STATE OF MICHIGAN

COURT OF APPEALS

DYNASTY INVESTMENT GROUP and CHARLES BOONE, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED April 2, 2013
v	No. 307441 Oakland Circuit Court
PAUL JACQUES and MARY JACQUES, Defendants/Counter-Plaintiffs-Appellees.	LC No. 2010-114389-CK

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiffs/counter-defendants, Dynasty Investment Group (Dynasty) and Charles Boone, appeal as of right an order granting summary disposition to defendants/counter-plaintiffs, Paul and Mary Jacques, in this breach of contract action. We affirm.

I. BACKGROUND

This case arises out of a dispute between plaintiffs and defendants regarding a contract to repair fire damage to defendants' home.

Plaintiffs, who were represented by attorney Dante' L. Goss, filed a complaint alleging they performed certain repairs as provided by contract and that plaintiffs failed to pay for services rendered, or make insurance proceeds available, as required by the contract. Defendants filed an answer to the complaint and also filed a counter-complaint. On July 1, 2011, defendants moved for summary disposition of plaintiff's complaint and their counter-complaint pursuant to MCR 2.116(C)(10). The trial court entered a scheduling order that provided that the motion hearing would be held on August 24, 2011, at 8:30 a.m. and that any response by plaintiffs was to be filed on or before July 27, 2011.

Plaintiffs did not file a reply to the summary disposition motion as required by the scheduling order, and on August 18, 2011, the trial court issued an order granting defendants' motion for summary disposition because plaintiffs failed to adhere to the court's scheduling-order deadline of July 27, 2011, and "failed to respond in violation of MCR 2.116(G)(3) & (4)."

On August 24, 2011, the day the trial court had initially scheduled a hearing on defendants' motion for summary disposition, Goss and Elliot P. Kramer stipulated to an order, which the trial court signed, substituting Kramer for Goss as Dynasty's counsel.[1] That same day, Kramer filed a response to defendants' motion for summary disposition.[2]

On September 1, 2011, the trial court entered a judgment against plaintiffs in the amount of $82,100.24. On September 9, 2011, plaintiffs moved for relief from the order granting defendants summary disposition and the judgment entered in favor of defendants. In their motion, plaintiffs asserted that Goss never advised them that defendants ever filed a motion for summary disposition and consequently were not aware of the July 27, 2011, deadline for filing a response. Plaintiffs further asserted that the trial court's prior order and judgment should be set aside because even though their response to the motion for summary disposition was filed after the deadline the trial court established in the scheduling order, the response nonetheless was filed before the time set by the trial court for hearing on defendant's motion.[3] Plaintiffs also maintained that the circumstances qualified as "any other reason justifying relief from the operation of the judgment" under MCR 2.612(C)(1)(f) and, alternatively, that the facts before the court qualified as mistake, inadvertence, surprise, or excusable neglect under MCR 2.612(C)(1)(a).

Despite the claimed bases for relief from judgment in their motion, in plaintiffs' accompanying brief to the motion, plaintiffs relied solely on MCR 2.612(C)(1)(f) in claiming that the order and judgment should be set aside. The entire justification or argument within the brief is as follows:

> MCR 2.612(C)(1)(f) gives the courts ample power to vacate judgments whenever extraordinary circumstances make it necessary to achieve justice. *Lark v Detroit Edison Co*, 99 Mich App 280[; 297 NW2d 653] (1980). Plaintiff/Counter-Defendant's counsel's mistake or inadvertence will result in a travesty of justice.
>
> That the judgment entered be set aside and the Plaintiff granted a hearing on the Motion for Summary Disposition as the Judgment is in favor of the

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[1] The caption and text of the order only listed Dynasty as a plaintiff and did not mention Boone at all.

[2] Specifically, the record reveals that an "answer" to defendants' motion for summary disposition was filed at 8:31 a.m. and an accompanying brief was filed at 8:34 a.m.

[3] This is not an entirely accurate assertion. In both the motion for relief from judgment and their brief on appeal, plaintiffs assert that their response was mailed via FedEx on August 19, 2011, and filed "prior to the actual motion date." However, as we noted above, the record establishes that the documents were not actually filed with the trial court until August 27, 2011, at 8:31 a.m. and 8:34 a.m., respectively. Thus, contrary to MCR 2.116(G)(1), the response was filed on, and not prior to, the date of the scheduled hearing, and after the 8:30 a.m. scheduled start time.

> Defendant in the sum of $82,100.24 when Plaintiff's [sic] records indicate that the Defendant owes the Plaintiff the sum of $72,787.59.
>
> That attorney Goss's neglect in not filing a response should not be imputed to the Plaintiffs, especially when Plaintiffs contacted a new attorney who filed an Answer and Brief to the oral [sic] motion.[4]

On September 23, 2011, defendants responded to plaintiffs' motion seeking relief from the order and judgment. Defendants made several arguments, including that Kramer only entered an appearance on behalf of Dynasty, thereby necessarily leaving the order and judgment intact against Boone; that an attorney's neglect is imputed to the client and is not a reason to grant relief under the court rules; and that Dynasty did not have a meritorious defense.

On October 21, 2011, the trial court entered a stipulated order allowing Kramer to be substituted counsel for both Dynasty and Boone. On November 18, 2011, the trial court, in a one-sentence order, denied plaintiffs motion for relief from the order and judgment.

II. ANALYSIS

On appeal, plaintiffs argue that the lower court abused its discretion by denying plaintiffs' request for relief from judgment. We disagree.

"A trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 164; 807 NW2d 892 (2011).

MCR 2.612 governs obtaining relief from a judgment or order, and subpart (C) provides the grounds for obtaining such relief:

> (1) On motion and on just terms, the court may relieve a party . . . from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment. [MCR 2.612(C)(1).]

At the outset, we note that plaintiffs abandoned their argument at the trial court that MCR 2.612(C)(1)(a) was a ground for setting the order and judgment aside. See *Prince v MacDonald*,

[4] Plaintiff's reference to an oral motion appears to be in error because, as we have discussed, defendants filed a written brief and motion for summary disposition.

237 Mich App 186, 197; 602 NW2d 834 (1999) (stating that failure to brief an issue constitutes an abandonment of that issue). Plaintiff's brief relied exclusively on MCR 2.612(C)(1)(f), and as such, whether MCR 2.612(C)(1)(a) was a ground for setting the order and judgment aside was never properly raised at the lower court and is therefore unpreserved for our review. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005).

Regardless, even if the issue was preserved, plaintiff failed to assert or prove that Goss's neglect to file a response to defendants' motion for summary disposition constituted "excusable" neglect. As this Court has noted, "While many acts of neglect are not 'excusable,' some are, else that word would not appear in the rule." *Reno v Glen R Gale, Corner of State & William P'ship*, 165 Mich App 86, 95; 418 NW2d 434 (1987) (quotations marks and citations omitted). Goss never filed an affidavit explaining his neglect, and contrary to plaintiffs' assertion, plaintiff's motion and accompanying brief contained in the lower court record was not signed by Boone and did not include an affidavit from Boone providing evidence of excusable neglect. Thus, because the trial court was presented with no evidentiary support to find excusable neglect, the trial court did not abuse its discretion in rejecting plaintiff's motion. Moreover, "MCR 2.612(C)(1)(a) was not designed to relieve counsel of ill-advised or careless decisions." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997) (quotation marks and citations omitted).

Plaintiffs, without citation to any authority, claim in their brief on appeal that they "should not be punished for their counsels' failure to timely response to Defendants[']s Motion for Summary Disposition." However, an attorney's negligence is ordinarily imputed to the client. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 96; 666 NW2d 623 (2003).

Regarding subsection (f),

> "[i]n order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." [*King v McPherson Hosp*, 290 Mich App 299, 304; 810 NW2d 594 (2010), quoting *Heugel v Heugel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999).]

In their brief in support of their motion to set aside the order and judgment, plaintiffs argued that MCR 2.116(C)(1)(f) applied because of two reasons: (1) plaintiffs' records indicated that defendant owed plaintiff over $70,000, and (2) Goss's neglect should not be imputed to plaintiffs. The fact that plaintiffs' records reflected a different outcome than what defendants sought (and ultimately received) is not an "extraordinary circumstance" mandating the judgment be disturbed. In nearly all lawsuits, the parties each have different views of the underlying facts and what constitutes a fair and just outcome based on those facts. Plaintiff's mere assertions regarding the proper outcome were not sufficient to show that justice would not be achieved if the judgment were not set aside. And because Goss's neglect falls under MCR 2.116(C)(1)(a), it

cannot be used to support a ground for relief under MCR 2.116(C)(1)(f). *Id.* As a result, plaintiffs were not entitled to relief under MCR 2.116(C)(1)(f).

In summary, plaintiffs failed to meet their burden of proof for their motion to set the order and judgment aside under MCR 2.612(C), and the trial court did not abuse its discretion in denying the motion.

Plaintiffs also argue on appeal that the prior order and judgment should be set aside because the trial court failed to evaluate whether defendants were entitled to judgment and, instead, solely relied on the fact that plaintiffs never timely filed a response to defendant's motion for summary disposition. MCR 2.116(G)(4) provides that "[i]f an adverse party does not so respond [to a motion for summary judgment], judgment, *if appropriate*, shall be entered against him or her." (Emphasis added.) However, this issue is not properly preserved. As discussed previously, plaintiffs argued two bases in the trial court for setting aside the prior order and judgment, and they failed to assert below that the trial court had made a "mistake" under MCR 2.612(C)(1)(a).

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens