STATE OF MICHIGAN

COURT OF APPEALS

NIEWENHUIS CONSTRUCTION, L.L.C.,

Plaintiff-Appellee,

v

GENESIS EQUITY GROUP, L.L.C., TRENT E. FRANCKE, and CARLOS O. RUSO,

Defendants,

and

DANIEL A. VANSUILICHEM,

Defendant-Appellant.

UNPUBLISHED
January 3, 2012

No. 297060
Kent Circuit Court
LC No. 09-001135-CK

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant Daniel VanSuilichem (defendant) appeals as of right from the trial court's January 22, 2010, judgment, which followed the granting of plaintiff Niewenhuis Construction, L.L.C.'s motion for summary disposition. We affirm.

Plaintiff commenced this action in February 2009 against Genesis Equity Group, L.L.C., Trent E. Francke, Carlos O. Ruso, and defendant, seeking to recover $178,742.93 for construction work performed by plaintiff at various properties owned by defendants. On the last day of discovery, plaintiff submitted requests for admission, including a request that defendants admit that they were "justly indebted" to plaintiff for the amount owed. Defendant failed to respond in any way to these requests. As a result, the requests were deemed admitted. Based on the deemed admissions, the trial court granted plaintiff summary disposition and entered judgment against defendant and his codefendants, jointly and severally, for the amount owed.

Defendant argues in general that the trial court abused its discretion by deeming plaintiff's requests for admission to have been admitted. This portion of defendant's argument is preserved, and this Court reviews a trial court's decision to deem requests admitted for an abuse of discretion. See *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991). If the trial court's decision falls within the range of reasonable and principled outcomes, the trial court

has not abused its discretion. *Maldanado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009). Defendant also specifically contends, however, that the requests for admission were not received and that they were submitted after the date for completion of discovery set by the trial court. These issues were not raised below. Consequently, they are not preserved for appellate review. *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Accordingly, this Court reviews these issues using the plain-error standard. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). Thus, the burden is on defendant to demonstrate that: (1) an error occurred, (2) the error was plain or obvious, and (3) the error affected a substantial right. *Kern v Blethen–Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 2.312(B) provides, in pertinent part, that "[e]ach matter as to which a request [for admission] is made is deemed admitted unless, within 28 days after service of the request . . . the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." MCR 2.312(D) further provides that "[a] matter admitted under this rule is *conclusively established* unless the court on motion permits withdrawal or amendment of an admission" (emphasis added). Here, as in *Medbury*, 190 Mich App at 556, "it is undisputed that [defendants] did not respond to [plaintiff's] request[s] for admission within the twenty-eight day period specified by the court rule, did not seek an extension of time to answer the request[s], and did not object to the form or content of the request[s] before the hearing regarding [plaintiff's] motion for summary disposition." Accordingly, "MCR 2.312(B)(1) clearly provides that this failure results in deeming admitted each matter with respect to which the request was made." *Id*. While the trial court may permit a party to file a late response to a request for admission, *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983), defendant never moved the trial court to allow him to do so. Accordingly, the trial court cannot be said to have abused its discretion in deeming the requests to have been admitted.

Had defendant argued in the trial court that he was never served with the requests for admission, the trial court would have been required to determine, as a factual matter, whether defendant actually received the requests. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387-389; 761 NW2d 353 (2008). However, defendant did not do so. Instead, defendant asserted only that his counsel's failure to respond to the requests constituted excusable neglect. Moreover, the requests for admission and proof of service of those requests were filed with the trial court in the usual manner, and there is nothing in the lower court record to suggest that the requests were not received. Therefore, the trial court's decision to deem the requests admitted does not constitute plain error. *Kern*, 240 Mich App at 336.

Likewise, defendant's assertion that the requests for admission were not timely affords no basis for reversal. MCR 2.312(A) states that a party may serve requests for admission "within the time set for completion of discovery"—that is, before the discovery cut-off date. There are no exceptions, caveats, or limitations within this rule to suggest that requests for admission must be served more than 28 days before the end of discovery. Plaintiff's requests were served within the time set for the completion of discovery, albeit on the last day on which discovery was permitted. MCR 2.107(C)(3) ("Service by mail is complete at the time of mailing."). Therefore,

defendants had an obligation to respond to the requests. Because they failed to do so, "the matters in the request are deemed admitted," *Medbury*, 190 Mich App at 556, and conclusively so, MCR 2.312(D)(1), "unless the trial court, on motion, permits withdrawal or amendment for good cause shown," *Employers Mutual Casualty Co v Petroleum Equip, Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). Defendant never moved the trial court to permit him to file late responses to the requests for admission. Accordingly, the trial court properly deemed all matters within plaintiff's requests for admissions to have been conclusively admitted. MCR 2.312(D); *Medbury*, 190 Mich App at 556-557.

The trial court's scheduling order does not compel a different result. That order provided that the trial court would consider "compelling discovery and imposing sanctions for failing to engage in discovery only if the discovery request at issue was timely," and it defined a timely request as a request "served sufficiently in advance of the [November 10, 2009] deadline . . . that the applicable time for responding expired prior thereto . . . ." That the trial court indicated that it might decline to compel responses to discovery requests served at the end of the discovery period did not alter defendant's obligation to respond to requests for admission served in accordance with MCR 2.312(B)(1), or the pronouncement in MCR 2.312(D)(1) that a failure to meet this obligation would result in the requests to admit being deemed admitted. Therefore, the trial court's decision to deem the requests admitted does not constitute plain error. *Kern*, 240 Mich App at 336.

Defendant next argues that the trial court erred by granting plaintiff's motion for summary disposition, based primarily on the unanswered requests for admission. We disagree.

This Court reviews a trial court's decision concerning a motion for summary disposition de novo on the basis of the entire record to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a decision on a motion brought under MCR 2.116(C)(10), this Court must consider the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. at 120; MCR 2.116(G)(6). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). "[T]he admissions resulting from a failure to answer a request for admissions may form the basis for summary disposition." *Medbury*, 190 Mich App at 556.

Because defendant failed to respond to plaintiff's requests for admission, he was deemed to have admitted that defendants contracted with plaintiff for construction work, which plaintiff performed and for which defendants had not paid, and that, consequently, each defendant was "justly indebted" to plaintiff in the amount of $178,742.93. These admissions properly formed the basis of the trial court's grant of summary disposition. *Id*. Additionally, codefendant Carlos Ruso admitted at the motion hearing that defendants hired plaintiff to perform construction work and that plaintiff did that work. While defendant asserted that it was "other companies and entities," and not these defendants, that hired plaintiff, he did not substantiate this assertion by affidavit or other documentary evidence. Therefore, considering the evidence presented to the

trial court at the time the motion was decided, including, most notably, the deemed admissions, *Innovative Adult Foster Care*, 285 Mich App at 475-476, we conclude that the trial court did not err by granting plaintiff's motion for summary disposition.[1]

Defendant argues that the judgment should be set aside because he was not properly served with notice of the hearing on plaintiff's summary disposition motion. We disagree.

MCR 2.107(B)(1) and (C)(3) provide that "[s]ervice required or permitted to be made on a party for whom an attorney has appeared in the action must be made on the attorney . . . by delivery or by mailing to the attorney at his or her last known business address . . . with first class postage fully prepaid . . . [via] United States mail." The lower court record reflects that plaintiff served its original notice of hearing, together with its summary disposition motion and brief in support of that motion, on then-counsel of record, by mailing the papers to counsel's business address via first-class United States mail, postage prepaid. This constituted proper service of these pleadings on defendants. MCR 2.107(B) and (C).[2] However, plaintiff's subsequent service of the amended notice of hearing was not properly effectuated. Defense counsel's motion to withdraw having been granted and there being no defense counsel of record, plaintiff was required to serve defendant by mailing the amended notice to him "at the address stated in [his] pleadings." MCR 2.107(C). However, plaintiff did not serve defendant at his address as stated in the pleadings, instead sending the materials to defendant's former residential address. Hence, this service was not proper. *Id*. Still, defendant was actually apprised of the motion hearing, as evidenced by his appearance at that hearing, and consequently, he was afforded the opportunity to defend against plaintiff's motion. *Vicencio v Ramirez*, 211 Mich App

[1] At the motion hearing, the trial court made statements evidencing an apparent misapprehension regarding whether defendants had answered plaintiff's complaint. However, the trial court did not find defendants in default, but instead plainly relied on the deemed admissions in concluding that plaintiff was entitled to summary disposition under MCR 2.116(C)(10). Accordingly, no relief is warranted on the basis of the trial court's statements.

[2] Presumably because defense counsel had filed a motion to withdraw, which was pending before the trial court at the time plaintiff filed its motion for summary disposition, plaintiff also served the notice of hearing and motion papers on each of the defendants in the case. In so doing, plaintiff did not serve defendant at the address indicated in the pleadings, instead sending the materials to defendant's former residential address. Thus, this service directly on defendant was not proper under MCR 2.107(C) ("Service on a party must be made by delivery or by mailing to the party at the address stated in the party's pleadings."). Nevertheless, plaintiff effectuated proper service of these materials on defendant by serving them on defendant's then-counsel of record in accordance with MCR 2.107(B) and (C). Thus, defendant cannot be heard to complain that he was not properly served with the motion for summary disposition, the brief in support of that motion, and the original notice of hearing.

501, 504; 536 NW2d 280 (1995). Therefore, defendant's assertion that the judgment should be reversed on this basis lacks merit.[3]

Defendant next contends that the trial court should have permitted him to amend any pleadings the court found unsatisfactory. However, defendant did not seek to amend his pleadings in any manner. Moreover, considering defendant's admission that he was "justly indebted" to plaintiff in the amount of $178,742.93, any amendment of defendant's pleadings would have been futile, and accordingly, need not have been allowed. *Wormsbacher v Phillip R Seaver Title Co*, 284 Mich App 1, 8-9; 772 NW2d 827 (2009); *PT Today, Inc v Comm'r of the Office of Fin & Ins Serv*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

We additionally find no merit in defendant's contentions that the judgment should be set aside because plaintiff sued the wrong parties, because there was another action pending between these parties in another venue, or because there was no basis to impose personal liability against defendant. Defendant was properly deemed to have admitted, conclusively, that he was "justly indebted" to plaintiff for the amount claimed. Despite being represented by counsel for much of the time leading up to the hearing on the motion for summary disposition, defendant made no attempt to add any parties or claims to this action, to object to the absence of any necessary parties or claims, or to challenge venue. Accordingly, the trial court did not err when entering judgment against him.

Defendant's assertion that the trial court abused its discretion by denying his motion for relief from judgment also lacks merit. This Court reviews a trial court's decision to grant or deny a motion for relief from judgment for an abuse of discretion. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005). Thus, if the trial court's decision falls within a range of reasonable and principled outcomes, the trial court has not abused its discretion. *Maldanado*, 476 Mich at 388; *Corporan*, 282 Mich App at 605-606. For the reasons previously discussed, the trial court properly entered judgment against defendant. Hence, the trial court did not abuse its decision by denying defendant relief from that judgment.

Finally, defendant argues that the trial court abused its discretion by permitting defense counsel to withdraw as counsel of record. We disagree.

A trial court's decision to permit withdrawal of an attorney is reviewed for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). Again, if the trial court's decision falls within a range of reasonable and principled outcomes, the trial court has not abused its discretion. *Maldanado*, 476 Mich at 388; *Corporan*, 282 Mich App at 605-606.

[3] We again note that plaintiff's service of the original notice of hearing and motion-related papers on defendant's counsel afforded defendant notice of the substantive basis for plaintiff's motion to which defendant failed to timely respond. Thus, plaintiff's failure to properly serve defendant with the amended notice of hearing plainly did not deprive defendant of the opportunity to defend the substance of the motion.

An attorney who has entered an appearance for a party may withdraw only with the party's consent or by leave of the court. MCR 2.117(C)(2); *In re Withdrawal of Attorney*, 234 Mich App at 431. Among other bases, withdrawal is permitted if it "can be accomplished without material adverse effect on the interests of the client," if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled," or if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client." MRPC 1.16(b)(4) and (5); *Bye v Ferguson*, 138 Mich App 196, 207-208; 360 NW2d 175 (1984).

Defense counsel established that he had proper grounds for seeking to withdraw and that he provided all the defendants with sufficient notice that he intended to withdraw. Defendants did not contest counsel's motion. When granting the motion, the trial court provided defendants with 30 days to obtain new counsel. A trial court does not abuse its discretion by permitting counsel to withdraw if, as here, the clients are afforded with satisfactory notice of the intent to withdraw and have sufficient time to obtain new counsel. Cf. *Bye*, 138 Mich App at 206-207; see also *Wykoff v Winisky*, 9 Mich App 662, 669; 158 NW2d 55 (1968). Here, as in *Wykoff*, had defendant "acted with reasonable diligence in obtaining [new] counsel, . . . [he] could have properly filed whatever motions might have appeared to be in [his] best interest," including a response to the motion for summary disposition. That defendant did not do so does not render the trial court's decision to permit counsel to withdraw an abuse of discretion. See, generally, *id*. at 668-671. Under all the circumstances, there is no basis for reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering