STATE OF MICHIGAN

COURT OF APPEALS

DANIEL LINVILLE and JODY LINVILLE,

Plaintiffs/Counterdefendants-Appellees,

v

JANICE LINVILLE,

Defendant/Counterplaintiff-Appellant,

and

YORKSHIRE PLAZA COOPERATIVE,

Defendant.

UNPUBLISHED
June 24, 2021

No. 354352
Macomb Circuit Court
LC No. 2019-002033-CH

Before: MURRAY, C.J., and FORT HOOD and RICK, JJ.

PER CURIAM.

Defendant-appellant Janice Linville appeals as of right the trial court's orders granting plaintiffs' motion for summary disposition under MCR 2.116(C)(10) as unopposed, and denying defendant-appellant's motion for reconsideration or relief from judgment. We affirm.

I. FACTS

The trial court's opinion and order denying defendant-appellant's motion for reconsideration or relief from judgment contains the following convenient summary of the underlying facts:

> Plaintiffs Daniel and Jody Linville (Daniel and Jody) allege that Daniel is the son of defendant Janice Linville (Janice), and Daniel loaned Janice $10,000.00 so that she could afford to enter into an occupancy agreement to lease a townhome with defendant Yorkshire Plaza Cooperative (Yorkshire) on October 5, 2006 and became a member of Yorkshire. Daniel and Jody allege that Janice agreed to pay Daniel back, and Daniel originally lived in the townhome with Janice and was listed

as an occupant. Daniel and Jody allege that after Daniel and Janice began to have problems with Yorkshire, they submitted a form to change Daniel's status from occupant to member, and Daniel paid the $75.00 application fee. Daniel and Jody allege that Daniel was thereafter elected to Yorkshire's board as treasurer, but he was removed after ten months because the election count was determined to be incorrect. Around 2017, Daniel and Jody allege that Janice moved in with her daughter . . . , and Daniel and Jody gave Janice another $10,000.00. Daniel and Jody allege that Janice also signed a document acknowledging that she sold her half-interest in the townhome to Daniel and Jody, and they made payments for and improvements to the townhome for over two years. But in April of 2019, Daniel and Jody allege that Yorkshire advised them that it did not recognize them as members, and Janice filed a complaint for eviction in the 39th District Court; a consent judgment was entered, and Daniel and Jody vacated the townhome. But for the agreement and representations made by Janice, Daniel and Jody allege that they would not have loaned $10,000.00 to Janice to purchase the townhome nor paid the $10,000.00 to convey her interest in the property. Daniel and Jody thus filed the pending complaint, bringing one count for breach of contract as to Janice, one count for declaratory relief recognizing Daniel and Jody as members of Yorkshire, one count for unjust enrichment as to Janice, one count for fraud in the inducement as to Janice, and one count for promissory estoppel as to Janice.

Janice then filed her counterclaim. Janice alleges that she is the only person who has ever signed an occupancy agreement with Yorkshire, and Daniel was only ever listed as an occupant. Janice alleges that she moved from her townhome to another residence when her relationship with Daniel broke down, and alleges that Daniel was growing, processing, and selling marijuana from the townhome. Janice alleges that Daniel was therefore subject to eviction from the townhome for violating the bylaws, a notice to quit was served on January 28, 2019, and a consent judgment was entered on May 31, 2019. Janice alleges that despite the consent judgment, Daniel and Jody caused significant property damage when moving out, they refused to surrender the keys to the residence, they removed all appliances, and they removed the breaker from the electrical panel that controlled the air conditioning unit. Janice thus filed the pending counterclaim bringing one count for declaratory judgment that she is the only party with any documented interest in the townhome and one count for conversion as to Daniel and Jody.

On November 12, 2019, the Court entered a stipulated order to compel Janice to answer discovery requests within 14 days after Yorkshire had filed a motion to compel. After Janice failed to answer discovery requests or attend her scheduled deposition, Yorkshire filed a motion for sanctions. On January 21, 2020, the Court granted Yorkshire's motion and ordered that Janice is precluded from offering any defenses to Daniel and Jody's claims at trial.[1] On February 19, 2020,

[1] See MCR 2.313(B)(2)(b) (authorizing a court to issue "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing

> the Court entered a consent order allowing the sale of the townhome with proceeds to be placed in the client trust account of Yorkshire's attorneys. On February 25, 2020, the Court entered a stipulated order to dismiss Daniel and Jody's claims as to Yorkshire with prejudice. On March 10, 2020, Daniel and Jody filed a motion for summary disposition pursuant to MCR 2.116(C)(10), which was scheduled to be heard on April 6, 2020. The parties attended case evaluation on March 16, 2020.
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> On March 15 and March 18, 2020, in response to the state of emergency due to COVID-19, the Michigan Supreme Court issued Administrative Order Nos. 2020-1[, 505 Mich ci (2020)] and 2020-2[, 505 Mich cv (2020)], which restricted operations in trial courts and facilitated adjournment of pending hearings in order to limit public access to courtrooms. On March 27, 2020, the Court adjourned the motion for summary disposition hearing to April 27, 2020. On April 27, 2020, having received no communication from Janice nor a timely response to the motion for summary disposition, the Court entered an order dispensing with oral argument and granting the unopposed motion for summary disposition.

Defendant-appellant filed a motion for reconsideration or relief from judgment on May 15, 2020, which the trial court denied in the opinion and order quoted above. This appeal followed.

II. REMEDY FOR TARDY RESPONSE

Defendant-appellant argues that the trial court erred by refusing to accept her late-offered response to plaintiffs' motion for summary disposition, on the grounds that the tardiness resulted from reasonable mistake or excusable neglect, and also asserts that granting plaintiffs' motion as a sanction for that tardiness was an overly harsh remedy.

A. STANDARD OF REVIEW

A court's general conduct of proceedings is reviewed for an abuse of discretion. See *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). This includes a court's decision whether to accept, or otherwise how to respond to, an untimely filing. See *EDI Holdings, LLC v Lear Corp*, 469 Mich 1021; 678 NW2d 440 (2004) (applying that standard to the circuit court's decision to enforce its summary disposition scheduling order); *Flanagin v Kalkaska Co Rd Comm*, 319 Mich App 633, 640; 904 NW2d 427 (2017) ("A court has discretion to consider untimely documents."); *Kemerko Clawson, LLC v RXIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005) ("This Court reviews for an abuse of discretion a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order.").

Because defendant-appellant's arguments take exception to the trial court's decision to proceed to judgment without considering defendant-appellant's response to plaintiffs' motion for summary disposition, they are well viewed as challenges to the court's decision to deny defendant-appellant's motion for reconsideration or relief from judgment. A court's decision on a motion for

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designated matters into evidence"). Defendant-appellant has not challenged this facet of the proceedings below on appeal.

reconsideration is reviewed for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000). A court's decision on a motion for relief from judgment is likewise reviewed for an abuse of discretion. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 364; 760 NW2d 856 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. MISTAKE OR EXCUSABLE NEGLECT

Defendant-appellant argues that the trial court abused its discretion when it declined to overlook the tardiness of her response to plaintiffs' motion on the ground that it resulted from reasonable mistake or excusable neglect. We disagree.

Not in dispute is that plaintiffs filed their motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on March 10, 2020. When such a motion is properly filed and supported, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Further, according to MCR 2.116(G)(1)(a)(ii), "[u]nless a different period is set by the court, . . . any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing." When a party fails to offer a timely response to a (C)(10) motion, any belated response and supporting evidence are properly excluded from consideration. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978) (the opposing party's "belated attempt to file an affidavit in opposition" to summary disposition "was in such form and manner that the judge's failure to treat it as a timely opposing affidavit was not an abuse of discretion"). Also not in dispute is that the original date for the hearing on plaintiffs' motion was April 6, 2020, but that after a three-week delay resulting from limitations on court proceedings because of the COVID-19 pandemic, the hearing was rescheduled for April 27, 2020, and that defendant-appellant filed her response to that motion on that date.

Instructive for this purpose is that MCR 2.603(D)(3) provides that a default may be set aside in accordance with MCR 2.612, which governs motions for relief from judgment. The latter permits such relief on grounds including "[m]istake, inadvertence, surprise or excusable neglect." MCR 2.612(C)(1)(a). However, the caselaw indicates that routine inadvertence does not constitute excusable neglect: "[T]he neglect of an attorney is not good cause and may be imputed to a party against whom default is entered . . . ." *Kuikstra v Cheers Good Time Saloons, Inc*, 187 Mich App 699, 703; 468 NW2d 533 (1991), rev'd in part on other grounds 441 Mich 851 (1992). "The law regards the neglect of an attorney as the client's own neglect and will give no relief from the consequences thereof." *Everett v Everett*, 319 Mich 475, 482; 29 NW2d 919 (1947) (cleaned up). See also *Okros v Myslakowski*, 67 Mich App 397, 400; 241 NW2d 223 (1976) ("Although defense counsel acted with a good faith belief that there was an understanding to defer entry of default, his

neglect or omission is not adequate grounds for setting aside a default judgment. His omission is attributable to the client.").[2]

In her motion for reconsideration or relief from judgment, defendant-appellant recounted that the hearing date for plaintiffs' motion was "adjourned from April 6, 2020 to April 27, 2020, due to the COVID-19 Crisis," then asserted that "[a] review of the Court's website indicated that, although the matter was scheduled for April 27, 2020, the court was only hearing emergency and . . . custody matters," and that "[g]iven the . . . prior adjournment . . . , the information of the . . . Court's homepage, and the lack of notice that the matter would be conducted via video conferencing, Defendant was unaware that the Court would be handling the matter administratively, and believed the hearing date would again be adjourned."

The trial court rejected those protestations of mistake or excusable neglect, explaining as follows:

> Here, the record reflects that the Court had once previously adjourned the motion hearing in light of the state of emergency, and it provided the parties with ample notice before the originally scheduled hearing date. [Defendant-appellant] and her attorney then failed to take any action until the date of the adjourned hearing, when counsel finally contacted the Court and submitted an untimely response to the motion for summary disposition. . . . [Defendant-appellant] has failed to demonstrate any error in the Court's finding that no response had been timely filed and that it was proper to exercise its discretion to decide the uncontested motion without argument. Moreover, there is no evidence that [defendant-appellant] or her attorney were unable to contact the Court, in light of the unusual emergency circumstances, to either confirm the date or manner of the hearing or to request an adjournment if more time was needed to file a response. The Court therefore concludes that there is no palpable error by which the Court or the parties have been misled, there was no mistake made by the Court, and MCR 2.612(C)(1)(a) does not excuse counsel's carelessness and lack of diligence.

On appeal, defendant-appellant sets forth the same reasons for why she "had every reason to believe that the hearing date would be [further] adjourned . . . to allow the parties to argue in support of their positions," and thus that her "untimely filing of the response to Plaintiff's Motion . . . constitutes mistake, inadvertence or excusable neglect, and does not rise to the level of carelessness." We observe, however, that defendant-appellant conceded below that her perusal of the trial court's website, while suggesting that court operations would generally be limited to emergency or custody matters, also indicated that the hearing on plaintiffs' motion remained "scheduled for April 27, 2020." To the extent that the public statement that operations would be limited to matters of a different sort conflicted with the retention of the April 27, 2020 hearing date, defendant-appellant was not entitled to resolve the conflict by disregarding the information

[2] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (cleaned up).

that applied specifically to her case. If she thought that the other information provided created a question concerning the continued validity of the April 27, 2020 hearing date, she should have sought clarification from the trial court. But the court held that "there is no evidence that [defendant-appellant] or her attorney were unable to contact the Court, in light of the unusual emergency circumstances, to either confirm the date or manner of the hearing or to request an adjournment if more time was needed to file a response," and defendant-appellant does not challenge that finding.

For these reasons, defendant-appellant has failed to show that her failure to respond to plaintiffs' motion in timely fashion resulted from other than the sort of lack of diligence, or carelessness, that does not constitute "[m]istake, inadvertence, surprise or excusable neglect" warranting postjudgment relief under MCR 2.612(C)(1)(a). See *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 96; 380 NW2d 60 (1985) ("A failure to respond to admittedly received pleadings," on grounds that the defendant was confused about the interplay of two related causes of action in progress, "hardly rises to the level of mistake or excusable neglect.").

C. JUDGMENT FOR PLAINTIFFS AS SANCTION

In protesting that granting plaintiffs' motion for summary disposition was an overly harsh sanction for her failure to respond to the motion in timely fashion, defendant-appellant suggests that the court reached that result solely on that procedural basis, without inquiry into the substantive merits of plaintiffs' motion. Plaintiffs similarly state in their brief on appeal, for purposes of arguing that this Court need not entertain defendant-appellant's challenges to the merits of their motion, that "the Trial Court granted summary disposition for Appellant's failure to timely file a response brief." We, however, do not view the trial court's decision to grant plaintiffs' motion as one based solely on defendant-appellant's failure to offer a timely response to the motion.

As noted, MCR 2.116(G)(4) states that, when a (C)(10) motion is properly filed and supported, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." That rule further states that "[i]f the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4). The qualification that judgment is to be entered against a party failing to respond to the motion "if appropriate" indicates that deciding an unanswered (C)(10) motion in favor of the moving party is not automatic, but still requires some inquiry into its merits.

In this case, although the trial court expressly noted that plaintiffs' motion engendered "no response" from defendant-appellant, offering that observation or characterization does not indicate that the court granted plaintiffs' motion simply as a rote reaction to defendant-appellant's tardiness in responding to it. In its order granting summary disposition, the court mentioned "[h]aving reviewed plaintiff's motion," and also "relying upon plaintiff's verified complaint for damages and equitable relief and attachments to the motion," indicating that the court granted plaintiffs' motion on its merits, even if it felt no need to discuss those merits in detail because it deemed the motion as unopposed.

Defendant-appellant relies on *Smith v Merrill Lynch Pierce Fenner & Smith*, 155 Mich App 230, 234; 399 NW2d 481 (1986), in which this Court held that "[d]ismissal is too harsh a remedy where the error is slight and the prejudice is minimal." (Cleaned up.) In this case, however, as noted, the trial court did not decide the case in plaintiffs' favor purely on the procedural basis that defendant-appellant was tardy with her response to their motion for summary disposition—even if the court's refusal to consider the tardy response to the motion virtually ensured that result.

More on point is the case on which plaintiffs rely, *EDI Holdings LLC*, 469 Mich 1021; 678 NW2d 440 (2004). In this Court's decision in that case, this Court noted that "[t]he law generally prefers adjudication on the merits," and also that "[r]efusing to accept a response in the context of MCR 2.116(C)(10) constitutes a strong sanction because it renders the movant's facts undisputed and leads inevitably to summary disposition." *EDI Holdings LLC v Lear Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2003 (Docket No. 240442), pp 2. The panel concluded that the trial court abused its discretion by refusing to accept two months after the applicable court-ordered deadline a brief in opposition to a (C)(10) motion, and thus deciding the motion in the appellee's favor, "without a stronger showing that [the] delay represented an attempt to thwart the case's adjudication." *Id*. at 2-3 and n 5. Our Supreme Court, however, in an order entered in lieu of granting leave, stated without elaboration that this Court "erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order." *EDI Holdings LLC*, 469 Mich at 1021. The Supreme Court's ultimate disposition of *EDI Holdings* thus indicates that a trial court is entitled to all the deference implied by the abuse-of-discretion standard when it decides not to accept a tardy response to a (C)(10) motion.

For these reasons, defendant-appellant has failed to show that the trial court abused its discretion when it decided plaintiffs' motion for summary disposition as an unopposed one.

III. MERITS

This Court reviews a trial court's decision on a motion for summary disposition do novo. *Ford Credit Int'l, Inc v Dep't of Treasury*, 270 Mich App 530, 534; 716 NW2d 593 (2006). When reviewing a decision on a (C)(10) motion, this Court considers "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

The qualification in MCR 2.116(G)(4) that judgment be entered against an adverse party who has failed to respond to a proper (C)(10) motion "if appropriate" can hardly mean that the trial court is expected to consider how an unanswered motion might have been answered, or that an appellate court reviewing the decision should, while doing so, consider arguments and exhibits on appeal that the appellant failed properly to present for consideration below. We conclude that ascertaining the propriety of granting an unopposed (C)(10) motion requires the trial court only to satisfy itself that the motion was properly filed and supported, and on its face legally and factually reasonable.

Plaintiffs in their motion for summary disposition sought relief primarily through their theory of breach of contract while alternatively asserting implied contract or other equitable doctrines, and they reiterate this position in their responsive brief on appeal.

Plaintiffs' supporting documentation includes plaintiff Daniel Linville's deposition, in which he testified that he lent $10,000 to defendant-appellant in 2006, then "soaked thousands upon thousands of dollars into . . . upgrading" the subject property. Plaintiffs additionally refer to an October 5, 2006 occupancy agreement for the property, which is signed by defendant-appellant and designates plaintiff Daniel Linville as an additional occupant. Concerning a later payment to defendant-appellant of $10,000, plaintiffs provided an exhibit depicting a document bearing the date April 15, 2017, along with signatures attributed to defendant-appellant along with plaintiffs, and stating that defendant-appellant "received $10,000" from plaintiffs "for the purchase of my half" of the subject property. Defendant-appellant describes this as "only one scrap of paper referencing a purported payment of $10,000 . . . , allegedly secured by the subject real property," otherwise impliedly contests the validity of her signature, and asserts that this exhibit does not satisfy the requirement under the statute of frauds that an enforceable agreement for the sale of an interest in land be memorialized and signed by the party against whom it is asserted, citing MCL 566.106.[3] However, defendant-appellant did not properly put forward her assertions about the authenticity, validity, or sufficiency of that document by way of a timely answer to plaintiffs' motion for summary disposition. Further, because invocation of the statute of frauds is an affirmative defense, it must be specially set forth in a responsive pleading. MCR 2.111(F)(3)(a). In this case, defendant-appellant gives no indication where, if anywhere, this defense was raised below, and it was not included among the affirmative defenses set forth in her answer to the complaint. Accordingly, we need not consider that defense. See *Mahnick v Bell Co*, 256 Mich App 154, 159-160 n 2; 662 NW2d 830 (2003).

Defendant-appellant disputes plaintiffs' allegations concerning their investment in improvements to the subject property by protesting that plaintiffs "have not submitted any work orders, material invoices, or canceled checks showing that Plaintiffs were responsible for any property improvement at all," and also "have not submitted any assessments, appraisals, or brokers opinion(s) of value to substantiate their claims that the value of the property was improved." However, defendant-appellant cites no authority for the proposition that deposition testimony alone is insufficient to support a (C)(10) motion. Defendant-appellant otherwise asserts, without offering evidentiary support, that most of what plaintiffs characterize as improvements actually consisted of repairs for damage caused by defendant Daniel Linville himself, and which was covered by insurance, or that plaintiffs had no reasonable expectation of receiving value for any such investments on behalf of a family member. Had defendant-appellant developed these theories into a coherent and well-supported answer to plaintiffs' (C)(10) motion, the trial court might

[3] See also MCL 566.108; MCL 566.132(1)(e). "The statute of frauds is an affirmative defense that is not only invoked to prevent fraudulent construction of a written contract, but also to prevent disputes over what provisions were included in an oral contract." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989).

properly have denied the motion. But a working argument pointedly and properly not considered below because of tardiness into appellate advocacy does not undermine the decision below.

For these reasons, defendant-appellant has failed to show that the trial court erred when it granted plaintiffs' motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/Christopher M. Murray
/s/Karen M. Fort Hood
/s/Michelle M. Rick