

STATE OF MICHIGAN
COURT OF APPEALS

REBECCA LYNN GREEN,

Plaintiff-Appellee,

v

ROBERT RAYMOND GREEN,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 261537

Grand Traverse Circuit Court

LC No. 04-024210-DO

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

In this divorce action between plaintiff Rebecca Green and defendant Robert Green, Robert Green appeals as of right the default judgment of divorce. He also challenges the trial court's order denying his motion to set aside the same default judgment. The default judgment was entered 61 days after the complaint for divorce was filed, when Robert Green, acting in propria persona, failed to file an answer. We reverse and remand for a hearing to determine the issues of property division and alimony.

I. Basic Facts And Procedural History

Rebecca Green filed for divorce after 22 years of marriage on November 3, 2004. On the same day, Rebecca Green filed a motion for exclusive possession of the marital home and temporary spousal support. The trial court issued a notice of final hearing for divorce judgment on November 4, 2004, instructing the parties that a final hearing in the matter was set for January 3, 2005.

A hearing on Rebecca Green's motion for exclusive use of the marital home was held on November 22, 2004. Robert Green represented himself at the hearing and sat at the defense table. Rebecca Green's counsel indicated that he had spoken with both Rebecca Green and Robert Green regarding possession of the marital home and that the parties had reached an agreement. On December 2, 2004, the trial court signed a consent order reflecting the parties' agreement, which was signed by Rebecca Green's attorney and Robert Green.

On December 6, 2004, Rebecca Green filed a default against Robert Green for failing to file a responsive pleading. Robert Green was mailed a copy of the default affidavit on December 9, 2004. The parties appeared before the trial court on January 3, 2005, the day originally scheduled for the final hearing. Robert Green was present at the hearing without

counsel. At the hearing, Rebecca Green's counsel indicated that he had prepared a default judgment. Rebecca Green's counsel indicated that he had allowed Robert Green to review the judgment and that Robert Green had objections to the judgment. Robert Green was not given the opportunity to provide testimony. The trial court indicated that Robert Green could file a motion to set aside the default if he had concerns. The trial court concluded that it would enter a default judgment including Rebecca Green's proposed division of property and alimony.

Robert Green moved to set aside the default, arguing that he was not provided proper notice under MCR 2.603(B)(1). He also argued that the judgment should be set aside for good cause under MCR 2.603(D)(1). The trial court denied the motion, stating in relevant part:

Let's take up the issue of notice. MCR 2.603(B)(1), does provide an obligation of notice of court proceedings; Mr. Green certainly received notice, because he was present at the court proceedings. Was notice timely? That will turn on to what degree Perry,^[1] or the amended Court Rule, apply to divorce cases, and what vitality they have, if the purpose is providing due process, and notice, and opportunity to be present.

It is evident from the proof of service within the divorce file that a notice of a final divorce hearing was consistent with this Court's directive. This Court's directive filed November 4th of 2004. The date of the pro confesso divorce hearing was on January 3rd, of 2005. There was a proof of service indicating a process server . . . served a number of documents on [Robert Green], including a notice of final hearing of divorce, on November 10th, of 2004, nearly two months in advance of the hearing, less a week. That is considered adequate notice. [Rebecca Green] served the notice, as opposed to a specific notice of the entry of a default judgment of a divorce, with an opportunity to proceed and to participate in those proceedings. And, that's where there is a conflict between Perry and Draggool.^[2]

Obviously, if [Robert Green] were to argue that the Court Rule in effect, as a matter of procedure, overrules Draggool on this particular point, because it is specifically intended to apply to divorce cases; Draggool held to the contrary, and itself overruled Perry. It does not appear to this Court that if there was an intent to overrule Draggool, that that would have been clearly stated in the use note.

There are several excellent policy reasons why the general rules relating to defaults and participation in the proceedings should not apply to divorce cases If there is no truly enforceable requirement with regard to the disclosure of witnesses and exhibits, to the failure to appear for a deposition, the failure to produce documents regarding assets and liabilities, and a party can simply show

¹ *Perry v Perry*, 176 Mich App 762; 440 NW2d 93 (1989).

² *Draggool v Draggool*, 223 Mich App 415; 566 NW2d 642 (1997).

up at the final divorce hearing with their records and witnesses and determine to skip all of those proceedings, then what effectively is the sanction.

* * *

This Court believes Draggoo was absolutely correct in overruling Perry. And, that absent some indication in the rule, that it was meant to apply to divorce cases. So, is in fact—and, this is a matter of significant public policy in this state. If in the fact the Court of Appeals believes that parties can be defaulted in a divorce proceeding and still be entitled to all the same privileges associated with participating in the divorce trial that they would otherwise have, that I think is a very significant change, and this should be announced by the Court of Appeals. . . . The Court doesn't believe that's currently the law in this state, and feels it's obligated to follow Draggoo as the last published decision, it's precisely on point.

Where does that leave us then? Well, that just takes us back to 2.603 and 2.612

* * *

With regard to good cause, . . . [t]here are lots of mechanisms by which someone can have good cause or excusable neglect Simply, not participating in the proceedings is not excusable.

The trial court granted Robert Green's subsequent motion to stay the judgment pending this appeal.

II. Motion To Set Aside Default Judgment

A. Standard Of Review

Robert Green argues that the default judgment should be set aside because (1) he did not receive notice of entry of default judgment as required by MCR 2.603(B)(1)(a); (2) he demonstrated good cause and a meritorious defense under MCR 2.603(D)(1); (3) he established several of the criteria set forth in MCR 2.612; and (4) the trial court improperly made decisions and entered a judgment without taking evidence and without issuing findings of fact. We review a trial court's denial of a motion to set aside a default judgment of divorce for an abuse of discretion.³ "Although the law favors a determination of a claim on the basis of its merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered."⁴ We also review de novo a trial court's interpretation of court rules.⁵

³ *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

⁴ *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003), citing *Alken-Ziegler, Inc, supra* at 229.

⁵ *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 598; 552 NW2d 523 (1996).

B. MCR 2.603(B)(1)

MCR 2.603(B)(1), which governs notice of a request for a default judgment, provides in relevant part:

(a) A party requesting a default judgment must give notice of the request to the defaulted party, if

(i) the party against whom the default judgment is sought has appeared in the action;

(ii) the request for entry of a default judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or

(iii) the pleadings do not state a specific amount demanded.

(b) The notice required by this subrule must be served at least 7 days before entry of the requested default judgment.

(c) If the defaulted party has appeared, the notice may be given in the manner provided by MCR 2.107. If the defaulted party has not appeared, the notice may be served by personal service, by ordinary first-class mail at the defaulted party's last known address or the place of service, or as otherwise directed by the court.^{6]}

Robert Green argues that he should have received notice of Rebecca Green's request for a default judgment because he satisfies all three subparts of MCR 2.603(B)(1)(a). More

⁶ MCR 2.603(B)(1) was amended, effective January 1, 2005. AO 2004-09, Oct. 5, 2004. Before that date, the court rule provided as follows:

(a) A party seeking a default judgment must give notice of the request for judgment to the defaulted party

(i) if the party against whom the judgment is sought has appeared in the action;

(ii) if the request for entry of judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or

(iii) if the pleadings do not state a specific amount demanded.

(b) The notice required by this subrule must be served at least 7 days before entry of the requested judgment.

(c) If the defaulted party has appeared, the notice may be given in the manner provided by MCR 2.107. If the defaulted party has not appeared, the notice may be served by personal service, by ordinary first-class mail at the defaulted party's last known address or the place of service, or as otherwise directed by the court.

specifically, he argues that the trial court abused its discretion in finding that a standard “Notice of Final Hearing of Divorce” was sufficient to provide notice of entry of the default judgment.

In *Perry*, the defendant in a divorce action was defaulted for failure to appear.⁷ Although a proof of service of the default was filed and the plaintiff told the defendant about the default hearing two days before, the defendant was not notified in writing of the date of the hearing for default judgment.⁸ A default judgment, which included a property settlement, was entered after the hearing.⁹ On appeal, this Court noted:

The purpose of the notice requirement is to apprise the defaulting party of the possibility of entry of judgment so that he may have an opportunity to participate in any hearing necessary to ascertain the amount of damages or other form of remedy to be granted. This purpose is premised on the distinction between the entry of default and the entry of judgment. The former operates as an admission by the defaulting party that there are no issues of liability, but leaves the issues of damages unresolved until entry of judgment. The latter reduces the default to a judgment for money damages. Once a valid default is taken, the defaulting party remains entitled to full participatory rights in any hearing necessary for the adjudication of damages.^{10]}

Thus, this Court held that, under MCR 2.603(B)(1)(b), the defendant was entitled to seven days notice “prior to the entry of default judgment.”¹¹ This Court then explained that, although ordinarily a party must show both good cause and a meritorious defense in order to prevail on a motion to set aside a default judgment,¹² a party is not required to demonstrate a meritorious defense where the party requesting the default allegedly failed to give notice as required by MCR 2.603(B).¹³ This Court stated that MCR 2.603(B) “expresses a fundamental concept of due process and its observation is mandatory.”¹⁴ Accordingly, this Court concluded that failure to provide the notice required by MCR 2.603(B) invalidates the default judgment.¹⁵ Thus, this Court held that the defendant “was entitled to notice of the request for entry of the default judgment of divorce” and that the plaintiff’s verbal communication was not proper notice.

⁷ *Perry, supra* at 765.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 767 (citations omitted).

¹¹ *Id.* at 768.

¹² MCR 2.603(D)(1).

¹³ *Perry, supra* at 769-770, citing *Petroff v Petroff*, 88 Mich App 18, 19-21; 276 NW2d 503 (1979).

¹⁴ *Id.* at 770, citing *Vaillencourt v Vaillencourt*, 93 Mich App 344, 350; 287 NW2d 230 (1979).

¹⁵ *Id.*

Rebecca Green argues that the holding in *Perry* has been overturned in part by *Draggo v Draggo*. In *Draggo*, also a divorce action, the trial court entered a default judgment against the defendant under MCR 2.313(B)(2) for flagrant discovery violations.¹⁶ The trial court then entered a default judgment dividing the parties' marital assets after hearing only the plaintiff's testimony estimating the value of the assets.¹⁷ Citing *Perry*, the defendant argued on appeal that the default was improper because the trial court barred him from presenting any proofs on the issue of property division and prohibited him from participating in the trial in any meaningful way.¹⁸ Addressing *Perry*, the *Draggo* panel stated:

The trial court's actions in the case at bar were entirely appropriate. The rule . . . that "a defaulting party who has properly invoked his right to jury trial retains that right if a hearing is held to determine the amount of recovery" does not apply in an equitable action, such as a divorce action, where there is no right to a jury trial. . . . [W]e find that *Perry* was wrong when it indicated that a defaulted party in a divorce case is entitled to full participatory rights in the adjudication of the property division. Further, because the court is required to grant a divorce upon the insistence of only one of the parties, there is no question that a divorce had to be granted in the case at bar. If the court entered a default against defendant, but then allowed him to fully participate in presenting evidence regarding the property division, it would be as if no sanction at all had been imposed for defendant's flagrant disobedience of the court's orders.^[19]

The *Draggo* panel further stated that "[t]o allow a defaulted party to flout the court's authority but still have an opportunity to contest the property division would thus negate the effectiveness of [MCR 2.313(B)(2)(b)] as a deterrent in a divorce action."²⁰

Notably, the issue of whether the defendant in *Draggo* had proper notice under MCR 2.603(B) was not before the Court, and the *Draggo* panel did not address the issue of whether notice is mandatory under MCR 2.603(B). Further, the reasoning in *Draggo* is limited to circumstances where a default judgment is entered as a discovery sanction and not to circumstances, as here, where the default is entered at plaintiff's request for failing to appear. Thus, we conclude that *Draggo* did not overrule *Perry*'s holding that the MCR 2.603(B) notice requirement is mandatory. Indeed, the plain language of MCR 2.603(B)(1)(b) indicates that notice is mandatory and provides no exception for actions in equity.²¹ Accordingly, we turn to

¹⁶ *Draggo*, *supra* at 423.

¹⁷ *Id.* at 422.

¹⁸ *Id.* at 425.

¹⁹ *Id.* at 427.

²⁰ *Id.* at 428.

²¹ "The notice required by this subrule *must* be served at least 7 days before entry of the requested judgment." MCR 2.603(B)(1)(b) (emphasis added).

whether Robert Green “appeared” in the present action and whether he was given notice as required by MCR 2.603(B)(1)(b).

C. Defaulting Party’s Appearance

MCR 2.117(A)(1) provides: “A party may appear in an action by filing a notice to that effect or by physically appearing before the court for that purpose.” For the purpose of default proceedings, a party appears by any act acknowledging jurisdiction of a court or by invoking court action on its behalf.²² To render an act adequate to support the inference that it is an appearance, two requirements must be met: (1) knowledge of the pending proceedings and (2) intent to appear.²³ Any action on a defendant’s part, except an objection to jurisdiction over his person, will constitute a general appearance.²⁴

Here, Robert Green did not answer the complaint within the required time. However, he represented himself during a motion hearing for temporary spousal support and exclusive use of the marital home, attended a friend of the court meeting to determine temporary spousal support, and approved a consent order drafted by opposing counsel. We conclude these actions more than adequately demonstrate Robert Green’s knowledge of the pending divorce proceedings and intent to appear and participate in the action. Accordingly, we conclude that Robert Green appeared for the purpose of triggering the notice required by MCR 2.603(B)(1)(a)(i).

D. Moving Party’s Notice

Under MCR 2.603(B)(1)(b), notice of the request for a default judgment “must be served at least 7 days before entry of the requested default judgment.” Here, Rebecca Green filed a default affidavit on December 6, 2004. Robert Green was mailed a copy of the default affidavit on December 9, 2004. But the record does not contain a proof of service establishing that Robert Green was mailed a notice of a hearing for a default judgment.²⁵ Notice for final hearing of divorce indicating that a pro confesso hearing was scheduled for January 3, 2005, was not sufficient to notify Robert Green that a default judgment dividing the marital property would be entered against him. Thus, because Rebecca Green failed to give the required notice, the default judgment is invalid and must be vacated.²⁶

In light of our disposition on this issue, we need not reach Robert Green’s remaining arguments.

²² *Ragnone v Wirsing*, 141 Mich App 263, 265; 367 NW2d 369 (1985).

²³ *Id.*

²⁴ *Id.*

²⁵ See *Perry*, *supra* at 765, 771.

²⁶ *Id.* at 770.

We reverse the trial court's decision refusing to set aside the default and the default judgment and remand for a hearing to determine the issues of property division and alimony. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski