

STATE OF MICHIGAN
COURT OF APPEALS

TYRONE HOGAN,

Plaintiff-Appellee,

v

CITY OF PONTIAC and PONTIAC POLICE
DEPARTMENT,

Defendants,

and

DETECTIVE PALOMBO

Defendant-Appellant.

UNPUBLISHED

April 12, 2007

No. 267621

Oakland Circuit Court

LC No. 04-056519-NO

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

In this police brutality case, defendant Palombo,¹ a police detective, appeals by leave granted the trial court's order denying defendant's motion to set aside a default and default judgment. We reverse and remand for further proceedings.

Although plaintiff argues that the trial court's proceedings were not encumbered by any irregularities that might justify defendant's relief from the default judgment, the record reflects a series of uncorrected procedural errors from the outset, including highly questionable tactics by the attorneys from both sides. The very basis for the lawsuit arises from a bizarre set of circumstances. Plaintiff's attorney, Frederick M. Toca, was advocating for a defendant in a high-profile murder trial resulting from a brawl at a large party. The prosecution had suffered several setbacks because all the witnesses were reluctant to testify against their friend. Finally, defendant contacted a woman who was willing to testify about the fatal incident, and the witness was reportedly subject to adverse pressure and intimidation throughout the criminal proceedings.

¹ Defendant Palombo is the only relevant defendant in this case, so we refer to him as the singular defendant.

The murder suspect's preliminary examination was scheduled, and Toca invited his friend, plaintiff, to watch it. Plaintiff met Toca at the courthouse, but momentarily stepped outside to talk on his cellular phone. When he returned, he began looking for Toca in the windows of various courthouse rooms. Meanwhile, defendant was guarding the door to the room where the witness was present, keeping a lookout for threatening and intimidating individuals. Defendant was alarmed when he saw plaintiff peering into windows, so he immediately removed him from the courtroom door and accused him of "eyeballing" his star witness. He asked plaintiff to produce identification, but plaintiff refused. When plaintiff left the area to sit down, defendant followed him and again asked to see some identification. Plaintiff claims that defendant removed him to yet another location, told him that he would show him his identification, and opened his coat to reveal a pistol and a badge. Plaintiff claims that defendant again asked for identification with his hand on the weapon. Plaintiff alleges that he was in fear for his life, but he continued to refuse to present any identification, and defendant eventually escorted plaintiff out of the courthouse.

Plaintiff filed suit on March 1, 2004, and defendant was served that afternoon. Exactly twenty-one days later, plaintiff's attorney filed for default, which was entered the next day. Nevertheless, defendant had the case timely removed to federal district court the day after the default was entered, and the federal judge accepted defendant's answer and jury demand without incident. When plaintiff failed to respond to the federal court's demand for additional briefing on his constitutional issues, the federal court remanded the case to state circuit court, and the trial court reopened the case without setting aside the entered default. The issue lay dormant for more than one year. In the meantime, the parties fought bitterly over discovery issues, each alternatively reciprocating recalcitrance and overreaching. After several delays and adjournments, the trial court held a pretrial hearing on May 31, 2005.

At the hearing, which quickly transformed into a status conference, defense counsel estimated that the remaining depositions, including plaintiff's and defendant's, could be completed by the end of June, leaving defendant time to file a motion for summary disposition by the end of July. Defense counsel suggested that oral arguments could be held in August, with a pretrial order to follow thirty days after the court issued its decision, leaving trial to begin sometime in September. Plaintiff stated that he did not object to the proposed schedule, and the trial court simply stated, "So ordered." At the hearings' conclusion, the trial court instructed defendant to obtain the September date suggested. The register of actions indicates, however, that defendant may have scheduled trial for August 29, 2005, because that is the trial date that appears next to a May 31, 2005 entry. In any event, about a week later the trial court heard defendant's motion to compel plaintiff's deposition, which had been repeatedly postponed and otherwise thwarted by plaintiff's unwillingness to submit to questioning. At the hearing on June 8, 2005, the court announced that it would personally oversee the remaining discovery, and it granted defendant's motion to compel, ordering plaintiff to appear for his deposition. The register of actions indicates that a motion by defendant to adjourn trial was also granted on that date, but no substitute date for trial was provided and no discussion of the matter was held on the record.

The parties could not agree on the wording of the discovery order, and it was not entered until June 20, 2005. Even then, defendant continued to object to the order, and moved to correct the order on July 20, 2005, a month after its entry. The trial court heard the motion on July 27,

2005, and did not find any error in the previous order. However, it told defendant that he could order the transcript from the June 8, 2005, hearing and renew his objections or raise the issue at the status conference. The record does not indicate that the depositions of plaintiff, defendant, or any other witness in the courthouse were ever taken. Defendant's anticipated dispositive motion and motion for further clarification of the June 20, 2005, order were never filed.

The trial court called the case for trial on August 29, 2005, without having conducted the proposed status conference or any other pretrial hearing. Plaintiff's counsel checked in for the morning call, but had left the courtroom by the time the trial court called the case. Defendant and defense counsel failed to appear at all. The case was initially passed. Defendant claims that plaintiff's counsel received a telephone call alerting him to the proceedings but that defendant never received the benefit of a telephone call. Later that afternoon, plaintiff's counsel was present when the case was again called. Plaintiff moved for default, which the trial court granted, but the trial court did not immediately enter a default judgment. At the hearing on plaintiff's motion for default judgment, defense counsel argued that defendant never received proper notice of the default, so the trial court should adjourn the proceedings until defendant could present his motion to set aside the default. Instead, the trial court entered a default judgment in plaintiff's favor, but again postponed any damages award until it could rule on defendant's motion to set aside the default and could gather plaintiff's testimony regarding damages. On September 28, 2001, the trial court decided to take under advisement defendant's motion to set aside the default and ordered the parties to facilitation. However, the trial court allowed plaintiff to make a record to preserve his testimony.

During his testimony, plaintiff substantially contradicted his complaint, which had indicated that defendant brandished his pistol and pointed it directly at him. In his testimony, plaintiff suggested that defendant may have touched his hand to his pistol, but he did not suggest that defendant ever removed the weapon from its holster. Plaintiff did not claim any physical injuries from defendant's use of force, but primarily claimed momentary terror from the fear that defendant would draw his weapon and shoot him. Plaintiff also testified that he suffered from chronic insomnia, for which he never sought treatment.

When the parties returned to court more than one month later and after totally abandoning facilitation efforts, the trial court denied defendant's renewed motion to set aside the default, and it instead set the matter for trial limited to the issue of damages. We granted defendant's application for interlocutory appeal.

Defendant argues that the trial court erred by denying his motion to set aside the default and default judgment. Defendant asserts that the default and default judgment should be set aside because there was a substantial defect or irregularity in the proceedings, and he had a meritorious defense. We agree. We review a trial court's denial of a motion to set aside a default or default judgment for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court may grant a motion to set aside a default or default judgment "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). A party demonstrates good cause under MCR 2.603(D)(1) by establishing "1) a substantial irregularity or defect in the proceeding upon which the default is based [or] (2) a reasonable excuse for failure to comply with the requirements that created the default" *Alken-Ziegler, supra* at 233. However, "if a party states a meritorious

defense that would be absolute if proven, a lesser showing of ‘good cause’ will be required than if the defense were weaker, in order to prevent a manifest injustice.” *Id.* at 233-234.

In this case, the defendant’s affidavit presented an absolute defense, and that affidavit was substantiated by plaintiff’s own testimony before the trial court ruled on defendant’s motion to set aside the default and default judgment. Nevertheless, the trial court, without making any findings of fact on the record regarding defendant’s “good cause,” ordered the parties into facilitation, and when negotiations foundered, denied defendant’s motion to set aside the default and default judgment. Our review of defendant’s assertions of “good cause” reveals serious procedural defects that warranted factual exploration by the court. In fact, the facts underlying defendant’s explanation for why he disregarded the August trial date were never disputed. The trial court “ordered” a trial date in September, which was to follow several proceedings that never transpired. The parties haggled over the proper entry of the discovery order and consequently delayed for more than a month the depositions they required, and the trial court suggested that resolution could await a later conference or hearing. The necessary depositions were never taken before the scheduled trial date, which the register of actions inexplicably recorded as adjourned.

Plaintiff’s counsel admitted that he received a call from the court alerting him to the pending action, and defense counsel denied ever receiving any special notification. Finally, although a pretrial hearing was clearly contemplated, no pretrial hearing was ever held, contrary to MCR 2.501(A)(1). Although the trial court had all these procedural errors before it, it made no findings on the record, did not inquire into any of the underlying assertions, and did not find defense counsel’s arguments and assertions meritless. Instead, it merely delayed its ruling and ordered the case to facilitation, leaving us without a record to review. In a similar situation regarding a default judgment, our Court stated that a trial court should “evaluate on the record other available options before concluding that a drastic sanction is warranted.” *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 397; 484 NW2d 718 (1992). Here, the trial court did not consider its options on the record, make any findings of fact or conclusions of law, and did not indicate any exercise of discretion in its decision to deny defendant’s motion. This approach was especially unusual and inappropriate in light of defendant’s factually sensitive and substantially undisputed assertions of procedural irregularities. The record does not even indicate whether the trial court relied on the initial, clearly defunct default² or the recent default related to defendant’s failure to appear for trial.

The unfolding of events, the trial court’s assertions on the record, and the court documents themselves all would have led a vigilant attorney to disbelieve that August 29 was still an accurate trial date. Added to the other procedural infirmities and defendant’s proffered absolute defense, the trial court’s cursory denial of defendant’s motion was not a principled

² Default was not appropriately entered at the case’s outset, because the case’s removal and defendant’s subsequent answer were timely and accepted by the federal district court. Nothing in the record validates plaintiff’s belated reliance on the initial default, and it should be deemed set aside for plaintiff’s failure to pursue it.

outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006); see also *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 537; 672 NW2d 181 (2003).

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

/s/ Janet T. Neff

/s/ Peter D. O'Connell

/s/ Christopher M. Murray