

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

GENZYME CORPORATION,  
Plaintiff,

vs.

Case No. 15-2937-CB

ST. PETER MEDICAL CENTER, PC,  
Defendant.

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MACOMB COUNTY  
MICHIGAN

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OPINION AND ORDER

Defendant has filed a motion to set aside the default and the default judgment entered against it with respect to Plaintiff's claims. Plaintiff has filed a response requesting that the motion be denied.

I. Factual and Procedural Background

Plaintiff is a medical research and biotechnical company based in Cambridge, MA. Defendant is a medical center based in Sterling Heights, MI. Dr. Labeed Nouri is an orthopedic surgeon and defendant's registered agent. For many years, plaintiff has supplied medical products to defendant.

In its complaint, plaintiff alleges that defendant is indebted to plaintiff upon an open account. Further, plaintiff alleges that defendant as failed to play the amount owed under the alleged contract. Thus, plaintiff purports to state a claim of breach of contract.

On December 18, 2015, a default was entered in this matter against defendant based on its failure to timely answer. On January 18, 2016, a default judgment was entered. The default judgment stated that the total damages amount was \$43,510.57. On May 3, 2016, defendant filed the instant motion for stay of proceedings and to set aside the default and the default judgment. In an *ex parte Order*, the Court ordered a stay of proceedings on May 3, 2016. On May 4, 2016, plaintiff's filed its response. On May 5, 2016, defendant filed its reply. On July 6, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

## II. Standard of Review

MCR 2.603(A)(1) provides that "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." Pursuant to MCR 2.603(D)(1), "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."

## III. Arguments and Analysis

With respect to good cause, defendant contends that it was never served with the summons and complaint. At the hearing, Dr. Nouri testified that he did not recall being personally served by plaintiff's process server.

To demonstrate good cause, the defaulting party must show either: "(1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirements that created the default." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App

639, 653; 617 NW2d 373 (2000). While Dr. Nouri maintains that he does not remember being served with the summons or complaint, Dr. Nouri does not actually allege any defect with the service or process, nor does he deny that the service occurred. To the contrary, plaintiff's process server's Verified Return of Service plainly shows that defendant, through its registered agent, Dr. Nouri, was properly served with the summons and complaint at defendant's business address on September 9, 2015. See Plaintiff's Ex. 2. Furthermore, plaintiff's process server testified at the hearing that he personally served Dr. Nouri with the summons and complaint. Despite receiving service defendant failed to respond within 21 days as required by MCR 2.108(A)(1). Further, Dr. Nouri's lack of memory regarding these events does not amount to a procedural irregularity or otherwise excuse defendant's failure to respond. See *Barclay, supra*; see also *Spica v Schrottenboer*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2015 (Docket No. 317510). Consequently, the Court is convinced that defendant has failed to demonstrate good cause for its failure to respond. Because good cause is a prerequisite to setting aside a default and default judgment, defendant's failure to establish good cause requires the Court to deny its motion.

In addition, even if the Court were to find good cause, defendant has also failed to establish a meritorious defense. Defendant argues that it never entered into an agreement with plaintiff for the sale of goods and that it never received any goods. Accordingly, defendant claims that it does not owe plaintiff any damages.

Regarding a meritorious defense, MCR 2.603(D)(1) "requires an affidavit of facts establishing a meritorious defense." *Huntington Nat'l Bank v Ristich*, 292 Mich App 376,

392; 808 NW2d 511 (2011). The affiant must have “personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit.” *Id.*

Here, defendant’s affidavit of meritorious defense repeated its contention that it was not served with the summons and complaint and claimed that it did not owe plaintiff any money. Specifically, Dr. Nouri stated that “I have never been served with any pleadings . . . I only learned of this litigation on May 3, 2016.” See Defendant’s Ex. 2 at 1. At the hearing, however, the Court provided an opportunity for defendant to establish a meritorious defense on the record. Accordingly, Dr. Nouri claimed that he “did not recall” being served by plaintiff’s process server. Dr. Nouri’s inability to “recall” contradicts his affidavit, wherein he explicitly denied service altogether.

Furthermore, Dr. Nouri’s affidavit states “I do not believe that” defendant owes plaintiff money for an open account. However, “[m]erely contesting . . . liability does not establish a meritorious defense.” *Huntington Nat Bank v Ristich*, 292 Mich App 376, 393-94; 808 NW2d 511 (2011); see also *Novi Constr, Inc v Triangle Excavating Co*, 102 Mich App 586, 590; 302 NW2d 244 (1980) (stating that a defendant’s conclusive statement that it has a meritorious defense because it does not owe an alleged amount of money, without any factual basis for the statement, is insufficient to establish a meritorious defense). Here, defendant failed to present any evidence, other than Dr. Nouri’s own unsupported assertions, which it could defend against plaintiff’s breach of contract claim. Therefore, defendant has failed to establish a meritorious defense.

At the hearing, defendant also asserted that MCR 2.612(B) does not require a meritorious defense. MCR 2.612(B) states in pertinent part that “the court may relieve the defendant from the judgment” if the defendant “did not in fact have knowledge of the pendency of the action.” Defendant’s argument pursuant to MCR 2.612(B) lacks merit because email correspondence with plaintiff clearly demonstrates that defendant had knowledge of the pendency of the action prior to the entry of the default and default judgment. See Plaintiff’s Ex. 3 and 4. Specifically, on September 23, 2015, attorney Peter Gojcaj contacted plaintiff’s counsel requesting additional documentation to corroborate plaintiff’s claims in the summons and complaint against defendant. Although Mr. Gojcaj stated he was not retained by defendant, he was aware of the litigation between plaintiff and defendant prior to the entry of default and default judgment. See Plaintiff’s Ex. 3 at 3. Furthermore, on October 1, 2015, plaintiff’s counsel emailed Mr. Gojcaj the additional documentation he requested. Thereafter, Mr. Gojcaj responded, “Thank you . . . I will forward to Defendant.” See Plaintiff’s Ex. 4 at 1. Based on the record, defendant had knowledge of the pendency of the action prior to the entry of the default and default judgment. Therefore, his argument pursuant to MCR 2.612(B) fails.

Because defendant has failed to establish good cause and a meritorious defense, defendant’s motion to set aside the default and default judgment must be denied.

IV. Conclusion

For the reasons set forth above, defendant's motion to set aside the default and default judgment is DENIED. 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: AUG 12 2016

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge