

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE CO, as the
Subrogee of CARL REINHARDT and MOLLY
REINHARDT,

Plaintiff-Appellee,

v

XL INSURANCE COMPANY and CFM U.S.
CORPORATION,

Defendants-Appellants.

UNPUBLISHED
November 15, 2012

No. 306625
Bay Circuit Court
LC No. 10-003676-NZ

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover payments made after a house fire, defendants CFM U.S. Corporation and XL Insurance Company appeal by right the trial court's orders denying CFM's motion for summary disposition, granting plaintiff Auto-Owners Insurance Company's motion for entry of default judgments against both CFM and XL Insurance, and denying CFM and XL Insurance's request to have the default judgments set aside. In addition, XL Insurance argues that the trial court erred when it refused to dismiss XL Insurance from the suit on the grounds that XL Insurance was not a proper party. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Carl and Molly Reinhardt purchased a wood burning fireplace manufactured by CFM and had it installed by Modern Energy Systems, Inc. In January 2008, the Reinhardts' home caught fire and burned down. Auto-Owners insured the Reinhardts' home and paid the Reinhardts for their fire loss. Thereafter, Auto-Owners, as the Reinhardts' subrogee, sought to recover over \$260,000 in payments and expenses related to the fire from CFM because it believed that the fireplace manufactured by CFM was faulty and caused the fire.

In January 2009, Auto-Owners began efforts to determine CFM's legal status. Auto-Owners learned from CFM's bankruptcy lawyer that CFM was, as of March 2009, in bankruptcy in Delaware, but that it had been insured by XL Insurance on the date of the Reinhardts' fire loss. In June 2009, Auto-Owners communicated with XL Insurance's claims consultant about Auto-Owners' claim; the consultant told Auto-Owners that Auto-Owners would have to obtain relief from the bankruptcy stay before XL Insurance would consider the claim.

Auto-Owners inquired about a stipulation to lift the stay and CFM's bankruptcy lawyer agreed that CFM had stipulated to lift the stay in a few cases. However, he stated that any agreement to lift the stay would have to be limited to the recovery of insurance proceeds and include a waiver of all other claims against the debtors. Auto-Owners retained a lawyer in Delaware to request a relief from the stay and, in October 2009, the Bankruptcy Court granted the request. The bankruptcy court ordered that the stay be lifted only "to the extent of available and applicable insurance coverage."

Auto-Owners began to negotiate with XL Insurance in October 2009 to settle its claims. Auto-Owners provided documentation for the loss to XL Insurance. In response, XL Insurance's claims consultant noted that, although Auto-Owners' documentation suggested that the fire may have resulted from a failed weld on the fireplace, there was also evidence from which XL Insurance might argue that improper installation caused the fire loss. XL Insurance continued to request information from Auto-Owners through June 2010. Finally, in order to ensure that its suit was timely, Auto-Owners sued CFM, XL Insurance, and Modern Energy in August 2010.¹

Auto-Owners tried to serve CFM's resident agent in Michigan with the complaint, but the complaint was returned to sender. Thereafter, in October 2010, Auto-Owners served CFM through the Corporation Service Company, which was CFM's successor corporation's resident agent in Indiana. Auto-Owners served XL Insurance in September 2010. After both CFM and XL Insurance failed to answer the complaints, Auto-Owners asked the trial court to enter defaults against them. However, after XL Insurance's lawyer agreed to litigate the case, Auto-Owners agreed to set aside the defaults.

In April 2011, CFM moved for summary disposition under MCR 2.116(C)(3) and (7). It argued that Auto-Owners failed to comply with the methods of service provided under MCR 2.105(D). And, because the applicable period of limitations had passed, CFM maintained that Auto-Owners' claims against it must be dismissed.

After CFM moved for summary disposition, Auto-Owners again requested a default for XL Insurance, which the trial court granted in April 2011. CFM moved to have the default against XL Insurance set aside in May 2011. CFM argued that XL Insurance's failure to answer Auto-Owners' complaint was caused by "confusion", "mishandling of the matter", and "clerical error." Moreover, CFM stated that XL Insurance has a viable defense because MCL 500.3030

¹ Although Auto-Owners sued Modern Energy for negligent installation and the failure to repair, its claims against Modern Energy are not at issue and Modern Energy is not a party to this appeal.

precluded Auto-Owners from naming CFM's insurer as a defendant in the tort action. Finally, CFM also argued that Auto-Owners had agreed to dismiss XL Insurance from the underlying suit and asked the trial court to enforce that agreement.

In May 2011, the trial court held a hearing on the motions. At the hearing, Auto-Owners argued that, although it was unable to serve CFM in Michigan, CFM had actual notice through the service on it in Indiana. The trial court stated that it accepted Auto-Owners' lawyer's representations and determined that the service was "proper" under the facts of the case. It did, however, determine that the default against XL Insurance should be set aside. The trial court entered an order setting aside the default against XL Insurance and denying CFM's motion to dismiss for those reasons later that same month.

In June 2011, Auto-Owners again asked for entry of default against both CFM and XL Insurance. The trial court entered the defaults on June 23, 2011.

CFM and XL Insurance moved to have the defaults against them set aside in July 2011. They noted that the trial court had not set a deadline for their responsive pleadings, which they had since completed. They attached CFM's answer and XL Insurance's motion to dismiss under MCR 2.116(C)(8) to their motion to set aside the defaults. In response, Auto-Owners moved for entry of judgment against both CFM and XL Insurance. It argued that the applicable deadlines were provided by court rule and, for that reason, CFM and XL Insurance could not rely on the trial court's failure to set a deadline through a scheduling order as good cause for missing the deadlines provided by court rule. Accordingly, Auto-Owners maintained, CFM and XL Insurance had not established grounds for setting aside the defaults and the trial court should enter judgment against them.

The trial court agreed with Auto-Owners and determined that CFM and XL Insurance had not established grounds for setting aside the defaults. As such, the trial court denied CFM and XL Insurance's motion to set aside the defaults in August 2011. On the same day, the trial court entered orders granting judgment in Auto-Owners' favor against both CFM and XL Insurance.

CFM and XL Insurance moved for reconsideration or relief from the judgments in September 2011, which the trial court denied later that same month. Also in September 2011, the trial court entered amended judgments for \$263,480.60 against CFM and for \$213,480.60 against XL Insurance in Auto-Owners' favor.

This appeal followed.

II. SERVICE OF PROCESS

A. STANDARDS OF REVIEW

CFM first argues that the trial court erred when it denied CFM's motion for summary disposition under MCR 2.116(C)(3) and MCR 2.116(C)(7). Because Auto-Owners failed to comply with the service requirements stated under MCR 2.105(D) before the period of limitations expired, CFM maintains that the trial court had to dismiss Auto-Owners suit against it. 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). This Court also reviews de novo the proper interpretation and application of Michigan's court rules. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). Similarly, this Court reviews de novo questions of constitutional law, such as whether the method used to serve a defendant met the minimum requirements of due process. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009).

B. ANALYSIS

CFM does not dispute that Auto-Owners served its summons and complaint on the corporation that CFM's successor designated as its resident agent in Indiana within the applicable period of limitations. Rather, CFM argues that there was no evidence that Auto-Owners served "any officer, director, trustee or person in charge of any Michigan-based" CFM office as required under MCR 2.105(D). It further argues that, because its lawyer represented to the trial court that he did not receive a copy of the summons and complaint until after the applicable period of limitations and then only received a copy from XL Insurance's lawyer, that the trial court should have concluded that there was a complete failure to serve CFM.

Our Supreme Court has established detailed procedures for the service of process on corporate entities. See MCR 2.105(D). But the provisions for service under MCR 2.105(D) are not intended to constitute an exhaustive or exclusive list of the available means for serving process; they are "intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." MCR 2.105(J)(1); see also, *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986), citing *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950). Accordingly, if a plaintiff has complied with the requirements for the service of process under MCR 2.105(D), courts will presume that the service met the minimum requirements of due process. It does not, however, necessarily follow that a plaintiff's failure to use the method for service of process stated under MCR 2.105(D) constitutes the failure to meet minimum due process. *Bunner v Blow-Rite Insulation Co*, 162 Mich App 664, 674; 413 NW2d 474 (1987) ("Neither errors in the content of the service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose."). Rather, the goal is to ensure that the defendant has actual notice of the proceedings and an opportunity to be heard. See MCR 2.105(I)(1); *Bunner*, 162 Mich App at 674. Indeed, our Supreme Court has provided that an action "*shall not* be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." MCR 2.105(J)(3) (emphasis added). "The use of 'shall not' in the rule indicates that it is mandatory. Thus, if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill*, 155 Mich App at 613. This is true even though MCR 2.105(J)(3) appears to clash with specific service-of-process rules; in every case, the relevant question is whether "the manner actually used satisfie[d] constitutional due process" by giving the defendant sufficient notice. *Id.* at 614. Thus, we must determine whether the trial court erred when it found that CFM had actual notice.

At the hearing on CFM's motion, Auto-Owner's lawyer stated that his office contacted the corporation designated as CFM's successor's resident agent in Indiana and was told that he could serve CFM through the successor. He also noted that they had been in contact with CFM's insurer, XL Insurance, through the past two years. There was also record evidence that Auto-Owners had been in contact with CFM's bankruptcy lawyer and had appeared in CFM's bankruptcy.² Auto-Owners argued before the trial court that CFM had had actual notice through these contacts. The trial court agreed that this was sufficient to give actual notice: "I think service is good under the circumstances. Counsel's representations are good with the Court. Service was made proper, in a manner that gave notice to the Defendant." Because the trial court was in the best position to judge the credibility of the parties' representations, we will defer to its finding that Auto-Owner's lawyer's representations were credible;³ as such, we cannot conclude that the trial court clearly erred when it found that Auto-Owners had been told that it could serve CFM through CFM's successor's resident agent in Indiana. See *Johnson*, 281 Mich App at 387-389 (stating that this Court reviews a trial court's findings underlying its application of a court rule for clear error and deferring to the trial court's assessment of credibility). Likewise, we cannot conclude that the trial court clearly erred when it found that the service on the resident agent in Indiana gave CFM actual notice before the expiration of the applicable period of limitations. Because Auto-Owner's served CFM's successor within the applicable period of limitations and the service was sufficient to give CFM actual notice, the trial court did not err when it denied CFM's motion to dismiss under MCR 2.116(C)(3) and (C)(7).

III. DEFAULT JUDGMENTS

A. STANDARDS OF REVIEW

CFM and XL Insurance both argue that the trial court erred when it entered default judgments against them and erred when it denied their motions to set aside the defaults. This Court reviews a trial court's decision on a motion to set aside a default for an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

² Auto-Owners did not present evidence that it served CFM through its bankruptcy trustee. See *Bunner*, 162 Mich App at 673 (noting that a plaintiff can serve a bankrupt corporation through the bankruptcy trustee under the court rules).

³ Our Supreme Court has held that there is no right to have a jury resolve questions of fact regarding the adequacy of service of process under a motion brought under MCR 2.116(C)(3) and (C)(7). See *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 289-290; 731 NW2d 29 (2007). Rather, the trial court can proceed to resolve any factual disputes in an immediate bench trial under MCR 2.116(I)(3). *Id.* Here, the parties have not disputed the trial court's procedure for resolving the factual disputes underlying Auto-Owner's service of process. As such, we express no opinion as to the propriety of the trial court's decision to make findings on the basis of the record and parties' representations.

B. CFM'S DEFAULT

CFM argues that the trial court abused its discretion by entering a default judgment against it, even though it did not file an answer to Auto-Owner's complaint as required under MCR 2.108, because it did "otherwise defend" against Auto-Owner's suit. On appeal, CFM does not identify the specific actions that it contends were sufficient to comply with the court rules. Instead, it merely contends that this conclusion is warranted on "the contents of this record." By failing to properly support its argument with citations to the record and relevant analysis of the law as it applies to the actions that it allegedly took, CFM has abandoned this claim of error on appeal. *Chen v Wayne State University*, 284 Mich App 172, 206-207; 771 NW2d 820 (2009). In any event, the record demonstrates that CFM failed to take timely action after the trial court denied its motion under MCR 2.116(C)(3) and (C)(7).

After the trial court denied CFM's motion, which it made before filing a responsive pleading, it had to "file a responsive pleading within 21 days after notice of the denial." MCR 2.108(C)(1). Notwithstanding MCR 2.108(C)(1), and unlike the case in *Marposs Corp v Autocam Corp*, 183 Mich App 166; 454 NW2d 194 (1990), CFM did not take any action to defend against Auto-Owner's suit within the 21 day period. As such, the trial court did not err when it entered a default judgment against CFM. MCR 2.603(A)(1).

CFM also failed to establish grounds for setting aside the default. In order to warrant setting aside a default under MCR 2.603(D)(1), CFM had to "demonstrate both good cause, i.e., a reasonable excuse for the failure to answer, and a meritorious defense." *Saffian*, 477 Mich at 14. Good cause and meritorious defense are separate requirements under MCR 2.603(D)(1). *Alken-Ziegler*, 461 Mich at 230. And, although the strength of the defense will affect the "good cause" showing that is necessary in order to warrant relief, the party moving to have the default set aside must nevertheless establish a procedural irregularity, defect, or reasonable explanation for failing to file its answer. *Id.* at 233-234. But despite these requirements, CFM's only excuse for failing to answer was that there were "procedural irregularities" before the trial court. It did not explain what those irregularities were or how those irregularities interfered with or excused its failure to answer. Moreover, whatever procedural irregularities there might have been prior to the trial court's hearing on CFM's motion for summary disposition, there were no irregularities evident on the record after that hearing that might have interfered with CFM's ability to file an answer within the 21 days provided after the denial. Because CFM failed to establish good cause for its failure to file an answer within the period set by MCR 2.108(C)(1), we cannot conclude that the trial court abused its discretion when it denied CFM's motion to set aside the default. *Saffian*, 477 Mich at 12.

C. XL INSURANCE'S DEFAULT

The trial court entered a default against XL Insurance after it failed to answer or otherwise defend against Auto-Owners' complaint. However, the trial court later set aside that default in an order entered on May 31, 2011.⁴ XL Insurance did not submit an answer along with the motion to set aside the default and the trial court's order setting aside the default did not provide a time limit within which XL Insurance had to answer or take other action to defend against Auto-Owners' complaint. A trial court's order setting aside a default restores the parties to their original positions; that is, the parties are placed in the same position that they would have been in had there been no default. See 49 CJS, Judgments, § 622, p 689. By setting aside XL Insurance's first default, the trial court restored XL Insurance to the position that it held on the day that Auto-Owners served it with the summons and complaint. Accordingly, XL Insurance had to serve and file its answer to Auto-Owners' complaint or take other action permitted by law or the court rules within the time set under MCR 2.108(A) from the date that the trial court's order setting aside the default became effective. Because Auto-Owners served XL Insurance outside this state, XL Insurance had 28 days to file its answer or take other action. See MCR 2.108(A)(2).

Here, the trial court signed its first order setting aside XL Insurance's default on May 16, 2011. Auto-Owners requested a default on June 21, 2011, which was entered on June 23, 2011. Because XL Insurance had not answered or taken any other action to defend against Auto-Owners' suit within 28 days of the May 16, 2011 order, the trial court properly entered a default against XL Insurance.

Even assuming that the trial court's May 31, 2011 order was the order that triggered the 28-day period (as opposed to the order signed on May 16, 2011), we would nevertheless conclude that XL Insurance is not entitled to any relief. On appeal, XL Insurance has not raised a claim that the default was prematurely entered; instead, it argues on appeal that the trial court should not have entered the default because *it did* take action to defend against Auto-Owners' suit. But like CFM, XL Insurance failed to identify the actions that it took to defend against Auto-Owners' suit after the trial court set aside its original default. And, even assuming that XL Insurance had until June 28, 2011 to answer or otherwise defend, the record shows that XL Insurance did not take any action to answer or defend until it moved to set aside the default on July 6, 2011, which was after the later deadline for taking action. By failing to properly argue and address the record and the applicable law, we conclude that XL Insurance has abandoned its claim that the trial court erred by entering a default against it. *Chen*, 284 Mich App at 206-207.

XL Insurance also argues that the trial court abused its discretion when it denied XL Insurance's motion to set aside the default. XL Insurance contends that it had good cause for failing to take any action: the "Michigan Court Rules do not provide a pleading requirement for when a default is set aside, and the Circuit Court's May 31, 2011, Order . . . was silent as to

⁴ The record shows that the trial court signed a handwritten order setting aside the default on May 16, 2011, but that order also shows that Auto-Owners' lawyer was assigned to prepare an order. The trial court signed the prepared order on May 31, 2011.

when CFM and XL Insurance were required to answer.” XL Insurance further contends that it had an absolute meritorious defense; specifically, it notes that there is evidence that CFM might not have manufactured the fireplace and, even if it did, that the fireplace might not have caused the fire. It also states that it is entitled to be dismissed from the case because an insurer cannot be named as a defendant in an original action under MCL 500.3030. XL Insurance raised these issues before the trial court, but the court rejected them: “Well, we’ve gone through this before. Defaults were—were entered, set aside, and time—you had time to—to file pleadings, and nothing was filed, and at this point, I believe it’s appropriate”

In declining to exercise its discretion to set aside the default against XL Insurance, the trial court emphasized the fact that it had already set aside one default against XL Insurance and, despite having already been defaulted once before, XL Insurance again failed to take any action to answer Auto-Owners’ complaint. Indeed, given that it had already been defaulted for failing to answer or defend, it is remarkable that XL Insurance did not submit a proposed answer or motion for summary disposition with its motion to set aside the first default. And, although the court rules do not specifically provide a time within which a party who successfully moves to set aside a default must answer the original complaint, XL Insurance could not reasonably believe that it had more time to answer or take some other action than it had when first served with the summons and complaint. Accordingly, XL Insurance did not have a particularly compelling excuse for failing to take any action until July 2011. See *Saffian*, 477 Mich at 14.

XL Insurance’s meritorious defenses are also not as strong as they might appear at first blush. Auto-Owners established that it was entitled to a default against CFM, XL Insurance’s insured, after it failed to meet the deadline provided under MCR 2.108(A). Because CFM could not establish good cause for its failure to respond, it could not establish a basis for setting aside its default. For that reason, XL Insurance could not rely on CFM’s potential defenses. See *Perry & Derrick Co v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970) (“A default judgment is just as conclusive an adjudication and as binding upon the parties of whatever is essential to support the judgment as one which has been rendered following answer and contest.”). As such, to the extent that its policy covered CFM’s liability, XL Insurance would ultimately be obligated to pay out on its policy covering CFM. Taking the fact that XL Insurance repeatedly failed to take action to answer or defend Auto-Owners’ claims and that its excuse for failing to take action after the trial court set aside the original default was weak along with the fact that its identified defense could not preclude liability under its policy with CFM, we cannot conclude that the trial court’s decision to deny the motion to set aside the default fell outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12.

IV. PROPER PARTY

XL Insurance also argues that the trial court erred when it failed to dismiss the claims against it because it was an improper party under MCL 500.3030 and erred when it failed to enforce Auto-Owners’ lawyer’s agreement to stipulate to the dismissal of the claims against XL Insurance. XL Insurance never filed a properly supported motion asking the trial court to dismiss the claims against it under MCL 500.3030. Rather, CFM filed a motion—apparently on XL Insurance’s behalf—in which it asked the trial court to set aside the default against XL Insurance because XL Insurance’s inaction was caused by an agreement between XL Insurance’s lawyer and Auto-Owners’ lawyer in which Auto-Owner’s lawyer agreed to stipulate to dismiss

XL Insurance from the suit if XL Insurance would appear and defend CFM. The trial court ultimately granted CFM's request for relief and set aside the default against XL Insurance. After which XL Insurance had ample opportunity to move for dismissal of the claims against it.⁵ On this record, we cannot fault the trial court for failing to sua sponte dismiss the claims against XL Insurance under MCL 500.3030, or to otherwise enforce the parties' agreement. The trial court granted the only relief that CFM formally requested and it was XL Insurance's obligation to properly and timely move for dismissal of the claims against it or for enforcement of the agreement, which it did not do. See *Barnard Mfg*, 285 Mich App at 382-383 (stating that trial courts have no duty to advocate on behalf of a party; rather, under "our adversarial system, each party bears the responsibility for ensuring that its positions are vigorously and properly advocated.").

There were no errors warranting relief.

Affirmed. As the prevailing party, Auto-Owners may tax its costs. MCR 7.219(A).

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly

⁵ XL Insurance's lawyer represented to the court at the hearing on the motion to set aside the default that he had been about to file just such a motion, but did not do so because Auto-Owners' lawyer agreed to the stipulation.