STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WEXFORD

ANDREA PETERSON,
Plaintiff,

v

File No. 98-13933-NO

RAYMOND WEIGEL,
Defendant
_____/

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_____/

OPINION ON MOTION TO SET ASIDE DEFAULT JUDGMENT

FACTS

A narrow issue is presented to the Court by this motion challenging a Default Judgment entered in this civil action for damages. The original Summons and Complaint were filed by the Plaintiff on July 14, 1998. On October 13, 1998, Proof of Service was made by Affidavit of a process server, Floyd Natzmer, which in regular form alleged that personal service of the Summons and Complaint together with jury demand were served on Defendant Raymond Weigel on July 31, 1998. The default of the Defendant was entered for failure to respond or defend on October 21, 1998. A Proof of Service indicates that the Application, Entry and Default of the Defendant were mailed to him on October 27,1998. Another Proof of Service indicates that a Motion for Entry of a Default Judgment, proposed Default Judgment, Notice of Request for Judgment and Notice of Hearing were all mailed to the Defendant on January 20,1998. On the date given in that notice (January 29, 1999) following proceedings before the Court in which again the Defendant did not appear either in person or by counsel, the Default Judgment was entered.

The Defendant now has moved the Court to set aside this Default Judgment alleging that in personam jurisdiction over the Defendant was lacking because the Plaintiff failed to effect personal service of the Summons and Complaint. The Defendant and his wife have filed Affidavits, and the process server has also filed an Affidavit in response setting forth their respective views of the events of July 31, 1998, during which the claim is made that the Defendant was personally served. While the versions of what happened that day differ in many particulars, they are not directly contradictory except for one point - that being whether the packet containing the Summons and Complaint actually ended up inside the home of the Defendant or on the ground outside the home when it left the hands of the process server. Reading the affidavits together on the points on which they agree, adding the parts from each which are not inconsistent with the other, leaving out the unimportant differences, and assuming that the declarants are being truthful, the events of July 31, 1998 transpired as follows:

> The process server, Mr. Natzmer, called the Weigel home on July 31 and spoke to Mr. Weigel by telephone and told him he had a package to deliver. No precise arrangements were made, but later in the day Mr. Natzmer went to the Weigel home. He rang the doorbell and the door was answered by Mrs. Weigel. In the course of approaching the door and having the door opened by Mrs. Weigel, Mr. Natzmer saw an elderly gentleman, presumably Mr. Weigel, in the home attempting to evade being seen. Mrs. Weigel asked Mr. Natzmer what he wanted and Mr. Natzmer (twice, according to him) told her that he had a package that he had to personally deliver to Mr. Weigel. Mrs. Weigel called for her husband, but he never came to the door. Finally Mrs. Weigel attempted to take the package from Mr. Natzmer's hand in spite of his insistence that it must be delivered to Mr. Weigel. She then started to shut the door and Mr. Natzmer either slid the package containing the Summons and Complaint through the door into the house or, according to Mrs. Weigel, threw it in the direction of her with it striking the door and landing outside (it is on this point that the material difference in the Affidavits occurs), followed by Mr. Natzmer leaving the residence. Mr. Natzmer further claims that he observed Mrs. Weigel throwing the package out of the home with it landing on the walk as he was leaving.

As noted, the motion is presented to the Court on Affidavits. No witnesses were presented at the hearing of the motion, nor were any other forms of evidence presented for fact-finding or credibility determination. Therefore, the following conclusions must be made:

1. The Defendant was not personally served with the Summons and Complaint in the sense that it was not placed in his direct physical control.
2. Mr. Natzmer did not indicate in his telephone conversation with Mr. Weigel his intended business beyond stating he had a package to deliver.
3. The package containing the Summons and Complaint ended up on the Defendant's walkway outside his house.
4. The Defendant, in his affidavit, unequivocally denies notice of the existence of this lawsuit prior to the notice of the request

for default judgment pleadings in January 1999.

On these facts, the Defendant claims that the Judgment is void, there being no jurisdiction for the Court to enter the Judgment based on the failure of personal service. The Plaintiff responds that the Defendant has had actual notice of these proceedings and the content of the lawsuit and points to various items of correspondence sent to the Defendant pre-suit and not returned, and also argues that admission by the Defendant that he received the default documents in January, 1999, coupled with his failure to seek relief from the default at that time, makes his current motion untimely.

LAW AND ANALYSIS

What seemed to the Court at first blush a relatively straightforward and obvious answer to this Motion was quickly rendered much more problematic by the observation in the Defendant's Brief, quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (4th ed) pp 319-320 to the following effect:

> "MCR 2.603(D)(2) and MCR 2.612(B) retain the qualifying phrase 'if personal service was made,' a remnant from GCR 1963, 520.4. The 1963 rules equated 'personal service' with 'personal jurisdiction.' This concept has been repudiated by recent court decisions, and by the current rules themselves. The jurisdiction of the Michigan courts is established by Constitution and statute; service of process satisfies the constitutional guarantees of due process. The two are not identical.
>
> If a Michigan court lacks subject matter jurisdiction, the resulting judgment is void. The same is true if personal jurisdiction over the defendant is necessary to render judgment and the court lacks it. A void judgment may be set aside at any time. This includes default judgments."

The commentator later reaches the issue at hand:

> "How then does one characterize a judgment in which service of process was not made on the defendant? The general rule is that a judicial proceeding conducted contrary to due process of law is void. This does not mean, however, that every minor violation of MCR 2.105 rises to constitutional status. The principal question is whether or not the process failed to inform the defendant of the existence of the action. The burden of proving lack of service rests on the party seeking relief.

The issue then reduces to this: On the facts of this case, was the failure of direct personal service such that it amounted to a constitutional due process violation rendering the default judgment void? If so, the relief from that judgment must be granted without further inquiry into the other qualifiers imposed on a defendant in MCR 2.203 or MCR 2.612.

We turn next to MCR 2.105 and its lessons on personal service, as well as to the cases, old and new. MCR 2.105(A) provides, in relevant part, that "(p)rocess may be served ... by, (1) delivering a summons and a copy of the complaint to the defendant personally..." The commentary in 1 Martin, Dean & Webster, Michigan Court Rules Practice at page 118 points out that the rule does not define what that means, (wisely?) leaving latitude in determining what constitutes delivery to depend on the circumstances of the case. The author goes on to point out that "(i)nforming the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to suffice to constitute 'delivery'."

Reviewing the cases dealing with the issue lends a flavor of what the appellate courts have found sufficient, and insufficient, to constitute personal service. In the beginning, we have People ex rel. Midler v. Superior Court Judge 38 Mich 310 (1878) which not only can stand for the proposition that leaving a copy of a complaint on an unconscious person does not constitute valid personal service, but also give comfort to current practitioners who daily face the criticism that modern lawyers are singularly callous and insensitive louts. In Midler, the plaintiff's attorneys instructed the process server to leave the documents on the body of the defendant who was apparently causa mortis - he died before the time that an answer to the complaint was due - and the Supreme Court expressed no reservation in finding this was insufficient service to bind the defendant or his executors. At the level of abstraction necessary to derive a principle from the case, it can be stated that a defendant must cognitively recognize that he/she has been served with the legal documents for the service to be valid.

We next turn to the line of cases which generally disallow service of legal process effected by forced entry into a defendant's residence. This principle is alluded to in Sterns v. Vincent 50 Mich 209 (1883), an execution and levy gone bad in a trover action. Justice Cooley in his opinion accepts without discussion the proposition that "(t)he protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take it by closing the door against the officer, or to waive it by allowing him to enter." Sterns v. Vincent, supra, at 219-220. This specific language is quoted with approval in Vanden Bogert v May 334 Mich 606 (1952), another execution and levy case, where the Court goes on to discuss the rationale behind the rule - the common law's jealous protection of the peace, security and repose of a person in their own dwelling house. From these cases we may conclude that the due process notice value is not the only policy consideration in the area.

Mitchell v Hines 305 Mich 296 (1943) presents the case most nearly on all four's with the case before the court - that of the evasive defendant. In that case, the process server by affidavit asserted that he saw the defendant in the yard, but when the process server approached the defendant, he ran into the house and closed the door. A co-defendant later came to the door but denied admittance to the process server, who eventually threw the summons and complaint into the kitchen after showing it to the co-defendant's wife. The Supreme Court again found no service, finding that "the original writ was not shown to Hines, nor was a copy deliv-

ered to him." Mitchell v Hines, supra, at 300. The Court, while disapproving of the defendant's evasion of service as a matter of public policy and denying him costs, nonetheless quashed the service.

People v Featherstone 93 Mich App 541 (1979) is accurately cited by the defendant for the proposition that service cannot be made by sliding documents under the door of a recipient's residence, although it must be noted on the facts of that case, there was no indication as to whether or not the process server knew that the recipient was in the house.

The plaintiff relies on the newer cases which emphasize the due process-notice principles and the current court rules; Hill v Frawley 155 Mich App 611 (1986) and Bunner v Blow-Rite Insulation Co. 162 Mich App 669 (1987). In Hill, service was attempted by registered mail, return receipt requested, on the defendant-doctor, but someone else signed the receipt while the defendant was on vacation. The Court of Appeals held that service in that case was sufficient, because the defendant "acknowledged receiving the summons and complaint by retaining counsel and filing a summary disposition motion." The analysis in this case is clearly based on the actual notice and the defendants acknowledgement of the same. Similarly, in Bunner the issue was whether service on a trustee in bankruptcy for a defunct corporation. The trustee forwarded the suit papers to an insurer, and a law firm filed a "notice of retention" in the litigation. The Court of Appeals here again had no trouble finding actual notice by the defendant's own acknowledgement of the same. It is important to note that in both of these cases, actual notice was conceded by the defendants.

Finally, the Court tenders for consideration but without discussion two relatively new cases: White v Busuito 230 Mich App 71 (1998) (particularly footnote 2 on page 73) and Perfect Services Group, Inc. v Sony Electronics, Inc. COA No. 209574 (1999), unpublished opinion - copy attached. The discussions in these cases add to the sense of what is to be considered in deciding this issue.

The contours of the law in this area as set out above confirms the Martin, Dean and Webster commentator's observation of what constitutes delivery: Informing the defendant of the nature of the papers, offering them to the defendant, and leaving them within his physical control. By these tests, service in this case fails on all three points. Mr. Netzer told the defendant on the phone he had a package for him. He refused to identify the nature of the contents of the envelope to the defendant's wife. No personal contact was made with the defendant in the way of presentation, and the package by both accounts ended up outside the house on the walk. The Court is asked to make various inferences as to the state of mind of the defendant based on assertions of the plaintiff's attorney not part of the record (earlier mailing efforts, the failure of the defendant to immediately respond when the default notice, which is acknowledged, was received), but such inferences cannot properly be made. The Court is certainly skeptical based on the circumstances (human nature would suggest that the package would have been retrieved from the walk and ultimately find its way to the defendant's attention), but at bottom, the Court is not willing, based on the evidence presented, to find the Defendant's statement under oath in his Affidavit that he had no notice of the

proceedings, to be perjurious. Since personal service on the defendant was not in fact made, a finding by the Court of a deliberate lie on that point would be required to sustain the Default Judgment entered.

CONCLUSION

For all of the reasons set out above, the Defendant's motion to set aside the Default and the Default Judgment must be granted. An Order so providing may enter, which by its terms shall allow the Defendant 21 days from the date of entry to file his answer and otherwise defend.

Dated: August 31, 1999

Kenneth L. Tacoma
Circuit Judge, acting by
SCAO Assignment

STATE OF MICHIGAN

COURT OF APPEALS

STATE OF MICHIGAN

COURT OF APPEALS

PERFECT SERVICES GROUP, INC.,

Plaintiff-Appellee,

v

SONY ELECTRONICS, INC.,

Defendant-Appellant.

UNPUBLISHED
July 2, 1999

No. 209574
Oakland Circuit Court
LC No. 97-000113 CK

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from an order denying its motion to set aside the entry of a default and default judgment. We reverse and remand for further proceedings.

I

Defendant argues that the trial court erroneously denied its motion to set aside the entry of default and default judgment where plaintiff served notice of the proceeding on defendant's counsel, Nehs. We agree that both the default and default and default judgment should have been set aside.

A trial court's decision to set aside or not set aside the entry of a default will not be reversed on appeal absent a clear abuse of discretion. Park v American Casualty Ins, 219 Mich App 62, 66; 555 NW2d 720 (1996). A party against whom a default or default judgment has been entered may be relieved from the same if good cause is shown and an affidavit of facts illustrating a meritorious defense is filed. MCR 2.603(D)(1). This Court, in Park, supra, 219 Mich App 67, described "good cause" as follows:

> Good cause sufficient to warrant setting aside a default or a default judgment includes: (1) a substantial defect or irregularity in the proceeding on which the default is based, (2) a reasonable excuse for the failure to comply with requirements that created the default, or (3) some other reason showing that manifest injustice would result if the default or default judgment were allowed to and

Here, defendant claims a substantial defect in the proceedings, namely that plaintiff failed to provide defendant with proper notice of the default. We

agree.

Defendant contends that its counsel had not appeared in the action, and that plaintiff was accordingly obligated to serve defendant in accordance with MCR 2.603(A)(2). Plaintiff agrees that there was no appearance, but instead argues that its service on Nehs satisfied the notice requirement, because this was sufficient to alert defendant to the proceedings.

MCR 2.603(A)(2) provides:

> Notice of the entry must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service ... [Emphasis added.]

There is no Michigan court rule or statute which defines or specifies what actions are necessary to constitute an "appearance" under this rule. Ragnone v Wirsing, 141 Mich App 263, 265; 367 NW2d 369 (1985). The Ragnone Court held that ... any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance."' Id, 265, quoting 6 CJS, Appearances, § 19, p 24.

Here, Nehs' and Hyman's minimal contacts with plaintiffs counsel regarding settlement and requests for extension do not constitute "recogni[tion of] the case in court." Indeed, plaintiff itself does not maintain that these contacts qualify as an appearance within the meaning of the court rule, but instead contends that service on the attorney was acceptable because the "purpose" of the notice requirement was fulfilled. This argument is without merit. The court rules objectively set forth requirements for serving notice of a default, and a litigant cannot evade these requirements upon a subjective showing that the "purpose" of the rule has been addressed.

Plaintiff cites Harvey Cadillac Co v Rahain, 204 Mich App 355; 514 NW2d 257 (1994), in support of its argument that compliance with the rule is not strictly necessary. Plaintiff alleges that in Harvey Cadillac, this Court held that the notice requirement was satisfied where the plaintiff served notice on the defendant's "former counsel". Plaintiff reads too much into Harvey Cadillac. Although the opinion makes reference to the "former counsel", nothing in the opinion states or suggests that this attorney had yet discontinued representing the defendant at the time the default was served. Accordingly, we conclude that plaintiff cannot satisfy the notice requirement by serving the default on an attorney who has not made an appearance on behalf of a defendant, even where the attorney maintains some degree of professional contact with the defendant.

In Perry v Perry, 176 Mich App 762, 770; 440 NW2d 93 (1989); Vaillencourt v Vaillencourt, 93 Mich App 344, 350; 287 NW2d 230 (1979), we held that the notice provision with respect to requests for default judgments, MCR 2.603(B)(1), is a mandatory provision, and that noncompliance constitutes the denial of due process, requiring that the default judgment be set aside. We also held that when there is noncompliance with MCR 2.603(B), the requirements

of MCR 2.603(D) do not need to be met in order for the defaulted party to prevail in an action to have the default judgment set aside. By analogy, the notice provision for entry of defaults provided by MCR 2.603(A) is also a mandatory provision. Accordingly, we hold that defendant does not need to satisfy the requirements of MCR 2.603(D) to have the default and default

judgment set aside. In any event, defendant has demonstrated a meritorious defense in addition to good cause. MCR 2.603(D)(1). Defendant's affidavit regarding plaintiff's misfeasance in performing its contract alleges facts which, if proved true, would reduce or possibly eliminate defendant's liability for the alleged breach of contract.

Reversed and remanded to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Jeffrey G. Collins

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