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STATE OF MICHIGAN

COURT OF APPEALS

FREDERICK G. BENDER and SUSAN P. BENDER, Plaintiffs-Appellants,	UNPUBLISHED October 06, 2026 11:14 AM
v	No. 371606 Saginaw Circuit Court
DAVID A. BENDER and JEAN M. BENDER, Defendants-Appellees.	LC No. 23-000069-CH

Before: MARIANI, P.J., and FEENEY and TREBILCOCK, JJ.

PER CURIAM.

Plaintiffs own property that is surrounded on its northern and eastern boundaries by defendants' property.[1] In the trial court, plaintiffs alleged that they were landscaping their property as well as property beyond their border when defendants plowed, or otherwise destroyed, that landscaping. Plaintiffs asserted that they were entitled to: (1) damages for defendants' trespass and waste, and (2) a claim of some of the property beyond their boundary because defendants had acquiesced to the extended boundary. The trial court dismissed plaintiffs' claim of acquiescence, but plaintiffs prevailed on their other claims at a bench trial and were awarded monetary damages. Because the trial court erred by holding that plaintiffs were collaterally estopped from seeking a claim of acquiescence, we vacate the trial court's dismissal of plaintiffs' acquiescence claim and remand this case for further proceedings consistent with this opinion.

I. FACTS

Plaintiffs had allegedly been landscaping a 0.13-acre strip of land on defendants' parcel (the "disputed land") for several years, going back to when one of plaintiffs' parents owned plaintiffs' property. In August 2022 and September 2022, defendants plowed the disputed land as well as a strip of land on plaintiffs' parcel. Plaintiffs brought this action, raising claims that

[1] Frederick Bender (plaintiff) and David Bender (defendant) are brothers.

defendants had acquiesced to plaintiffs' possession of the disputed land and that defendants had committed trespass and waste.

On March 10, 2023, plaintiffs moved for their first default against defendants because defendants had not yet answered the complaint. On March 13, 2023, defendants, acting *in propria persona*, moved to dismiss plaintiffs' complaint, asserting, *inter alia*, that they had been in total possession of the disputed land and had used it for ingress to, and egress from, their property. Attached to defendants' motion was an affidavit and several exhibits. Nevertheless, on March 14, 2023, a default was entered ("the initial default"). Two weeks later, defendants moved to set aside the default. After a hearing was held on the matter, the trial court set aside the default, reasoning that defendants had shown: (1) a meritorious defense to the litigation, even if it was not titled as a response to plaintiffs' complaint; and (2) good cause for why their motion to dismiss was otherwise untimely.

After the initial default was set aside, plaintiffs amended their complaint and defendants began filing show cause motions in which they argued that plaintiffs had filed a frivolous lawsuit. Plaintiffs then filed a request for admissions from defendants, and defendants filed a motion to dismiss. Plaintiffs requested a second default for defendants' alleged failure to respond, and the trial court's clerk entered that second default ("the second default").

Defendants continued to file motions for show cause to dismiss plaintiffs' claims. Importantly, attached to one of defendants' motions to show cause was a 1991 judgment of foreclosure concerning the disputed land; one of the defendants in that prior case was the father of one of the plaintiffs in this case. Defendants in this case then highlighted a portion of the 1991 judgment of foreclosure that stated as follows:

> IT IS FURTHER ORDERED that in six months from the date of such sale, Defendant and all persons claiming or to claim from or under him be forever barred and foreclosed of and from all equity redemption, and claim of, in and to the mortgaged premises so sold, and every part and parcel thereof, which shall not, prior to that time, have been redeemed from such sale.

Thereafter, plaintiffs moved for entry of default judgment, arguing that defendants failed to: meet the deadlines set by the court, respond to plaintiffs' discovery requests, file initial disclosures, and answer plaintiffs' amended complaint. In that motion, plaintiffs confusingly asserted—as they continue to assert on appeal—that the trial court did not enter the second default.

The trial court first addressed defendants' motion to dismiss, holding that under MCR 2.116(C)(7) (prior judgment), through MCR 2.116(I) (which allows a court to order summary disposition sua sponte), plaintiffs were collaterally estopped from seeking a claim of acquiescence based on the 1991 judgment of foreclosure. The trial court then denied plaintiffs' motion for entry of default judgment, stating that even though "the Court Clerk never entered" a second default,[2] defendants had "responded (albeit defectively)," and "a very brief trial on the remaining issues of trespass and damages . . . [was] the most equitable and efficient means of disposing of this

[2] As previously stated, the second default was entered.

action . . . ." The trial court notified the parties that the remaining claims would proceed to trial. Defendants did not appear at the bench trial, and plaintiffs prevailed on their claims of trespass and waste. Plaintiffs were awarded $5,364.44.

Plaintiffs now appeal the trial court's: (1) order to set aside the initial default, (2) dismissal of their acquiescence claim, and (3) denial of their motion to enter default judgment.

II. DISMISSAL OF ACQUIESCENCE CLAIM

On appeal, plaintiffs argue that the trial court erred by dismissing their claim of acquiescence under a theory of collateral estoppel. We agree.

A. PRESERVATION AND STANDARD OF REVIEW

Plaintiffs preserved this issue by raising their claim of acquiescence in the trial court. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227; 964 NW2d 809 (2020). "We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A trial court has the authority to grant summary disposition sua sponte under MCR 2.116(I). See *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009). Summary disposition under MCR 2.116(C)(7) is appropriate when an action is barred by a prior judgment. *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015).

B. ANALYSIS

In its order dismissing plaintiffs' claim of acquiescence, the trial court stated that plaintiffs' claim was barred by collateral estoppel. The trial court determined that plaintiffs' action for acquiescence was barred due to the following portion of a 1991 judgment of foreclosure pertaining to plaintiffs' parcel:

> IT IS FURTHER ORDERED that in six months from the date of such sale, Defendant and all persons claiming or to claim from or under him be forever barred and foreclosed of and from all equity redemption, and claim of, in and to the mortgaged premises so sold, and every part and parcel thereof, which shall not, prior to that time, have been redeemed from such sale.

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). "The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action." *Id*. Accordingly, for collateral estoppel to apply, the following three elements must be satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks and citation omitted). "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Id*. at 684 (quotation marks

and citation omitted). "In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id*. at 684-685 (quotation marks and citation omitted).

In this case, the question at issue—whether defendants acquiesced to property lines established by plaintiffs' landscaping over the eastern border of their property—was not actively litigated in and determined by the 1991 judgment of foreclosure. Moreover, plaintiffs in this case are not trying to exercise the same legal right at issue in the 1991 foreclosure case and thus cannot demonstrate mutuality of estoppel. That is, the 1991 foreclosure concerned "all equity redemption, and claim of, in and to the mortgaged premises so sold, and every part and parcel thereof, which shall not, prior to that time, have been redeemed from such sale," whereas plaintiffs' claim in this case concerns defendants' alleged acquiescence to the property line. Although plaintiffs may be barred from seeking the right to recover the disputed land through a foreclosure sale or equity redemption,[3] the language of the 1991 judgment of foreclosure does not suggest that an owner of an adjacent parcel may not bring a claim of acquiescence.

Because (1) collateral estoppel requires a question of fact essential to the prior judgment to have been actually litigated and determined by a valid and final judgment, and (2) plaintiffs' claim of acquiescence over the property line and disputed land by way of caring for that land was not determined by the 1991 judgment of foreclosure, the trial court erred by holding that plaintiffs' claim of acquiescence was collaterally estopped. See *Leahy*, 269 Mich App at 530.

III. DEFAULTS

Plaintiffs further argue that the trial court erred by: (1) setting aside the initial default, and (2) declining to enter a default judgment after defendants failed to respond to requests for admissions. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

Plaintiffs preserved these issues by raising them in the trial court. See *Glasker-Davis*, 333 Mich App at 227. "[W]e review a trial court's decision on a motion to set aside a default for an abuse of discretion." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220; 760 NW2d 674 (2008). We also review a trial court's decision whether to enter a default judgment for an abuse of discretion. See *McGee v Macambo Lounge, Inc*, 158 Mich App 282, 285; 404 NW2d 242 (1987). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Nowacki v Dep't of Corrections*, 319 Mich App 144, 148; 900 NW2d

[3] Notably, although one of the defendants in the 1991 judgment of foreclosure was the father of one of the plaintiffs in this case, further discovery and analysis would need to be made regarding whether the plaintiffs in this case are in privity with the defendants in the 1991 foreclosure case. Parties are in privity if one party is "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Dep't of Environmental Quality v Sancrant*, 337 Mich App 696, 709; 976 NW2d 874 (2021) (quotation marks and citation omitted).

154 (2017) (quotation marks and citation omitted). "We review de novo the construction and application of a court rule." *Id*. at 148-149.

B. THE INITIAL DEFAULT

MCR 2.603 governs defaults and default judgments, and MCR 2.603(A)(1) states that "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the clerk must enter the default of that party . . . ." A party may file a motion to set aside a default or a default judgment, but that motion, as relevant here, "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." MCR 2.603(D)(1). Good cause can be shown by any of the following: "(1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand." *Shawl*, 280 Mich App at 221 (quotation marks and citation omitted). The trial court should consider the following when determining whether good cause exists:

> [W]hether 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 Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, 347 Mich App 280, 295; 14 NW3d 472 (2023); see *Shawl*, 280 Mich App at 238.]

In its order granting defendants' motion to set aside the initial default, the trial court stated that its decision was based the fact that defendants responded to the complaint within 14 days of the date on which their response was due, and defendants moved to set aside the default promptly and before the entry of a default judgment. Additionally, defendants' medical issues and the necessity of searching for documents also supported the court's decision to set aside the default, as did defendants' apparent mistake about when their response was due. The trial court acknowledged that there was no defective service or notice, which favored plaintiffs, but nonetheless concluded that defendants established good cause to set aside the default. The court further found that defendants provided evidence of a meritorious defense to the litigation because defendants provided evidence of their own continued use of the disputed land. In sum, the trial court examined the factors outlined in *Tolas* when determining that good cause was shown, and the trial court found that defendants provided evidence of a meritorious defense; plaintiffs have not shown that the trial court abused its discretion in conducting this analysis and granting defendants' motion to set aside the default on its basis. See *Shawl*, 280 Mich App at 220; MCR 2.603(D)(1).

C. THE SECOND DEFAULT

As discussed, "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the clerk must enter the default of that party . . . ." MCR 2.603(A)(1). In this case, plaintiffs requested a second default judgment after defendants failed to respond to plaintiffs' requests for admission. Requests for admission are governed by MCR 2.312. The party upon whom the requests are served must respond or object within 28 days after service of the request, otherwise, the matters in the requests are deemed admitted. MCR 2.312(B)(1). But MCR 2.312 does not provide for default as a remedy for a party who fails to respond to requests for admission, and MCR 2.603 does not state that default is a remedy for a failure to respond to requests for admission.

Even though plaintiffs continue to assert that the trial court did not enter the second default, and the trial court stated that a second default had not been entered, the second default was entered; more importantly, the court rules do not provide for default as a remedy for a party's failure to respond to requests for admission. The trial court held that a default or default judgment would be improper for this reason and, therefore, the trial court's decision to decline plaintiffs' request for a default judgment was within the range of principled outcomes. See *Nowacki*, 319 Mich App at 148. Accordingly, the trial court did not abuse its discretion when it denied plaintiffs' request for a default judgment. See *McGee*, 158 Mich App at 285.

IV. CUMULATIVE ERROR

Plaintiffs further argue that they are entitled to relief because the cumulative effect of these errors substantially prejudiced their case. Cumulative error warrants reversal if the errors "result in substantial prejudice that denies the aggrieved party a fair trial." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). "Although one of several incidents or errors, standing alone, may be disregarded as harmless error, it is still possible that when considered *in toto* they accumulate such a cumulative prejudice that they may require a reversal." *Piccalo v Nix*, 246 Mich App 27, 33; 630 NW2d 900 (2001) (quotation marks and citation omitted), vacated on other grounds 466 Mich 861 (2002).

In this case, however, there were no harmless errors. Even though the trial court erred by dismissing plaintiffs' acquiescence claim, there were no other errors. Therefore, plaintiffs are not entitled to relief for cumulative error.

V. CONCLUSION

The trial court erred by concluding that defendants were entitled to summary disposition on the basis that the 1991 judgment of foreclosure prohibits plaintiffs from bringing a claim of acquiescence in this instance. For that reason, we vacate the dismissal of plaintiffs' acquiescence claim and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Philip P. Mariani
/s/ Kathleen A. Feeney
/s/ Christopher M. Trebilcock