

STATE OF MICHIGAN
COURT OF APPEALS

MONETREX, INC.,

Plaintiff,

v

RBS CITIZENS NA, a/k/a CITIZENS
BANK, a/k/a CHARTER ONE BANK, a/k/a
CITIZENS FINANCIAL CORP.,

Defendant/Third-Party
Plaintiff-Appellee,

and

QC SERVICES, INC., and RICHARD
SHARPE,

Third-Party Defendants-
Appellants.

UNPUBLISHED
October 2, 2012

No. 305803
Oakland Circuit Court
LC No. 2009-105589-CZ

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

This appeal arises from the trial court's entry of a default in favor of third-party plaintiff RBS Citizens, NA (RBS Citizens) against third-party defendants QC Services, Inc. (QC Services) and Richard Sharpe. We affirm.

I. FACTS

In November 2009, Monetrex, Inc (Monetrex) filed a complaint for statutory conversion against RBS Citizens, claiming that RBS Citizens improperly negotiated a jointly payable check. In January 2010, RBS Citizens filed a third-party complaint against QC Services. RBS Citizens served a copy of the summons and complaint on Sharpe, as the resident agent for QC Services. Sharpe later admitted that he received the summons and complaint against QC Services and signed the return receipt.

The parties deposed Sharpe in March and April 2010. Sharpe admitted that on May 23, 2007, he received a check that was jointly payable to QC Services and Monetrex. Sharpe endorsed the check on behalf of QC Services alone, and deposited the proceeds from the check

into QC Services's account. Sharpe admitted that Monetrex was entitled to all the funds from the check. At the deposition, RBS Citizens's counsel informed Sharpe that it intended to amend its complaint to include Sharpe individually.

RBS Citizens amended its third-party complaint to include Sharpe as a party. In May 2010, RBS Citizens filed an amended complaint that alleged claims of conversion, breach of warranty, and indemnification against Sharpe individually. RBS Citizens sent the summons and amended complaint through certified mail, return receipt requested, to Richard Sharpe in "Commerce Twp., MI, 48342." On May 13, 2010, the signature "R Sharpe" acknowledged receipt of the package.

In June 2010, the trial court entered default judgments against QC Services and Sharpe for their failures to plead or defend RBS Citizens's complaint. Sharpe moved the trial court to set aside the default. Sharpe argued that RBS Citizens had not served him personally with the summons and amended complaint, the return receipt did not contain his signature, and the address on the return receipt contained an incorrect zip code.

In response to Sharpe's motion, RBS Citizens submitted a statement from the United States Postal Service that indicated that, despite the incorrect zip code on the summons and complaint package, it delivered the package on May 13, 2010, to Sharpe's actual address and zip code in "Commerce Twp, 48382." RBS Citizens also submitted seven samples of Sharpe's signature. Each of the samples was signed "R Sharpe."

In July 2010, the trial court reviewed the signature samples, and denied Sharpe's motion to set aside the default because Sharpe failed to establish good cause and had not submitted any affidavit of a meritorious defense. The trial court gave Sharpe's counsel the opportunity to state on the record any meritorious defenses that Sharpe would assert. Sharpe's counsel responded that Sharpe would deny the allegations.

Sharpe filed his first motion for reconsideration, in which he argued that he was not required to file an affidavit of a meritorious defense because the trial court lacked personal jurisdiction over him. Sharpe also claimed that his disabled, live-in brother-in-law, Robert Morrow, could possibly have signed Sharpe's name on the return receipt. Sharpe attached Morrow's affidavit to his motion for reconsideration, which included Morrow's statements that he did not remember signing for Sharpe, but it was possible that he did.

The trial court denied Sharpe's motion for reconsideration in December 2010. The trial court noted that, in reaching its ruling on Sharpe's motion to set aside the default judgment, it had reviewed samples of Sharpe's signatures. The trial court opined that "the only real difference between third-party defendants' arguments in July and now is that third-party defendants provide a name for the alleged forgery of Sharpe on the Acknowledgement of Service Card." The trial court concluded that Sharpe's motion for reconsideration presented the same issues on which it had already ruled, and it denied Sharpe's motion for reconsideration.

Sharpe filed his second motion for reconsideration in May 2010, and attached an affidavit from Greg Taub, the mail carrier for Sharpe's Commerce Township address. The affidavit stated that "[o]n May 13, 2010, Richard Sharpe did not sign an Acknowledgement of Service card for

the certified mail delivered to” the Commerce Township address. The trial court denied Sharpe’s second motion for reconsideration, stating that it was “not willing to entertain a reconsideration of its decision on a motion for reconsideration especially where third-party defendant is merely reasserting its arguments from its previous motion for reconsideration.”

Sharpe now appeals, arguing that the trial court abused its discretion when it refused to consider the affidavits, and that Sharpe did not have to establish a meritorious defense because the trial court did not have personal jurisdiction over him.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion both the trial court’s ruling on a motion to set aside a default,¹ and the trial court’s decision on a motion for reconsideration.² An abuse of discretion occurs when the trial court’s decision is outside the range of principled outcomes.³

B. LEGAL STANDARDS

“[T]he policy of this state is generally against setting aside defaults and default judgments that have been properly entered.”⁴ The trial court may set aside a default if the defaulted party shows the following:

(1) A motion to set aside a default or default judgment, except when grounded on lack of jurisdiction over the defendants, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

* * *

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.^[5]

The trial court may also set aside a default or default judgment because of a lack of personal jurisdiction:

A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows

¹ *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 272; 803 NW2d 151 (2011).

² *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

³ *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

⁴ *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999).

⁵ MCR 2.603(D)(1), (3).

reason justifying relief from judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.^[6]

To have a default set aside for a lack of personal jurisdiction, the defendant must show that “(1) personal jurisdiction over defendants was necessary and acquired, (2) defendants in fact had no knowledge of the action pending against them, (3) defendants entered an appearance within one year after the final judgment, (4) defendants show a reason justifying relief from the judgment, and (5) granting defendants relief from the judgment will not prejudice innocent third persons.”⁷ A defendant has knowledge of the action when the defendant has actual knowledge of the pending action.⁸

Further, the defendant must “show[] that he or she . . . has a meritorious defense[,]” because a “reason justifying relief” is synonymous with a meritorious defense.⁹ To determine whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that the plaintiff cannot prove, or the defendant can disprove, an element of a claim or statutory requirement, whether a ground for summary disposition exists, whether the plaintiff’s claim rests on inadmissible evidence, and any other relevant factors.¹⁰

When moving the trial court for reconsideration, “[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.”¹¹

C. APPLYING THE STANDARDS

Sharpe primarily argues that the trial court should have set aside the default because it had not acquired personal jurisdiction over him, and thus Sharpe did not need to allege a meritorious defense. Sharpe’s argument is unnecessarily convoluted because Sharpe focuses on the “except when grounded on a lack of jurisdiction” language of MCR 2.603(D), without applying the separate requirements of MCR 2.612(B), which allow a trial court to set aside a default for lack of personal jurisdiction.

To have the trial court set aside his default for a lack of personal jurisdiction, Sharpe was required to show that RBS Citizens had not actually served him, and that he had no knowledge of

⁶ MCR 2.612(B).

⁷ *Lawrence M Clarke, Inc*, 489 Mich at 273.

⁸ *Id.* at 277.

⁹ *Id.* at 281-282.

¹⁰ *Shawl v Spence Brothers, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008).

¹¹ MCR 2.119(F)(3); *Churchman*, 240 Mich App at 233.

the action.¹² We defer to the trial court's determination, made after reviewing Sharpe's signatures, concerning the credibility of Sharpe's statement that RBS Citizens had not served him. The decision to set aside a default is fact-intensive,¹³ and the trial court does not abuse its discretion when it makes a reasonable and principled decision on which side to believe when faced with conflicting evidence.¹⁴ Further, Sharpe has never argued that he "in fact had no knowledge of the action pending" against him, as required to have his default set aside for a lack of personal jurisdiction. We conclude that the trial court did not abuse its discretion when it determined that it had acquired personal jurisdiction over Sharpe.

Further, Sharpe was still required to provide a meritorious defense. Sharpe had to show a "reason justifying relief," which is synonymous with a meritorious defense.¹⁵

Sharpe also argues that the trial court abused its discretion when it refused to consider the affidavits that Sharpe attached to his motions for reconsideration, including his affidavit of meritorious defense and the affidavits of Morrow and Taub that further contested the validity of Sharpe's signature. We disagree. Generally, the trial court need not consider any affidavits presented for the first time in a motion for reconsideration that a party could have presented in its original motion.¹⁶ Although an affidavit of meritorious defense may not need to be filed simultaneously with a motion for default judgment,¹⁷ we will "find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order."¹⁸

Here, Sharpe attached the additional affidavits of Morrow and Taub to his motions for reconsideration, not to his original motion to set aside the default. At the hearing on the motion for reconsideration, the trial court refused to consider the affidavits contesting the validity of Sharpe's signature because it had already ruled on that issue. Sharpe's additional affidavits concerning the validity of his signature merely expanded on a theory that the trial court had already rejected. The trial court did not abuse its discretion when it refused to consider them.

At the default hearing, Sharpe's counsel responded that Sharpe would deny RBS Citizens's claims. Sharpe's counsel did not indicate any facts or specific defenses. The trial court ruled that Sharpe had not established good cause or any meritorious defenses.

¹² *Lawrence M Clarke, Inc*, 489 Mich at 273.

¹³ See *Shawl*, 280 Mich App at 236.

¹⁴ *In re Parole of Elias*, 294 Mich App 507, 546; 811 NW2d 541 (2011).

¹⁵ *Lawrence M Clarke, Inc*, 489 Mich at 281-282.

¹⁶ *Churchman*, 240 Mich App at 233.

¹⁷ *Lawrence M Clarke, Inc*, 489 Mich at 273.

¹⁸ *Woods v SLB Prop Mgmt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008), quoting *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Sharpe's affidavit of defenses included statements that he had the right to endorse the check, that he never converted any funds for his personal use, that he never used QC Services to commit a fraud, and that he used the funds for legitimate purposes. In its written opinion on the motion for reconsideration, the trial court discussed Sharpe's affidavit of meritorious defenses, but rejected the affidavit in part because "this Court provided counsel with an opportunity to state on the record any meritorious defenses it would assert[.]" We conclude that the trial court did not abuse its discretion when it refused to consider Sharpe's additional defenses because Sharpe could have presented these defenses at the motion to set aside the default judgment, but did not.

Further, portions of Sharpe's affidavit of defenses impermissibly contradict with Sharpe's deposition testimony. Sharpe may not contradict his unequivocal deposition testimony with contradictory statements in an affidavit.¹⁹ Sharpe's affidavit of meritorious defenses included a statement that Sharpe was "entitled to endorse and enforce the check for payment of invoices that were due and owing related to services QC rendered . . . per an agreement with Monetrex." However, Sharpe testified unequivocally at his deposition that he was not entitled to the proceeds from the check:

Q. . . . in this affidavit you say that money belonged to Monetrex?

A. Jointly, yes, it does.

Q. Well, did it belong to Monetrex or not?

A. Yes.

* * *

Q. So QC Services, Inc. was supposed to get some of the money?

A. The check should have gone to Monetrex, but it didn't. It came to me. I signed it, put it in the bank and used it for payroll.

Q. But you say in this affidavit that the money belongs to Monetrex, that Monetrex was entitled to all the funds represented by the check.

A. Absolutely. That is the process.

We conclude the trial court did not abuse its discretion when it denied Sharpe's motion to set aside the default when Sharpe failed to show that RBS Citizens had not actually served him, and Sharpe also failed to allege any meritorious defense. Without a meritorious defense, Sharpe was not entitled to have his default set aside under either MCR 2.612(B) for a lack of personal jurisdiction, or under MCR 2.603(D). We conclude that the trial court did not abuse its

¹⁹ *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001).

discretion when it refused to consider the affidavits Sharpe attached to his motions for reconsideration, including affidavits concerning his signature and additional defenses, because Sharpe did not present these affidavits with his original motion.

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck