreclosure vesting fee simple title to the property in defendant was entered by the Wayne Circuit Court on March 4, 2002. On March 2, 2004, plaintiff filed the instant suit for monetary damages, alleging that in seeking foreclosure against the property defendant failed to comply with the notice requirements of MCL 211.78i. Copies of the summons and complaint were personally served on the person in charge of defendant's office by a process server on March 8, 2004. On April 5, 2004, plaintiff filed and caused to be entered against defendant a default "for failure to timely answer or respond" to plaintiff's complaint.

Before being served with notice of the default, defendant moved, on April 15, 2004, for summary disposition under MCR 2.116(C)(7), arguing that because the complaint was not served within two years of entry of the judgment of foreclosure plaintiff's suit was barred by the limitations period set forth in MCL 211.78i. Citing *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), wherein our Supreme Court held that tolling of a statute of limitations can only be accomplished by complying with the provisions of MCL 600.5856, which at the time included service of process on the defendant before expiration of the period of limitation, defendant argued that because plaintiff had not sent a copy of the summons and complaint to defendant by registered mail, as required by MCR 2.105(G)(8), service of process

was not yet complete.¹ Thus, defendant argued, the filing of the complaint on March 2, 2004 did not toll the statute of limitations, which expired on March 4, 2004 and required that plaintiff's suit be dismissed.

On April 19, 2004, plaintiff served defendant with notice of the entry of default and also sent a copy of the summons and complaint to defendant's office by registered mail addressed to the Wayne County Treasurer, Raymond J. Wojtowicz. That same day, defendant moved to set aside the default on the ground that it had been improperly entered because service of process was at that time defective, and because defendant had a meritorious statute of limitations defense to the action. See MCR 2.603(D)(1).

Following a hearing on defendant's motions to set aside the default and for summary disposition, the trial court denied the motion to set aside the default, indicating in comments from the bench that defendant failed to properly support its claim of a meritorious defense. Because the court declined to set aside the default, it did not address the merits of defendant's motion for summary disposition. After issuing a stay, this Court granted leave to appeal.

II. Analysis

A. Motion to Set Aside Default

A trial court's ruling on a motion to set aside a default is reviewed for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). We conclude that the court abused its discretion by failing to set aside a default that was entered improperly.

When the defendant is a public entity and the public officer on whom service on behalf of the entity may be made is not served personally, the Michigan Court Rules require that in addition to leaving a copy of the summons and complaint with the person in charge of the office of the public entity, copies of those documents must also be sent by registered mail addressed to the public officer at his or her office. See MCR 2.105(G)(8). Pursuant to MCR 2.108(A)(2), the defendant thereafter has twenty-eight days from the time service was made by mail to file and serve an answer or responsive motion.

In this case, plaintiff began, but did not complete service of process by leaving the documents with the person in charge of defendant's office on March 8, 2004. As noted above, completion of process required that plaintiff also serve a copy of the summons and complaint by registered mail addressed to the public officer on whom service on behalf of defendant could be made. MCR 2.105(G)(8). Because such service was not completed until April 19, 2004,

¹ *Gladych* was abrogated by 2004 PA 87, which amended MCL 600.5856 to provide that a statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a). That amendment, however, applies only to cases filed on or after April 22, 2004.

defendant's obligation to respond to plaintiff's complaint did not arise until that time. MCR 2.108(A)(2); see also, e.g., *White v Busuito*, 230 Mich App 71, 75-77; 583 NW2d 499 (1998) (compliance with the service requirements MCR 2.108(A)(6) is a "prerequisite to the defendant's obligation to answer or otherwise defend the action"). Consequently, there having been no response due at the time it was entered, the April 5, 2004 default entered on the basis of a failure to timely respond was void ab initio and must be set aside.² *White, supra* at 77.

B. Motion for Summary Disposition

Although not decided by the trial court, defendant's motion for summary disposition presents a question of law for which all necessary facts have been presented. This Court may review such an issue even if it has not been properly preserved. *In re BAD*, 264 Mich App 66, 71-72; 690 NW2d 287 (2004). In doing so, this Court reviews the entire record de novo to determine whether the defendant is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. As previously noted, the two-year limitations period at issue here was set to expire on March 4, 2004. Thus, the issue is whether plaintiff tolled the expiration of the limitations period under the version of the tolling statute, MCL 600.5856, then in effect. As discussed in *Gladych, supra* at 598-599, before its amendment by 2004 PA 87, MCL 600.5856 provided four alternative methods for tolling a statute of limitations, at least one of which must be satisfied in order to prevent a limitations period from continuing to run:

Section 5856 provides that the statute of limitations is tolled only if (1) the complaint is filed and a copy of the summons and complaint are served on defendant, (2) jurisdiction is otherwise acquired over defendant, (3) the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service (but no longer than ninety days after the summons and complaint are received by the officer), or (4) if, during the applicable notice period under MCL 600.2912b, a claim would be barred by the statute of limitations, but only for the number of days equal to that in the applicable notice period after notice is given in compliance with § 2912b.

In other words, if one does not perform any actions specified by § 5856, the statute of limitations is not tolled and therefore the period of limitations continues to run after the complaint has been filed.

² Because the default is void and, therefore, of no legal effect, we need not address whether defendant complied with the requirements of MCR 2.603(D)(1) in seeking to set the default aside. See *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004); see also *Hackley Union Nat Bank & Trust Co v Sheneman*, 30 Mich App 1, 16-17; 186 NW2d 344 (1971); *DAIIE v Maurizio*, 129 Mich App 166, 171; 341 NW2d 262 (1983) (where a judgment or order is void, relief must be granted).

Here, the undisputed facts demonstrate that plaintiff failed to meet, within the time necessary to prevent the statute of limitations from expiring, any of the three alternatives applicable in this matter.³ Regarding the first of these alternatives the facts show that, although plaintiff filed its complaint within the limitations period, service of a copy of the complaint and summons was not begun until March 8, 2004, and was not completed until April 19, 2004 – well after expiration of the limitations period on March 4, 2004. With respect to the second alternative, i.e., that “jurisdiction [was] otherwise acquired over defendant,” the facts similarly do not support such jurisdiction prior to expiration of the limitations period. Although a defendant who enters a general appearance and contests a cause of action on the merits submits itself to the jurisdiction of the court, see *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993), defendant did not appear in the action until April 15, 2004, and then only for the limited purpose of challenging the suit as time-barred. Finally, it is undisputed that plaintiff did not place a copy of the summons and complaint “in good faith . . . in the hands of an officer for immediate service” before the two-year statute of limitations expired, but rather employed the services of a process server who, in any event, failed to initiate service before the expiration of the limitations period. *Gladych, supra* at 600. Because plaintiff failed to fully perform any of the alternative actions within the time necessary to prevent the statute of limitations from expired, the limitations period expired and summary disposition for defendant under MCR 2.116(C)(7) is proper. *Id.*

In reaching this conclusion, we reject plaintiff’s assertion that MCR 2.105(J)(3), which provides that “[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service,” renders summary disposition here improper. Indeed, dismissal of plaintiff’s suit is warranted not because of some impropriety with otherwise timely service, but rather as the result of a failure to serve process before the end of the limitations period. See MCR 2.105(J)(1); *Gladych, supra* at 600-601.

We therefore reverse the trial court’s order denying defendant’s motion to set aside the default and remand this matter for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis

³ The fourth alternative, which applies only to causes of actions alleging medical malpractice, is clearly inapplicable here.