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STATE OF MICHIGAN

COURT OF APPEALS

SMITH'S DESIGNER CONSTRUCTION, INC.,

Plaintiff/Counterdefendant-Appellee,

v

BRYAN R. ELLIS and NICOLE TANYA BRANCH-ELLIS,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

LIBERTY BANK AND TRUST COMPANY,

Defendant,

and

READY ROOTER, LLC, EXPERT MASTER PLUMBERS, LLC, VICTOR VIOREL PINTICAN, and STRICKLY HEATING AND COOLING, LLC,

Third-Party Defendants-Appellees.

UNPUBLISHED
August 13, 2026
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No. 374581
Wayne Circuit Court
LC No. 22-006097-CH

Before: ACKERMAN, P.J., and BAZZI and LIEVENSE, JJ.

PER CURIAM.

In this appeal involving a dispute over construction work performed on a residential home, defendants/counterplaintiffs/third-party plaintiffs, Bryan R. Ellis and Nicole Tanya Branch-Ellis (collectively, the Ellises), appeal by right the trial court's final order closing the case. On appeal, the Ellises challenge an underlying April 2, 2024 order setting aside a default and an underlying May 30, 2024 order granting summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Both orders were entered in favor of third-party defendant, Strickly Heating and Cooling, LLC (Strickly). Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from a contract to perform construction work on the Ellises' home. The Ellises are husband and wife. In July 2020, they entered into a contract with plaintiff/counterdefendant, Smith's Designer Construction, LLC (Smith's Designer), for construction services to improve their home. A portion of the work involved services to install and restore the home's heating, ventilation, and air conditioning (HVAC) system, which Smith's Designer subcontracted Strickly to perform.

The construction project progressed into 2021, until there was a breakdown in the relationship between Smith's Designer and the Ellises. Smith's Designer maintained that the Ellises failed to pay for services rendered, while the Ellises claimed that Smith's Designer provided inadequate services that it failed to repair and failed to complete agreed-upon work. Smith's Designer sued the Ellises in May 2022 for breach of contract, unjust enrichment and quantum meruit, and foreclosure of a construction lien. In response, the Ellises counterclaimed for breach of contract, slander of title, and fraud. In their counterclaim, the Ellises alleged that Smith's Designer breached its contract in part by failing to repair faulty work performed on the HVAC system. Smith's Designer thereafter filed a notice of nonparty fault pursuant to MCR 2.112(K)(3), asserting that Strickly "installed the HVAC system in question, including the attic furnace, and it would be responsible to [the Ellises] for any failure to do so in a workmanlike manner." Several other notices of nonparty fault were issued to other subcontractors.

In June 2023, the Ellises filed a third-party complaint against Strickly and other third-party defendants, Ready Rooter, LLC; Expert Master Plumbers, LLC; and Victor Viorel Pintican. Against all third-party defendants, the Ellises asserted claims of negligence for damages incurred because of the third-party defendants' failure to exercise ordinary care in performing work on the home and unjust enrichment and quantum meruit based on payments allegedly made by the Ellises for faulty work.

Lonnie Mitchell, the owner of Strickly, was personally served with the summons and third-party complaint. Upon receipt, he contacted Tyrone Smith, the owner of Smith's Designer, who "told [Mitchell] not to worry about the lawsuit because the [Ellises] were upset because [Smith's Designer] had sued them for non-payment of fees and that [Smith] would take care of the matter." Mitchell took Smith at his word and did not take any action with respect to the lawsuit.

In September 2023, the Ellises sought and obtained an entry of default against Strickly for its failure to defend the action. The default was entered on September 11, 2023, and a Certificate of Mailing was signed the following day. In March 2024, the Ellises moved for entry of a default judgment against Strickly—as well as Pintican and Expert Master Plumbers, LLC—for their respective failures to defend the case. Strickly and Pintican then filed appearances in the action. Strickly responded in opposition to the motion for default judgment. Strickly and Pintican also filed motions to set aside the default. The trial court held a motion hearing on the Ellises' motion for default judgment, and thereafter issued an April 2, 2024 order denying the Ellises' motion for default judgment and granting Strickly's and Pintican's motions to set aside the defaults, reasoning that they did not receive notice of the default entries and relied upon Smith's representations that he would take care of the lawsuit.

With the default set aside, litigation commenced between the Ellises and Strickly. In April 2024, Strickly moved for summary disposition of the Ellises' claims for negligence and unjust enrichment, primarily contending that their claims should be dismissed because they sounded in breach of contract, rather than tort. The trial court agreed, and following a motion hearing, it entered a May 30, 2024 order granting summary disposition in favor of Strickly and dismissing the Ellises' claims. After the remaining litigation between the Ellises and Smith's Designer resolved, the Ellises initiated the instant appeal, challenging the orders entered in favor of Strickly.

II. DEFAULT

The Ellises argue that the trial court abused its discretion by setting aside the default against Strickly, which was properly entered. We disagree.

"This Court reviews for an abuse of discretion a trial court's decision on a motion to set aside a default." *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 294; 14 NW3d 472 (2023). "A trial court abuses its discretion when its decision falls outside the range of reasonable outcomes." *Id*. "A trial court necessarily abuses its discretion when it premises its decision on an error of law." *Id*. at 294-295. However, the policy of this state generally disfavors "setting aside defaults and default judgments that have been properly entered." *Tindle v Legend Health, PLLC*, 346 Mich App 468, 474; 12 NW3d 667 (2023) (quotation marks and citation omitted). "This Court reviews de novo whether the trial court properly interpreted and applied the court rules." *Tolas*, 347 Mich App at 294.

MCR 2.603(D)(1) provides that "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and a statement of facts showing a meritorious defense, verified in the manner prescribed by MCR 1.109(D)(3), is filed." Accordingly, "a default will not be set aside unless the defaulting party demonstrates both good cause and a meritorious defense." *Edmore v Crystal Automation Sys Inc*, 322 Mich App 244, 255; 911 NW2d 241 (2017) (quotation marks and citation omitted). These determinations should be made based on the totality of the circumstances. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 237; 760 NW2d 674 (2008).

"[G]ood cause can be shown by (1) a substantial procedural defect or irregularity or (2) a reasonable excuse for the failure to comply with the requirements that created the default." *Tindle*, 346 Mich App at 476 (quotation marks and citations omitted). This Court has articulated several factors to consider regarding the good-cause requirement:

> The trial court should consider a list of factors in determining whether there was good cause: whether the party completely failed to respond or simply missed the deadline; if the party simply missed the deadline, how long afterward the party filed; how long the movant took to move to set aside the default; whether there was defective process or notice; the circumstances behind the failure to file or timely file; whether the failure was knowing or intentional; the size of the judgment; whether the judgment results in ongoing liability; and whether the internal policies of the insurer were followed, if the defaulting party was an insurer. [*Tolas*, 347 Mich App at 295.]

In evaluating whether a party established a meritorious defense, a trial court should consider whether the affidavit of meritorious defense sets forth evidence that:

> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible. [*Shawl*, 280 Mich App at 238.]

The foregoing good-cause and meritorious-defense factors are not "intended to be exhaustive or exclusive," and "the trial court should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive." *Id*. at 239.

In setting aside the default entered against Strickly, the trial court relied on Strickly's and Pintican's "testimony that they never received the Default Notice/Notice of Request for Entry of Default and their reliance on Smith's to handle the matter to be reasonable excuses as to why they did not answer the complaint." It further noted that Strickly and Pintican both "obtained Counsel who provided responses and their separate motions to set aside in a reasonable fashion."

With respect to its finding that Strickly established good cause or a "reasonable excuse[]" for not answering the complaint, the trial court received an affidavit from Mitchell, where he acknowledged that he was served with the summons and complaint on July 6, 2023. He then "immediately contacted" Smith, who told him "not to worry about the lawsuit because the [Ellises] were upset because [Smith's Designer] had sued them for non-payment of fees and that [Smith] would take care of the matter." Mitchell "took Mr. Smith, at his word," and did not hear anything further about the lawsuit until Smith later informed him that the Ellises were seeking a judgment against Strickly. Mitchell denied being notified that Strickly was "deemed a responsible non-party" with respect to the lawsuit. He also denied receiving notice of the default entry or the motion for default judgment, noting that he was not registered with the trial court's electronic-filing system. He further stated that if he had received the notice of nonparty fault, entry of default, or motion for default judgment, he "would have hired an attorney as [he] ultimately did once [he] found out what was going on in this matter." Further, upon hiring an attorney, he learned "that the very person who led [him] into 'not worrying' about this lawsuit is the one who falsely claims that [he] was served with" a notice of nonparty fault.

In addition to Strickly's affidavit, the trial court also considered the affidavit of Pintican, which set forth assertions that were nearly identical to the fact pattern that Mitchell presented. Pintican likewise stated that he was served with the Ellises' third-party complaint, which prompted him to contact Smith, who "told [him] that it was all being worked out and that [he] could ignore the court papers." Pintican did not receive any further notice of the lawsuit until March 14, 2024, when Smith informed him that the Ellises "were going after [him] after all."

At the hearing on the Ellises' motion for default judgment, Strickly and Pintican each set forth their respective timelines of what happened in the case and noted the similarities regarding

Smith's representations and their lack of notice. Strickly stated that it and Pintican had "not spoken with one another," that "everything that Counsel [for Pintican] just told [the trial court] with respect to notice is exactly what happened to Strickly," and that both Strickly and Pintican "took the word of [Smith] in this particular case that he would take care of this and it was between the homeowners and [Smith's Designer]."

The trial court did not abuse its discretion by concluding that good cause was established. While it is true that Strickly failed to respond to the third-party complaint, the trial court properly considered the circumstances behind the failure—namely, that Smith represented he would take care of the lawsuit, which only involved Smith's Designer and the Ellises. Further, Mitchell asserted that Strickly did not receive notice of the default entry. See *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993) ("Failure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2) and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D)."). And when Mitchell learned that the Ellises sought a judgment against Strickly, he quickly hired counsel. These circumstances strongly suggest that Strickly did not intentionally fail to defend the action. Accordingly, upon consideration of the relevant factors, the trial court properly determined that Strickly established good cause to set aside the default. See *Tolas*, 347 Mich App at 295 (listing the relevant factors for evaluating good cause).

The Ellises argue that the trial court abused its discretion with respect to its good-cause determination because the record did not support Strickly's assertion that notice was deficient and Strickly's reliance on Smith's representations was not reasonable. These arguments are unavailing.

With respect to the sufficiency of the default notice, MCR 2.603(A)(2) provides:

> Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.
>
> The notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

The record reflects that the entry of default against Strickly contained a Certificate of Mailing, stating that the Ellises "served a copy of this default request and entry on the parties or their attorneys by first-class mail addressed to their last-known addresses as defined by MCR 2.107(C)(3)," on September 12, 2023. While the Certificate of Mailing seems to indicate that notice was properly effectuated by first-class mail, the fact that both Strickly and Pintican

acknowledged receipt of the third-party complaint but not their respective default entries adequately supported the trial court's determination that notice was defective.[1]

The Ellises also argue that Strickly's reliance on Smith's representations was not reasonable because the third-party complaint clearly alleged that Smith's Designer filed a notice of nonparty fault against Strickly, which should have put Mitchell on notice that Smith's Designer "was taking a position that was contrary to Strickly's interests during this litigation." However, the fact that both Mitchell and Pintican failed to answer the complaint in reliance on Smith's representations bolsters the reasonableness of Strickly's excuse.

In sum, the trial court was presented with not one, but two defaulted parties who provided affidavits that they relied on Smith's assertions, did not receive notice of the default entries, and promptly took action to defend the lawsuit upon learning of the Ellises' motion for default judgment. Based on the evidence presented, the trial court properly considered the totality of the circumstances to determine that Strickly's request to set aside the default was supported by good cause. This determination did not fall outside the range of reasonable or principled outcomes.

The Ellises also argue that the trial court necessarily abused its discretion by failing to evaluate whether Strickly established a meritorious defense. While the trial court did not explicitly make this finding in its order setting aside the default, it accurately cited the controlling legal standards, which note the meritorious-defense requirement. Further, the trial court noted that Strickly filed a response to the motion for default judgment and moved to set aside the default, both of which contained arguments that Strickly could establish a meritorious defense. Accordingly, it is implicit in the trial court's ruling that Strickly established a meritorious defense. To the extent that the trial court erred by failing to make its finding explicit, reversal is not required because its determination was supported by the record. See *Tolas*, 347 Mich App at 296 ("Although the trial court did not review the specific factors applicable when setting aside a default, the record supported its decision.").

In evaluating whether a party established a meritorious defense, a trial court may consider whether the affidavit of meritorious defense sets forth evidence that "the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement." *Shawl*, 280 Mich App at 238. Mitchell stated in his affidavit of meritorious defense that there was "substantial factual support to establish that the [Ellises'] claims are demonstrably false," noting that Strickly never had a contractual relationship with the Ellises and that Strickly's work on the home was inspected by the city of Detroit and deemed satisfactory. For reasons more fully explained below, Mitchell's statements sufficiently establish a meritorious defense to overcome the Ellises' claims "that the HVAC system of the residence was installed improperly," and that Strickly was therefore negligent and unjustly enriched.

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[1] The Ellises also contend that the trial court abused its discretion by ruling on Strickly's motion to set aside without allowing the Ellises an opportunity to respond and dispute Strickly's notice argument. However, they failed to preserve this issue by raising it at the motion hearing. See *Tolas*, 347 Mich App at 289 ("If a litigant does not raise an issue in the trial court, this Court has no obligation to consider the issue.").

III. SUMMARY DISPOSITION

Turning to the merits of the case, the Ellises argue that the trial court erred by granting summary disposition in favor of Strickly. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Chisholm v State Police*, 347 Mich App 646, 651-652; 16 NW3d 563 (2023). "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim and is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 652. "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds might disagree." *Id*. On review, "we consider the documentary evidence in the light most favorable to the nonmovant." *Id*.[2] Additionally, the existence of a duty of care is a question of law, and "[w]e review de novo the determination whether a duty exists." *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

"To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Additionally, "[a] claim alleging unjust enrichment requires that a plaintiff establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Landstar Express America, Inc v Nexteer Auto Corp*, 319 Mich App 192, 205; 900 NW2d 650 (2017) (quotation marks and citation omitted).

In its order granting summary disposition in favor of Strickly, the trial court found "that the claim set forth by the [Ellises] is not a tort action but rather a breach of contract." The trial court additionally held that "[b]reach of contract was not and could not be alleged, as the Ellises have no contract with [Strickly] and have shown nothing in their contract with Smith's that would show a third-party obligation on the part of [Strickly]." Further, because Strickly did not owe a duty to the Ellises, "no allocation of fault can be attributed to [Strickly]."

The Ellises contend the trial court erroneously concluded that their claims sounded in breach of contract, rather than tort, because they properly alleged that Strickly's negligent installation of the HVAC system caused damage to the home. According to the Ellises, the trial court failed to appreciate that Strickly owed them a common-law duty of care when installing the HVAC system that was independent of any duty arising from the subcontract. The primary inquiry here is whether Strickly—who subcontracted with Smith's Designer to perform HVAC services to the Ellises' home—owed a duty of care to the Ellises that would support their claim of negligence.

"[T]he fundamental principle distinguishing a cause of action in tort from one in contract is the concept of duty." *Loweke*, 489 Mich at 164. The Michigan Supreme Court has articulated

[2] While Strickly also brought its motion pursuant to MCR 2.116(C)(8), the trial court's order clearly indicated that its grant of summary disposition was pursuant to MCR 2.116(C)(10).

a separate-and-distinct test to determine whether an action for negligence sounds in contract or tort. In *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), our Supreme Court stated:

> [L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie.

Noticing that the separate-and-distinct test in *Fultz* was being misapplied to "establish a form of tort immunity that bars negligence claims raised by a noncontracting third party," the Supreme Court subsequently clarified the inquiry in *Loweke*, 489 Mich at 168. There, the Supreme Court provided:

> [W]hen engaging in the separate and distinct mode of analysis in *Fultz*'s analytical framework, courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law. [*Id*. at 171 (quotation marks and citation omitted).]

Thus, a separate-and-distinct duty may arise from "the generally recognized common-law duty to use due care in undertakings . . . ." *Id*. at 170. See also *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967) (describing "the basic rule of the common law" as "impos[ing] on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others").

Applying these principles to the instant case, the trial court did not err when it determined that the Ellises' claim sounded in contract and that Strickly owed no duty to the Ellises that would support their claim of negligence. Notably, the Ellises' claims regarding the installation of the HVAC system initially arose when they filed their counterclaims against Smith's Designer, which alleged breach of contract for its failure to repair inferior work on the HVAC system. The Ellises did not allege any claims of negligence against Smith's Designer at the time they filed their counterclaims. However, after Smith's Designer filed a notice of nonparty fault, the Ellises brought a claim of negligence against Strickly for "failing to exercise ordinary care and due diligence in negligently performing work on the Residence," because the work was not done in a workmanlike manner. This allegation arose from the "notice of nonparty fault . . . asserting that Strickly would be responsible to [the Ellises] for any failure to perform the HVAC work in a workmanlike manner."

At first blush, the Ellises' allegation that Strickly breached its duty to exercise ordinary and due care seems to implicate a common-law duty separate from that arising from the subcontract.

However, the circumstances giving rise to their claim for negligence clearly establish that Strickly's duty to properly install the HVAC system was not separate or distinct from its contractual obligations to Smith's Designer. The Ellises' allegation that Strickly negligently performed work on their home was premised on their failure to perform work "in a workmanlike manner." This claim arose solely from the notice of nonparty fault filed by Smith's Designer.

Accordingly, the Ellises' claim that Strickly failed to provide HVAC services in a workmanlike manner arose only by virtue of the existing contract between Smith's Designer and Strickly. In other words, but for their contractual relationship, Strickly's breach for allegedly deficient workmanship would not be possible. The Ellises do not allege any separate basis through which an independent duty would arise, such as conduct that unreasonably endangered their property or the creation of a new hazard that damaged their home. See *Fultz*, 470 Mich at 469 (noting that no separate-and-distinct duty arose where a subcontractor did not create a new hazard). Because Strickly did not owe the Ellises an independent legal duty that was separate from its contractual obligations, the trial court properly dismissed the Ellises' negligence claim.

Setting this issue aside, the trial court's grant of summary disposition was proper for a more basic reason: the Ellises failed to raise a genuine issue of material fact regarding whether Strickly breached its duty by installing the HVAC system in an unworkmanlike manner or was unjustly enriched by receiving payment for faulty work. In its motion for summary disposition, Strickly argued that its workmanship was satisfactory and approved by the city of Detroit. In support, it attached a certificate of acceptance issued to Strickly by the Mechanical Division, stating that the home was inspected on April 8, 2021, "and found . . . to be satisfactory." Strickly also attached Mitchell's affidavit, which stated that Strickly performed satisfactory HVAC services.

The Ellises did not meaningfully address this issue and failed to provide any documentary evidence regarding the quality of the HVAC services, attaching only the pleadings and notice of nonparty fault to their response. Under the burden-shifting framework of MCR 2.116(C)(10), the Ellises failed to establish a genuine issue of material fact to support their negligence and unjust-enrichment claims. See *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996) (noting that a motion for summary disposition is properly granted where "the opposing party fails to present documentary evidence establishing the existence of a material factual dispute"). Although the trial court did not grant summary disposition on this basis or specifically address the issue of unjust enrichment in its order granting summary disposition, the Ellises' failure to raise a genuine issue of material fact nonetheless provides a separate basis for this Court to affirm the decision. See *Bodnar v St John Providence, Inc*, 327 Mich App 203, 224 n 3; 933 NW2d 363 (2019) (explaining that this Court may uphold a trial court's ruling if it produced the correct result).[3]

[3] To the extent the Ellises argue that summary disposition is premature because discovery had not commenced regarding their claims against Strickly, "a party may not simply allege that summary disposition is premature. The party must clearly identify the disputed issue for which it asserts discovery must be conducted and support the issue with independent evidence." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 253; 964 NW2d 50 (2020).

Affirmed.

/s/ Matthew S. Ackerman
/s/ Mariam S. Bazzi