

STATE OF MICHIGAN
COURT OF APPEALS

LARS SYVERSON,

Plaintiff-Appellee,

v

AAA OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED

February 16, 1999

No. 204260

Wayne Circuit Court

LC No. 95-535763 NF

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of default in favor of plaintiff on the issue of liability. We reverse.

The trial court entered an order of default against defendant as to liability as a sanction for (1) defense counsel's late arrival on the day scheduled for trial, and (2) defendant's failure to produce its former employee Deborah Isham as a witness at trial or, in the alternative, to inform plaintiff of Isham's last known address and telephone number. In response to defendant's motion to set aside the default, the trial court indicated that it would have set aside the order of default if it had been granted only on the basis of defense counsel's late appearance. However, the court also concluded that default, although severe, was the appropriate sanction for defendant's failure to take the proper actions with respect to the Isham matter.

On appeal, defendant argues that the trial court erred in entering the order of default and in denying its motion to set aside default. We agree. The question whether a default should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Gavulic v Boyer*, 195 Mich App 20, 24; 489 NW2d 124 (1992). However, the question whether the court rules allow for entry of default in the first place presents an issue of law to be reviewed de novo. See *Waati & Sons Electric Co v Dehko*, 230 Mich App 582, 586; 584 NW2d 372 (1998) (explaining that questions regarding the interpretation of court rules are reviewed de novo on appeal).

With respect to the first reason for the trial court's entry of default, Michigan cases provide that default (or dismissal) may be appropriate in circumstances where both a party and his or her attorney fail to appear at a duly scheduled trial. See *Banta v Serban*, 370 Mich 367; 121 NW2d 854 (1963); *Zerillo v Dyksterhouse*, 191 Mich App 228; 477 NW2d 117 (1991); *Cook v Haynes*, 92 Mich App 288; 284 NW2d 479 (1979); *Cavataio v City-wide Cleaners & Dryers, Inc*, 23 Mich App 419; 178 NW2d 831 (1970). However, we are aware of no case or court rule standing for the proposition that a party may be defaulted for the late arrival of its attorney. Here, a representative of the defendant insurance company was present in the courtroom at the time the case was called. Furthermore, defendant's attorney telephoned the trial court to inform it that she was running late because of "automobile problems." When she did so, the trial court's research attorney, "John," advised her that it would be "safe" to arrive anytime before 11:00 a.m., because a different jury trial was still in progress. Defendant's attorney arrived at the courtroom at 9:50 a.m. Under these circumstances, we think it is clear that default was not warranted. Cf. *Cook, supra* at 291-292.

The second reason given by the trial court also did not warrant entry of default. Pursuant to MCR 2.603(A), a defendant who fails "to plead or otherwise defend as provided by [the court] rules" must be defaulted. Under the facts of this case, we are unable to find any violation of the court rules by defendant. Plaintiff explains on appeal that he prepared a "subpoena duces tecum"¹ ordering Isham to appear and testify at trial. The subpoena was then served on defense counsel. Plaintiff received no response until the eve of trial when defense counsel telephoned plaintiff's counsel to inform her that Isham had left the company. The trial court explained that, at the very least, defense counsel should have informed plaintiff's counsel of Isham's status and last known address. No doubt this was true as a matter of courtesy, but such action was not required under the court rules.

Pursuant to MCR 2.506(G)(3) a subpoena "directed to a party, or to an officer, director, or managing agent of a party, may be served in the manner provided by MCR 2.107." If Isham was employed by defendant at the time the subpoena was served on defense counsel, she was *not* a party, officer, director, or managing agent. Accordingly, plaintiff's service of the subpoena on defense counsel pursuant to MCR 2.107 was not effective service. Because Isham was not a party, officer, director, or managing agent, plaintiff was required by the court rules to personally serve Isham in a manner provided by either MCR 2.506(G)(1) or (G)(2). For this reason alone, plaintiff should not be heard to complain about the failure of defendant to "produce" Isham. The rule governing subpoenas also provides that the sanction for the failure of a party, officer, director, or managing agent to attend is to be directed towards the party, while the sanction for the failure of a witness to attend is to be directed toward the witness. See MCR 2.506(E) & (F); *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 288; 404 NW2d 242 (1987). Here, because Isham was a witness rather than a party, officer, director, or managing agent of defendant, default could not have been properly entered pursuant to MCR 2.506(F)(6).

MCR 2.302(E)(1)(a)(i) provides that a party in a civil lawsuit has a duty to supplement responses to discovery requests regarding the location of persons having knowledge of discoverable matters. The failure to do so may, in some imaginable circumstances, justify default as a sanction. See MCR 2.302(E)(2), referring to MCR 2.313(B)(2). However, in this case the record contains no

specific request for discovery directed toward defendant regarding Isham's whereabouts. Apart from the fact that the subpoena to Isham improperly served on defense counsel was not a "request for discovery," it was also not a "question directly addressed to . . . the identity and location of persons having knowledge of discoverable matters." See MCR 2.302(E)(1)(a)(i). Accordingly, default could not have been properly entered pursuant to MCR 2.302(E)(2).

Finally, we note that default could not have been properly entered pursuant to MCR 2.313(B), as a sanction for an abuse of discovery, because defendant did not "fail to obey an order to provide or permit discovery."

For these reasons, we conclude that the trial court had no legal basis under the court rules upon which to properly enter the order of default.

Reversed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael J. Talbot

¹ A subpoena duces tecum is a process to compel the production of *documents* within the control of the person served. See Black's Law Dictionary (6th ed), defining "subpoena duces tecum."