

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-157

DECEMBER TERM, 2020

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| Nancy Clodgo* v. Green Mountain Transit | } | APPEALED FROM: |
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| | } | Superior Court, Chittenden Unit, |
| | } | Civil Division |
| | } | |
| | } | DOCKET NO. 1022-11-19 Cncv |
| | | |
| | | Trial Judge: Helen M. Toor |

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the civil division’s order granting defendant’s motion for judgment on the pleadings based on plaintiff’s failure to respond to the motion. We affirm.

In November 2019, plaintiff filed a complaint alleging that her employer, Green Mountain Transit, discriminated against her on the basis of her marital status, in violation of the Fair Employment Practices Act (FEPA), by changing its employer-provided health insurance to require additional premiums for domestic partners, but not spouses.

On March 20, 2020, defendant moved for judgment on the pleadings, asserting that: (1) FEPA does not include marital status as a protected class; (2) plaintiff does not have standing to raise a claim on behalf of her domestic partner; and (3) plaintiff did not suffer any adverse employment action relative to her benefits. That same day, defendant filed a certificate of service with its motion in the civil division attesting that it had sent the motion to plaintiff both by first-class mail and email. Plaintiff did not respond to the motion within the fourteen-day period allowed by rule, see Vermont Rule of Civil Procedure 78(b)(1), or thereafter.

Thirty-eight days later, on April 27, 2020, the civil division granted the motion based on plaintiff’s failure to file a response. See Pharmacists Mut. Ins. Co. v. Myer, 2010 VT 10, ¶ 18, 187 Vt. 323 (upholding dismissal of plaintiff’s counterclaims without addressing their merits based on plaintiff’s failure to oppose defendant’s motion to dismiss those claims). On May 27, 2020, plaintiff filed a notice of appeal to this Court without first seeking relief in the civil division under Vermont Rule of Civil Procedure 59(e) (motion to alter or amend judgment) or Vermont Rule of Civil Procedure 60(b) (motion for relief from judgment based on excusable neglect).

In her argument on appeal, plaintiff suggests that dismissal is not justified here because, accepting the facts in her complaint as true, a discriminatory intent can be gleaned from defendant’s decision to require additional premiums for domestic partners but not spouses. Plaintiff asks this Court in this time of pandemic upheaval to adopt a compassionate view regarding her failure to respond to defendant’s motion for judgment on the pleadings.

Plaintiff's argument is unavailing. Plaintiff briefly indicates in her statement of the case that her failure to respond to defendant's motion was caused by the closure of her attorney's normal business operations due to the COVID-19 pandemic, but she does not provide any details for this assertion and does not suggest that her failure to respond was excusable neglect under settled law. On March 16, 2020, this Court issued the first iteration of its Administrative Order No. 49, which, in relevant part, permitted electronic filings in the superior court. Notably, the administrative order indicated that it was not extending statutes of limitations or court filing deadlines. Consistent with the administrative order, defendant filed its motion for judgment on the pleadings by email and first-class mail. Although the governor issued executive orders in late March suspending in-person business operations for nonessential businesses, including law firms, no executive order or administrative order suspended court filings or litigants' obligations under court filing deadlines. Nevertheless, plaintiff failed to respond to defendant's motion and never sought an extension of time to file a response.

In addition to her failure to respond to defendant's motion for judgment on the pleadings or to seek an extension of time to oppose the motion, plaintiff never filed a post-judgment motion claiming either excusable neglect due to COVID-19 or otherwise in her failure to respond or a legal error in the court's decision. See Zinn v. Tobin Packing Co., 140 Vt. 410, 414 (1981) ("A motion for relief from judgment pursuant to V.R.C.P. 60(b)[] is addressed to the discretion of the trial court and is not subject to appellate review unless it clearly and affirmatively appears from the record that such discretion was withheld or otherwise abuse."); see also NEPSK, Inc. v. Town of Houlton, 283 F.3d 1, 5 (1st Cir. 2002) (indicating that objection to judgment on pleadings based on failure to file timely response may be addressed under Rule 59 or Rule 60 and that trial court's decision under those rules are reviewed for abuse of discretion). Nor does plaintiff make such an argument here. Given these circumstances, we find no abuse of discretion and thus no basis to overturn the civil division's order granting defendant's motion for judgment on the pleadings.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice