

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

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BROAD STREET SECURITIES, INC.,

Plaintiff-Appellee,

V

BURKHART, WEXLER & HIRSHBERG and  
WALTER L. BAUMGARDNER,

Defendants-Appellants.

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UNPUBLISHED  
January 25, 2011

No. 294499  
Oakland Circuit Court  
LC No. 2008-094038-NM

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

In this legal malpractice case, defendant<sup>1</sup> appeals the trial court's judgment for plaintiff. For the reasons set forth below, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In the underlying suit, *Stecker v Broad Street Securities*,<sup>2</sup> the Steckers accused Broad Street Securities of failing to properly advise them regarding their brokerage accounts. The Steckers sued Broad Street in Saginaw Circuit Court. The plaintiffs in *Stecker* won a default judgment that the Saginaw trial court declined to set aside, despite the existence of an arbitration agreement in the parties' contract. On appeal, this Court affirmed and ruled that the defendant had not shown good cause for filing a late answer and failed to attach an affidavit of meritorious defense to the motion to set aside the default.

Here, Broad Street sued defendant for legal malpractice in Oakland Circuit Court. Broad Street alleges that defendant committed malpractice by failing to submit an affidavit showing good cause why a timely response was not filed and a meritorious defense in his motion to set aside the default. The motion to set aside the default was premised upon a signed contract to arbitrate any disputes.

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<sup>1</sup> The only remaining defendant is attorney Walter L. Baumgardner.

<sup>2</sup> *Stecker v Broad Street Securities*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2009 (Docket No. 283698).

Defendant moved for a change of venue and argued that venue was not proper in Oakland County because he “does not reside in Oakland County, but has a place of business in, conducts business in the City of St. Clair Shores, Macomb County, Michigan.” Plaintiff countered that defendant is not only an attorney but also a registered representative with plaintiff, a brokerage firm. Plaintiff argued that while defendant works as a stockbroker in Oakland County, he is also practicing law there, and plaintiff attached to its response documentary evidence that defendant conducts business in Oakland County. The trial court denied the motion to change venue.

The parties then agreed to have the case tried on stipulated facts. These facts include, in relevant part (exhibit references omitted):

1. On or about December 30, 2005 Paul and Heidi Stecker opened a brokerage account with Plaintiff Broad Street Securities wherein both parties agreed to arbitrate disputes related to the Steckers’ investment account.

\* \* \*

9. On or about September 5, 2007, the Steckers filed a Complaint against Broad Street.

10. On or about October 25, 2007 the Steckers’ lawsuit was served on Plaintiff, who immediately forwarded the lawsuit to its counsel.

11. On November 13, 2007, the clerk of the Court entered a default.

\* \* \*

17. On December 13, 2007, Baumgardner filed a motion entitled “Motion to Set Aside Default Judgment, Dismiss Complaint and Compel Arbitration.”

18. Although a default had been entered at the time of filing the motion, a default judgment was not yet entered.

19. On January 3, 2008 Baumgardner sent a copy of the new account agreement to the trial court judge.

20. On January 7, 2008 the trial court held a hearing on Baumgardner’s “Motion to Set Aside Default Judgment, Dismiss Complaint and Compel Arbitration.”

21. The Court concluded that Baumgardner failed to comply with the Michigan Court Rules in his request to set aside the Default. Specifically, Baumgardner failed to provide the court with an affidavit of facts showing a meritorious defense:

“THE COURT: All right. The Court will find that [MCR] 2.603 was not followed, and on that technical basis the Court will deny the motion.”

22. On January 10, 2008, Steckers' counsel sent correspondence to Baumgardner attaching: 1) an unsigned affidavit setting the amount of damages for purposes of entry of the Default Judgment at \$102,448 based on the value of the allegedly improperly sold stock as of January 10, 2008 (as opposed to the sale date of the stock, to wit, July 27, 2007); and 2) a pleading entitled "Default Judgment entered by Clerk of the Court."

23. On or about January 17, 2008, Steckers' counsel signed a document entitled "Affidavit in Support of Entry of Default Judgment" setting the amount of damages for purposes of entry of the Default Judgment at \$96,596 based on the value of the allegedly improperly sold stock as of January 17, 2008 (as opposed to the sale date of the stock, to wit, July 27, 2007), and moved for entry of a Default Judgment by the clerk of the Court, pursuant to MCR 2.603(B)(2)(a), which was signed by the clerk of the Court on or about January 22, 2008.

24. Baumgardner failed to challenge the entry of the Default Judgment, and more specifically, the amount of the Default Judgment.

25. On or about February 25, 2008 Baumgardner sent a letter to the trial court judge.

26. On March 20, 2008 the trial court entered an Opinion and Order Denying the Motion to Set Aside Default.

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30. The Michigan Court of Appeals subsequently refused to set aside the Default, and Default Judgment. The Michigan Court of Appeals noted that the Stecker Complaint was "eventually answered .... one month late with no excuse of the delay. Thus, defendant did not show good cause for setting aside the default. Moreover, defendant failed to file an affidavit of meritorious defense with its motion to set aside the default."

31. The Michigan Court of Appeals also noted that Baumgardner failed to challenge the amount of the Default Judgment in the trial court. ("Defendant did not raise this challenge below, so it is not preserved for appellate review.").

32. Baumgardner has argued during the pendency of this case that no affidavit was required to be filed because the motion to set aside default was based on lack of jurisdiction. However, the Michigan Court of Appeals disagreed, and stated that even if there was a valid arbitration agreement, it "did not deprive the trial court of subject matter jurisdiction over the claim."

33. Due to the procedural irregularities, Broad Street was not afforded an opportunity to explain to the trial Court that the Steckers have actually suffered no damages whatsoever.

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35. The Steckers suffered no actual damages, but were awarded a windfall of \$100,999.75.

36. Moreover, Plaintiff has incurred substantial, additional expense in prosecuting this proceeding for which Baumgardner is also liable in the event that the Court concludes that his representation of Plaintiff was negligent.

Plaintiff filed a trial brief, but defendant failed to do so. The court entered an opinion and order and ruled that plaintiffs should be awarded \$100,999.75. The court noted that the stipulated facts state that defendant was retained to set aside the default and that the Saginaw Circuit Court judge ruled that the sole reason it would not set aside the default was because MCR 2.603 was not followed. The court also noted that the Court of Appeals opinion “rejected Baumgardner’s lack of subject matter jurisdiction argument.” The trial court further observed that “despite entry of default, Baumgardner still could have, and should have, challenged the amount of default, but failed to do so” despite the fact that, as set forth in the stipulated facts, he recognized that the Steckers were awarded a windfall, yet did nothing to protect his client.

Here, defendant argues that venue was improper in Oakland County. In determining venue, “courts must look to the first injury resulting from an act or omission of a defendant to determine where venue is proper. It is the original injury, not the original breach of the standard of care, that establishes venue under MCL 600.1629(1)(a) and (b).” *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 630; 752 NW2d 37 (2008). However, defendant does not cite correct legal authority, he did not argue in the trial court that the original injury occurred elsewhere, he fails to disclose where the injury occurred (nor does he actually identify the injury), he does not challenge plaintiff’s assertion that he conducts business in Oakland County, and he does not suggest where venue would be proper. Accordingly, we decline to address this issue because it is inadequately briefed:

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant further argues that the trial court erred in holding that he committed malpractice because he did not follow the requirements of MCR 2.603(D)(1):

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

Defendant maintains that he was forced to argue that the arbitration clause made this a jurisdictional matter because plaintiff failed to answer the underlying complaint and, accordingly, he did not need to show good cause and a meritorious defense. Defendant takes the position that his hands were tied because there was no “good cause,” and he relies almost entirely on plaintiff’s alleged failure to answer the complaint. However, the stipulated facts

state, “On or about October 25, 2007 the Steckers’ lawsuit was served on Plaintiff, who immediately forwarded the lawsuit to its counsel.” Thus, under the stipulated facts, the default was not caused by plaintiff’s conduct. Moreover, the Saginaw trial court based its decision to deny the motion to set aside the default on the absence of an affidavit of meritorious defense, not on the absence of good cause. Further, though defendant argues that this Court in *Stecker* ruled there was *no* good cause, this is inaccurate; this Court ruled that Broad Street *did not show* good cause. *Stecker*, unpub op at 2. Indeed, defendant did not make any attempt to show good cause under the court rule.

The good cause prong of the analysis may be satisfied upon the trial court’s finding that either: (1) a substantial irregularity or defect was present in the proceeding on which the default is based; or (2) there was a reasonable excuse for failure to comply with the requirements that created the default. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 95; 666 NW2d 623 (2003), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 230; 600 NW2d 638 (1999). Further, if the moving party offers a meritorious defense that would be absolute if proved, a lesser showing of “good cause” will be required in order to prevent manifest injustice. *Alken-Ziegler, Inc*, 461 Mich at 233-234. Courts favor a decision on the merits, and defendant fails to show that his motion would not have been granted had he made some attempt to provide a reasonable excuse for the delay. *Id.* at 229. Here, defendant did not attempt to show any reasonable excuse for the delay. Moreover, defendant alone decided that he did not need to include good cause or an affidavit of meritorious defense with his motion. The case law cited by this Court in the underlying case is clear: the existence of an arbitration agreement does *not* remove the case from the court’s jurisdiction such that no affidavit is required. *Campbell v St John Hosp*, 434 Mich 608, 612-613; 455 NW2d 695 (1990). Thus, defendant’s causation argument also fails.

Affirmed.

/s/ Henry William Saad  
/s/ Kirsten Frank Kelly