STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

* * * * *

CUSACK MUSIC, LLC, a Michigan limited liability company,

Plaintiff,

v

PROANALOG DEVICES, LLC, an Indiana limited liability company,

Defendant.
_____/

OPINION AND ORDER
Case No. 20-6059-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 the 10th day of August, 2020
PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Motions Before the Court

Defendant moves to set aside the default judgment entered against it, and to change venue in this case to the State of Indiana. The motion to set aside the default judgment is granted. Defendant's motion for change of venue is denied.

Background Facts and Procedural History

This is an action in breach of contract. Plaintiff, located in Holland, Michigan, designs, manufactures, and distributes component parts for the music industry. Defendant, located in Merrillville, Indiana, provides custom-built effects for electric guitars. Plaintiff alleges that on November 1, 2018, the parties entered into a contract whereby plaintiff agreed to design and manufacture goods for defendant and defendant agreed to pay for said goods. Plaintiff further

alleges that defendant failed to pay for those goods and services. Defendant contends that there was no contractual agreement between the parties.

On March 10, 2020, Scott Smith, defendant's principal, filed an answer on behalf of the defendant, partially acknowledging and partially disputing the debt. Mr. Smith is not an attorney. On the same day, this Court entered an order setting an early scheduling conference for April 1, 2020. The order stated that a limited liability company must be represented by Michigan legal counsel in Michigan courts and gave defendant until April 1, 2020 to obtain Michigan counsel. The order further provided that if counsel for defendant failed to appear at the conference, the answer filed by Mr. Smith shall be stricken and plaintiff shall be permitted to file a default.

Following the onset of the COVID-19 state of emergency, the April 1, 2020 early scheduling conference was adjourned to April 17, 2020 with notice that it would be held by two-way interactive video technology (on the Zoom platform). No one appeared on defendant's behalf. The Court entered an order that day striking defendant's answer and affirmative defenses. On April 21, 2020, the Court entered a default and default judgment. On April 27, 2020, Bowen Law Offices, a Michigan law firm, filed an appearance on behalf of the defendant.

Motion to Set Aside Default Judgment

MCR 2.603(D)(1) provides, in pertinent part: "A motion to set aside a ... default judgment ... shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." The test set forth in MCR 2.603(D)(1) is a two-element test. The "good cause" element and the "meritorious defense" element must be considered separately. *Zaiter* v *Riverfront Complex, Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001). However, "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." *Alken-Ziegler, Inc* v *Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999). "[T]rial courts should base the final result on the totality of the circumstances," *Shawl* v *Spence Brothers, Inc*, 280 Mich App 213, 237; 760 NW2d 674 (2008), as the law favors the determination of claims on their merits. *Alken–Ziegler,* 461 Mich at 229.

Taking the meritorious defense element first, "[i]n determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit [of meritorious defense] 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." *Shawl*, 280 Mich App at 238.

Mr. Smith has filed an affidavit of meritorious defense. In his affidavit, Smith states: (1) in the summer of 2018, defendant placed an order with the plaintiff; (2) the summer 2018 order was the only order that defendant ever placed with plaintiff; (3) as to the November 1, 2018 order alleged in plaintiff's complaint: (a) no contract existed between the parties, (b) no order was placed, (c) no price or payment terms were agreed to, and (d) no parts were received by defendant. In addition, Mr. Smith's affidavit states that plaintiff's complaint is barred by the statute of frauds.

If the statements in Mr. Smith's affidavit are proven to the satisfaction of the trier of fact, they would constitute an absolute defense[1] to plaintiff's action against the defendant.[2] Therefore, the Court finds that the defendant has shown a meritorious defense.

Next, we examine the good cause element. Because defendant has shown a meritorious defense that would be absolute if proven, a lesser showing of good cause is required than if the defense been weaker. See *Alken-Ziegler*, 461 Mich at 233-234.

"Good cause" means "(1) a substantial degree of irregularity in the proceedings upon which the default is based, (2) a reasonable excuse for the failure to comply with the requirements that created the default, or (3) some other showing that manifest injustice would

[1] Actually, two alternative meritorious defenses: (1) that the November 1, 2018 contract never existed; and (2) that if the November 1, 2018 contract does exist, enforcement of said contract is barred by the applicable statute of frauds.

[2] Plaintiff disputes the truth of the statements in Smith's affidavit, contending that the statements are "lies." Plaintiff argues that a meritorious defense cannot be established merely by filing an affidavit filled with lies. The Court does not resolve the factual dispute, but accepts the statements in Smith's affidavit as true solely for the purposes of defendant's motion to set aside the default judgment.

result if the default is not set aside." *Alken-Ziegler*, 461 Mich at 233.[3] "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 the default judgment 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 (as with paternity or child support); and (9) if an insurer is involved, whether internal policies of the company were followed." *Shawl*, 280 Mich App at 238.

In the affidavit of meritorious defense, Mr. Smith states: (1) after receiving the Court's order of April 10, 2020, he attempted to retain Michigan counsel; (2) disruptions caused by the COVID-19 pandemic made it difficult for him to run his business and locate Michigan counsel at the same time; (3) the announcement titled "20th Circuit Court response to COVID-19" on the Court's website led him to believe that the early scheduling conference calendared for April 1, 2020 had been adjourned without date; (4) an email from the 20th Circuit Court inviting defendant to the rescheduled early scheduling conference on April 17, 2020 was sent to his G-mail "promotions" folder which he rarely checks; (5) as a result, he failed to see the e-mail in time to attend the rescheduled early scheduling conference; and (6) on April 22, 2020, he was finally able to retain Michigan counsel.

Based on Mr. Smith's affidavit – and applying the *Shawl* factors to the facts as set forth in the affidavit[4] – the Court finds: (1) defendant's failure to obtain Michigan counsel in a timely manner was not knowing or intentional, and was hindered by the ongoing COVID-19 pandemic; (2) the announcement titled "20th Circuit Court response to COVID-19" on the Court's website is potentially misleading; (3) the defendant missed the deadline to obtain Michigan counsel and failed to respond to the Court's order of March 10, 2020, a delay which the Court concludes is

[3] Manifest injustice is not, in and of itself, a factor that shows good cause to set aside a default judgment. "Rather, 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' requirements of the court rule." *Alken-Ziegler*, 461 Mich at 233.

[4] The Court reiterates that the Court accepts these facts as true solely for the purpose of defendant's motions.

not inexcusable in light of the disruptions caused by the ongoing COVID-19 pandemic; and (4) the time period between the entry of the default judgment and the filing of the motion to set aside the judgment was brief. The Court concludes that defendant has stated good cause for setting aside the default judgment.

Motion for Change of Venue

Plaintiff's verified complaint was filed January 21, 2020. Paragraph 5 of the complaint alleges that venue is proper in Ottawa County. On March 10, 2020, Mr. Smith filed an answer on behalf of the defendant. Paragraph 5 of the answer states that defendant "disagree[s] with the statements in paragraph 5 [of plaintiff's complaint]." Paragraph 5 of that answer goes on to state: "Plaintiff supplied materials to defendant one time only." Paragraph five of the answer contains no factual statements regarding venue. It is undisputed that the factual allegations on which the defendant bases the motion for change of venue – i.e., that defendant is not located in Ottawa County and does not conduct business in Ottawa County – were known to the defendant at the time that Mr. Smith filed the answer and could have been pled in the answer or set forth in a motion to change venue.

A motion for change of venue must be filed before or at the time that defendant files the answer. MCR 2.221(A). "Untimeliness is not a ground for denial of a motion filed after the answer if the court is satisfied that the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed." MCR 2.221(B).

"An objection to venue is waived if it is not raised within the time limits imposed by this rule [i.e., rule 2.221(B)]." MCR 2.221(C). In *Bursley* v *Fuksa*, 164 Mich App 772, 778; 417 NW2d 602 (1987), the Court of Appeals held that a "total waiver" of the right to change venue takes place if the motion is not made within the time limits specified in MCR 2.221. In 2 Longhofer and Quick, Michigan Court Rules Practice (7th ed), § 2221.7, p 175, the authors state that *Bursley* stands for the proposition that the time limits imposed by MCR 2.221(B) shall be "strictly enforced."

In the case at bar, defendant did not file a motion for change of venue before or at the time that Mr. Smith filed the answer on behalf of the defendant. The fact that Mr. Smith took it upon himself as a non-lawyer to file that answer does not provide an excuse. Therefore, defendant has waived its objection to venue.

Paragraph 5 of the answer filed by Mr. Smith may not be read as a motion to change venue. Paragraph 5 is not a motion. Paragraph 5 does not satisfy any of the requirements for motion practice set forth in the Michigan Court Rules. Nor does paragraph 5, as to the issue of venue, "state the substance of the matters on which the pleader will rely to support the denial" as required by MCR 2.111(D).

The fact that Mr. Smith's answer was subsequently stricken by the Court is of no moment. The order of April 17, 2020 striking the answer does not state that the answer is void *ab initio*. Indeed, had defendant obtained Michigan counsel by April 1, 2020 as defendant was ordered by the Court to do, the answer filed by Mr. Smith would not have been stricken and would have remained part of the record.

With respect to the merits of defendant's motion, the issue is whether defendant conducts business in Ottawa County, such that venue in Ottawa County is proper in this action. In *Marposs Corp v Autocam Corp*, 183 Mich App 166, 454 NW2d 194 (1990), the defendant corporation made one purchase from the plaintiff, which was shipped in three installments, with two of the deliveries made F.O.B. in Oakland County. The Court of Appeals concluded that this did not constitute systematic or continuous business dealings in that county. The performance of acts "merely incidental" to the defendant's ordinary business activities is not within the scope of "systematic or continuous business dealings." *Pulcini v Doctor's Clinic, P.C.*, 158 Mich App 56, 59; 404 NW2d 702 (1987).

In the present case, plaintiff alleges that defendant initiated the business relationship with plaintiff in Ottawa County, toured the plaintiff's facility in Ottawa County, submitted multiple orders, and took delivery in Ottawa County. These acts were allegedly not "incidental" to defendant's business, but an integrated part of it.

Obiter dicta the Court is dubious that it has the power to change venue to a county outside of the territorial jurisdiction of the State of Michigan.[5] Defendant cites no authority that stands for the proposition that the circuit court possesses such power.

Defendant's motion to set aside the default judgment is GRANTED. Defendant shall file its Answer within fourteen (14) days of entry of this Order. Defendant's motion for change of venue is DENIED.

IT IS SO ORDERED.

Dated: August 10, 2020

Hon. Jon A. Van Allsburg, Circuit Judge

[5] "The Michigan Court Rules allow for the transfer of cases *within the state* to remedy improper venue ...." 1 Lang, Young, Jr., and Beckering, *Michigan Civil Procedure* (June 2020 Update) (ICLE), Jurisdiction and Venue, §1.51, p 41 (emphasis added).