IN THE SUPREME COURT OF THE STATE OF DELAWARE

KRISTYN SIMPSON,	§	
	§	No. 123, 2012
Plaintiff Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
MARGARET COLEMAN,	§	C.A. No. 11C-04-016
	§	
Defendant Below-Appellee.	§	
	§	

Submitted: July 16, 2012
Decided: August 22, 2012

Before **HOLLAND**, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 22nd day of August 2012, it appears to the Court that:

(1) Plaintiff-Below/Appellant Kristyn Simpson appeals from the Superior Court's denial of her motion to vacate the dismissal of her negligence action against Defendant-Below/Appellee Margaret Coleman for personal injuries sustained in a motor vehicle accident. Simpson raises one claim on appeal. Simpson contends that the Superior Court abused its discretion by refusing to vacate the order of dismissal that it entered on October 20, 2011. We find no merit to Simpson's appeal, and affirm.

(2) Simpson filed a complaint against Coleman seeking damages for personal injuries sustained when Coleman rear-ended Simpson's vehicle. Coleman filed an answer denying negligence and disputing the claim for damages; Coleman also asserted various affirmative defenses.

(3) On July 26, 2011, the Superior Court sent the parties a trial availability request form. The form indicated that it was to be completed by the parties and filed with the Superior Court within fourteen days. Although the record indicates that Plaintiff's counsel asked Defendant's counsel about potential dates, Plaintiff's counsel did not file a response with the Superior Court. On September 16, 2011, the judicial case manager filed a second form requesting that Plaintiff's counsel report back about trial availability within fifteen days. The letter stated that "[a]t the direction of Judge Joseph R. Slights, failure by plaintiff's counsel to comply with this letter may result in the Court deeming dismissal of this case as unopposed and the court may dismiss this action without further notice to the plaintiff(s)." Again, Plaintiff's counsel did not respond to the request. On October 20, 2011, the Superior Court dismissed the matter.

(4) On November 3, Plaintiff filed a motion to vacate the dismissal. In support of the motion, Plaintiff indicated that the failure to respond was inadvertent, but provided no further explanation. Defendant stated that she took no position on the motion to vacate. Plaintiff failed to appear at the motion hearing

on November 21, 2011, and the Superior Court denied the motion for failure to prosecute.

(5) Nearly three months later, Plaintiff again moved to vacate the dismissal. The Defendant opposed the motion. The Defendant noted that on November 26—five days after the Superior Court denied the motion to vacate dismissal—the Plaintiff had filed a new complaint against the Defendant based on the same accident. That new complaint was dismissed after Defendant informed Plaintiff that the statute of limitations had run.

(6) Plaintiff offered no specific explanation for the failure to respond to the Superior Court's July 26, 2011 trial availability request, or the renewed request on September 16, 2011, other than inadvertence. The Superior Court denied the second motion to vacate the dismissal. The Superior Court explained:

> Here the plaintiff simply failed; filed her claim and did nothing. When the Court asked her to act by selecting a trial date and an ADR date, as required by our Civil Rule 16, she did nothing. When the Court urged her to be responsive or risk dismissal of the action, she did nothing. When the Court set a hearing to address the motion to vacate, she did not appear for that hearing. Now, three months later, she asks the Court to vacate the dismissal but offers no explanation for her dilatory conduct and no analysis of the application of the only rule that may be invoked to seek relief from the Court's October 20, 2011 order.
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> Under the circumstances, the Court cannot vacate the dismissal. Merely asking the Court to do so and pointing out that the plaintiff should be heard on the merits is not a basis under Rule 60 to vacate an order that was entered three months ago. If the Court was to do so in this instance, the Court would discount

> the compliance with the rules that all litigants – or almost all litigants show day to day in this Court. Moreover, the Court would frustrate the defendant's legitimate expectation for closure in this litigation.

This appeal followed.

(7) Simpson contends that the Superior Court erred by failing to vacate the order of dismissal under Rule 60(b). Superior Court Rule of Civil Procedure 60(b) provides:

> (b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.[1]

This Court reviews the denial of a Rule 60(b) motion for abuse of discretion.[2] "An abuse of discretion occurs when a court has . . . exceeded the bounds of reason in view of the circumstances, or . . . so ignored recognized rules of law or practice so as to produce injustice."[3] In considering whether the Superior Court has abused its discretion, this Court will consider: "(i) whether the conduct resulting in the entry of the default judgment was the result of excusable neglect; (ii) whether the outcome of the action *may* be different if the judgment is reopened; and (iii)

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[1] Del. Super. Ct. R. 60(b).
[2] *Stevenson v. Swiggett*, 8 A.3d 1200, 1204 (Del. 2010) (citing *Apartment Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 70 (Del. 2004)).
[3] *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 633–34 (Del. 2001) (internal quotations omitted).

whether the nonmoving party will suffer substantial prejudice if the judgment is reopened."[4]

(8) Here, Plaintiff provides no evidence or analysis to support an excusable neglect argument. Plaintiff states only that she failed to respond to the Superior Court's two trial advisory requests due to "inadvertence." To explain her failure to appear at the November 21 hearing, Plaintiff argues that she believed she did not need to appear because the motion was unopposed. She relies on the Superior Court of New Castle County Civil Case Management Plan, which provides:

> IV. Motion Procedure for Assigned Civil Case
>
> B. Routine Motions
>
> 2. Filing of Motions and Responses:
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> b. Response is due under no later than 4 days to motion hearing date and shall not exceed 4 pages. If no response is filed by the due date, the motion will be deemed unopposed. The motion may be taken off the calendar, forwarded to the assigned judge, and granted without further notice or hearing.[5]

A routine motion includes a motion to vacate a default judgment.[6] But this section provides that an unopposed motion "*may*" be taken off the calendar and granted without further notice. It does not state that it "will" be taken off the calendar and

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[4] *Schrader-VanNewkirk v. Daube*, 2012 WL 1952297, at *2 (Del. May 30, 2012) (citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 495 (Del. 1996)).
[5] New Castle County Civil Case Management Plan, at 9.
[6] *Id*. at 10.

so granted. Moreover, Plaintiff only filed the second motion to vacate after her attempt to circumvent the dismissal through a second lawsuit failed.

(9) Plaintiff's repeated delays weigh against granting relief. In *Shremp v, Marvel*, the plaintiff waited two months after learning of the dismissal to file a Rule 60(b) motion, consistent with a prior pattern of delay in litigation.[7] We affirmed the Superior Court's dismissal of the motion as untimely, noting the much shorter time periods provided for appealing from an adverse judgment, moving for a new trial, or moving for reargument.[8] Here, Plaintiff failed to appear for the first motion to vacate, and then waited months before filing the second motion to vacate.

(10) This Court has recognized that, in some circumstances, a motion to vacate a default judgment may be denied improperly. In *Schrader-VanNewkirk v. Daube*, we held that the Superior Court abused its discretion in denying plaintiff's motion to reopen a default judgment.[9] There, the Superior Court failed to provide plaintiff with personal notice that she needed to indicate her intent to appear at trial or risked dismissal of her case.[10] The Superior Court only informed the plaintiff's attorney, despite that attorney's representations that he could not contact his

[7] 405 A.2d 119, 120–21 (Del. 1979).
[8] *Id*. at 121.
[9] 2012 WL 1952297, at *3 (Del. May 30, 2012).
[10] *Id*. at *2.

client.[11] In that case we noted that "[h]ad plaintiff failed to appear for trial for the second time on February 14, 2011, dismissal of her complaint clearly would have been warranted."[12] The latter scenario is closer to the factual scenario at issue here.

(11) Plaintiff has not demonstrated a basis for finding excusable neglect, and thus has not satisfied the first prong of the analysis for finding an abuse of discretion. Under the second prong of the analysis, it is unclear if the outcome of this action may be different if the judgment is reopened. But, under the third prong, the prejudice to the Defendant of reopening the judgment weighs in favor of finding no abuse of discretion. Defendant has not conceded any liability. Three years have passed since the accident at issue, making discovery significantly more difficult. Defendant has not contributed to the litigation delays, and is entitled to closure at some point. The Superior Court properly exercised its discretion in denying the motion to vacate dismissal.

(12) Plaintiff also contends that the Superior Court erred in declining to apply the factors from *Drejka v. Hitchens* to the motion to vacate.[13] This argument lacks merit. In *Drejka*, the Superior Court excluded a plaintiff's medical expert, essentially entering a default judgment against the plaintiff, as a sanction for

[11] *Id*.
[12] *Id*.
[13] *See Drejka v. Hitchens*, 15 A.3d 1221 (Del. 2010).

violating the scheduling order.[14] In this case, the *Drejka* analysis would apply to the initial decision to dismiss for failure to respond to the Superior Court's inquiries or attend the motion hearing. But on appeal, Plaintiff seeks relief from a final judgment under Rule 60(b). This Court has explained:

> [O]n appeal from the grant or denial of a motion for relief under Rule 60(b), a party may attack only the propriety of the order; Rule 60(b) does not permit the [A]ppellant to attack the underlying judgment for an error which he could have complained of on appeal from it.[15]

Rule 60(b) implicates two significant values: "The first is ensuring the integrity of the judicial process and the second, countervailing, consideration is the finality of judgments."[16] The Superior Court's decision in this case reflects a careful consideration of both factors. The Superior Court did not err in declining to rule in Plaintiff's favor under *Drejka*.

(13) In light of the Plaintiff's repeated failures to respond to the Superior Court's requests, failure to appear in court, and attempt to circumvent the first dismissal by filing a new complaint, the Superior Court's refusal to reopen the judgment was a proper exercise of discretion.

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[14] *Id*. at 1224.
[15] *Wilson v. Montague*, 2011 WL 1661561, at *2 (Del. May 3, 2011) (citing *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 634 (Del. 2001)).
[16] *Id*.

(14) NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

BY THE COURT:

/s/ Henry duPont Ridgely
Justice