

MSC Opinion: Defendants entitled to relief from a default judgment under MCR 2.612(B) because they did not have knowledge of action and they demonstrated meritorious defense

5. July 2011 By Sarah Lindsey

In *Lawrence M. Clarke, Inc. v. Richo Constr., Inc.*, No. 140683, the Michigan Supreme Court held that the trial court abused its discretion when it denied defendants' motion to set aside a default judgment. In doing so, the Court determined that defendants were not personally notified of the default judgment, demonstrated a meritorious defense, entered an appearance within one year, and showed that no innocent third parties would be prejudiced. Accordingly, defendants were entitled to relief from the default judgment under MCR 2.612(B)(1).

The dispute arose when Plaintiff (general contractor) hired defendants (subcontractors) to work on the sewage system for a residential construction project. The defendants' work did not satisfy the governing municipality, and plaintiff alleges that the subsequent repair work was not satisfactory. Plaintiff later filed suit for breach of contract and fraud, but was unable to effect service because the house listed for defendants' corporation was vacated. As such, the case was dismissed without prejudice. Following the dismissal, plaintiff continued, unsuccessfully, to attempt to locate defendants. Plaintiff then re-filed the same complaint along with a motion to allow alternative service. The court allowed alternative service by posting the documents at defendants' registered addresses, mailing the documents to the registered addresses, and publishing a copy of the order in the county newspaper. After no response, the court entered a default judgment in the amount of \$371,598.37.

Defendants were later found and subsequently filed an emergency motion to set aside the default judgment. However, the motion was not accompanied by an affidavit as is required under MCR 2.603(D). Defense counsel later provided signed affidavits, but the trial court refused to consider them and denied defendants' motion to set aside the default judgment. The Court of Appeals affirmed the trial court's decision to deny the motion to set aside the default judgment, reasoning that defendants failed to file a timely affidavit in support of their motion.

The Michigan Supreme Court disagreed. The Court utilized MCR 2.612(B) rather than MCR 2.603(D). Under MCR 2.612(B), a court may grant relief from a default judgment if (1) personal jurisdiction over defendants was necessary and acquired; (2) defendants had no knowledge of the action pending against them; (3) defendants entered an appearance within one year after the final judgment; (4) defendants showed a reason justifying relief from the judgment; and (5) granting relief from the judgment would not prejudice innocent third persons. The Court also noted that an affidavit of meritorious defense is not expressly required under MCR 2.612(B), and the Court declined to opine whether an affidavit of meritorious defense must be simultaneously filed with a motion to set aside a default under 2.603(D)(1).

The Court applied each of the five factors. First, the court assumed *arguendo* that the trial court acquired personal jurisdiction over defendants, and thus the personal jurisdiction element was satisfied. Second, the Court applied *National Car Rental v. S & D Leasing, Inc.*, 89 Mich App 364 (1979), and concluded that defendants did not have *actual* knowledge (as distinguished from implied or constructive knowledge) of the action pending against them because they were never personally served with a summons and complaint, and they were not aware of the action until personal property was seized from them. Furthermore, in making this determination, the Court concluded that the method of substituted service was inadequate to provide defendants with actual knowledge of the action against them, because three of four of the trial court's requirements involved mailing service to the address that the court already knew was no longer a current address and the fourth requirement, publishing the order in the county newspaper, would be unlikely to succeed in providing actual notice. The Court also relied on *National Car* to conclude that defendants could satisfy the requirement of a "reason justifying relief from the judgment" by showing that they have a meritorious defense and that they did not have actual notice of the action. The Court concluded that defendants were able to show that they did not have actual notice, and they were also able to present facts showing meritorious defenses to plaintiff's breach of contract and fraud claims sufficient to justify relief from the default judgment. Additionally, the Court concluded that all parties to the contract were parties to the action, and thus no third parties would be prejudiced if the default judgment were to be set aside. The Court also determined that defendants made an appearance well within a year of the default judgment.

Ultimately, the Court concluded that defendants are entitled to relief from the default judgment under MCR 2.612(B) because they satisfied each of the five elements. Accordingly, the case was reversed and remanded to the trial court. In her concurring opinion, Justice Marilyn Kelly added that substituted service should not be permitted in a case such as this one, absent a showing that counsel made reasonable use of Internet search tools. She pointed out that defendants were eventually located using a Google search, and thus the use of electronic technology should be implemented in locating parties. Justice Hathaway also wrote a concurring opinion, stating that she did not believe that a court could assume that personal jurisdiction over defendants had been acquired. If personal jurisdiction was not obtained, then a defendant is not entitled to relief under MCR 2.612(B); rather, the judgment is void and the defendant may seek relief under MCR 2.612(C)(1)(d). Justice Hathaway concurred because she concluded that the trial court had acquired personal jurisdiction over defendants.