

STATE OF MICHIGAN
COURT OF APPEALS

SHARON TAYLOR,

Plaintiff-Appellant,

v

DAVID J. O'BRIEN and STEVEN ROBINSON,

Defendants-Appellees.

UNPUBLISHED

April 22, 2008

No. 274125

Monroe Circuit Court

LC No. 05-020451-CZ

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's denial of her motion for default judgment against defendant David O'Brien. More specifically, she challenges the trial court's decision to allow defendant Steven Robinson¹ to file a late answer to her complaint and its eventual grant of summary disposition to defendant. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. FACTS

This is a legal malpractice action in which plaintiff seeks to recover damages from defendant, an attorney whom plaintiff retained to represent her in proceedings in the district court. In March of 2002, plaintiff and her husband, who owned a rental property, entered into a lease agreement with another couple. After the other couple fell behind in rent, plaintiff filed a complaint *in pro per* for possession of the property and unpaid rent. Plaintiff won that judgment and later filed another *in pro per* complaint for additional damages. After the court suggested that plaintiff retain an attorney, she retained defendant, who agreed to accept the case for a flat fee of \$1,000 with no obligation to appeal. Defendant filed a motion to dismiss without prejudice in the district court, with the goal of refiling plaintiff's action in Wayne Circuit Court. This motion was denied. Upon request from plaintiff, defendant timely filed a claim of appeal. Plaintiff and defendant, however, had a dispute regarding further legal fees for the appeal, and defendant entered a motion to withdraw as her counsel in early 2004. This motion was granted

¹ Only Robinson is implicated in the issues plaintiff raises on appeal; therefore, we will hereafter simply refer to Robinson as defendant.

on March 26, 2004. On April 29, 2004, the circuit court dismissed plaintiff's appeal under MCR 7.101(I)(1) and MCR 7.101(J) for failure to file an appellant's brief and serve the same on appellee.

Plaintiff filed this complaint on September 2, 2005, alleging legal malpractice and breach of contract. Defendant then moved to extend the time for filing his first responsive pleading. On October 26, 2005, the court heard oral arguments and, hearing no objection to the extension from plaintiff, granted a 30-day extension with pleadings due November 28, 2005. Defendant filed his answer two days late, on November 30, 2005. The trial court denied plaintiff's request to enter a default. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff could not meet her burden of proving breach of duty, proximate cause, and the fact and extent of alleged injury. He argued that at the time he ended his representation of plaintiff, she had suffered no loss of appealable rights and therefore he was not a proximate cause of any alleged damages. The motion for summary disposition was granted by the circuit court on June 16, 2006. Plaintiff now appeals.

II. SUMMARY DISPOSITION

We first consider plaintiff's argument that the trial court erred by granting summary disposition to defendant based on a lack of proximate causation between defendant's alleged malpractice and her claimed damages. We disagree with plaintiff's contention.

A. Standard of Review

A grant of summary disposition is reviewed de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). In considering a grant of a motion for summary disposition under MCR 2.116(C)(10), the pleadings, admissions, and other evidence submitted by the parties is considered in the light most favorable to the nonmoving party. *Id.* at 551-552. Summary disposition is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 552.²

B. Analysis

This Court has provided the following instructive description of the concept of proximate causation:

Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, and

² As will be explained, it is manifest that defendant was entitled to summary disposition under MCR 2.116(C)(10), so there is no need to consider the trial court's alternative conclusion that summary disposition was also appropriate under MCR 2.116(C)(8).

depends in part on foreseeability. [*Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496-497; 668 NW2d 402 (2003) (citation omitted).]

It is manifest that any damages suffered by plaintiff due to defendant's alleged malpractice must have resulted from the adverse decision in the district court action and the ensuing failure to obtain reversal of that decision on appeal to the Wayne Circuit Court. It is also apparent that plaintiff's failure to properly pursue the appeal in the Wayne Circuit Court for a period of nearly six months after defendant's withdrawal from the case was a new and independent cause that operated more directly than any malpractice by defendant to cause the ultimate result, i.e., the adverse decision of the district court remaining intact. Further, it is also apparent that it would not be socially and economically desirable to hold defendant responsible for this result when plaintiff's failure to properly pursue the appeal far more directly caused the ultimate result. Accordingly, based on the intervening cause of plaintiff's own negligence in handling the appeal, the trial court properly granted summary disposition to defendant based on the lack of proximate causation between his alleged malpractice and the alleged harm to plaintiff.

III. DEFAULT JUDGMENT

Plaintiff also argues that the trial court erred in denying her request to enter a default based on defendant filing an answer to her complaint two days late. We conclude that any error was harmless.

A. Standard of Review

An error in a ruling or order is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A).

B. Analysis

It is apparent that the trial court believed that imposing liability on defendant based on a default would have been unjust given that his answer was filed only two days late. Accordingly, if the trial court had entered the default as sought by plaintiff, it is evident that the trial court would have granted a motion by defendant to set aside the default under MCR 2.603(D). Particularly, the grant of a motion to set aside a default requires a showing of good cause and the filing of an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1). Given the lack of proximate cause between defendant's alleged malpractice and plaintiff's claimed harm, it is readily apparent that defendant could easily have provided an affidavit of meritorious defense. It is also apparent that the trial court could, and would, reasonably have found good cause to set aside the default. See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 223-224; 600 NW2d 638 (1999) ("a trial court's decision regarding whether to set aside a default will not be disturbed absent an abuse of discretion"). The facts that the answer was filed only two days late and before plaintiff even attempted to enter a default, and that no basis exists on which to conclude that the extremely minor lateness of the filing of the answer prejudiced plaintiff, support a finding of good cause. In addition, "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." *Id.* at 233-234. Thus, that defendant had an

absolute meritorious defense, i.e., a defense that entitled him to summary disposition, further supports a finding of good cause to set aside the default. In sum, any error by the trial court in refusing to enter a default was harmless and thus under MCR 2.613(A) does not warrant the granting of relief.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Donald S. Owens

/s/ Bill Schuette