

STATE OF MICHIGAN
COURT OF APPEALS

GEORGIA C. LUKE,

Plaintiff-Appellant,

V

VALLEY RANCH APARTMENTS, LLC,

Defendant-Appellee.

UNPUBLISHED
February 24, 2011

No. 295503
Washtenaw Circuit Court
LC No. 09-000042-NO

Before: SAAD, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals a trial court order that granted defendant's motion for summary disposition. For the reasons set forth below, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This lawsuit concerns a slip-and-fall on ice in defendant's parking lot. After plaintiff filed her complaint, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on October 16, 2009. The motion hearing was scheduled for October 30, 2009. Pursuant to MCR 2.116(G)(1)(a)(ii), when a party has moved for summary disposition and the court has scheduled a hearing, "any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing." Accordingly, plaintiff was required to file and serve her response by Friday, October 23, 2009. Plaintiff mailed her response to both defense counsel and the trial court via United States Postal Service Express mail on October 22, 2009. Defense counsel received the overnight delivery by the next day and, therefore, service to counsel was timely. The mailing to the Washtenaw Circuit Court was addressed: "101 E. Huron Street, PO Box 8645, Ann Arbor, MI 48107-8645." It was delivered to the post office box on October 23rd at 9:31 a.m. However, court personnel had already picked up mail from the box that day. Court personnel signed for the response at 7:59 a.m. on Monday, October 26, 2009, and the court did not receive and stamp the response until after 2:00 p.m. that day. Because plaintiff had not timely filed any substantively admissible evidence to refute defendant's motion, the court granted defendant's motion.

Plaintiff moved for reconsideration and argued that she was unaware of the post office policy to hold mail requiring a signature at the post office, rather than deliver it directly to the court. She asserted that because she timely served defense counsel, and because her response was waiting in the court's post office box on Friday, October 23, 2009, the court erred in ruling

that she had not timely filed and served the response. The trial court denied plaintiff's motion and ruled that she failed to demonstrate palpable error and had not "show[n] that a different disposition of the motion must result from correction of the error."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

We review a trial court's decision regarding a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion occurs when the outcome of the decision falls outside the principled range of outcomes. *Radeljak v Daimler-Chrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

We hold that the trial court did not abuse its discretion when it granted summary disposition to defendant. As noted above, the court rule, MCR 2.116(G)(1)(a)(ii), specifically provides that "any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing." The rule also provides:

(G)(4) . . . When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

* * *

(I)(1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.

The trial court adhered to the requirements of the court rule. The court's application of the rule as written is not an abuse of discretion.

Further, the court did not grant defendant's motion simply because plaintiff's response was late. Rather, because plaintiff's response was late, the trial court did not consider her brief and its attachments when it decided the motion. Plaintiff did not produce any other evidence to support her response, so there was nothing to refute the weather reports and deposition evidence defendant submitted to the court. This lack of substantive evidence in support of plaintiff's claims formed the basis for the grant of defendant's motion, and this was a proper basis for granting defendant's motion. See, e.g., *EDI Holdings LLC v Lear Corp*, 469 Mich 1021 (2004) (peremptorily reversing this Court's conclusion that the trial court erred in enforcing its summary disposition scheduling order); *Prussing v General Motors Corp*, 403 Mich 366; 269 NW2d 181 (1978).

Plaintiff's argument that the court should have considered her late filing is not based on the language of the court rule. The response was not filed on time and we decline to hold that "received at the post office box" is equivalent to "filed." Nor is there an express exception in the court rule for a good-faith effort. Counsel should have realized that the response was mailed to the post office, and not to the court itself. Counsel could have called the court to discover when it would pick up the mail, or called at some point Friday afternoon to see if it had been received, but failed to do so.¹

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

¹ While this result may appear to be an unduly strict application of the court rule's timing requirement, plaintiff does not allege that it was the trial judge's custom and practice to allow for flexibility in applying the filing deadline or that counsel relied on that custom and practice when he mailed the brief to the post office. Because the record is silent on this issue and because plaintiff does not raise it, we do not address whether such evidence would alter the result under these circumstances.