COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0404

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CARLOS FRUM and SANDRA FRUM,

Plaintiffs-Respondents,

v.

LEE I. WIGOD,

Defendant-Appellant.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Lee I. Wigod appeals from a trial court order denying his motion to vacate the default judgment entered against him on the complaint filed by Carlos and Sandra Frum for strict foreclosure of a land contract. Because the trial court properly refused to vacate the default judgment, we affirm.

Whether to vacate a default judgment is within the trial court's discretion, and we will not disturb that ruling absent an erroneous exercise of that discretion. ***Miro Tool & Mfg., Inc. v. Midland Mach.,*** 205 Wis.2d 643, 647, 556 N.W.2d 437, 439 (Ct. App. 1996).

The Frums and Wigod entered into a land contract for the purchase of the Frums' real estate. The transaction was scheduled to close on October 7, 1994. At that time, Wigod was to pay closing costs and real estate commissions. On October 6, Wigod filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Wisconsin. At the October 7 closing, Wigod did not reveal that he had commenced a bankruptcy case. He paid the amounts due at closing by personal check. The check was returned for insufficient funds and has never been satisfied.

Wigod failed to make land contract payments, and on January 18, 1995, the Frums filed a state court summons and complaint seeking strict foreclosure of the land contract. Wigod was served with the summons and complaint on January 30. On April 4, 1995, the bankruptcy court annulled[1] the automatic stay in Wigod's bankruptcy. *See* 11 U.S.C.A. § 362 (West 1993). On the same day, the Frums filed a motion for default judgment in the state court foreclosure action. The hearing on the default judgment was scheduled for April 10.

At the hearing on the motion for default judgment, the Frums appeared in person and with counsel; Wigod appeared pro se by pay telephone from Illinois. The court was advised that the automatic stay had been annulled and the Frums alleged that Wigod had neither filed an answer nor appeared in the strict foreclosure action. Wigod's telephone line into the court was disconnected by the court after Wigod repeatedly

[1] The record does not contain a copy of this order. However, we accept the parties' description of the action taken by the bankruptcy court.

interrupted the proceedings claiming that he could not hear them. The trial court found that Wigod was properly served, did not answer the complaint and that the automatic stay in bankruptcy was no longer in effect. The trial court granted default judgment to the Frums.

On April 18, Wigod filed a pro se motion to vacate the default judgment. Thereafter, counsel for Wigod filed a notice of appearance and an affidavit in support of the motion. The affidavit stated that the April 10 hearing on the Frums' motion for default judgment was heard on less than ten days notice to Wigod in violation of Walworth County circuit court rules for pretrial and motion proceedings. The affidavit also stated that the default judgment hearing proceeded in violation of an automatic stay which came into effect pursuant to an Illinois bankruptcy petition Wigod filed several minutes before the hearing began. Wigod's counsel also filed an answer and affirmative defenses to the strict foreclosure action.[2]

At the hearing on Wigod's motion to vacate the default judgment, Wigod argued that he did not have to file an answer while the automatic stay in the Wisconsin bankruptcy was in place. He testified that a circuit court clerk told him that he did not need to file an answer to the foreclosure action because he was in bankruptcy and that he merely had to send the court a short note stating that there was a bankruptcy proceeding along with proof thereof. Under questioning by the court, Wigod stated that he understood his conversation with the clerk to mean that he did not have to file an answer to the foreclosure complaint. He testified that his attempts to contact the court by telephone for the April 10 default judgment hearing were fraught with technical difficulties.

[2] On April 24, 1995, the United States Bankruptcy Court for the Northern District of Illinois lifted the automatic stay and dismissed Wigod's bankruptcy case.

The court then had two clerks from the clerk of circuit court's office testify. Suzanne Harrington testified that she did not remember speaking with Wigod. She stated that she does not give legal advice to litigants and she specifically denied having said that providing evidence of a pending bankruptcy case would suffice for an answer to a complaint. Claudia Last testified that she spoke with Wigod about scheduling proceedings on his motion to vacate the default judgment. She denied that she would have advised him that a bankruptcy filing relieved him of the need to answer the complaint.

The court found no grounds to vacate the default judgment. The court found Wigod's testimony "basically incredible. I believe that in the past he's committed fraud, if not perjury. I believe that he is absolutely without credibility, and I see no grounds for granting him any relief. I think he has to come to court with clean hands, and that's hardly the case." Wigod appeals.

On appeal, Wigod makes three arguments. First, he argues that his October 1994 bankruptcy filing should have precluded the commencement of a strict foreclosure action in January 1995. We decline to address this argument because it goes to the merits of the strict foreclosure action.

Wigod did not appeal from the April 10 default judgment. Our review on this appeal is limited to whether the circuit court misused its discretion in declining to vacate the default judgment. Wigod may not challenge the commencement of the foreclosure action until the default judgment is vacated. *See* ***O'Neill v. Buchanan,*** 186 Wis.2d 229, 234-35, 519 N.W.2d 750, 752-53 (Ct. App. 1994). In order to vacate a default judgment, a party must make a showing under § 806.07, STATS., sufficient to reopen the case. *See* ***id.*** at 234, 519 N.W.2d at 752. Section 806.07(2) provides that "[a] motion under this section does not affect the finality of a judgment or suspend its

operation." Wigod's filing of a motion to vacate the April 10 default judgment did not affect the finality of that judgment. Because no appeal was taken from that judgment, this court lacks jurisdiction to address the merits of that action. *Cf.* ***Shuput v. Lauer,*** 109 Wis.2d 164, 172-75, 325 N.W.2d 321, 326-27 (1982) (judgment of foreclosure and sale not reviewable on appeal from order confirming sheriff's sale).

Wigod argues that the trial court should have granted him relief from the default judgment because he mistakenly relied upon the existence of the automatic stay, 11 U.S.C.A. § 362, when he failed to answer the strict foreclosure complaint. Wigod sought relief under § 806.07(1)(a), STATS., which permits a court to relieve a party from a judgment due to "[m]istake, inadvertence, surprise, or excusable neglect." *See* ***id***. "Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the circumstances." ***Baird Contracting, Inc. v. Mid Wis. Bank,*** 189 Wis.2d 321, 324, 525 N.W.2d 276, 277 (Ct. App. 1994). Here, the trial court found Wigod's explanation of his failure to answer the foreclosure complaint incredible. Questions regarding the credibility of witnesses are within the purview of the trial court, and we will not overturn the trial court's findings unless they are clearly erroneous. *See* ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). Wigod did not demonstrate that he acted as a reasonably prudent person would have under the circumstances.

Wigod argues that he did not receive proper notice of the April 10 default motion hearing. He argues that the local rules of the Walworth County circuit court governing motions for default judgment in mortgage foreclosure proceedings required at least ten days notice.

Section 806.02, STATS., governs default judgments. Notice of a motion for default judgment must be given to "[a]ny defendant appearing in an action …." *See*

§ 806.02(1). Wigod did not appear in the foreclosure action. "The term 'appearance' is generally used to signify an overt act by which one against whom a suit has been commenced submits himself to the court's jurisdiction." ***Artis-Wergin v. Artis-Wergin,*** 151 Wis.2d 445, 452, 444 N.W.2d 750, 753 (Ct. App. 1989). There is no evidence in the record that Wigod appeared in the action before the default motion was filed nor does he contend he did so. Because Wigod did not appear in the foreclosure action, he was not entitled to notice of the default judgment motion and hearing. Rather, his remedy was to seek relief under § 806.07, STATS., and the trial court did not err in denying him that relief.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.