STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL JACKSON, Plaintiff-Appellant,	UNPUBLISHED May 11, 2010
v	No. 289416 Wayne Circuit Court
PRISCILLA JO BAGGETT and SMART, Defendant-Appellees.	LC No. 08-107849-NI

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Michael Jackson appeals as of right the trial court's orders granting summary disposition in favor of defendants and denying plaintiff's motion for reconsideration. We affirm.

Plaintiff alleged that he was injured in an accident involving a SMART bus on March 30, 2005. On March 27, 2008, three days prior to the expiration of the three year statute of limitations, plaintiff filed suit against the driver, defendant Priscilla Baggett, and her employer, defendant SMART. On May 30, 2008, defendants filed their answer.

On July 21, 2008, defendants moved for summary disposition under MCR 2.116(C)(7), (8) and (10) alleging that plaintiff failed to provide written notice of the accident within 60 days, contrary to MCL 124.419. Defendants' summary disposition motion was scheduled to be heard on October 3, 2008, eleven weeks later. Pursuant to MCR 2.116(G)(1)(a)(ii), plaintiff was obligated to file and serve a response to the motion at least seven days prior to the hearing date. Plaintiff failed to do so.

On October 3, 2008, a new notice of hearing was served by defendants, rescheduling the hearing for October 8, 2008. The record does not state why the motion hearing was rescheduled. Defendants' brief in response to plaintiff's subsequent motion for reconsideration indicates that the motion was adjourned on request of plaintiff's counsel. Defendants' brief on appeal states that plaintiff's counsel requested the adjournment on the afternoon of October 2, 2008.

On October 6, 2008, two days prior to the rescheduled hearing, the trial court issued an order, which held in its entirety:

> Defendant SMART having filed a motion for summary disposition;[] and plaintiff not having filed a timely response; the Court now grants defendant's motion for summary disposition.
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> The Oral argument set for October 8, 2008 is canceled. *See* MCR 2.119(E)(3).

Plaintiff's counsel filed a motion for reconsideration asserting that he had filed his response to the summary disposition motion at approximately 4:00 p.m. on October 7, 2008 and that he learned of the court's October 6, 2008 order only upon appearing on October 8, 2008 at which time he was advised that the hearing had been cancelled. Contrary to the assertion that a brief was filed on October 7, 2008, however, the trial court's docket sheet does not contain an entry showing that such a response was filed and no such response is in the lower court record.

Plaintiff's motion for reconsideration was filed on October 9, 2008 and asserted that a timely brief was not filed because counsel had been in trial during the week prior and was to begin another trial on October 7, 2008. As noted above, the motion for reconsideration referenced a response filed late on October 7, 2008 and a letter attached to that response as evidence that timely notice had been given. Again, however, the lower court record does not contain these items. Plaintiff did attach to its brief to this Court a letter dated May 3, 2005, captioned "Notice of Claim," which complied with the substantive requirements of MCL 124.419. Plaintiff also attached an unnotarized affidavit purportedly signed by plaintiff counsel's paralegal stating that she mailed the notice letter on May 3, 2005. Defendants have not moved to strike these exhibits. The motion for reconsideration further asserted that plaintiff had a meritorious defense and requested "in the interest of fairness" that the trial court reconsider its prior ruling.

In their response to the motion for reconsideration, defendants stated that they had conducted a second search for the purported notice letter and no such letter was in their files. Defendants went on to argue:

> Plaintiff suddenly, and quite frankly mysteriously, produces a letter from his paralegal indicating there was sufficient notice. One wonders, if this letter really was created and sent, why would counsel for SMART spend hours writing and filing an inherently defective motion? And why, if this letter did exist, counsel for Plaintiff did not alert counsel for Defendants immediately, since he had 11 weeks notice? One further wonders why this letter suddenly and mysteriously appeared on the eve (literally) of a summary disposition motion? And one wonders how such a letter existed when virtually no attorney practicing in this field was even aware of this statute back in 2005 (since then there was a requirement of actual prejudice)?
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> Too many questions are raised by this mysterious letter. If this Court can get past the myriad of questions raised by this letter, Defendants request that the Center for computer Forensics in Southfield (or a similar computer forensic company) examine counsel for Plaintiff's hard drive to determine when this letter was created and modified. In addition, counsel for Defendants request that this Court order counsel and his paralegal to sit for deposition to inquire about the

origins of this letter and how often letters such as this were used in the ordinary course of his practice in 2005.

The trial court denied plaintiff's request for reconsideration on the ground that it could not take into account plaintiff's offer of proof to show timely notice of the claim because it was not timely filed. The court further stated that, even if plaintiff's assertion that he had filed a response to the motion at the end of the day on October 7, 2008 was true, the court would not have been able to consider it. The court also noted defendants' expressions of concern about the validity of the affidavit.

Plaintiff first argues that the trial court abused its discretion in denying its motion for reconsideration of the grant of summary disposition to defendants based on plaintiff's failure to timely respond to defendant's motion for summary disposition. Under the circumstances of this case, we disagree. We review for an abuse of discretion a trial court's decision to decline to entertain motions and briefs filed after the deadlines set in applicable court rules. *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005); see also *EDI Holdings LLC v Lear Corp*, 469 Mich 1021; 678 NW2d 440 (2004). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.116(G)(1)(a)(ii) requires a response to a motion for summary disposition to be filed at least seven days prior to the hearing. Plaintiff concedes that a trial court had the discretion to reject a late response to a motion for summary disposition, but argues that the trial court abused its discretion by doing so in this case because it was an overzealous adherence to the rule at the expense of justice. We note that our Supreme Court has peremptorily revered panels of this Court for adopting such a position.

In *EDI Holdings v Lear Corp*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 240442), a panel of this Court held that a trial court's grant of summary disposition to the plaintiff based on the defendant's failure to file a brief by the deadline provided by the trial court constituted an abuse of discretion. The panel had concluded that the law preferred adjudication on the merits and that without any showing that the defendant had delayed the proceedings in "an attempt to thwart adjudication, the trial court improperly imposed the sanction of rejecting Lear's response." *Id.* at 3. Our Supreme Court peremptorily reversed, holding that this Court "clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order." *EDI Holdings*, 469 Mich at 1021.

We recognize that the law strongly favors adjudication of claims on their merits. However, under the facts of this case, we do not find an abuse of discretion. Plaintiff had eleven weeks to submit his response or at least to notify defense counsel of the existence of the notice. Then, after seeking an adjournment, plaintiff still failed to promptly file a response. We cannot confirm from this record that a response was ever filed prior to October 8, 2008, and, at best, plaintiff's response was filed at the end of the business day, immediately before the motion hearing on the following morning. Further, plaintiff had failed to comply with early court orders dealing with discovery matters.

Finally, although the initial order granting summary disposition provided no reason other than plaintiffs' failure to respond, the order denying reconsideration references defendants' position that plaintiff failed to provide notice of the accident within the 60 days required, thus reflecting SMART's agent's affidavit to that effect. That affidavit constituted competent, and procedurally unopposed, evidence upon which the trial court based its decision on the merits. Thus, the trial court did decide the motion on the merits of the evidence it properly had before it, while exercising its discretion not to take into account what was belatedly filed. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1979).

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro