

STATE OF MICHIGAN
COURT OF APPEALS

ALADDIN FIREPLACE DESIGN CENTER,
LLC,

UNPUBLISHED
October 24, 2006

Plaintiff-Appellee,

V

No. 261769
Oakland Circuit Court
LC No. 05-063654-CK

AUTUMN RAE EICKENROTH, KENNETH
ALLEN SMITH, JAN MARIE BABEL,
THOMAS DONALD BABEL, and FIREPLACES
& MORE, INC.,

Defendants-Appellants.

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from a default judgment awarding plaintiff \$26,489.68 plus costs and attorney fees and from an order denying their motion to set aside the default. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 20, 2005, plaintiff personally served the individual defendants with a complaint alleging that it had sold fireplace equipment and related items to defendant Fireplaces and More, Inc. (“the corporation”) upon open account, and that the corporation owed it \$26,489.68 plus finance charges. In addition to counts of breach of contract and account stated, plaintiff alleged that the corporation was a contractor or subcontractor in the construction industry within the meaning of the Michigan Builders Trust Fund Act (MBTFA), MCL 570.151 *et seq.*, and that the individual defendants, as “shareholders, directors, officers, managers, employees, bookkeepers, and/or agents” of the corporation, had violated the MBTFA by fraudulently retaining construction funds for purposes other than to first pay subcontractors and materialmen.

On February 11, 2005, the 22nd day following service of the complaint, defendants filed their answer and a motion to change venue to Grand Traverse County. Also on the same day, plaintiff entered defendants’ default for failure to appear within 21 days following service of the

complaint.¹ A judgment was thereafter entered against the corporate defendant and the individual defendants, awarding plaintiff \$26,489.68, plus costs and attorney fees. The trial court subsequently denied defendants' motion to set aside the default judgment, holding that they had failed to set forth good cause as required by MCR 2.603(D)(1).²

This Court reviews a trial court's ruling on a motion to set aside a default for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). Generally, this Court will not set aside defaults that have been properly entered. *Id.* at 229; *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

Absent a lack of jurisdiction, a motion to set aside a default "shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). A party establishes good cause by showing either (1) a procedural irregularity or defect or (2) a reasonable excuse for not complying with the requirements upon which the default is based. *Alken-Ziegler, supra* at 233; *Barclay v Crown Building & Dev, Inc*, 241 Mich App 639, 653; 617 NW2d 373 (2000).

Defendants argue that they are entitled to have the default set aside pursuant to *Alken-Ziegler, supra*, because their defense—that they are not "contractors" within the meaning of the MBTFA—is "absolute." Under *Alken-Ziegler*, the strength of the meritorious defense asserted affects the good cause showing that is required from the party in default. *Id.* at 233. "[I]f 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 manifest injustice." *Id.* at 233-234.

However, the "good cause" and "meritorious defense" elements of a motion to set aside a default must be considered separately. *Id.* at 229-234. Manifest injustice is not an independent factor in establishing good cause. Rather, it is the result that would occur if a default were allowed to stand *after* a party had demonstrated good cause and a meritorious defense. *Alken-Ziegler, supra* at 233; *Saffian v Simmons*, 267 Mich App 297, 302; 704 NW2d 722 (2005). Thus, where the moving party has failed to establish good cause in the first instance, the court need not consider a defaulted party's alleged "meritorious defense." *Zaiter v Riverfront Complex Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001).

Defendants have failed to establish the existence of good cause. Defendants' proffered excuses for failing to file their responsive pleadings within the allotted time are (1) that they indicated to their attorney that they "believed" service of the complaint occurred on January 21, 2005; (2) that, had plaintiff chosen Grand Traverse County as the venue rather than Oakland

¹ Although there is some disagreement regarding the order of the entry of the answer and the default, the trial court's date stamp indicates that the answer was filed at 9:27 a.m. on February 11, 2005, and that the default was filed at 10:44 a.m. on that day.

² The trial court additionally refused to address defendants' motion for a change of venue, holding that it was not properly before the court pursuant to MCR 2.603(A)(3). This holding is not at issue on appeal.

County, the answer would not have been tardy because defendants' attorney's office is located near the Grand Traverse Circuit Court; and (3) that plaintiff should have filed its proofs of service earlier so that, when counsel called the trial court to determine the date of service, that information would have been available. No explanation is offered as to why defendants or counsel did not take further steps, such as simply checking the date on the summonses or contacting opposing counsel, to confirm their belief that service occurred on January 21. "A party is responsible for any action or inaction by the party or the party's agent." *Alken-Ziegler, supra* at 224. Therefore, where a party's attorney fails to timely respond to a complaint, that is generally not good cause to set aside a default. *Id.* at 224-225; see also *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996).

The trial court's denial of defendants' motion to set aside the default is entitled to great deference. *Alken-Ziegler, supra* at 228; *Saffian, supra* at 309. Where there has been a valid exercise of discretion, this Court's "review is sharply limited." *Alken-Ziegler, supra* at 227. Because defendants have failed to show good cause to set aside the default, this Court need not address their claim of meritorious defense. *Zaiter, supra* at 553 n 9.³

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder

³ Nevertheless, we note that defendants have additionally failed to establish a meritorious defense. Defendants cite absolutely no authority in support of their assertion that they are not "contractors" within the meaning of the MBTFA. A party may not leave it to the court to search for authority to sustain or reject its position. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).