

STATE OF MICHIGAN
COURT OF APPEALS

BETTYE THIGPEN,

Plaintiff-Appellant,

v

BESAM ENTRANCE SOLUTIONS,

Defendant-Appellee.

UNPUBLISHED

September 16, 2014

No. 316696

Oakland Circuit Court

LC No. 2012-129162-NO

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In this personal injury suit, plaintiff, Bettye Thigpen, appeals by right the trial court's order dismissing her claims against defendant, Besam Entrance Solutions. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Besam installed and maintained a revolving door at a hospital. Thigpen was injured while using the door. In September 2012, Thigpen sued Besam for negligence, premises liability, and a building-code violation.

The trial court at issue operates under the mandatory electronic-filing system promulgated by Administrative Order No. 2007-3, 478 Mich lviii (2007), as amended by 490 Mich lxviii (2011) and 494 Mich xv (2013). Besam e-filed its answer and affirmative defenses in November 2012 and Thigpen e-filed her answer to the affirmative defenses in January 2013. Iris Miller, a legal assistant with the office of Thigpen's lawyer, signed Thigpen's proof of service. The trial court entered a scheduling order with an April 2013 deadline for dispositive motions and a May 2013 deadline for discovery.

In March 2013, Besam moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Besam argued that it was entitled to summary disposition because it did not own or control the building where the revolving door was located and Thigpen had no proof that Besam's acts or omissions caused her injuries. Later that same month, the trial court entered an order, which provided that Thigpen had until April 26, 2013 to respond to Besam's motion. "If briefs are not timely filed," the order further provided, "the Court SHALL assume that the party, whether or not represented by counsel, does not have any authority for his/her/its position(s)." (Emphasis omitted.)

Thigpen did not timely respond, and the trial court entered an order granting Besam's motion in May 2013. The trial court granted the motion for five independent reasons, including Thigpen's failure to respond or rebut the motion, as well as her admission that the revolving door was not in Besam's possession when she was injured. The trial court concluded that Thigpen's claim premised on MCL 554.139(l)(a) had to be dismissed because that statute only applied to residential leases. The trial court also stated that Thigpen's responses to Besam's discovery demonstrated that she lacked proof that Besam's acts or omissions caused her injuries or that the door malfunctioned at all. The court further noted that it confirmed e-service of its March 2013 order and that Thigpen's lawyer or agent actually opened the scheduling order.

Thigpen moved to set aside the order of dismissal and reinstate the case on the basis that her lawyer did not receive notice of the hearing on the motion due to an e-mail error. In support of her claim, Thigpen attached a document received from a support specialist at Tyler Technologies, which purported to show that an error occurred in the delivery of Besam's motion to Thigpen's lawyer, but that no error occurred in the delivery to Iris Miller.

In response, Besam presented a copy of an e-mail showing that Miller received e-notice of its motion on March 25, 2013, and that someone with access to her e-mail opened the e-mail containing the motion on March 26, 2013. Besam further asserted that its lawyer provided Thigpen's lawyer with a copy of the motion at an April 2013 deposition and that Miller had previously been receiving the e-notices in the case.

The trial court denied Thigpen's motion to set aside the dismissal and reinstate the case. The trial court stated that the record belied Thigpen's assertions regarding service of the motion. The court concluded that Besam's motion and the court's scheduling order were e-served on a valid e-mail address at Thigpen's lawyer's firm, and that an individual with access to that e-mail address opened both e-mails. The court noted that all other filings had been sent to the same e-mail address without technological difficulty. The court further found that Thigpen provided no authority for the proposition that service upon Iris Miller was deficient and that Thigpen's lawyer was responsible for the accuracy of his e-mail address.

Thigpen now appeals in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). We review for an abuse of discretion a trial court's decision to enforce deadlines set forth in its scheduling order. See *Kemerko Clawson LLC v RxIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). Finally, we review for clear error the findings underlying the trial court's application of a court rule. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008).

B. ANALYSIS

Thigpen contends that the trial court abused its discretion when it dismissed her suit as a sanction. See *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). However, the record plainly shows that the trial court dismissed Thigpen's claim after Besam filed a properly supported motion for summary disposition and Thigpen failed to rebut the grounds for dismissal stated in the motion; the trial court had to grant Besam's motion for summary disposition under those circumstances. See *Barnard Mfg*, 285 Mich App at 374-375.

Thigpen nevertheless argues that her lawyer was not properly served with Besam's motion for summary disposition, as required under MCR 2.107(C). As such, she maintains, the trial court clearly erred when it found that her lawyer was served with Besam's motion and the court's scheduling order on the evidence that Iris Miller received and opened e-mails regarding both filings. As Thigpen points out, MCR 2.107(C)(4) permits service by e-mail, but only if the parties agree to it and file a stipulation to that effect. Further, "[i]f an e-mail is returned as undeliverable, the party, attorney, or court must serve the paper or other document by regular mail under MCR 2.107(C)(3), and include a copy of the return notice indicating that the e-mail was undeliverable." MCR 2.107(C)(4)(h). According to Thigpen, the parties never stipulated to allow Miller to receive e-mails on behalf of Thigpen's lawyer and, in any event, Besam should have sent Thigpen's lawyer a hardcopy of its motion by mail upon receiving notice that the e-delivery of its motion failed.

Contrary to Thigpen's contention on appeal, the electronic service in this case was not governed by MCR 2.107(C). Instead, the parties were operating under Oakland County's mandatory e-filing system, in which the parties' lawyers register e-mails with the e-filing system and receive notices of filings at those e-mail addresses:

All parties shall register with the court and opposing parties one e-mail address with the functionality required for the pilot program, through Tyler Odyssey File and Serve. All service shall originate from this registered e-mail address. Additional e-mail addresses for other attorneys or staff persons associated with counsel for the party may be added as registered users. Service shall be perfected upon a self-represented party or counsel and any additional registered users associated with counsel at the e-mail addresses registered with the Tyler (Wiznet) e-filing system. *Each individual bears the responsibility for the accuracy of the registered e-mail address.* [AO 2007-3, § 6(a) (emphasis added).]

Here, there is no dispute that Thigpen's lawyer registered an e-mail address for Iris Miller and that someone with access to Miller's e-mail address opened the e-mail containing notice of Besam's motion for summary disposition on March 26, 2013. Further, Thigpen does not dispute the trial court's finding that her lawyer or her lawyer's agent "in fact opened" the court's scheduling order regarding the motion for summary disposition. Thus, even if service did not go through to Thigpen's lawyer, it was nevertheless perfected on an "additional registered user[] associated with [her] counsel at the e-mail address registered with the Tyler (Wiznet) e-filing system," and Thigpen's lawyer bore the responsibility for the accuracy of his own registered e-mail address. *Id.* Accordingly, on this record, we cannot conclude that the trial court clearly erred when it found that Thigpen's lawyer received notice of Besam's motion for summary

disposition and the court's scheduling order. *Johnson Family Ltd Partnership*, 281 Mich App at 387.

Even if we were to conclude that the trial court erred on the issue of notice, we would nevertheless conclude that Thigpen has not demonstrated grounds for relief. On appeal, Thigpen has not argued that the trial court's additional bases for granting summary disposition were erroneous—that is, she has not argued or presented any evidence that she could have rebutted Besam's motion for summary disposition had she been given an opportunity to do so. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

As the trial court properly noted, Besam could not be liable under a premises liability theory because—as Thigpen admitted—it did not have possession and control over the premises at issue. See *Orel v Uni-Rak Sales, Co, Inc*, 454 Mich 564, 568; 563 NW2d 241 (1997). Similarly, Thigpen's statutory claim relied on MCL 554.139(1)(a), which only applies to a “lease or license of residential premises.” MCL 554.139(1). The hospital at issue was not a residential premises and Thigpen was not a lessee or licensee. Therefore, that claim too failed as a matter of law. Finally, Thigpen never presented any evidence that the door was not operating properly, let alone that Besam was responsible for any malfunction. Consequently, she failed to establish that Besam breached any duty that it may have owed to her. See *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Instead, Thigpen admitted that she did not know the proper name of the defect or malfunction, “if any,” and testified at her deposition that she stopped after stepping inside the revolving door before she was struck. Further, she does not contend that Besam's motion for summary disposition was premature. See *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly