

STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Ave.
Grand Haven, Michigan 49417
616-846-8320

**GREAT LAKES LANDSCAPES AND
SNOW REMOVAL, LLC,**

Plaintiff,

v

TALLMADGE MEADOWS MHC, LLC,

Defendant.

**OPINION AND ORDER
SETTING ASIDE DEFAULT
AND DEFAULT JUDGMENT**

Case No. 2022-006940-CB

Hon. Jon A. Van Allsburg

_____ /

At a session of said Court, held in the Ottawa
County Courthouse in the City of Grand Haven,
Michigan on December 8, 2022.
Present: Hon. Jon Van Allsburg, Circuit Judge

Defendant moves to set aside the default judgment entered on September 21, 2022. Plaintiff served defendant's registered agent by certified mail on August 10, 2022. Although a responsive pleading was due by September 8, 2022, plaintiff sent notice to defendant that it would hold off on further action until September 14, 2022. Unfortunately, defendant mailed its response on September 14, 2022 to Muskegon County Circuit Court where another action between the parties is pending rather than Ottawa County Circuit Court. The Court concludes that the default judgment must be set aside to prevent manifest injustice.

Summary of the Facts

Plaintiff alleges that on April 20, 2020, it entered into a three-year contract with defendant to provide snow removal services from November 1, 2020 to April 15, 2023 for defendant's mobile home community properties. Plaintiff also alleges that defendant owed \$66,378.40 on a previous contract at the time that it entered the April 20, 2020 contract with defendant. The parties discussed a payment plan and promissory note to resolve the outstanding debt in May 2020, but plaintiff alleges that defendant never signed the note. Because defendant's payment delinquency continued, plaintiff stopped services in February 2021. An audit completed on June 11, 2021, revealed that defendant owed plaintiff \$86,256.32.

On July 27, 2022, plaintiff filed a complaint for breach of contract and account stated in the amount of \$86,256.32, and lost profits in the amount of \$46,409.65 for a total of \$132,665.97 plus costs, interest, and attorney's fees. Plaintiff served defendant's registered agent by certified mail on August 10, 2022. On September 14, 2022, defendant, through counsel, alleges that it filed an answer to the complaint, but mistakenly filed it in the Circuit Court for Muskegon County. Muskegon County Circuit Court emailed defense counsel on September 20, 2022, to alert him that it had no case by that name or number in its system. Defense counsel attempted to file the answer in Ottawa County on September 23, 2022, but because a judgment had been entered and the case closed on September 21, 2022, defendant was unable to do so. On October 11, 2022, defendant's counsel filed this motion to set aside the default and default judgment.

At a hearing on the motion on November 11, 2022, defendant argued that there was good cause and a meritorious defense to set the default aside. Defendant reasoned that his counsel committed excusable neglect when it filed the motion in Muskegon County Circuit Court. Counsel advised that this action is one of two between the parties and that there is also a case pending in Muskegon County Circuit Court. Defendant asserted that plaintiff never properly served the complaint and that it would be a manifest injustice to let the default stand. Defendant argues that there are several meritorious defenses, including that the plaintiff charged interest which the contract does not allow, and that plaintiff's future earnings calculations are not reliable and include abnormally high profit margins.

Plaintiff responds that on August 24, 2022, defendant's counsel confirmed service and informed plaintiff that defendant would send an answer and settlement offer. On September 7, 2022, the day before the 28-day deadline for a response, plaintiff had not yet received a response, and so sent a letter to defendant advising that plaintiff would wait one week before taking further action. On September 21, 2022, having received no response, plaintiff filed a Notice of Default and Default Judgment which the court entered the same day. Plaintiff argues that defendant had multiple opportunities to file properly and that failure to file is attorney error and not just cause to set aside a default. Plaintiff further argues that a meritorious defense requires specifics and details, not just general denials. Plaintiff asserts that setting aside the Judgment will further prejudice plaintiff due to delay, as it has already waited years for payment and will have to wait even longer if further legal procedures are required.

Law and Analysis

"A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and a statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109 (D)(3), is filed." MCR 2.603 (D)(1). Where personal service is made, defendant must file the motion within 21 days after the default judgment was entered. MCR 2.603 (D)(2).

As a threshold matter, the court considers defendant's argument that it was not properly served with the initial complaint, which would suggest that the court does not have jurisdiction over the defendant. However, the court rules were modified in the past year to clarify service of process on a limited liability company. "Service of process on a limited liability company may be made by: (1) serving a summons and a copy of the complaint on the managing member, the non-member manager, or the resident agent; (2) serving a summons and a copy of the complaint on a member or other person in charge of an office or business establishment of the limited liability company and sending a summons and a copy of the complaint by registered mail, addressed to the registered office of the limited liability company." MCR 2.105(H). The court rules further provide that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." MCR 2.105(K)(3). A summons expires 91 days after the date the summons is issued. MCR 2.102(D).

In this matter, plaintiff filed its complaint on July 27, 2022. Plaintiff served defendant by certified mail on its registered agent in compliance with MCR 2.105(H) 14 days after filing on August 10, 2022, in compliance with MCR 2.102(D). The court finds that service was proper. However, even if service was improper, the court could not find that the Default should be set aside on those grounds. Once defendant received service via registered mail, defendant hired counsel. Defendant's counsel contacted plaintiff's counsel on August 24, 2022, acknowledged receipt of the Complaint, and expressed an intent to answer. Defendant's counsel's appearance was filed on September 23, 2022. On November 11, 2022, defendant's counsel appeared and argued the motion to set aside the Default Judgment. This indicates that defendant was timely and properly informed of the action. Moreover, The Supreme Court has repeatedly held that "[a] general appearance waives all questions of the service of process, and is equivalent to a personal service."¹ The Court finds that service on defendant was proper and that it has jurisdiction over defendant in this matter.

Next, defendant alleges that there is good cause and a meritorious defense to set aside the default judgment. "[G]ood cause' includes: (1) a substantial irregularity or defect in the proceeding upon which the default is based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result if the default is not set aside." *Reed v Walsh*, 170 Mich App 61, 65; 427 NW2d 588 (1988). Here defendant argues that there is a reasonable excuse, meritorious defense and that manifest injustice would result if the Court does not set aside the default.

¹ See *Nelson v McCormick*, 334 Mich 387, 390; 54 NW 2d 694 (1952); *Hempel v Bay Circuit Judge (syllabus)*, 222 Mich 553; 193 NW 281 (1923); *Fisher v Fisher*, 224 Mich 147, 149; 194 NW 488 (1923).

Specifically, defendant contends that it had a reasonable excuse for its untimely answer because its counsel sent its response to plaintiff's complaint to the wrong county clerk where another action between the parties is pending. Plaintiff's counsel argues that this is attorney negligence, which does not qualify as a reasonable excuse under the court rules. Plaintiff correctly points to case law that supports its position that such inaction is not excusable neglect. The Court in *Daugherty v State*, 133 Mich App 593, 598; 350 NW2d 291 (1984) found that "a busy schedule and heavy caseload do not constitute a reasonable excuse for failure to file a timely answer" citing *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Michigan*, 119 Mich App 671, 674-375; 326 NW2d 599 (1982). Yet, in *Daugherty*, 133 Mich App at 598-599, the Court of Appeals still set aside the default judgment to avoid manifest injustice. It reasoned that

[D]efendants will suffer manifest injustice if the default is not set aside. First, defendants have established the existence of a meritorious defense and raised serious questions of that that should be determined in a trial on the merits.... In addition, there is no evidence that defendants intentionally attempted to delay the adjudication of plaintiff's claims by failing to timely file their answer.... We do not perceive that plaintiff has been prejudiced by defendants' default. Any financial burden resulting from the delay and default can be alleviated by requiring defendants to pay plaintiff's costs incurred in relation to the default and subsequent motions to set aside the default. Therefore, plaintiff has suffered no irreparable injury as the result of defendants' failure to timely file their answer.

The Court of Appeals also found manifest injustice in *Reed v Walsh*, 170 Mich App 61; 427 NW2d 588 (1988). In that case defendant failed to respond to plaintiff's complaint for damages. In its motion to set aside default, defendant argued that it did not know about the answer deadline and presented a strong meritorious defense. Defendants were served with the complaint on September 13, the Default was entered on October 17, and the defendant filed its motion to set aside on November 1. The Court of Appeals found that while defendant's "lack of knowledge of the law and its consequences will not necessarily provide a reasonable excuse and good cause to set aside a default," it was enough here where "there is no evidence ... that defendant intentionally attempted to delay adjudication ... and defendant's inactivity was not very long. Defendant responded on November 1 to set aside the default entered on October 17. Furthermore, there is no prejudice to plaintiff, as that term is understood in this setting, if the default is set aside and there is a trial on the merits. Finally ... defendant did present a meritorious defense." *Id.* at 66.

In *Alken-Ziegler v Waterbury Headers Corp.*, 461 Mich 219, 233; 600 NW2d 638 (1999), the Supreme Court offered additional instruction and support for these rulings when it noted that the "third prong" of the "good cause" test is problematic and leads to misunderstanding of the rule. The Court cannot analyze manifest injustice independently of the meritorious defense like it can prongs one and two of the good-cause test (substantial irregularity and reasonable excuse). "[P]roperly viewed, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the "meritorious defense" and "good cause" requirement of the

court rule. When a party puts forth a meritorious defense and then attempts to satisfy ‘good cause’ by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will effect 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, in order to prevent a manifest injustice.” *Id.* at 233-234.

Because decisions to set aside defaults require the Court to carefully analyze the unique facts of each case, the Court of Appeals in *Shawl v Spence Bros., Inc.*, 280 Mich App 213; 760 NW2d 674 (2008), advocates for a totality of the circumstances test to assist trial courts in their analysis of good cause in meritorious defense. “With an already existing relationship between [good cause and meritorious defense], we believe that balancing these factors to come up with an overall assessment under the totality of the circumstances provides a better, more easily applied rule because it supplies a flexibility that takes into consideration the variable, fact-intensive nature of default cases, avoiding bright-line distinctions that fail to balance the dueling public policy issues of having cases decided on the merits and not setting aside properly entered default judgments.... In determining whether a party has shown good cause the trial court should consider the following factors:

- (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 default 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...; and
- (9) if an insurer is involved, whether internal policies of the company were followed.” *Id.* at 237-239.

In *Shawl* at 238, the Court of Appeals offers guidance to determine whether a meritorious defense exists. “The trial court should consider whether the affidavit 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.” Plaintiff asserts that defendant’s affidavit includes “general allegations of denial [that] are insufficient to establish a meritorious defense.” *Plaintiff’s Responsive Brief* at 4 (November 11, 2022). The Court disagrees.

In this case, plaintiff alleges three causes of action against defendant: breach of contract, account stated, and lost profits. The elements of a breach of contract claim are (1) a valid enforceable contract; (2) a breach of contract either by refusal to perform or by performance that does not conform to the contract's requirements; and (3) damages caused by the breach. Defendant asserts that plaintiff was first to breach the contract and that defendant informed plaintiff that its services did not meet industry standards. Defendant also asserts multiple issues with the assessed damages, which include interest and lost profit claims that are not contemplated in the contract, and improper charges. If proven, these defenses would likely reduce the payment obligation or relieve defendant of payment obligations altogether. Further, a necessary element of a lost profits claim is an underlying breach of contract. The court finds that these are serious questions that should be determined in a trial on the merits for both the breach of contract and lost profit claims.

To succeed on the account stated claim, plaintiff must show a series of monetary transactions between the parties over time; agreement on the amount due (express or implied by circumstances); and a promise to pay the amount due (express or implied by circumstances).² Plaintiff contends in its complaint that the account became stated pursuant to MCL 600.2145. An account stated claim is a common law cause of action that can be supported with an affidavit that, if undisputed, is prima facie evidence of the current balance due. Plaintiff did not provide an affidavit with its complaint, so there is no prima facie evidence in this case. Instead the court must rely on common law for its analysis of the merit of defendant's defenses.

Defendant alleges inaccuracies with plaintiff's accounting and disputes the terms of the underlying contract, specifically as to interest. Defendant also denies that it ever received the accounting statement included in plaintiff's complaint. If proven, these are absolute defenses to plaintiff's account stated claim and are, therefore, also meritorious defenses.

Because this court finds meritorious defenses to plaintiff's claims, it must consider this as part of its good-cause analysis pursuant to *Alken-Ziegler* and *Shawl*. In this case, Plaintiff served its complaint on defendant on August 10, 2022. Plaintiff asserts that it sent defendant's counsel a letter on September 7, 2022, stating that plaintiff would wait one week before taking additional action, which effectively provided defendant until September 14, 2022 to respond. On September 14, 2022, defendant mailed its answer to Muskegon County Circuit Court where there was another case ongoing between the Parties. Because Muskegon County does not have a formal e-filing system and defendant mailed its answer, defendant did not receive notice of the error until September 20, 2022. He tried to correct this error and file in Ottawa County Circuit Court on September 23, 2022, but could not because a default Judgment had been entered two days earlier. Defendant filed the present motion on October 10, 2022, 19 days later.

² Frederick A. Acomb Et Al., *Chapter 18: Contract and Related Actions*, in ICLE Michigan Causes of Action Formbook, at <https://www.icle.org/modules/books/chapter.aspx?lib=litigation&book=2020555610&chapter=18> (last updated 11/25/2022).

Given that there was other action ongoing between the parties in Muskegon County, and weighing the factors outlined in *Shawl*, the Court finds that the default judgment must be set aside to avoid manifest injustice. Defendant answered within a reasonable time after the date provided by plaintiff, but unintentionally filed it in the wrong court due to other ongoing litigation between the parties. This error is akin to the oversight in *Daugherty*. Taken on its own, it may be “mere negligence and not good cause,” *Daugherty*, at 598, but here, where defendant has meritorious defenses to all three counts, the court follows the manifest injustice standard outlined in *Alken-Ziegler* and requires a lesser showing of good cause due to the meritorious defenses.

The Court also distinguishes this case from *Reed* and *Daugherty* because of the simultaneous litigation in neighboring counties and finds that this mistake is more excusable and more reasonable than the mistakes in those cases where deadlines were missed because counsel was busy (*Daugherty*) or because defendant did not know of the filing requirements (*Reed*). Like *Reed*, there is no evidence to suggest that defendant wishes to improperly “delay adjudication and defendant’s inactivity was not very long.” Plaintiff will not be significantly prejudiced if the default is set aside, and the meritorious defense is significant.

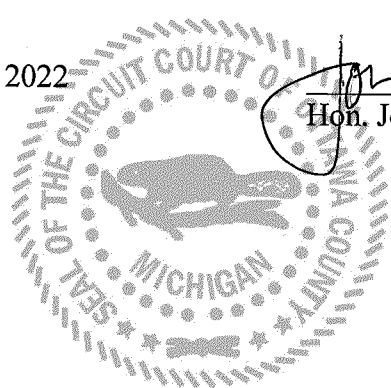
As an additional note, defendant also correctly asserts that MCR 2.603(D)(3) allows the court to set aside a default judgment in accordance with MCR 2.612. Defendant argues that its untimely and improperly filed pleading is excusable neglect under MCR 2.612(C)(a). Because the court finds that the default must be set aside to avoid manifest injustice, it declines to consider this argument.

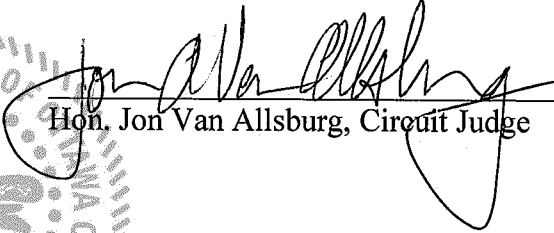
Conclusion

Defendant shall submit an Order setting aside the Default and Default Judgment, and shall file an Answer and take such other action as is authorized under the Michigan Court Rules within fourteen (14) days of this Order. MCR 2.603(D)(4) and MCR 2.625 require that an Order that sets aside a default judgment be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default judgment, which may include reasonable attorney fees. Defendant shall pay such taxable costs and fees within 14 days. If the parties are unable to agree on the amount of such costs, plaintiff may move for determination of such costs and fees.

IT IS SO ORDERED.

Dated: December 8, 2022




Hon. Jon Van Allsburg, Circuit Judge