

STATE OF MICHIGAN
COURT OF APPEALS

DONOVAN F. ALLEN,

Plaintiff-Appellee,

v

SAREM ALLEN,

Defendant-Appellant.

UNPUBLISHED

September 28, 2010

No. 293001

Washtenaw Circuit Court

LC No. 08-001846-DO

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment of annulment. For the reasons stated below, we reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a United States citizen, met defendant while he was visiting Cambodia. He sponsored her on a "fiancée visa" so she could come to this country to marry him. They were married in Texas in 2004. Plaintiff alleged he made it clear that he wanted children, but defendant "refused to 'begin a family.'" On July 30, 2008, shortly after defendant obtained her unrestricted green card, plaintiff was contacted by a woman who revealed that her husband and defendant were having an affair. Plaintiff removed all of defendant's belongings from the house, and alleged that on that date he realized she had only married him for the benefit of her immigration status. Plaintiff filed for divorce but almost immediately amended the complaint to seek in the alternative an annulment.

A settlement conference was held in February 2009, after which the parties were ordered to be present for a final settlement conference to be held on April 9, 2009. The order included language giving the parties notice that failure to attend could result in default or dismissal. Trial was set for April 20, 2009. However, on April 9, 2009, defendant moved to adjourn the trial because she was out of the country, visiting Cambodia, and could not return before the scheduled trial date. The court rescheduled the final settlement conference for April 16, 2009, but did not change the trial date. At the hearing the next day, the trial court found that defendant was aware of the conference and trial dates and had no good reason for not being in attendance as ordered. This gave the court the authority to grant a default. However, the court stated that it would "reserve its ruling as to whether to grant a default for annulment or a divorce." The court scheduled trial to begin the following Monday, April 20, 2009.

However, at the scheduled time, defendant's counsel requested another adjournment because he had learned that, although defendant had returned to the United States, she was in California and was too ill to travel. By this time, the trial court indicated that it had had enough of defendant's delays. The court announced it was going to "cancel the trial," and then scheduled April 28 as a date to:

. . . make a determination whether or not all the Court will need to do at that point is take proofs because of the default of the Defendant which the Court has already entered, or whether or not the Court is satisfied that they made some legitimate argument supported by evidence other than just statements placed on the record that get changed every time we're on the record.

The court indicated things would proceed "[m]uch along the lines in the court that provides for setting aside a default judgment."

Defendant attended the April 28, 2009, hearing. The court opened the hearing by stating that it had "already entered a default," and indicated that defense counsel was to present its argument "as to why the Court should set aside the default in this matter." Defense counsel proceeded to argue that defendant had good reasons why she could not attend when ordered to. The court agreed that this was the critical element, noting that although defendant had to show both good cause and a meritorious defense, as for the latter, "I'll give the Defendant the benefit of the doubt on that issue." But the court found:

Defendant failed to adhere to this Court's scheduling order, knew full well she would not [be] here for the final settlement conference and became unavailable for the trial ostensibly because she was ill and unable to travel. When I add all these things together, frankly, they don't lend any credibility to the Defendant as far as the Court is concerned.

The court informed the parties that it needed to take proofs "as to property and the like," but that "[t]he default regarding the annulment is still standing at this point." The court elaborated:

[A]nytime there is a default there usually is some form of evidence presented for the incorporation of that default into a default judgment. The default determines certain rights of the parties and/or limits the rights of the parties, dependent upon what the default is and what the default was about. Certainly, the prayer for relief was for a Judgment of Annulment. When the Defendant defaulted, it was the Court's understanding and the Court's ruling that the issue then of the annulment was no longer at issue before this Court. What was at issue then became the equitable issues that the Court is always confronted with and that is the determination of whether or not there's spousal support, distribution of property, retirement benefits and the like.

That same afternoon, the court continued the proceedings, taking testimony from plaintiff and defendant. Plaintiff was asked if there had been a breakdown in the marital relationship to the extent that the bonds of matrimony had been destroyed with no reasonable likelihood that the marriage could be preserved. The court also took testimony regarding the parties' personal

property and attorney fees. However, the trial court refused to allow either party to testify about defendant's purpose in marrying plaintiff.

The trial court entered a "Judgment of Annulment" that same day. The judgment stated: "[I]t satisfactorily appears that the material allegations in Plaintiff's complaint are true and there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and the marriage cannot be preserved, and that the Plaintiff is entitled to a judgment of annulment."

A trial court's decision on a motion to set aside a default judgment is reviewed for an abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552; 620 NW2d 646 (2001). Except when grounded on lack of jurisdiction over the defendant, a motion to set aside a default or a default judgment should be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Kowalski v Fiutowski*, 247 Mich App 156, 158; 635 NW2d 502 (2001). A judgment of annulment is a form of equitable relief. MCL 552.12. "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Questions of law are also reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

We first note that no default or default judgment was ever entered in this case. Docket entries reflect that a default was granted on April 16, 2009. However, as defendant pointed out in her motion to set aside the judgment, no default or default judgment is found in the lower court record. Courts speak through their written orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Moreover, the record shows that defendant was not served with notice that either a default or a default judgment had entered, as required by MCR 2.603(A)(2) and (B)(4). Thus, there was no reason for defendant to meet the good cause and meritorious defense requirements of MCR 2.603(D) for setting aside a default or default judgment.

Moreover, even if there had been a default judgment entered, plaintiff was required to present *proofs in open court* regarding grounds for an annulment. MCR 3.210(B)(2). In this case, that would mean evidence supporting his allegations of fraud. Yet, the court prevented the parties from testifying about this issue. No evidence of fraud is in the record. Plaintiff's mere allegations are clearly insufficient under the court rule to permit a default to enter. No other motion was made, and even if the proceedings are considered to be a bench trial, evidentiary proofs are completely lacking. The only proofs made support a judgment of divorce. Indeed, the grounds stated in the judgment are those supporting divorce. The court made no finding on the record regarding factual support for the remedy of annulment based on a claim of fraud.

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

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly