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STATE OF MICHIGAN

COURT OF APPEALS

ERIC CLEVELAND,

Plaintiff-Appellant,

v

DOUGLAS JEROME HATH, JANA L. KURRLE, CAVALIER BAR, INC., and ALLYSON MEREDITH THOMPSON,

Defendants-Appellees.

FOR PUBLICATION
February 15, 2024
9:05 a.m.

No. 363321
Shiawassee Circuit Court
LC No. 2021-006255-NZ

Before: REDFORD, P.J., and SHAPIRO and YATES, JJ.

YATES, J.

In 2018, a raging fire that began in a building owned by defendants, Douglas Hath and Jana Kurrle, spread to buildings owned by plaintiff, Eric Cleveland, and destroyed plaintiff's buildings. Plaintiff filed suit against defendants Hath and Kurrle as well as a tenant and the business that had occupied the building where the fire started, but the trial court ended the case by granting summary disposition to defendants under MCR 2.116(C)(7), (8), and (10). On appeal, plaintiff asserts that he should not have lost the case as a sanction for missing the deadline in the scheduling order for filing a response to defendants' summary disposition motions. We agree that the failure to file a timely brief in response to a dispositive motion is not, by itself, grounds for dismissal as a sanction. But if a motion for summary disposition under MCR 2.116(C)(10) challenges the existence of any genuine issue of material fact and the opposing party fails to timely present evidence in response, then the motion may be properly granted on the merits. Here, because plaintiff failed to file timely responses to defendants' summary disposition motions under MCR 2.116(C)(10) and the trial court thereafter properly resolved those motions on the merits, we affirm.[1]

[1] Because we reach this conclusion, we need not address the other grounds for relief on which the trial court relied, i.e., MCR 2.116(C)(7) and (8).

I. FACTUAL BACKGROUND

On July 11, 2018, the two-unit building at 127 N. Shiawassee Road in Corunna, Michigan, caught fire. Defendants Hath and Kurrle owned that building, they operated the Cavalier Bar, Inc. (Cavalier Bar) on the first floor, and they rented the second-floor apartment to their niece, Allyson Thompson. Witnesses, including plaintiff, claimed they saw an air-conditioning unit in a second-floor window on fire. In short order, the raging fire spread from defendants' building to plaintiff's property, including two buildings directly south of defendants' property. Plaintiff's buildings were consumed by the fire, resulting in a "total loss" for plaintiff.

Thompson told the police that she had heard that her air-conditioning unit may have caused the fire. She explained that she had left the unit on "automatic," as she often did, while she was at work. An investigation by Michigan State Police Fire Investigation Unit Trooper Jeffrey Hoyt on the day of the fire concluded that the fire had started "on the second story above the Cavalier Bar," but the cause of the fire was "undetermined." After the fire was extinguished, defendants' building "was in a large pile where the bar used to be[,]" rendering any examination of the scene useless.

Three years after the fire, plaintiff filed suit on October 18, 2021, presenting three claims: negligence; trespass; and nuisance. In the negligence claim, plaintiff alleged defendants failed to: (1) exercise reasonable care under the circumstances; (2) use their property in a reasonable manner without interfering with or disturbing plaintiff's rights and property; (3) utilize their property in a reasonable manner to avoid harm to plaintiff's property; and (4) ensure that unsafe conditions did not spread to plaintiff's property and harm that property. In the trespass claim, plaintiff asserted that defendants trespassed by intentionally, recklessly, and wantonly allowing the fire to spread to plaintiff's property. In the nuisance claim, plaintiff alleged that defendants negligently caused and allowed the fire not only to start on their property, but also to spread to plaintiff's property.

On January 20, 2022, the trial court issued a scheduling order, stating, among other things, that: (1) dispositive motions were to be heard by July 29, 2022; (2) those motions were to be filed six to eight weeks before that deadline; (3) responses to the motions were to be filed 14 days before oral argument; and (4) reply briefs were due seven days before oral argument. Additionally, that scheduling order stated, in bold text in the section addressing summary disposition motions, that "[i]f you do not submit a timely brief, the Court will assume there is no legal or factual support for your position."

On June 17, 2022, defendants Hath, Kurrle, and Cavalier Bar filed a motion for summary disposition under MCR 2.116(C)(7) and (10). Citing MCR 2.116(C)(7), they contended plaintiff's claims were barred by the statute of limitations because more than three years had elapsed between the date of the fire and the filing of the complaint. With respect to MCR 2.116(C)(10), they argued that plaintiff had no evidence that the fire was intentionally or negligently caused, which was fatal to plaintiff's claims of negligence, trespass, and nuisance. They further insisted that evidence was required to establish causation because speculation and conjecture were inadequate.

On June 23, 2022, defendant Thompson moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). She argued that summary disposition was justified under MCR 2.116(C)(8) because plaintiff failed to state a claim on which relief could be granted. Specifically, Thompson averred that plaintiff failed to identify any action or omission attributable to her and instead simply

made conclusory allegations about the elements of each claim. With respect to MCR 2.116(C)(10), Thompson asserted that the claims of negligence, trespass, and nuisance failed as a matter of law because there was no evidence that she caused the fire.

Defendants served plaintiff with a notice stating that a hearing on the motions for summary disposition would occur on September 30, 2022.[2] Under the terms of the trial court's scheduling order, plaintiff's responses to the motions were due September 16, 2022. But plaintiff did not file a response by that date. Having received no timely response from plaintiff, the trial court granted defendants' summary disposition motions in an opinion and order issued on September 19, 2022. The trial court stated that plaintiff was put on notice that failing to respond by the deadline would likely have consequences.

Addressing the merits of the motion from Hath, Kurrle, and the Cavalier Bar, the trial court noted that they had sought summary disposition under MCR 2.116(C)(7), asserting that the claims were time-barred. The trial court concluded that, "[b]y failing to file a timely answer to the motion, Plaintiff has abandoned any argument to the contrary." And with regard to defendants' request for relief under MCR 2.116(C)(10) based upon the lack of any genuine issue of material fact, the trial court noted that the motion was supported by documentary evidence, which shifted the burden to plaintiff to create a genuine issue of material fact for trial. Finally, the trial court determined that, even construing the evidence in the light most favorable to plaintiff, no genuine issue of material fact remained for trial.

Turning to defendant Thompson's motion, the trial court ruled she was entitled to judgment under MCR 2.116(C)(8) because plaintiff had not stated a claim on which relief could be granted. Citing *Wolfenbarger v Wright*, 336 Mich App 1, 16; 969 NW2d 518 (2021), the trial court offered the explanation that "[t]he complaint does not allege any conduct by Thompson that would support recovery." Rather, "[t]he complaint simply treats all of the defendants as a single entity" and "[t]he conclusory allegations in the complaint are insufficient to state a cause of action." Additionally, applying the requirements for summary disposition under MCR 2.116(C)(10), the trial court noted that Thompson supported her motion with documentary evidence and that construing that evidence in the light most favorable to plaintiff, there was no genuine issue of material fact. As a result, the trial court found summary disposition appropriate.

One day after the trial court issued its opinion and order, plaintiff—without seeking leave of court—filed a response to defendants' motions. Then, two days later, plaintiff moved for relief from judgment or reconsideration. Plaintiff's counsel asserted that, despite the scheduling order's statement that summary disposition responses were due 14 days before the hearing, he had a good-

[2] That date was two months past the deadline that the trial court initially set for dispositive motions to be heard. The trial court did issue an order on May 9, 2022, extending the deadline for discovery from May 27, 2022, to July 27, 2022. Although that order only addressed the discovery deadline, the trial court and the parties may have naturally inferred that the deadline for summary disposition hearings was extended as well. Regardless, a court has the inherent authority to control its docket. *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016).

faith belief that responses were due seven days before the hearing under MCR 2.116(G)(1)(a)(*ii*).[3] Further, counsel argued that MCR 2.108(E) enabled the trial court to accept the late filing because it was the result of excusable neglect. Plaintiff ultimately requested that the court afford him leave to file the late response. Instead, on September 30, 2022, the trial court denied plaintiff's motion for reconsideration, explaining that plaintiff had failed to identify any palpable error in its decision on summary disposition and enforcing the terms of the scheduling order as written. Plaintiff now appeals.

II. LEGAL ANALYSIS

On appeal, plaintiff argues the trial court's scheduling order, which permitted it to "assume there is no legal or factual support" for a party's position if that party fails to file a timely brief, is "invalid because it conflicts with the Michigan Court Rules." Additionally, plaintiff faults the trial court for dismissing his claims as a sanction for his failure to timely respond, thereby violating his constitutional rights. Finally, plaintiff insists that the award of summary disposition was improper because factual issues on all of his claims remain unresolved. We shall address these three issues in turn.

A. THE TRIAL COURT'S SCHEDULING ORDER

Plaintiff challenges as invalid the scheduling order that permitted the trial court to "assume there is no legal or factual support" for plaintiff's "position" because plaintiff failed to timely file a response brief. Plaintiff characterizes that assumption as contrary to the Michigan Court Rules. Specifically, plaintiff states that a summary disposition motion seeking relief under MCR 2.116(C) must be treated as a "contested motion" under MCR 2.119(E) by dint of MCR 2.119(D)(3), so the trial court could not effectively deem such a motion uncontested by relying on its scheduling order. Whether an order conflicts with a court rule is a question of law that this Court reviews de novo, *Moriarity v Shields*, 260 Mich App 566, 569; 678 NW2d 642 (2004), but this Court reviews a trial court's decision to enforce its scheduling order for an abuse of discretion. See *EDI Holdings, LLC v Lear Corp*, 469 Mich 1021 (2004).

We begin on common ground. According to MCR 8.112(A)(1), trial courts can adopt rules regulating practice, but such rules cannot conflict with the court rules promulgated by our Supreme Court. Here, however, the trial court's "rule" at issue is not a "local court rule" at all. Local court rules must be adopted by the circuit court and then approved by our Supreme Court. *Schlender v Schlender*, 235 Mich App 230, 232; 596 NW2d 643 (1999). Plaintiff has offered no evidence that the trial court's scheduling order was part of a local court rule. Nonetheless, courts must abide by the court rules adopted by our Supreme Court, see MCR 1.103, so it makes no difference whether

[3] MCR 2.116(G)(1)(a)(*ii*), which addresses hearings on motions for summary disposition, states that "any response to the motion (including [a] brief and any affidavits) must be filed and served at least 7 days before the hearing" on the motion "[u]nless a different period is set by the court[.]" Here, in the scheduling order, "a different period" of 14 days was set by the court. Consequently, plaintiff's reliance on that court rule is misplaced.

the scheduling order employed in this case was part of a local court rule. What matters is whether the scheduling order operates in contravention of the Michigan Court Rules.

Under MCR 2.401(B)(2)(a)(*ii*), trial courts may issue scheduling orders "to establish times for events . . . including . . . filing of motions[.]" Here, the trial court not only established deadlines for motion practice, but also cautioned the parties in paragraph 8(j) of its scheduling order: "If you do not submit a timely brief, the Court will assume that there is no legal or factual support for your position." That language seems consistent with the well-settled proposition that "[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court's scheduling order appears compatible with that standard because the scheduling order, just like relevant caselaw, obligates the party opposing a summary disposition motion to present evidence and arguments to fend off a motion for relief under MCR 2.116(C)(10). Here, defendants expressly sought relief under MCR 2.116(C)(10) and presented arguments and evidence supporting that relief, so plaintiff's failure to timely submit responses to defendants' motions left the trial court little choice but to conclude that relief must be awarded.[4]

Under Michigan law, if a moving party presents evidence to support a motion for summary disposition under MCR 2.116(C)(10), the burden shifts to the party opposing the motion to produce evidence to show that there is a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where, as here, the opposing party "fails to present" any evidence, "the motion is properly granted" because no genuine issue of material fact exists. *Id.* at 363. Indeed, that must be the outcome unless the moving party's motion fails to present a credible argument or itself presents evidence that creates a question of fact, such as inconsistent testimony about a central fact in the case. Here, defendants' summary disposition motions presented viable arguments and did not offer evidence that gave rise to a genuine issue of material fact. Therefore, defendants' motions shifted the burden to plaintiff to present evidence to establish a genuine issue of material fact. By neglecting to submit timely responses to the motions, plaintiff failed to carry that burden, so the trial court properly awarded relief to defendants under MCR 2.116(C)(10).

[4] By framing the trial court's options in this manner, we do not intend to limit the trial court's discretion to accept a tardy brief or to reconsider its ruling in light of a motion for reconsideration. In exercising that discretion, a trial court may consider the reasons that the brief was not timely filed and the interests of substantive justice as well as other grounds that may be relevant to the specific case. Here, however, the trial court properly exercised its discretion and determined that it would not accept a tardy brief. Hence, the only question before us is whether the trial court was obligated to consider imposing a sanction, rather than granting the motion based on the materials before it, a proposition we reject. Moreover, plaintiff did not set forth adequate reasons for the failure to timely file his brief and, as discussed below, his arguments regarding the existence of a question of fact are wholly without merit.

Finally, and in a manner that fortifies all our conclusions above, we note that the trial court did not abuse its discretion by enforcing its scheduling order against plaintiff. In *EDI Holdings*, 469 Mich 1021, our Supreme Court ruled that a trial court did not abuse its discretion by enforcing a scheduling order even though that resulted in summary disposition for the moving party because the opposing party failed to file a timely response. As the ruling in *EDI Holdings* dictates, the trial court here did not abuse its discretion by enforcing its scheduling order against plaintiff for failing to timely respond to defendants' summary disposition motions.[5] See also *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 349-352; 711 NW2d 801 (2005) (the trial court did not commit an abuse of discretion by refusing to hear a motion filed after the deadline set in a scheduling order).

B. PLAINTIFF'S CLAIMS OF SANCTIONS AND CONSTITUTIONAL VIOLATIONS

Plaintiff argues that the trial court dismissed his case as a sanction. In describing the award of summary disposition as a sanction, plaintiff shifts blame for the missed briefing deadline from himself to the trial court. In doing so, he mischaracterizes the trial court's action in enforcing the scheduling order. Notwithstanding plaintiff's failure to comply with the briefing deadline, the trial court rendered a written opinion and order that analyzed individually the two motions for summary disposition filed by defendants. Accordingly, the resulting summary disposition awards were not sanctions imposed by the trial court. Instead, the awards were the products of analysis and faithful application of the established principles governing resolution of motions for summary disposition. The outcome of the motions was no different than the result would have been if plaintiff had timely filed a response that offered no evidence that created any genuine issue of material fact.

Plaintiff further insists that the trial court's resolution of this case violated his constitutional right to petition under the First Amendment of the United States Constitution and his constitutional right to due process. We find no merit in plaintiff's constitutional claims. Plaintiff's theories rest on the contention that he was deprived of the opportunity "to petition the Government for a redress

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[5] This Court's decision in that case, which our Supreme Court reversed, describes circumstances and arguments strikingly similar to those in the case before us now. See *EDI Holdings LLC v Lear Corp*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2003 (Docket No. 240442). There, the plaintiff moved for summary disposition, and the trial court then issued a scheduling order providing briefing deadlines and stating that "the court would not consider late briefs." *Id*. at 2. The defendant did not file a timely response brief. "Instead it moved to adjourn the hearing date" for the summary disposition motion, "and the trial court granted the motion" to adjourn. *Id*. But before the adjourned hearing took place on the motion for summary disposition, "the trial court granted summary disposition to plaintiff" without oral argument and the defendant "filed its brief" the next day. *Id*. On appeal to this Court, the defendant argued—just as plaintiff in the case before us argues—"that the trial court erred when it decided the summary disposition motion without a hearing or the benefit of [the defendant]'s tardy brief." This Court agreed with that argument, characterizing the trial court's actions as an improper use of the scheduling order, criticizing the trial court for refusing to consider the defendant's tardy brief, and reversing the trial court's award of summary disposition as an inappropriate sanction. See *id*. at 2-3. As our Supreme Court's order in that case demonstrates, however, that approach was soundly rejected on appellate review. *EDI Holdings*, 469 Mich 1021.

of grievances." US Const, Am I; see also Const 1963, art 1, § 3; *California Motor Transp Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition."). Plaintiff was given the opportunity to petition the government through access to the courts. He filed a complaint and litigated his case. Even after he failed to comply with a deadline in the trial court's scheduling order, he still received a decision on the merits from the trial court. No authority in Michigan recognizes a constitutional right not to lose a case as a result of failing to meet a deadline in a scheduling order. Our Supreme Court's order in *EDI Holdings*, 469 Mich 1021, reveals that no such constitutional right exists.

C. SUMMARY DISPOSITION ON THE MERITS

As the trial court concluded, the dispositive issue on the merits is whether defendants were entitled to summary disposition under MCR 2.116(C)(10). We review the trial court's decision on the summary disposition motions de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden*, 461 Mich at 119. "In evaluating such a motion, a [trial] court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The motion should be granted "when there is no genuine issue of material fact." *El-Khalil*, 504 Mich at 160. Significantly, "[w]hen reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided." *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009). Therefore, all materials plaintiff presented to the trial court after the trial court issued its written decision on September 19, 2022, cannot be considered. Applying these principles, we must analyze plaintiff's three claims in light of defendants' motions for summary disposition under MCR 2.116(C)(10).

To prevail on a claim of negligence, plaintiff must prove that "(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). To prove a claim of nuisance, plaintiff must demonstrate that (1) defendants interfered with the use or enjoyment of plaintiff's property rights and privileges; (2) defendants' invasion of the property interests caused plaintiff significant harm; and (3) the invasion was intentional and unreasonable or was "otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct." *Capitol Props Group, LLC v 1247 Center St, LLC*, 283 Mich App 422, 431-432; 770 NW2d 105 (2009). To succeed on a trespass claim, plaintiff must prove that defendants made an unauthorized "direct or immediate intrusion of a physical, tangible object onto" his land and "the intrusion [was] intentional." *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008). Therefore, each claim against each defendant requires proof of negligent or intentional conduct by each defendant that caused the fire to start or spread.

Each defendant moved for summary disposition under MCR 2.116(C)(10) contending that plaintiff offered no evidence to show that that defendant negligently or intentionally did anything

to cause harm to plaintiff's property.[6] Even if unsupported by evidence, that approach constitutes a valid basis for seeking summary disposition under MCR 2.116(C)(10) because if the nonmoving party has the ultimate burden of proof at trial, the moving party can assert that the opposing party will be unable to meet that burden. Indeed, our Supreme Court has made clear that " 'the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.' " *Quinto*, 451 Mich at 362. All defendants here not only made that argument, but also furnished evidence to support their argument. They submitted reports from the fire department showing that, although the investigation revealed that the fire started on the second floor, the cause of the fire was "undetermined." Nothing else in those documents would enable the trier of fact to conclude or infer that any defendant caused the fire or caused it to spread to plaintiff's property. Because conjecture and speculation are insufficient to defeat a motion for summary disposition, *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001), defendants were entitled to summary disposition under MCR 2.116(C)(10).

Plaintiff's position that defendant Cavalier Bar and its owners, defendants Hath and Kurrle, were negligent in failing to properly install and maintain an air conditioner is unpersuasive. The evidence on which plaintiff relies for that point was submitted to the trial court after it rendered its decision on the motions, so it cannot be considered. *Rudell Estate*, 286 Mich App at 405. Plaintiff further alleges that defendants breached their duty of care by failing to install and maintain smoke alarms on both levels of the building. When the trial court rendered its decision, though, there was no evidence available to the trial court to establish that the building lacked smoke alarms.[7]

Finally, plaintiff argues that summary disposition under MCR 2.116(C)(10) was improper in light of the doctrine of res ipsa loquitur. Our Supreme Court has noted that "[t]he major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act[.]" *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (quotation marks and citation omitted). Plaintiff never argued, either before or after the trial court issued its ruling, that that doctrine should be applied, so we decline to address it for the first time on appeal. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Moreover, the trial court did not err when it failed to consider the doctrine's application sua sponte. *Woodard*, 473 Mich at 7 (stating that plaintiffs have to "avail themselves of the doctrine"). Thus,

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[6] As the trial court aptly noted in its opinion and order granting summary disposition to defendants, plaintiff's "complaint simply treats all of the defendants as a single entity." That flaw led the trial court to grant summary disposition to defendant Thompson under MCR 2.116(C)(8) in addition to relief under MCR 2.116(C)(10). The other three defendants did not request summary disposition under MCR 2.116(C)(8), so the trial court did not apply that analysis to the claims against them.

[7] Plaintiff relies on documents submitted after the trial court issued its decision. Those documents quote statements attributed to defendant Thompson that "there was a smoke detector located within the second-floor apartment," but Thompson had taken down the smoke detector in her apartment "and placed [it] on a desk in the living room." Notably, Thompson's testimony does not establish that there were no smoke detectors in the building. Her comments indicate that she moved a smoke detector to her living room. She did not say that she removed the batteries or disabled the device.

we conclude that the trial court correctly awarded summary disposition under MCR 2.116(C)(10) to each and every defendant.

Affirmed.

/s/ Christopher P. Yates
/s/ James Robert Redford
/s/ Douglas B. Shapiro