

STATE OF MICHIGAN
COURT OF APPEALS

DCFS USA LLC,

Plaintiff-Appellant,

v

STANDISH SIBERT,

Defendant-Appellee.

UNPUBLISHED
November 14, 2013

No. 311282
Wayne Circuit Court
LC No. 11-009724-CK

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to set aside the default judgment. Plaintiff also challenges the trial court's order granting defendant's motion to dismiss and order denying plaintiff's motion for reconsideration. We reverse the trial court's order granting defendant's motion to set aside the default judgment, rendering moot the remaining issues of whether the trial court erred in granting defendant's motion to dismiss and denying plaintiff's motion for reconsideration.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2008, defendant entered a retail installment contract with plaintiff for the purchase of a motor vehicle. When defendant failed to make payments on the vehicle, plaintiff filed an action to recover money damages resulting from the breach. Pursuant to the trial court's order for alternate service, plaintiff served defendant with the summons and complaint by posting and by certified mail. Defendant failed to file an answer. On February 8, 2012, the trial court granted plaintiff's request for a default judgment.

On February 28, 2012, defendant filed a motion to set aside the default judgment. Defendant's motion only alleged that he "[w]as not properly served." At the hearing on defendant's motion, defendant provided no additional explanation regarding his allegation that he was not properly served. In addition, defendant contended that he received a call from the trial judge's clerk, who informed defendant to not attend a scheduled hearing on January 30, 2012, because the case was to be reassigned to a different judge. Defendant alleged that plaintiff filed two claims against him and that plaintiff "was trying to merge them together." Plaintiff argued that defendant was not entitled to set aside the default judgment because he failed to comply with MCR 2.603(D), which required defendant to set forth good cause for setting aside

the judgment and file an affidavit of meritorious defense. The trial court granted defendant's motion to set aside the default judgment:

There is some confusion here. I'm going to grant the motion to set aside this judgment. And I understand that 2.603(D) applies, but given the circumstances here there is just confusion I have about this case – let me see. We have two case numbers. The cases were consolidated. We have 11-003474 CK that was filed on 3-23-11 and then we have the 11-009724 CK that was filed on 8-11-2011. There is some confusion. I'm going to grant your motion, sir. Your motion is granted.

Defendant subsequently filed a motion to dismiss and the trial court granted the motion. The trial court also denied plaintiff's motion for reconsideration. Plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court abused its discretion in granting defendant's motion to set aside the default judgment. We agree.¹

This Court reviews the trial court's decision to set aside a default judgment for an abuse of discretion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 94; 666 NW2d 623 (2003). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Taylor v Kent Radiology*, 286 Mich App 490, 524; 780 NW2d 900 (2009). Issues concerning the interpretation and application of court rules are questions of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“Under MCR 2.603(D)(1), a party seeking to set aside a default judgment must satisfy two separate and distinct requirements: (1) good cause for the failure to respond to the complaint and (2) a meritorious defense.” *Lawrence M. Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 282; 803 NW2d 151 (2011). Good cause may be shown by:

(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. [*Shawl v Spence Bros, Inc*, 280 Mich App 213, 221; 760 NW2d 674 (2008) (quotation marks and citations omitted).]

¹ To the extent plaintiff argues that defendant's motion to set aside the default judgment was not timely, the record indicates that the trial court entered the default judgment on February 8, 2012, and defendant filed the motion on February 28, 2012. Therefore, defendant timely filed the motion in accordance with MCR 2.603(D)(2)(b) (motion must be filed within 21 days after the default judgment was entered).

“The purpose of an affidavit of meritorious defense is to inform the trial court whether the defaulted defendant has a meritorious defense to the action.” *Huntington Nat. Bank v Ristich*, 292 Mich App 376, 392; 808 NW2d 511 (2011). “Such an affidavit requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit.” *Id.*

Here, defendant failed to satisfy both prongs of MCR 2.603(D)(1). In his motion, defendant merely alleged that he “[w]as not properly served” and did not provide any further basis to establish good cause. Despite defendant’s contention, record evidence establishes that plaintiff served defendant with the summons and complaint by posting and by certified mail pursuant to the trial court’s order for alternate service. Defendant provided no explanation for his conclusion that he was not properly served. We further conclude that the trial court abused its discretion in determining that the “confusion” regarding the consolidated case was sufficient to constitute “a reasonable excuse for failure to comply with the requirements which created the default” or “some other reason showing that manifest injustice would result from permitting the default to stand.” See *Shawl*, 280 Mich App at 221. Defendant was served with the summons and complaint and failed to file an answer. Regardless, even if we were to conclude that defendant established good cause, defendant failed to file an affidavit of meritorious defense. Thus, defendant failed to comply with MCR 2.603(D)(1). In light of our resolution of the dispositive issue, we need not address plaintiff’s claims on appeal relating to the motion to dismiss and motion for reconsideration because they are moot.

Reversed. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly