

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICHARD LIVINGSTON,

Plaintiff-Appellant,

v

HUNTINGTON MORTGAGE,

Defendant-Appellee.

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UNPUBLISHED

March 13, 2012

No. 302075

Allegan Circuit Court

LC No. 10-046583-CH

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order setting aside a default obtained by plaintiff against defendant and granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this action arising from the foreclosure of plaintiff's home. We affirm.

Defendant, the mortgagee of plaintiff's property, foreclosed on plaintiff's property on two separate occasions and attempted to sell the property at a sheriff's sale. However, plaintiff filed for bankruptcy in the United States District Court for the Western District of Michigan before each scheduled sale and the foreclosure proceedings were stayed. Defendant again instituted foreclosure proceedings in June 2009 and successfully purchased defendant's property at a sheriff's sale on July 2, 2009. At or around the time the sale took place, plaintiff filed for bankruptcy a third time.<sup>1</sup> Defendant did not record the sheriff's deed immediately after it purchased the property because it had learned of plaintiff's bankruptcy filing and did not want to violate the automatic stay issued in conjunction with such a filing.

On September 18, 2009, the bankruptcy court entered an order confirming that an automatic stay was not in effect at the time of the sheriff's sale and declaring the foreclosure sale valid. On September 25, 2009, defendant recorded the sheriff's deed from the sale.<sup>2</sup> The

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<sup>1</sup> Apparently, at or approximately the same time the sheriff's sale began, plaintiff filed for bankruptcy a third time. However, because plaintiff's bankruptcy filing was not complete before the foreclosure sale began, the sale proceeded as scheduled.

<sup>2</sup> Although defendant, as the purchaser, was required by MCL 600.3232 to record the deed within 20 days of the sale, defendant waited to do so until the stay was lifted.

foreclosure deed provided a one-year term of redemption, which was set to expire on July 2, 2010.

Plaintiff filed the present action alleging that because defendant failed to record the sheriff's deed within 20 days of the sheriff's sale, he was entitled to an equitable extension of the redemption period. He also alleged that defendant withheld from him the terms of redemption. On June 8, 2010, plaintiff served process on defendant by personally serving a security receptionist at defendant's principal office in Ohio. Defendant filed its answer to plaintiff's complaint on July 8, 2010, two days after the deadline had passed for doing so. Consequently, a default was entered against defendant on July 12, 2010. On September 3, 2010, the trial court set aside the default pursuant to MCR 2.603(D)(1), finding that while defendant filed its answer more than 28 days after it was served, good cause existed for the delay because the initial service was improper under MCR 2.105(D)(2) because plaintiff did not send a summons and a copy of the complaint to the principal office by registered mail. The trial court also found that defendant presented a meritorious defense because it found that plaintiff was not entitled to the relief he requested.

After the default was set aside, the trial court granted defendant's motion for summary disposition on October 22, 2010. The trial court found that no genuine issue of material fact existed on the issue of whether plaintiff was entitled to an equitable extension of the redemption period because plaintiff could not show that the late filing of the sheriff's deed stemmed from fraud, accident, or mistake. Additionally, the trial court determined that summary disposition was appropriate because plaintiff had not demonstrated any damages or efforts to redeem the property during the one-year redemption period and, therefore, plaintiff was not entitled to the relief he was seeking.

On appeal, plaintiff first argues that the trial court erred by setting aside the default. "A trial court's decision regarding a motion to set aside a default judgment is reviewed for an abuse of discretion." *Lawrence M Clarke, Inc v Richo Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011). The party seeking to have a default set aside must establish two things: good cause and a meritorious defense. MCR 2.603(D)(1). First, the moving party must demonstrate good cause. MCR 2.603(D)(1). "The good cause inquiry is satisfied if there is a substantial irregularity or defect in the proceeding on which the default is based or a reasonable excuse for failure to comply with the requirements that created the default." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 531; 672 NW2d 181 (2003). Second, in addition to establishing good cause, the moving party must present an affidavit of facts demonstrating that meritorious defense. MCR 2.603(D)(1).

We hold that the trial court did not abuse its discretion in setting aside the default. First, good cause existed because defendant's answer was filed only two days late and the delay did not prejudice plaintiff in any way. See *Reed v Walsh*, 170 Mich App 61, 66; 427 NW2d 588 (1988) (the trial court did not abuse its discretion in setting aside a default when the defendant's short delay in filing his answer did not prejudice plaintiff in any way); *Daugherty v State*, 133 Mich App 593, 599; 350 NW2d 291 (1984) (good cause existed for setting aside the default, in part, because the plaintiff had adequate time to prepare his case after defendant filed his answer; thus the plaintiff was not prejudiced by the default). In this case, plaintiff had ample time to prepare his case after defendant filed its answer; thus, he was not prejudiced by the two-day

delay. *Id.* Moreover, he sought a default after he received defendant's answer. Therefore, good cause existed for setting aside the default. *Id.*; *Reed*, 170 Mich App at 66.<sup>3</sup>

Second, defendant presented a sufficient affidavit of facts demonstrating a meritorious defense. A party seeking to set aside a default must provide an affidavit of meritorious defense from an individual who possesses personal knowledge of the defense and the facts in the case. *Huntington Nat'l Bank v Ristich*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_ (Docket No. 297151, issued April 26, 2011), slip op at 8-9; MCR 2.603(D)(1). An affidavit is sufficient for purposes of MCR 2.603(D)(1) if the affiant has first-hand knowledge of the defense, and she states the basis for the source of her information. See *Davis v Great American Ins Co*, 136 Mich App 764, 769; 357 NW2d 761 (1984). In this case, defendant presented an affidavit from Sherri Tremonti, a paralegal at the law firm that represented defendant in the foreclosure proceedings. The affidavit set forth the facts that provided the basis for the trial court's decision to grant defendant's subsequent motion for summary disposition. The existence of grounds for summary disposition can suffice for a showing of a meritorious defense. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008). Therefore, we agree with the trial court that defendant established a meritorious defense for setting aside the default. We also find meritless plaintiff's claim that Tremonti lacked personal knowledge of the facts she alleged in her affidavit. When an affiant's credibility is challenged on appeal, this Court defers to the trial court's credibility determinations. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). The trial court found Tremonti credible, and also found that she had the requisite personal knowledge. We defer to that determination. *Id.*

Finally, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. The trial court found that no genuine issue of material fact existed as to whether there was fraud, accident, mistake, or irregularity that would permit an equitable extension of the redemption period. A plaintiff is entitled to an equitable extension of the redemption period only if he can show fraud or irregularity. *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607, 618; 714 NW2d 409 (2005). See also *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969) (“[t]he law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud, or irregularity.”)

Plaintiff alleges silent fraud on the part of defendant. He alleges that he contacted the law firm representing defendant on two occasions and asked for the terms of redemption and that

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<sup>3</sup> The trial court predicated its finding of good cause on plaintiff's defective service of process on defendant. As plaintiff correctly points out, defendant waived any objection he might have had to defective service by failing to object to improper service in his first responsive pleading. See, generally, *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 293; 731 NW2d 29 (2007). Nevertheless, as noted above, we find that good cause existed, and affirm because the trial court reached the correct result, albeit for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

the person he contacted failed to respond to his requests. A plaintiff successfully brings a claim of silent fraud if he establishes: (i) the suppression of a material fact upon which defendant intended plaintiff to rely; (ii) actual reliance; and (iii) a duty to disclose the fact. *Hord v Environmental Research Institute of Mich*, 463 Mich 399, 412-413; 617 NW2d 543 (2000); *Clement-Rowe v Mich Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995); *Hamade v Sunoco, Inc*, 271 Mich App 145, 171; 721 NW2d 233 (2006). Plaintiff has failed to establish any genuine issue of material fact as to his claim of silent fraud. He did not allege either that he relied on the suppression of the redemption terms, or that defendant intended for him to rely on it. Thus, he cannot demonstrate a genuine issue of material fact regarding silent fraud on the part of defendant. See *id.*; *Clement-Rowe*, 212 Mich App at 508.

Moreover, plaintiff cannot establish mistake, accident, or irregularity in the foreclosure proceedings that would warrant an equitable extension of the redemption period. It is undisputed that the sheriff's deed was filed outside of the time period provided by MCL 600.3232. However, plaintiff cannot show the existence of a material fact that would entitle him to relief because defendant's failure to file the deed on time did not curtail any of plaintiff's efforts to redeem the property. See *Lilly v Gibbs*, 39 Mich 394, 395-397 (1878). Contrarily, plaintiff failed to make any effort to redeem the property. Thus, the trial court correctly determined that there was no genuine issue of material fact that would entitle plaintiff to relief on this matter. *Id.*

Finally, even if defendant could show fraud, accident, mistake, or irregularity, he is not entitled to relief because there was no genuine issue of material fact regarding plaintiff's damages. In this case, plaintiff did not establish any damages because he did not demonstrate any efforts to redeem the property. See *Mills v Jirasek*, 267 Mich 609, 613-615; 255 NW 402 (1934). In order to warrant relief because a sheriff's deed is filed late, a plaintiff must establish damages, i.e., that he attempted to redeem the property, but was prevented from doing so. *Id.* Here, while plaintiff inquired about the terms of redemption, he failed to make any effort to redeem the property. Accordingly, he cannot show that the failure to file the sheriff's deed within the time mandated by MCL 600.3232 damaged him in any respect. Therefore, the trial court correctly determined that there was no genuine issue of material fact, and summary disposition was appropriate under MCR 2.116(C)(10).

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

/s/ Patrick M. Meter  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey