

STATE OF MICHIGAN
COURT OF APPEALS

DETRICE DOZIER, as Next Friend of SHANIKA
DOZIER, a Minor,

UNPUBLISHED
August 21, 2007

Plaintiff-Appellee,

v

No. 269944
Wayne Circuit Court
LC No. 04-428630-NO

TUBBY'S SUB SHOP, individually and d/b/a
TUBBY'S #124,

Defendant-Appellant,

and

MATTI & MATTI, INC., and SHEANEAN
COLEMAN,

Defendants,

and

FARMER'S INSURANCE EXCHANGE,

Garnishee Defendant.

Before: Owens, P.J., and White and Murray, JJ

PER CURIAM.

Defendant, Tubby's Sub Shop, d/b/a Tubby's #124, appeals by delayed leave granted¹ from an order denying its motion to set aside a default judgment entered against it in favor of plaintiff. We reverse.

¹ *Dozier v Tubby's Sub Shop*, unpublished order of the Court of Appeals, entered November 27, 2006 (Docket No. 269944).

This action arises out of a fight at a Tubby's sub shop between Shanika Dozier and Sheanean Coleman, allegedly an employee of Tubby's, in which Dozier was injured. On appeal, Tubby's first argues that the circuit court failed to acquire personal jurisdiction over it. We disagree.

We review *de novo* whether the trial court acquired personal jurisdiction over a defendant. *Poindexter v Poindexter*, 234 Mich App 316, 319; 594 NW2d 76 (1999). In arguing that the circuit failed to acquire personal jurisdiction, Tubby's first argues that it is owned by AK & G, Inc. ("AK & G") and, therefore, is not a legal entity. In order to be subject to a lawsuit and valid judgment, a party must be a legal entity. Thus, for example, because a sheriff's department is not a legal entity, but merely an arm of the county, it is not subject to suit. *Sumner v Wayne County*, 94 F Supp 2d 822, 827 (ED Mich, 2000). Here, however, the Michigan Domestic Profit Corporation Information Update includes the name "Tubby's Sub Shop" with the name "AK & G" under the heading for "corporate name." Further, the Corporation Update provides the same resident agent and address for both entities. Thus, AK & G and Tubby's are, according to the state of Michigan, synonymous. Either party, therefore, could be subject to this lawsuit as a defendant.

We also reject Tubby's argument that the trial court did not acquire personal jurisdiction over it because the service of the summons and complaint was improper. MCR 2.105(D) pertains to service of process on a corporation and provides, in relevant part, that service may be made by:

(1) Serving a summons and a copy of the complaint on an officer or the resident agent;

(2) serving a summons and a copy of the complaint on a director, trustee, or person in charge of an office or business establishment of the corporation and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation[.]

Although the return of process indicates that the summons and complaint were delivered to "Al S.," supposedly the manager in charge at this Tubby's, this service was defective because Tubby's manager was not an officer or registered agent of the corporation. Moreover, although the process server delivered the summons and complaint by first-class mail and posted these documents at Tubby's registered address in accordance with the order for alternate service, plaintiff addressed these documents to Matti & Matti, Inc. ("Matti"), rather than Tubby's or AK & G. Thus, the service of process was improper under MCR 2.105(D).

The failure to comply with MCR 2.105(D) did not render the service of process ineffective. MCR 2.105(J)(3) provides: "An 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." "Thus, if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill v Frawley*, 155 Mich App 611, 614; 400 NW2d 328 (1986).

We conclude that Tubby's had actual notice of this lawsuit. Indeed, plaintiff delivered a summons and complaint to the manager of Tubby's, posted the summons and complaint at Tubby's registered address, and sent the summons and complaint to Tubby's registered address by first-class mail. Although the summons and complaint were addressed to Matti, the 2004 Corporate Updates for Tubby's and Matti provide identical addresses and resident agents for both corporations, and Tubby's was clearly listed as a defendant. It should also be noted that plaintiff notified Tubby's insurer, Farmer's Insurance Exchange in November 2002 of the incident at the sub shop involving Coleman and sent a "courtesy" copy of the summons and complaint to Farmer's on September 16, 2004.²

Tubby's reliance upon *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991), is misplaced, as in that case plaintiff's attorney indicated in writing that he was not intending on effectuating service on the defendant when mailing a copy of the complaint. *Id.* at 426. Here, plaintiff attempted to follow the alternate service order in notifying defendant of the lawsuit, which included posting and mailing the summons with the complaint.

We do, however, agree with Tubby's argument that the circuit court erred in denying its motion to set aside the default judgment because it did not have notice of the entry of default, motion for default judgment, or the order of default judgment. "Review of a trial court's decision on a motion to set aside a default or a default judgment is for a clear abuse of discretion." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id.*, citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.603(D), which governs setting aside default judgments, provides in relevant part:

(1) A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

The party seeking entry of a default must provide notice of the entry to the defaulted party who has not appeared and file a proof of service and copy of the notice with the court. MCR 2.603(A)(2); MCR 2.603(A)(2)(b). A party subsequently requesting a default judgment must provide notice of the request to the defaulted party if no specific amount of relief is stated

² Tubby's claims that its owner, Ghassan Mikha, did not have actual notice of this lawsuit until the sheriff executed the order to seize property in November 2005. While it is true that Mikha became the sole owner of AK & G on May 3, 2004 (nearly four months before the complaint was filed), the Corporate Update for AK & G still listed Ayad Matti, a former part owner of the company, as the resident agent and director of AK & G and Tubby's as of August 17, 2004. In light of this, it appears that Tubby's had actual notice of this lawsuit when alternate service was posted and mailed to the address of Tubby's registered agent.

in the pleadings.³ MCR 2.603(B)(1)(a); MCR 2.603(B)(1)(a)(iii). Regarding the entry of a default judgment, the court clerk is required to provide notice of the default judgment to all parties and “keep a record that notice was given.” MCR 2.603(B)(4).

Failure to provide notice to the defaulted party of entry of the default, a request for default judgment, or an order of default judgment constitutes a substantial irregularity or defect in the proceeding and satisfies the good cause requirement of MCR 2.603(D). *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993).

After this case was remanded to the trial court, plaintiff presented unsigned cover letters addressed to Tubby’s and Matti indicating that the entry of default, motion for default judgment, and order of default judgment were enclosed with the letters. However, Mikha averred that he never received any notice regarding the entry of default, the motion for default judgment, or the order of default judgment. Moreover, plaintiff failed to file a proof of service indicating that she served Tubby’s with notice of the entry of default as required by MCR 2.603(A)(2)(b). The failure to provide a proof of service, combined with other procedural irregularities, may constitute sufficient cause to set aside a default and default judgment. *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 534; 672 NW2d 181 (2003). It should also be noted that other than plaintiff’s enclosure letters, the record is devoid of any indication that Tubby’s was provided with proper notice regarding default in this matter. In light of these facts, Tubby’s has shown good cause for setting aside the default judgment due to a substantial defect or irregularity in the proceeding.⁴

Once Tubby’s established that the procedural irregularities constituted good cause, Tubby’s was required to show a meritorious defense to set aside the default judgment. *Saffian*, *supra* at 14. In support of such a defense, Mikha averred that Coleman was not “on the clock” or working within the scope of her employment when she became involved in the altercation with plaintiff. In general, an employer is not liable for the tortuous acts of its employees who are

³ Plaintiff requested damages in an amount above \$25,000 that the circuit court “deems appropriate under the circumstances.”

⁴ We note that the trial court relied upon *Davidson v Bellehumeur*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 2002 (Docket No. 222814), slip op at 4 n 5, and *Ford v Wyre*, unpublished opinion per curiam of the Court of Appeals, issued August 18, 2000 (Docket No. 209140), slip op at 6, in finding that plaintiff’s failure to file a proof of service was not a substantial defect in the proceeding. Notwithstanding the fact that unpublished opinions are not binding under the doctrine of stare decisis, MCR 7.215(C)(1), both cases are inapplicable.

In *Davidson*, *supra*, slip op at 4, the plaintiff’s failure to file a proof of service was not a substantial defect because the defendant admitted that he had actual notice of the entry of default. In *Ford*, *supra*, slip op at 6, the plaintiff’s failure to file a proof of service was not a substantial defect because the plaintiff provided an affidavit from the process server indicating that the defendant was personally served with notice of the entry of default. In contrast, plaintiff in the instant case failed to provide any proof of notice other than her own enclosure letters to Tubby’s.

acting outside the scope of their authority. *Zsigo v Hurley Medical Center*, 475 Mich 215, 223; 716 NW2d 220 (2006). This testimony, which as of now stands unrefuted, supports a meritorious defense. Consequently, the trial court erred in denying defendant's motion to set aside the default and default judgment.

Reversed and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Helene N. White

/s/ Christopher M. Murray