[Cite as *Millonzi v. Perram Elec., Inc.*, 2002-Ohio-7340.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ANN M. MILLONZI, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JOHN A. MILLONZI, DECEASED,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2001-L-109, 2001-L-110, and 2001-L-111**
PERRAM ELECTRIC, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeals from the Court of Common Pleas, Case No. 99 CV 000755

Judgment: Reversed and remanded.

James V. Loiacono, Cannon, Stern, Aveni & Loiacono Co., L.P.A., 41 East Erie Street, Painesville, OH 44077 (For Plaintiff-Appellant).

Walter R. Matchinga, Weston, Hurd, Fallon, Paisley & Howley, L.L.P., 2500 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Defendant-Appellee, Perram Electric, Inc.).

I. James Hackenberg, Baker & Hackenberg Co., L.P.A., 100 Society National Bank Building, 77 North St. Clair Street, Painesville, OH 44077 (For Defendants-Appellees, Major Waste Disposal Services, Inc. and John M. Paranish, Jr.).

Patrick M. Foy and *Richard C.O. Rezie,* Gallagher, Sharp, Fulton & Norman, Seventh Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115 (For Defendant-Appellee, City of Mentor).

Richard R. Kuepper, Law Offices of Richard R. Kuepper & Associates, 480 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 and *Irene C. Keyse-Walker,* Arter & Hadden, L.L.P., 1100 Huntington Building, 925 Euclid Avenue, Cleveland, OH 44115 (For Defendant-Appelle, JTO, Inc.).

ROBERT A. NADER, J.

{¶1} This is a consolidated appeal of the Lake County Court of Common Pleas' grant of summary judgment in favor of appellees, the City of Mentor, Perram Electric, John Paranish, Jr., Major Waste Disposal, Inc., and JTO, Inc., and against appellant, Ann M. Milonzi.

{¶2} On August 31, 1998, John Milonzi was killed in a traffic accident within the City of Mentor. Appellant, the decedent's wife, individually and as executrix of the decedent's estate, filed suit against appellees.[1] At a pretrial, on December 21, 2000, the trial court gave appellees oral leave to file summary judgment motions, by January 19, 2001.

{¶3} By January 19, 2001, all of the appellees, except JTO, Inc., had filed motions for summary judgment. On January 31, 2001, appellant filed pleadings entitled "Response to [appellees'] Motion for Summary Judgment." In these pleadings, appellant did not address the merits of appellees' motions. Instead, appellant moved

the court for an oral hearing on the summary judgment motions and requested that the hearing not be scheduled until appellant had reasonable time to complete discovery. Appellant argued that, without additional time for discovery, she would not be able to completely and accurately respond to the motions.

{¶4} On March 29, 2001, JTO, Inc. moved the court for leave to file a motion for summary judgment. The trial court granted leave and JTO filed its motion for summary judgment, on May 9, 2001.

{¶5} On May 17, 2001, the trial court granted summary judgment to all of the appellants, except JTO. On May 31, 2001, the trial court granted JTO's motion for summary judgment.

{¶6} Appellant appealed the judgments of the trial court, asserting the following assignment of error:

{¶7} "[t]he trial court erred, to the prejudice of appellant, when it proceeded to grant summary judgment, in favor of appellees without establishing a hearing date, and providing notice of same to appellant."

{¶8} Appellant argues that the trial court erred by failing to set a hearing date on which her responses to appellees' motions for summary judgment were due and by failing to give her notice of such a date.

{¶9} In *Laituri v. Nero* (1998), 131 Ohio App.3d 797, this court held, upon similar facts, that "Civ.R. 56(C) implicitly *requires* setting a hearing date, either oral or non-oral, after which the trial court may rule on the motion for summary judgment." (Emphasis added.) Id. at 802. In reaching this conclusion, this court also found that Loc.R. III (D) (6) of the Court of Common Pleas of Lake County, General Division, which provides that motions for summary judgment may be considered upon the briefs alone, twenty days after their filing, was unenforceable to the extent that it purports to allow the court to issue a judgment on a motion for summary judgment without setting the motion for hearing and providing notice thereof at least fourteen days in advance. Id.

{¶10} In *Laituri,* this court went on to conclude, "appellant was entitled to *written notice* stating the date on which his response to appellees' second motion for summary judgment was due. To the extent that the local rule contradicts this requirement, it is unenforceable." (Emphasis added.) Id. at 803.

{¶11} It is undisputed that, in this case, the trial court did not provide appellant with written notice of a hearing, oral or non-oral, and did not provide her with written notice of the date on which her responses to appellees' motions for summary judgment were due. Accordingly, under the rule set forth in *Laituri,* supra, the trial court erred in granting appellees' motions for summary judgment because the trial court did not give fourteen days notice of a hearing as required by Civ.R. 56(C). We further note that

appellant responded to appellees' motion for summary judgment by filing a motion requesting the trial court to set a hearing date which provided adequate time for her to complete discovery. Appellant argued that she had not had sufficient time to depose officers of JTO, Inc. and C.T. Consultants, Inc., who had recently been joined as defendants in appellant's suit. The trial court, however, never responded to her request.

{¶12} Appellees argue that *Laituri* is inapplicable in this case because it is factually distinguishable. Though we believe that the facts of this case are remarkably similar to the facts in *Laituri,* application of the *Laituri* holding does not depend upon factual distinctions. Our holding in *Laituri* is quite clear that Civ.R. 56(C) requires the court to set a hearing date, after which the court may rule on the motion for summary judgment. We also clearly held that the court must give the nonmoving party written notice, at least fourteen days prior to the hearing date. None of appellees' alleged factual distinctions prevents *Laituri* from being fully applicable in this case.

{¶13} Appellants also argue that the Supreme Court of Ohio held, in *State ex rel. Freeman v. Morris* (1992), 65 Ohio St.3d 458, that written notice of the date set for hearing of a motion for summary judgment is not necessary. *Freeman,* however, is distinguishable from the case sub judice. In *Freeman,* the nonmoving party had filed his response to the merits of the motion for summary judgment before the date the court decided the motion. The nonmoving party thus suffered no prejudice. In the present

case, appellant never responded to the merits of appellees' motions. Indeed, appellant moved the court to set a hearing date, which provided adequate time for her to complete discovery, which the court never ruled upon.

{¶14} The city of Mentor argues that even if the trial court erred by failing to set a hearing date and provide appellant with fourteen days written notice, appellant was not prejudiced because the city's motion was properly granted on the merits. We hold, however, that the trial court erred in considering the merits of appellees' motions without setting a hearing date.

{¶15} Appellant's assignment of error has merit.

{¶16} Based on the foregoing, the judgment of the Lake County Court of Common Pleas is hereby reversed and all cases are remanded to give appellant notice of the date of the summary judgment hearings, providing appellant with a reasonable opportunity to complete discovery and an opportunity to respond to appellees' motions.

DONALD R. FORD, J., concurs.

JUDITH A. CHRISTLEY, J., concurs in judgment only with concurring opinion.

JUDITH A. CHRISTLEY, J., concurring in judgment only.

{¶17} I respectfully concur in judgment only with the opinion of the majority. In reversing the judgment of the trial court, the majority relies on *Laituri v. Nero* (1999), 131 Ohio App.3d 797, in which this writer dissented on one of the issues in question here, to wit: the need for written notice from the trial court prior to deciding a motion for summary judgment. Although I still believe the analysis of my dissent is correct, I obviously would defer to the precedent established by the majority in *Laituri.* Having said that, however, I agree that the trial court's judgment should be reversed for reasons other than the lack of written notice relied upon by the majority.

{¶18} In the instant matter, what the record shows is that appellant did respond to appellees' motions for summary judgment. In that response, appellant moved for an oral hearing and essentially requested a continuance for discovery. At oral argument before this court, it was suggested that sometime in December 2000, there was a status conference and that response dates for the various motions were set out. Unfortunately, that schedule was never reduced to writing and made an order of the court; thus, it was not of record. Had it been of record as a written order of the court, it would have complied with *Laituri*.

{¶19} Instead, the record shows a timely response by appellant to the various motions for summary judgment filed by appellees. Although appellant's response did

not address the merits of the motions, as I noted above, it did request an oral hearing and more time for discovery. The trial court, however, never ruled of record on appellant's requests. Furthermore, regardless of what occurred during the December 2000 status conference, there is no record thereof.[1] For that reason, appellant's assignment has merit, not because of *Laituri*, but because there was a timely, legitimate request for a hearing and a continuance that was never addressed of record by the trial court. Civ.R. 56(F). See, also, *Humprey v. Scottish Lion Ins. Co., LTD.* (Mar. 15, 1996), 11th Dist No. 94-T-5099, 1996 WL 200567, at 10 (holding that "Civ.R. 56(F) provides that prior to ruling upon a summary judgment motion, a trial court 'may' grant a continuance to allow the responding party to conduct discovery when it is apparent that the responding party is unable to properly respond.").

{¶20} Thus, I respectfully, concur in judgment only.

1. I note that the events of this status conference could have properly been made part of the record through an App.R. 9(C) statement.