

STATE OF MICHIGAN
COURT OF APPEALS

JP MORGAN CHASE BANK,

Plaintiff-Appellee,

UNPUBLISHED
November 19, 2013

v

GARY R. McMINN,

Defendant-Appellant,

No. 311115
Oakland Circuit Court
LC No. 2012-126509-CH

and

CHERYL LYNN CRISMAN,

Defendant.

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

PER CURIAM.

Defendant Gary R. McMinn ("McMinn") appeals as of right the trial court's order entering default judgment in favor of plaintiff JP Morgan Chase Bank ("JP Morgan") and denying his motion to set aside the default. We affirm.

I. FACTUAL BACKGROUND

This case involves real property commonly known as 687 Central Drive, Lake Orion, Michigan, that is comprised of two lots, described as Lot 15 and Lot 16. The house on the property is partially located on both lots. In 2004, McMinn granted Washington Mutual Bank a mortgage securing "Lot 15, of 'Orion Summer Home Co's, Subdivision'." After McMinn defaulted on his mortgage obligation, JP Morgan—which acquired McMinn's mortgage from Washington Mutual—foreclosed on the property, purchased the property at a sheriff's sale, and in April 2010 received a Sheriff's Deed conveying ownership of the property to it. McMinn then initiated a lawsuit in federal district court against JP Morgan challenging the foreclosure efforts and the validity of the mortgage and alleging predatory lending practices by Washington Mutual, JP Morgan's predecessor.

During the pendency of the federal court proceedings, McMinn conveyed Lot 16 to defendant Cheryl Lynn Crisman by quit-claim deed in exchange for \$1, apparently dividing the property in a manner that did not comply with local ordinances and clouding the title of the

property. JP Morgan also discovered, apparently during the federal court proceedings, that the mortgage erroneously omitted Lot 16 from the legal description of the mortgaged property.

In March 2012, JP Morgan and McMinn settled the federal lawsuit, and the federal court entered a stipulated order of dismissal, dismissing with prejudice all claims of the federal lawsuit. The stipulated order declared the foreclosure, sheriff's sale, and issuance of the sheriff's deed void and reinstated the mortgage as it was originally described, i.e., "Lot 15 of 'Orion Summer Co's Subdivision'." The stipulated order also stated, "[t]his order has no effect on the validity of the Mortgage against other property with legal descriptions different than the Property as listed herein."

Thereafter, on April 26, 2012, JP Morgan filed the instant lawsuit against McMinn and Crisman in which JP Morgan (1) sought reformation of the mortgage to correct the alleged erroneous legal description of the mortgaged property to include both Lot 15 and Lot 16, expressing the true intent of the parties when the mortgage was granted, and (2) requested the court to void the alleged invalid conveyance by quit-claim deed of Lot 16 to Crisman.

This appeal arises from the failure of McMinn to timely respond to JP Morgan's complaint, which led to the entry of default against McMinn and the court's subsequent entry of default judgment against him. McMinn claims that the trial court abused its discretion in denying his motions to set aside the default and default judgment because, in accordance with MCR 2.603(D)(1), he established good cause for his failure to answer the complaint in a timely manner and proffered a meritorious defense under the doctrines of res judicata and/or laches. We disagree.

II. SETTING ASIDE THE DEFAULT

"The question whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion." *Park v American Cas Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996); see also, *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011). "A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes." *Huntington Nat'l Bank*, 292 Mich App at 383. "[A]lthough the law favors a determination of claims on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 217; 760 NW2d 674 (2008), quoting *Alken-Ziegler*, 461 Mich at 229; see also *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Further, the applicability of res judicata and the equitable doctrine of laches present questions of law subject to de novo review. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

MCR 2.603(A)(1) authorizes the entry of a default against a party who fails to plead or otherwise defend as provided in our court rules, including a failure to timely file an answer. *Huntington Nat'l Bank*, 292 Mich App at 381. In the instant case, in accordance with MCR 2.105(A)(1), McMinn was personally served with the summons and complaint at his place of

employment on May 8, 2012. Under MCR 2.108(A)(1), McMinn was required to file an answer or responsive pleading within 21 days after being served with the summons and copy of the complaint. McMinn failed to do so, thereby warranting the entry of a default and default judgment against him under MCR 2.603. *Id.*

Under MCR 2.603(D)(1), upon motion by the defaulted party, the trial court may set aside a default or a default judgment if the defaulted party establishes good cause for failing to comply with the condition that led to the default and presents an affidavit of facts showing a meritorious defense. *Shawl*, 280 Mich App at 217. These are separate inquiries, and thus, a trial court should not consider whether a defaulted party asserted a meritorious defense in determining whether the party established good cause. *Alken-Ziegler*, 461 Mich at 230-234; *Huntington Nat'l Bank*, 292 Mich App at 390. However, “the strength of the defense will affect the ‘good cause’ showing that is necessary. In other words, 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[.]” *Alken-Ziegler*, 461 Mich at 233-234; see also *Shawl*, 280 Mich App at 237. A court must look to the totality of the circumstances in evaluating good cause. *Shawl*, 280 Mich App at 237-238.

III. GOOD CAUSE INQUIRY

“The good cause inquiry is satisfied if there is a substantial irregularity or defect in the proceeding on which the default is based or a reasonable excuse for failure to comply with the requirements that created the default.” *ISB Sales Co*, 258 Mich App at 531; see also *Shawl*, 280 Mich App at 221. In ascertaining whether the defaulted party has established good cause, the trial court should consider the totality of the circumstances. *Shawl*, 280 Mich App at 236-237. Relevant factors to consider include:

(1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due under MCR 2.603(D)(4); (8) whether the default judgment results in an ongoing liability (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed.” [*Id.* at 238.]

McMinn acknowledges a failure to respond to JP Morgan’s complaint in a timely manner and that his counsel miscalculated the requisite period of time to answer the complaint. McMinn also admits that he never contacted plaintiff’s counsel before the entry of default. Despite the miscalculation of time by his counsel and the lack of any allegation of a substantial irregularity or defect in the proceedings, McMinn contends that, considering the factors identified in *Shawl* in light of his absolute meritorious defenses under the doctrines of *res judicata* and/or *laches*, he satisfied the good cause requirement. We disagree.

The first *Shawl* factor weighs in favor of McMinn because he did not completely fail to respond to the complaint but simply missed the deadline to file an answer or responsive pleading. In fact, the default was entered only one day after McMinn missed the 21-day deadline to file an answer or responsive pleading under MCR 2.108(A)(1). The second and third factors also weigh in favor of McMinn because he promptly filed a motion to set aside the default on June 7, 2012, only eight days after the entry of default on May 30, 2012, and before the court's entry of the default judgment on June 13, 2012, and he filed his first responsive pleading, a motion for summary disposition on June 13, 2012, only 12 days after the entry of default. The fourth factor weighs against McMinn because there is no evidence of defective process or notice. McMinn was personally served with notice of JP Morgan's complaint, and, in fact, admits that he was properly served. The fifth factor also weighs heavily against McMinn because the circumstances behind the failure to timely file do not indicate any reasonable excuse for the delay. Instead, the delay was the result of his defense counsel's miscalculation of the requisite time period for answering the complaint. An attorney's miscalculation is generally not a ground for setting aside a default properly entered. See *Park*, 219 Mich App at 67. The sixth factor weighs in favor of McMinn because the evidence indicates that the failure to timely file was an unintentional mistake by defense counsel in miscalculating the requisite time period. There is no evidence or allegation indicating that McMinn intentionally delayed the proceedings. The seventh factor weighs against McMinn because the judgment is for equitable relief, not monetary damages. The eighth factor weighs in favor of McMinn because the default judgment does not result in an ongoing liability. Finally, the ninth factor, which is relevant where an insurer is involved, is not applicable here. See *Shawl*, 280 Mich App at 237-238.

Analyzing the factors outlined in *Shawl*, it is evident that JP Morgan was not likely prejudiced by McMinn's short delay in responding to its complaint, especially since McMinn filed his motion to set aside the default before the court entered the default judgment. In fact, JP Morgan does not claim that the delay prejudiced its ability to prove its case or to obtain the relief sought. On the other hand, McMinn presented no reasonable excuse for failing to timely file an answer or responsive pleading to plaintiff's complaint, which was properly served on him via personal service and provided notice of the pending proceedings. *Shawl*, 280 Mich App at 221. Instead, the delay was admittedly caused by defense counsel's miscalculation of the time to respond to the complaint, which is generally not good cause for setting aside a default. See *Park*, 219 Mich App at 67. Keeping in mind that "the policy of this state is generally against setting aside defaults and default judgments that have been properly entered," *Shawl*, 280 Mich App at 217, quoting *Alken-Ziegler*, 461 Mich at 229, and, absent a clear abuse of discretion, we will not reverse a trial court's ruling on a motion to set aside a properly entered default. *Alken-Ziegler*, 461 Mich at 227; *Park*, 219 Mich App at 66.

Under the totality of the circumstances, we cannot say that the trial court's decision in this case fell outside the range of principled outcomes so as to constitute an abuse of discretion. *Huntington Nat'l Bank*, 292 Mich App at 383. Although we recognize that a lesser showing of good cause is required if the defaulted party asserts a meritorious defense that would be absolute if proven, *Alken-Ziegler*, 461 Mich at 233-234; *Shawl*, 280 Mich App at 237, as we address below, we agree with the trial court that McMinn also failed to assert such a meritorious defense in his motion to set aside the default judgment.

IV. MERITORIOUS DEFENSE INQUIRY

In determining if a meritorious defense has been established, a court should consider whether the requisite affidavit asserting a meritorious defense contains evidence that: “(1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement; (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or (3) the plaintiff’s claim rests on evidence that is inadmissible.” *Shawl*, 280 Mich App at 238; MCR 2.603(D)(1). In his motions to set aside the default and default judgment, McMinn asserted as meritorious defenses to JP Morgan’s claims that the cause of action is barred under the doctrines of res judicata and laches.¹ As McMinn asserts on appeal, these alleged meritorious defenses would be “absolute as proven,” thereby lowering the necessary showing of good cause if the evidence presented supports them. *Alken-Ziegler*, 461 Mich at 233-234.

Pursuant to the doctrine of res judicata, “a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.” *Montana v US*, 440 US 147, 153; 99 S Ct 970; 59 L Ed 2d 210 (1979) (citations omitted). “Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action.” *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005), citing *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001). As in the instant case, where a federal court decided the prior action, the applicability of res judicata must be determined under federal law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999); *Beyer v Verizon North, Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006). The federal doctrine of res judicata is substantially similar to the doctrine of res judicata under Michigan law. *Pierson Sand & Gravel, Inc*, 460 Mich at 380. In *Beyer*, 270 Mich App at 428-429, this Court set forth the following rules to analyze res judicata where a state action follows a federal action:

Under federal law, res judicata precludes a subsequent lawsuit if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their “privies;”

¹ We note that McMinn did not assert any specific defenses in his affidavit of meritorious defenses as required under MCR 2.603(D)(1). Instead, the affidavit of meritorious defense filed with his motion to set aside the default generally stated: “If allowed the opportunity to substantively defend against this action, Defendants assert that they have an absolute defense to Plaintiff’s action and may have further meritorious defenses to the allegations made.” However, McMinn did specifically assert the defenses of res judicata and laches as meritorious defenses in his briefs in support of his motion to set aside the default and default judgment. On appeal, McMinn presents additional meritorious defenses to plaintiff’s claims, i.e., a lack of mutual mistake and failure to state a claim upon which relief can be granted. However, McMinn failed to specifically assert these defenses in his affidavit presenting a meritorious defense as required under MCR 2.603(D)(1) or in his motions to set aside the default and default judgment. Accordingly, the additional defenses he claims on appeal are not properly before this Court and we decline to address them. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003).

(3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.” [Citations and quotations omitted.]

McMinn’s proffered res judicata defense fails to fulfill the first element of the res judicata doctrine, because the claims raised in the instant action were not finally decided on the merits in the federal action. *Beyer*, 270 Mich App at 428-429. The stipulated order of dismissal at issue in the instant case explicitly states, “[t]his Order has no effect on the validity of the Mortgage against other property with legal descriptions different than the Property as listed herein.” It is apparent, therefore, from the express terms of the stipulated order that the parties intended for the stipulated order to govern only Lot 15 and did not contemplate as part of their stipulated agreement an adjudication of matters concerning the validity of the mortgage against and the rights of the parties regarding Lot 16. A “dismissal with prejudice arising out of an agreement of the parties is an adjudication of all matters contemplated in the agreement, and a court order which memorializes this agreement bars further proceedings.” *Nemaizer v Baker*, 793 F2d 58, 61 (CA 2, 1986). Accordingly, in light of the parties’ apparent agreement as expressed in the stipulated order of dismissal, we find that res judicata does not operate to bar JP Morgan’s instant action. Therefore, we agree with the trial court that res judicata is not a meritorious defense to support McMinn’s motion to set aside the default judgment, although for different reasons. See *Gleason v Dep’t of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003), citing *Mulholland v DEC Int’l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989) (“A trial court’s ruling may be upheld on appeal where the right result issued, albeit for the wrong reason”).

McMinn also asserted the doctrine of laches as a meritorious defense in his motion to set aside the default judgment. “The doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation.” *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 200; 596 NW2d 142 (1999). “The doctrine of laches is a tool of equity that may remedy the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.” *Public Health Dept v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996) (quotations and citation omitted). “It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party.” *Id.* (citations omitted). The doctrine of laches is not triggered by the passage of time alone. *Lothian v Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). Instead, “when considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay.” *Id.* It is the prejudice caused by the delay that justifies the application of laches. *Dunn v Minnema*, 323 Mich 687, 696; 36 NW2d 182 (1949).

McMinn contends that the alleged erroneous description in the mortgage occurred in 2004, at the time of the grant of the mortgage, approximately eight years before JP Morgan filed its complaint seeking reformation of the mortgage. He asserts that this delay in seeking reformation of the mortgage was untimely. JP Morgan claims that it did not discover the error in the legal description of the mortgaged property until after the original foreclosure on the property, after which it filed its claim, and thus, there was no untimely delay to invoke the doctrine of laches. Even assuming JP Morgan’s delay in filing its complaint seeking reformation of the description of the mortgaged property to include Lot 16 is unreasonably long, to invoke the doctrine of laches, McMinn was also required to demonstrate that he was prejudiced by the

delay. *Lothian*, 414 Mich at 168. A “mere delay in attempting to enforce a right does not constitute laches[.]” *Dunn*, 323 Mich at 696. McMinn, however, failed to assert in his motions to set aside the default and the default judgment how JP Morgan’s delay in seeking reformation of the mortgage prejudiced him. Accordingly, he also failed to assert a meritorious defense under the doctrine of laches.

V. CONCLUSION

In light of McMinn’s failure to establish good cause or a meritorious defense, we conclude that the trial court did not abuse its discretion in entering a default judgment in favor of JP Morgan or in denying McMinn’s motion to set aside the default judgment under MCR 2.603(D)(1).

Affirmed.

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