

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

LISA CAPOCCIA-LEONE,
LORETA "LAURA" MARTIN, and
RANDY MARTIN,

Plaintiffs,

vs.

Case No. 17-2548-CB

ANTONIO CAPOCCIA, and
LRT PROPERTIES, LLC,

Defendants.

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OPINION AND ORDER

Defendants LRT Properties, LLC and Antonio Capoccia ("Mr. Capoccia or together as Defendants") filed a motion to set aside a default.

I. Factual and Procedural Background

By complaint dated July 17, 2017, Lisa Capoccia-Leone, Loreta "Laura" Martin and Randy Martin ("Plaintiffs") allege that they and Mr. Capoccia were members of LRT Properties, LLC ("LRT"), with Mr. Capoccia having a 50% membership interest while Plaintiffs together have the other 50%. Complaint ¶6. Plaintiffs aver that they wished to sell the property held by LRT but Mr. Capoccia caused the termination of two potential sales without seeking input from Plaintiffs. Consequently, in their complaint, Defendants allege: Count I, dissolution of LRT Properties; Count II, declaratory judgment against all defendants; Count III, violation of MCL 450.4515; Count IV, breach of contract, operating agreement; Count V, tortious interference; Count VI, breach of fiduciary duty; Count VII, and for appointment of a receiver. In January 2018, the clerk

entered a default against Defendants for failure to answer the complaint. Defendants now seek to set aside the default.

II. Arguments

Defendants argue that the parties' attorneys had been involved in settlement negotiations when Plaintiffs' attorney represented that he would have the subject property appraised. Defendants maintain that they had ongoing communications with Plaintiffs up until the time the' filing of default. Defendants contend that their good faith efforts to try to resolve the dispute combined with Plaintiffs' counsel's delay and not telling Plaintiffs' counsel that he was going to file a default constitute a reasonable excuse for not filing responsive pleadings.

Plaintiffs respond that the Court should deny the motion to set aside the default because Plaintiffs took the appropriate steps to serve Defendants who therefore lack good cause element required to set aside a default. Further, Plaintiffs argue that Defendants fail to show a meritorious defense because Defendants' claims are subject to summary disposition because the express terms of the operating agreement permit the dissolution of the LLC upon the occurrence of a withdrawal event. Plaintiffs argue that their resignation from the LLC constitutes a withdrawal event.

III. Law and Analysis

A motion to set aside a default or a default judgment is generally granted only if the movant shows *good cause* and files an affidavit of *meritorious defense*. MCR 2.603(D)(1). The good cause and meritorious defense elements are separate and should not be blurred. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 233; 760 NW2d 674 (2008). Good cause consists of: (1) a procedural defect or irregularity; or (2) a

reasonable excuse for the failure to comply with requirements that created the default. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233; 600 NW2d 638 (1999). Whether to grant a motion to set aside a default or a default judgment rests in the discretion of the trial court. *Park v American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). A court may consider whether a party failed to respond completely or simply missed a deadline, the length of time that has passed from the time of default, the circumstances behind the failure to file timely and whether the failure was intentional. *Id.* at 238. *Shawl*, 280 Mich App at 238. The trial court must award costs as a condition of setting aside a default. MCR 2.603(D)(4).

In this case, Defendants have shown good cause justifying the setting aside of the default. That is, Defendants have a reasonable excuse for failure to comply with the filing requirements that led to the default because, unlike a situation where a party intentionally disregards or fails to respond to a complaint, the parties here were engaging in ongoing settlement negotiations and good-faith efforts to resolve their disagreements. Mr. Capoccia stated by affidavit that he attempted to resolve the dispute and even identified some appraisers for Plaintiffs but heard no response. See Defendants' Exhibit G, H. Mr. Capoccia also stated that he asked Plaintiffs' counsel whether he needed to respond to the lawsuit. Defendants' Exhibit A. The parties' were involved in discussions, calls, meetings and emails about this matter. Defendants' Exhibits A, E, F and documents unattached pursuant to MRE 408. A significant amount of time has not passed since the default. Therefore, the Court is satisfied that Defendants' failure to file a timely answer should be reasonably excused given their good-faith efforts and the ensuing miscommunications.

Defendants also satisfy the requirement of an affidavit of meritorious defense. Defendants assert as a defense that there are no grounds or authority for the Court to dissolve LRT. Defendants argue that LRT is of indefinite duration and that the members have not voted to dissolve the company. While Defendants acknowledge that the resignation of Plaintiffs would be a "withdrawal event" under the operating agreement, whether the members have withdrawn or resigned has not been shown and presents a question of fact. Consequently, the Court is satisfied that the default should be set aside.

IV. Conclusion

For the reasons set forth above, Defendants' motion is GRANTED and the default is set aside. Defendants shall pay costs pursuant to MCR 2.603(D)(4). Defendants shall file responsive pleadings within twenty-one (21) days of the date of this order. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: JUN 06 2018



Hon. Kathryn A. Viviano, Circuit Court Judge