

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE**

SAMUEL SWEET, R/E, LLC,
Plaintiff

v

DENNIS and PATTI MONTAGUE,
Defendants

Case No. 19-112353-CB
Hon. Michael P. Hatty

**OPINION AND ORDER REGARDING DEFENDANT’S
MOTION TO SET ASIDE DEFAULT AND PLAINTIFF’S
MOTION FOR ENTRY OF DEFAULT JUDGMENT**

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 29th day of August, 2019.

THIS MATTER COMES before this Court on the Parties’ competing motions: Defendant’s Motion to Set Aside Default and Plaintiff’s Motion for Entry of Default Judgment, this Court having reviewed the documents on file, having heard oral argument from the parties, being otherwise fully advised in the premises, and for the reasons set forth herein, GRANTS Defendant’s Motion to Set Aside Default and DENIES Plaintiff’s Motion for Default Judgment. Accordingly, the default entered against Defendant is set aside on the condition that with 14 days of this Order Defendant pay \$500 to Plaintiff, through its attorney, and file and serve an answer to the complaint.

I

Plaintiff filed this action on February 28, 2019, seeking the foreclosure of an unrecorded 2013 land contract concerning certain real property located in Richfield Township, Genesee County, State of Michigan. Defendant Patti Montague (“Defendant”) was personally served with

process on March 17, 2019. Defendant Dennis Montague apparently passed away on May 11, 2018. This action was originally assigned to Genesee County Circuit Court Judge Celeste D. Bell, but was reassigned to Genesee County Business Court Judge F. Kay Behm on March 6, 2019, pursuant to MCL 600.8035 and MCR 2.112(O)(3). The Genesee County Circuit Court Clerk entered a default against Defendant on April 25, 2019. Defendant was served with this default on April 29, 2019.

Plaintiff filed its instant Motion for Entry of Default Judgment on May 8, 2019. Defendant was served with the same on May 7, 2019. Defendant filed her instant Motion to Set Aside Default on May 10, 2019. Plaintiff was served with the same that same day. Judge Behm disqualified herself from this matter on May 15, 2019, and this Court was assigned the matter by the Supreme Court Administrative Office on May 22, 2019.

II

Defendant attaches two affidavits to her instant motion: one Affidavit of Meritorious Defense subscribed and sworn to by herself and one Affidavit of Good Cause subscribed and sworn to by attorney Sean O'Bryan. As to good cause, Mr. O'Bryan asserts that he was representing Defendant at the time and that he was under the impression, whether mistakenly or not, that the Parties had agreed that Plaintiff would not obtain a default against Defendant while they negotiated a settlement of the matter in good faith, that he is "not a litigator," and that he would have sought a different attorney to represent Defendant in this matter if litigation proceeded. Defendant asserts reliance on this purported arrangement, or at least the advice of her previous counsel, in not filing an answer to the complaint. As to a meritorious defense, Defendant argues that she and her husband made regular payments on the underlying land contract, which was originally entered into by the parties in 2007 and modified in 2013; that the interest, amortization schedule, and 2017 balloon payment were improperly calculated by

Plaintiff; and additional arguments concerning the sufficiency of Plaintiff's pleadings, the competency of the parties to contract, and the meeting of the minds between the parties concerning multiple contracts. Plaintiff refutes these allegations and argues that it is entitled to the relief provided for in the Parties' agreement and the laws of this state and that this Court should enter a default judgment against Defendant because she failed to properly defend this action.

III

MCR 2.603(D)(1)-(2) provides that other than for reasons of lack of jurisdiction over the defendant and grounds for relief provided for under MCR 2.612, a default may be set aside if a motion requesting such relief is filed before entry of the default judgment and "only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(4) provides that an order setting aside a default "must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default... [together with any] other conditions the court deems proper, including a reasonable attorney fee."

Good cause sufficient to set aside a default means: "(1) a substantial irregularity or defect in the proceeding upon which the default is based, [or] (2) a reasonable excuse for failure to comply with the requirements that created the default." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). The Michigan Court of Appeals created a totality of the circumstances test for determining whether a party has demonstrated good cause for purposes of setting aside a default or default judgment. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 236; 760 Mich App 213; 760 NW2d 674 (2008). The trial court should consider the following factors in making this determination:

- (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;
- (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.

Shawl at 238.

The requisite affidavit of meritorious defense must be based on “personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth.” *Huntington National Bank v Ristich*, 292 Mich App 376, 392; 808 NW2d 511 (2011). To determine whether a meritorious defense has been presented, courts may consider whether “(1) [t]he plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement; (2) [a] ground for summary disposition exists... or (3) [t]he plaintiff’s claim rests on evidence that is inadmissible.” *Shawl* at 238.

Both the lists of factors to consider in determining whether good cause and a meritorious defense exists are not exhaustive, and the court should only consider those factors that are relevant to the case and should exercise its discretion in deciding how much weight each factor should receive. *Id* at 239. Ultimately, the decision whether or not to set aside a default should be based on the totality of the circumstances:

We base the need for a “totality of the circumstances” test in part on the broad elements considered in the cases discussed earlier and in part on the Michigan Supreme Court’s recognition that although “good cause” and a “meritorious defense” are separate requirements that may not be blurred and that a party must have both, there is some interplay between the two: 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. With an already existing relationship between the two requirements, 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.


Id at 237 (internal quotations omitted).

IV

This Court finds that Defendant has put forth good cause and raised a meritorious defense warranting the default entered against her to be set aside. With regard to the alleged good cause, this Court finds that her reliance on the purported understanding between the attorneys at that time and between herself and Mr. O'Bryan as sufficient considering the meritorious defenses raised, which will be discussed later. This Court does not believe that Defendant must prove Plaintiff or Plaintiff's attorney misrepresented any matter or committed fraud in order for this Court to make such a determination. Thus, no evidentiary hearing is necessary. As to the defenses raised by Defendant, she is correct that MCR 2.113(C)(1) requires that when a claim is based on a written instrument, said instrument must be attached as an exhibit to the pleading or the written instrument must be (a) a matter of public record, (b) in the possession of the adverse party and the pleading so states, or (c) inaccessible to the pleader and the pleading so states. Upon review of the complaint, Plaintiff has not complied with this Court rule. A defense is meritorious if plaintiff's complaint is insufficient as a matter of law. *Lindsley v Burke*, 189 Mich App 700, 702-703; 474 NW2d (1991). This Court further finds that the remaining defenses raised in Defendant's instant Motion are sufficient such that this matter should be decided on the merits. Because this Court is granting Defendant's Motion to Set Aside Default, Plaintiff's Motion for Entry of Default Judgment is DENIED as moot.

Further, pursuant to MCR 2.603(D)(4), this Court's granting of Defendant's Motion to Set Aside Default is conditional, in that Defendant shall pay \$500 to Plaintiff, through its attorney, and file and serve an answer to the complaint with 14 days of entry of this Order; otherwise Defendant's Motion is denied and the default is confirmed.

IT IS SO ORDERED.



Michael P. Hatty
Circuit Court Judge