

EXAMINERS' ANALYSIS OF QUESTION NO. 5

I. SETTING ASIDE THE DEFAULT:

"Michigan law generally disfavors setting aside default judgments that have been properly entered." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 653 (2000). Under MCR 2.603(D)(1), a trial court may set aside a default judgment as follows:

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.

The party seeking to set aside the default bears the burden of demonstrating good cause and a meritorious defense. *Saffian v Simmons*, 477 Mich 8, 15 (2007). To establish "good cause," the moving party must establish: "(1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirements that created the default." *Barclay*, 241 Mich App at 653. The trial court has discretion to determine whether a "defendant's excuse for failing to timely answer the complaint was reasonable." *Saffian*, 477 Mich at 16. "Manifest injustice is not a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense." *Barclay*, 241 Mich App at 653.

The stronger the meritorious defense the easier it is to show good cause.

When a party puts forth a meritorious defense and then attempts to satisfy 'good cause' by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, 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 (1999).]

A. MERITORIOUS DEFENSE

In *Brooks Williamson & Assoc v Mayflower Constr Co*, 308 Mich App 18, 29 (2014), the court stated the following:

In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit 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.

Jones' affidavit does not set forth a meritorious defense, as a dispute regarding the amount owed does not constitute a meritorious defense under the court rule. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 393-394 (2011) ("Rather, defendant simply asserted that he had a meritorious defense because he disputed the amount of the debt owed to plaintiff. Merely contesting the amount of liability does not establish a meritorious defense."). Although the resolution of the meritorious defense issue would normally end the inquiry, the applicants were asked to analyze both criteria for deciding a motion to set aside a default judgment.

B. GOOD CAUSE

Even if Jones Inc. had established a meritorious defense, its motion would still not succeed because it has not established good cause. Nothing in the facts suggests that there was any procedural irregularity or defect that resulted in entry of the default or default judgment. It is also true that a corporation cannot be represented in court by a non-lawyer. *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust*, 497 Mich 265, 277-278 (2015) referencing *Detroit Bar Assoc v Union Guardian Trust Co*, 282 Mich 707, 711 (1938). As for a reasonable excuse for not complying with the rules that resulted in the default, Jones Inc.'s argument will not prevail. Jones Inc., through Jones, was served with the lawsuit and took timely action in an attempt to answer the complaint. The only

shortfall was Jones' ignorance of the law regarding representation of corporations. But that ignorance of the law does not constitute good cause to set aside the default judgment. *Reed v Walsh*, 170 Mich App 61, 65 (1988) ("[W]e agree with the trial court that a lay defendant's lack of knowledge of the law and its consequences will not necessarily provide a reasonable excuse and good cause to set aside a default.").

II. FAILURE TO PROVIDE JURY TRIAL

The final issue is whether Jones Inc. was entitled to a jury trial on the damages OSI claims entitlement to, and which the judge made part of the default judgment. The facts show that OSI filed a jury demand, and Jones Inc. filed what was essentially a notice that it was relying on OSI's jury demand. Although in default, and unable to defend on the merits, Jones Inc. is entitled to have a jury determine whether, and to what extent, OSI is entitled to damages. "A default does not constitute a waiver of a jury trial in a civil action." *Mink v Masters*, 204 Mich App 242, 246 (1994), citing *Wood v DAIE*, 413 Mich 573, 583-584 (1982). Accordingly, even though Jones Inc. did not establish a meritorious defense or good cause, the judgment must be vacated so that a jury can determine the amount of damages to which OSI is entitled.