STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

DONALD E. BURKE and GAIL F. BURKE,
husband and wife,

Plaintiffs,

v

File No. 97-7376-NZ
HON. PHILIP E. RODGERS, JR.

TOP O' MICHIGAN ELECTRIC COMPANY
and LAKE STATES TREE SERVICE, INC.,
jointly and severally,

Defendants.
/

Thomas W. Annelin (P29695)
Attorney for Plaintiffs

Joseph R. Enslen (P46237)
Attorney for Defendant Lake States Tree Service, Inc.

DECISION AND ORDER ON THE DEFENDANT LAKES STATES TREE SERVICE, INC.'S MOTION TO SET ASIDE DEFAULT JUDGMENT, FOR RELIEF FROM JUDGMENT, AND FOR A STAY OF FURTHER PROCEEDINGS AND ON DEFENDANT'S OBJECTION TO PLAINTIFFS' SECOND REQUEST AND WRIT FOR GARNISHMENT

This action was filed in August of 1997. The Defendant Lake States Tree Service, Inc. ("LSTS") failed to appear and defend. The Co-Defendant, Top O' Michigan Electric Company, appeared and ultimately settled with the Plaintiffs. A Judgment in the amount of $25,000.00 was entered against Defendant Top O' Michigan Electric Company only on October 5, 1998. On October 21, 1998, a satisfaction of that judgment was filed.

On January 19, 1999, the Court held a hearing on the Plaintiffs' motion for entry of default judgment against LSTS. The Court heard testimony and received exhibits, including documentation regarding diminution in the value of the Plaintiffs' property and restoration costs. On February 2, 1999, the Court entered a default judgment against LSTS in the amount of $144,021.53.

On November 4, 1999, LSTS filed a Motion to Set Aside Default Judgment, For Relief From Judgment, and For a Stay of Further Proceedings. On November 18, 1999, LSTS also filed an Objection to Plaintiffs' Request and Writ for Garnishment. The Plaintiffs filed an untimely response. On December 20, 1999, the Court heard the oral arguments of counsel and took these matters under advisement. The Court

having considered the motions, responses, objections, and arguments, and otherwise being fully advised in the premises, now renders this written Decision and Order denying the Defendant's motions and granting, in part, the Plaintiffs' Request and Writ for Garnishment.

ISSUES PRESENTED

I. Whether the Court should set aside the default judgment entered against LSTS.

II. Whether LSTS is entitled to a set off of the amount paid by the Co-Defendant.

I.

The Court's analysis of the first issue presented involves application of MCR 2.603(D)(3)[1] and MCR 2.612.[2]

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[1]MCR 2.603(D) provides, in pertinent part, as follows:

(1) 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 an affidavit of facts showing a meritorious defense is filed.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may only be set aside if the motion is filed

(a) before entry of judgment, or

(b) if judgment has been entered, within 21 days after the default was entered.

(3) In addition, the court may set aside an entry of default and a judgment by default in accordance with MCR 2.612.

(4) An order setting aside the default must be conditioned on the party against whom the default was taken paying the taxable costs incurred by the other party in reliance on the default, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

The "good cause" requirement may be satisfied by showing:

(1) a substantial defect or irregularity in the proceedings upon which the default was 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 from permitting the default to stand." 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 662, quoted in *Bigelow v Walraven*, 392 Mich 566, 576, n 15; 221 NW2d 328 (1974).

[2]MCR 2.612 provides, in pertinent part, as follows:

(B) Defendant Not Personally Notified. A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

Where a default judgment has been entered, a motion to set aside is to be decided according to the guidelines set forth in MCR 2.612. *Komejan v Suburban Softball, Inc*, 179 Mich App 41, 49-50; 445 NW2d 186 (1989). LSTS claims that it never received notice of these proceedings and that it has a meritorious defense.

Although LSTS claims that it never received notice of this action and never received notice of the motion for entry of a default judgment or entry of the default judgment, the Court's file indicates that LSTS was served by certified mail on September 2, 1997. At oral arguments, counsel for LSTS acknowledged that the person who was listed with the State as its registered agent was served with process. However, LSTS contends this that person was no longer its registered agent, so that LSTS was not served. LSTS concedes that it failed to update the State's records as required by law. Further, when the person who was served denied he was then LSTS's registered agent, service was obtained upon LSTS pursuant to MCR 2.603(B)(1)(c). Further, LSTS continued to do business with the Co-Defendant Top O' Michigan Electric Company who was served and actively engaged in this litigation. LSTS admittedly settled Top O' Michigan's indemnification claim against it for $30,000.00. (See LSTS Brief in Support at p 8.)

Since the default judgment was entered on February 2, 1999, the Plaintiffs have recovered $78,101.49 from LSTS through garnishment proceedings. LSTS must have been aware of the garnishment proceedings. Thus, there is ample evidence in the record that LSTS was aware of this litigation long before it filed these

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(C) Grounds for Relief From Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

(3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

motions. Finally, the affidavit of James Leibenguth and the attachments thereto evidence that LSTS, through its agents and employees, had actual notice of this litigation.

The Defendant LSTS has failed to persuade this Court that it was not aware of the pendency of this action. Even if the Court were to assume that LSTS did not have actual knowledge of the pendency of this action, there is no reason to justify granting LSTS relief. The Plaintiffs' initial inability to properly serve LSTS was occasioned by LSTS's failure to update the State's records to reflect the name and address of its current registered agent. The failure of a corporation to follow basic state laws designed to insure that it receive notice does not constitute non-culpable negligence nor good cause to set this judgment aside.

The showing of a meritorious defense and factual issues for trial have been held by the Court of Appeals, under certain circumstances, to fulfill the good-cause requirement by way of constituting a reason evidencing that manifest injustice would result from permitting a default to stand. See *Daugherty v Michigan* (After Remand), 133 Mich App 593, 598-602; 350 NW2d 291 (1984); *Hunley v Phillips*, 164 Mich App 517, 523; 417 NW2d 485 (1987); *Reed v Walsh*, 170 Mich App 61; 427 NW2d 588 (1988). The Michigan Supreme Court, however, recently criticized the Court of Appeals for "blur[ring] the separate requirements of 'good cause' and 'meritorious defense' under MCR 2.603(D)(1)." *Alken-Ziegler v Waterbury Headers Corp*, ____ Mich ____; 600 MNW2d 638, 643 (1999). The Court went on to explain:

> The court rule requires a party seeking to set aside a default or a default judgment to demonstrate good cause and to file an affidavit showing a meritorious defense.
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> * * * * * *
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> 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 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, in order to prevent a manifest injustice."

Id at 645.

This Court does not view the defenses asserted by LSTS as meritorious, substantial, deserving of factual development at trial, or sufficient to require the setting aside of the default judgment in this case.

II.

RIGHT OF SET OFF

LSTS raised the issue of whether it was entitled to a set off for the amount paid by the Co-Defendant Top O' Michigan Electric Company pursuant to its settlement with the Plaintiffs. As mentioned above, judgment in the amount of $25,000.00 was entered against the Co-Defendant on October 5, 1998 and a

satisfaction of that judgment was filed on October 21, 1998.[3] Presumptively, the Plaintiffs were paid the $25,000.00.

Under the contribution-release statute, MCL 600.2925b and 600.2949, the liability of a defendant nonsettling tort-feasor is the total liability of the joint tort-feasors minus the amount of the settlement of the settling tort-feasor. The award is not reduced by an amount proportionate to a settling tort-feasor's percentage of negligence. *Mayhew v Berrien Co Road Comm,* 414 Mich 399; 326 NW2d 366 (1982). Thus, LSTS is entitled to a set off of $25,000.00, an amount equal to the amount the Co-Defendant Top O' Michigan paid to the Plaintiffs.

CONCLUSION

The Defendant Lake States Tree Service, Inc. has failed to show that it did not have notice of these proceedings. The Defendant Lake States Tree Service, Inc. has failed to show that it has a meritorious defense. Therefore, the Defendant's Motion to Set Aside Default Judgment and Motion for Relief From Judgment should be and hereby are denied.

LSTS is entitled to a set off in an amount equal to the value of Plaintiffs' settlement with the Co-Defendant Top O' Michigan or $25,000.00. The judgment against LSTS for the full amount of the Plaintiffs' damages should be and hereby is reduced by $25,000.00. The total amount that the Plaintiffs are entitled to recover against LSTS is reduced from the judgment amount of $144,021.53 to $119,021.53. The Defendant's Motion to Stay Further Proceedings is denied. The Defendant's objection to garnishment is denied. The Plaintiffs' Request and Writ of Garnishment is granted, but limited to any outstanding amounts due consistent with this Decision and Order.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/24/00

[3]LSTS also states in its brief at page 8 that Top O' Michigan sought indemnification from LSTS and settled with LSTS for $30,000.00. The Court does not know why the parties settled the indemnification claim for more than the $25,000.00 that Top O' Michigan paid the Plaintiffs, but for the purposes of the contribution-release statute, that amount is irrelevant.