STATE OF MICHIGAN

COURT OF APPEALS

OLGA GENNADYEVNA DEWALD,

Plaintiff-Appellee,

v

JEROME WESTFIELD DEWALD,

Defendant-Appellant.

UNPUBLISHED
May 25, 2010

No. 294094
Oakland Circuit Court
LC No. 2007-736726-DC

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order granting his motion for relief from a default judgment of filiation, custody, parenting time, and child support. We affirm.

In June 2006, the parties divorced in Russia. In July 2007, plaintiff filed a complaint in Michigan seeking an order awarding her custody of the parties' two minor children and child support. According to the complaint, defendant "was on parole for larceny by conversion and is suspected to have illegally moved back to Russia." Plaintiff tried unsuccessfully serving the summons and complaint on defendant at an address in East Lansing. In November 2007, the circuit court authorized alternate service by posting in the Oakland County courthouse and publication in the Oakland County Legal News. After posting and publication took place over the course of three weeks in December 2007, on January 24, 2008 plaintiff filed an application for a default of defendant, which the court clerk entered the same day. On February 29, 2008, the circuit court entered a default judgment of filiation, custody, parenting time and child support.

In early May 2009, the circuit court ordered that a bench warrant issue for defendant's arrest on the ground that he had failed to appear at a show cause hearing concerning his unpaid child support, which exceeded $10,000. Later in May 2009, the circuit court discharged the bench warrant after defendant had appeared "in friend of the court" on May 18, 2009. In July 2009, defendant moved for relief from judgment under MCR 2.612, arguing that he never received notice of plaintiff's complaint or the default judgment, and that plaintiff fraudulently misrepresented to the court that she did not know his address in Moscow. In an August 2009 addendum to the motion for relief from judgment, defendant insisted that the default judgment against him "[wa]s void for lack of personal jurisdiction." After a lengthy hearing, the circuit court on August 12, 2009 granted defendant relief from judgment pursuant to MCR 2.612(C)(1)(f), finding that plaintiff knew defendant's address in Moscow but did not disclose it

to the court or attempt to serve him there, despite (1) having many contacts with defendant between the filing of the Michigan custody action and the circuit court's entry of the default judgment, and (2) serving defendant successfully at his Moscow address in relation to a lawsuit initiated in Russia. The circuit court's order read, "The relief from judgment is granted. Support arrearage and custody and parenting time provision is set aside. There is no child support arrearage. This order shall be presented to the U.S. Embassy for return and issuance of passport. Retroactive support is reserved."[1]

Defendant avers on appeal that the circuit court failed to recognize the nullity of its default judgment, its lack of personal jurisdiction over him, its erroneous reservation of the retroactive child support issue, and its error in not granting relief under MCR 2.612(C)(1)(d) instead of subrule (f). We review for an abuse of discretion a trial court's ruling on a motion for relief from judgment. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). A trial court abuses its discretion only when it selects a decision that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). We review de novo issues of statute and court rule application and interpretation, constitutional issues, and whether a court possesses personal jurisdiction over a litigant. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

Under MCR 2.612(C), the following circumstances may warrant a grant of relief from a 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:
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> * * *
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> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
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> (d) The judgment is void.
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> (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.

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[1] In a subsequent motion for reconsideration, defendant maintained that the circuit court had mistakenly granted relief under MCR 2.612(C)(1)(f), instead of subrule (d), because the court never obtained personal jurisdiction over him. The circuit court denied the motion, discerning no palpable error in its prior ruling.

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

We conclude that the circuit court did not abuse its discretion in granting defendant relief from judgment pursuant to MCR 2.612(C)(1)(f), and that the court properly continued to exercise personal jurisdiction over defendant. Contrary to defendant's argument, the circuit court did not refuse to recognize the nullity of the default judgment against him. "It is well settled that judgments that have been set aside are nullities." *Smith v MEEMIC Ins Co*, 285 Mich App 529, 532; 776 NW2d 408 (2009). As reflected in the language of the circuit court's August 12, 2009 order, the court remained well aware that in granting defendant relief from the February 2008 default judgment it was rendering the default judgment a nullity; as we have noted, the court ordered that it was setting aside the default judgment's "[s]upport arrearage and custody and parenting time provision[s]," and that "[t]here is no child support arrearage." At the hearing, the circuit court additionally set the matter for trial and instructed the parties to begin discovery and negotiations concerning the issues of child support and custody.

Also contrary to defendant's position on appeal, the circuit court properly invoked MCR 2.612(C)(1)(f) as the basis for granting him relief from the default judgment. Generally, to justify a court's grant of relief under subrule (f), three requirements must exist: "(1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel*, 237 Mich App at 478-479. However, the Court in *Heugel*, *id*. at 481, reaffirmed that "a trial court may properly grant relief from a judgment under MCR 2.612(C)(1)(f), even where one or more of the bases for setting aside a judgment under subsections a through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand." "The trial courts must be empowered to draw from their long experience, both with the particular case and from the bench, to determine whether any variables in the case warrant th[e] extraordinary relief" afforded in MCR 2.612(C)(1)(f). *Id*. at 480, quoting *Kaleal v Kaleal*, 73 Mich App 181, 189; 250 NW2d 799 (1977). Subsection (f) invests "the court with a grand reservoir of equitable power to do justice in a particular case and vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Heugel*, 237 Mich App at 481 (internal quotation omitted).

Defendant testified that he never received service of any proceedings in plaintiff's Michigan custody action, and asserted in an affidavit that he had no knowledge of the case until his parole officer in Michigan apprised him of it. Plaintiff estimated that she first mentioned the

Michigan custody case to defendant in December 2008. The parties' testimony agreed that over the course of their marriage, they lived at two primary locations in Moscow. Defendant recounted that he had lived at one of these locations as his permanent address between August 2006 and September 2008 and from May 2009 to the present; plaintiff confirmed that in October 2007 she had commenced litigation against defendant in Russia and that her Russian attorney achieved service of the complaint on defendant at one of the two Moscow addresses they had shared. Plaintiff recalled that she had forwarded to her counsel in the Michigan custody matter the two addresses likely occupied by defendant in Moscow. The parties did not dispute that over the course of repeated contacts, by email and otherwise, between 2006 and May 2008, plaintiff never mentioned to defendant the Michigan custody action or the default judgment. Given the ample evidence in this case supporting the circuit court's findings that plaintiff had neglected to properly serve defendant, despite possessing knowledge of his likely whereabouts that she did not share with the court, an injustice would result if the court permitted the default judgment to stand. Consequently, the circuit court acted within its discretion in granting defendant relief under MCR 2.612(C)(1)(f).

We reject defendant's contention that the circuit court lacked personal jurisdiction over him because he never received service of process. Our review of the record reveals that the circuit court possessed personal jurisdiction on the basis of defendant's general appearances in the court.

> A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2). [*Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993), overruled in part on other grounds in *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 293; 731 NW2d 29 (2007).]

In this case, before defendant sought relief from the default judgment and contested plaintiff's failure to serve him, (1) he appeared at the friend of the court on May 18, 2009, (2) he filed a motion to reduce the amount of child support the circuit court had ordered him to pay in the default judgment, (3) he requested a waiver of motion filing fees, (4) he and plaintiff moved to opt out of friend of the court services, (5) he negotiated a proposed stipulated order with plaintiff regarding child support, and (6) he appeared via telephone at a July 8, 2009 hearing and expressed his desire to stipulate to a proposed order on the record, although the circuit court refused to allow the parties to opt out of friend of the court services. These actions establish that defendant had knowledge of the custody proceedings, intended to appear, and in fact made general appearances, thus submitting to the circuit court's jurisdiction. *Penny*, 203 Mich App at 181-182. Moreover, at the hearing on the motion for relief from the default judgment, defense counsel repeatedly conceded that the circuit court had personal jurisdiction over defendant and that he wanted to continue litigating the issues of parenting time, child support, and custody.

Defense counsel's affirmations of the circuit court's personal jurisdiction constitute a waiver to any present objections by defendant, which extinguishes any personal jurisdiction-related error. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 229; 724 NW2d 724 (2006) ("Challenges to personal jurisdiction may be waived by either express or implied consent.") (internal quotation omitted); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (noting that "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court") (internal quotation omitted).

Although defendant submits that the circuit court erred in relying on *Penny*, 203 Mich App 178, defendant appears to confuse the circuit court's holdings. The court set aside the default judgment against defendant on the basis of its conclusion that as a result of fraud by plaintiff, defendant did not receive proper service of the complaint or notice of the default and default judgment against him. The circuit court did not find that, because defendant had appeared after entry of the default judgment, he made an appearance with respect to that default judgment. Instead, the circuit court merely and correctly determined that it had continuing subject-matter jurisdiction over the custody issue, MCL 722.26; *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004), and personal jurisdiction over defendant after he made general appearances in the circuit court.

Defendant also claims that the circuit court violated his due process rights.[2] The failure of service of the complaint or default and default judgment on defendant deprived him of procedural due process because the failure of service prevented him from having an opportunity to be heard concerning the child custody, support, and parenting time matters. *Krueger v Williams*, 410 Mich 144, 157-159; 300 NW2d 910 (1981). Although the initial lack of service deprived defendant of due process, the circuit court ultimately set aside the default judgment and directed that the parties litigate the issues anew. And, as noted, defendant made general appearances and submitted to the circuit court's personal jurisdiction over him. *Penny*, 203 Mich App at 181-182; see also *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985) ("A party who enters a general appearance and contests a cause of action on the merits submits to the jurisdiction of the court and waives service of process objections.").

The only case defendant cites in support of his due process argument, *Armstrong v Manzo*, 380 US 545; 85 S Ct 1187; 14 L Ed 2d 62 (1965), does not apply to the instant circumstances. In *Armstrong*, *id*. at 547-548, a court terminated the petitioner's parental rights to his daughter without notice in the course of an adoption proceeding. The United States Supreme Court held that the lack of notice combined with the resultant burden of proof imposed on the petitioner when he eventually sought relief combined to violate his constitutional rights:

> Had the petitioner been given the timely notice which the Constitution requires, the . . . moving parties . . . would have had the burden of proving their

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[2] Defendant neglected to set forth this issue in his appellate statement of questions presented, rendering it technically not properly before the Court. MCR 7.212(C)(5); *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

> case as against whatever defenses the petitioner might have interposed. It would have been incumbent upon them to show not only that [the adoptive father] met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed.
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> Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For it is plain that where the burden of proof lies may be decisive of the outcome. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution. [*Id*. at 551-552 (internal quotation omitted).]

Here by contrast, defendant has already obtained relief in the form of wiping the slate clean in these custody proceedings through the circuit court's grant of his motion for relief from the default judgment. Because defendant has the opportunity to litigate the custody issues anew, his due process rights remain intact.

With respect to defendant's suggestions that the circuit court should not have granted relief under MCR 2.612(C)(1)(f) "if an equally plausible alternative exists that will provide the same result," and that the circuit court harbored a bias against him, defendant has abandoned these claims by neglecting to refer to binding authority in support of them. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Furthermore, regarding defendant's judicial bias claim, we have discerned nothing in the record tending to substantiate this assertion, and his bias claim has become moot given that a new judge has been appointed to preside over his case. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50; 748 NW2d 221 (2008).[3]

Affirmed. Costs to plaintiff as the prevailing party on appeal. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

[3] To the extent that defendant also urges this Court to peremptorily reverse the circuit court pursuant to MCR 7.211(C)(4), we decline to consider this proposal because defendant did not properly raise it in a motion before this Court, MCR 7.211(A)(2), (3), and he offers no authority establishing the propriety of peremptory reversal.