

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

MARINE ELECTRIC SYSTEMS, INC,  
Plaintiff/Counter-Defendant,

v.

Case No. 19-30167-CB  
Hon. Michael P. Hatty

STERLING COMMERCIAL CREDIT, LLC,  
Defendant/Counter-Plaintiff

and

W. EDWIN SMALL and GREG BOLLER,  
Defendants

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**OPINION AND ORDER REGARDING INDIVIDUAL  
DEFENDANTS W. EDWIN SMALL AND GREG BOLLER'S  
MOTION TO SET ASIDE DEFAULTS ENTERED**

At a session of the 44<sup>th</sup> Circuit Court,  
held in the City of Howell, Livingston County,  
on the 22nd day of August, 2019

THIS MATTER COMES before the Court on Defendants' Motion, Plaintiff having responded, and this Court having heard oral argument from the parties on August 15, 2019, and being otherwise fully advised in the premises, GRANTS Defendants' motion for the reasons stated herein. The defaults entered against W. Edwin Small and Greg Boller shall be set aside upon payment to Plaintiff in the amount of \$500, for its costs and fees, pursuant to MCR 2.603(D)(4). All Defendants shall further file and serve an answer to Plaintiff's First Amended Complaint within 14 days of entry of this Order.

**I**

Plaintiff filed its Complaint in this matter on January 4, 2019, naming Sterling Commercial Credit, LLC as the sole defendant. In lieu of filing an answer, Defendant filed a

motion for summary disposition on February 20, 2019. Simultaneously, Defendant also filed a counterclaim against Plaintiff. On April 10, 2019, Plaintiff filed a First Amended Complaint, which named Mr. Small and Mr. Boller as additional defendants. On April 15, 2019, counsel for Sterling filed an appearance for the individual Defendants. Defendant Sterling then filed a motion to strike Plaintiff's First Amended Complaint on April 16, 2019, arguing, in part, that Plaintiff was time-barred under the MCR 2.118(A)(2) from amending its complaint without consent or leave granted. Plaintiff responded by arguing no responsive pleading has been filed by Sterling, and thus it was permitted, under MCR 2.118(A)(1), to amend its complaint "once as a matter of course." This Court agreed with Plaintiff and entered an order that denied Defendant Sterling's motion on June 4, 2019.

On June 13, 2019, this Court held a hearing on Defendant Sterling's motion for summary disposition, for which Defendant did not appear. Accordingly, this Court denied Defendant's motion without prejudice by order dated June 19, 2019. Defendants' have since asserted that they believed their previously filed motion for summary disposition was made moot by this Court's denial of their motion to strike Plaintiff's First Amended Complaint. Essentially, Defendants state that the arguments made in their motion for summary disposition were now incomplete as to the additional claims raised by Plaintiff and did not align with the counts plead. Therefore, on June 25, 2019, Defendants filed and served a document entitled "Sterling Commercial Credit, LLC's Renewed Motion for Summary Disposition." This motion further provided that it was brought by "Sterling Commercial Credit, LLC, by and through its attorneys..." The individual Defendants were not named in the title or the introductory sentence of the "Renewed Motion for Summary Disposition." However, the relief requested by the motion was a complete dismissal of Plaintiff's First Amended Complaint. Additionally, Paragraph V of the Defendants' argument,

located on page 14 of the brief in support of this motion, specifically address and defend the claims asserted against the individual defendants.

Subsequent to this “renewed motion” being filed and served, Plaintiff requested and obtained a default against the two individual Defendants on July 11, 2019, 37 days after this Court denied Defendant’s motion to strike Plaintiff’s First Amended Complaint. Defendants now bring this motion to set aside those defaults, asserting that the labelling of their “Renewed Motion for Summary Disposition” was a clerical mistake, pursuant to MCR 2.612(A); that the substance of this motion was an adequate and complete defense contemplated by MCR 2.603(A)(1); that this is good cause to set aside the default entered; and that defense so raised is meritorious. Plaintiff responds by arguing that Defendants have exercised bad faith in their “refusal” to answer the First Amended Complaint, that Defendants’ purported clerical mistake is not sufficient to set aside the default, and that the defense raised by Defendants is not meritorious.

## II

Although the law favors the determination of claims on the merits, the general policy in Michigan is against setting aside defaults and default judgments that have been properly entered under MCR 2.603. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229 (1999). A default is properly entered under MCR 2.603(A)(1) if the party in question “failed to plead or otherwise defend.” The Michigan Court of Appeals “has made clear that... a party must not be defaulted if the party has otherwise defended the action by taking some defensive action in the case.” *Vill of Edmore v Crystal Automation Systems, Inc*, 322 Mich App 244, 256-257; 911 NW2d 241 (2017).

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.

MCR 2.603(D)(1).

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* at 233. The Michigan Court of Appeals has set forth 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 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).

### III

In consideration of the instant motion, this Court is guided by *Vill of Edmore, supra*, and its reliance on the previous decision of *Marposs Corp v Autocam Corp*, 183 Mich App 166; 454 NW2d 194 (1990):

In [*Marposs Corp*], the defendant filed motions for summary disposition and a change of venue. The trial court denied both motions. The defendant sought leave to appeal the trial court's denial of its motion for a change of venue but not the denial of its motion for summary disposition. The defendant did not file an answer and a default was entered. Although the defendant had failed to file a responsive pleading under MCR 2.108(A)(1), this Court held that the trial court erred by

concluding that the defendant had defaulted because the defendant otherwise defended had itself under MCR 2.603(A)(1).

*Vill of Edmore* at 257 (internal citations omitted).

Similarly, this Court finds that all Defendants have defended themselves under MCR 2.603(A)(1), such that good cause exists to set aside the defaults in this matter. Specifically, as to the title or labeling of Defendants' current motion for summary disposition, the Michigan Court of Appeals has held that form should not be put over substance in reviewing such a motion and, absent a party being misled, an error with respect to such form is not fatal. *Swigart v Gallagher*, 171 Mich App 382, 385; 429 NW2d 913 (1988). If Defendants' motion were provided more than a cursory review, it is apparent that all Defendants are defending against the claims asserted by Plaintiff in total. Plaintiff should be expected to have performed a more substantive review in requesting the default than the clerks should be in performing the ministerial task of reviewing Plaintiff's request. *Alycekay Co v Hasko Const Co, Inc*, 180 Mich App 502, 448 NW2d 43 (1989). In considering the totality of the circumstances, that of the defenses raised by Defendant and the good cause shown, This Court concludes that the default entered against Defendants Mr. Small and Mr. Boller should be set aside.

MCR 2.603(D)(4) provides:

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


This Court, in considering both the mandatory and discretionary nature of this court rule, as well as the amount of time this Court has had to expend in deciding issues of pleading practice and procedure, is granting of Defendants' Motion to Set Aside Defaults on the condition that all Defendants file and serve an answer to Plaintiff's First Amended Complaint within 14 days of

the entry of this order. This is in addition to the condition that Defendants pay \$500 to Plaintiff, through its attorney for costs and fees incurred. Otherwise, Defendants' Motion is denied and the defaults are confirmed.

**IT IS SO ORDERED.**

August 22, 2019

Date

  
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Hon. Michael P. Hatty  
Business Court Judge