COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP408 **Cir. Ct. No. 2013CV006303**

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

MANCHESTER VILLAGE OWNERS ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

MARIA-LUCIA A. CARDOSO, A/K/A M.-LUCIA DE A. CARDOSO,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 BRENNAN, J. Maria-Lúcia Araújo Cardoso appeals from an order of the circuit court, granting the plaintiff's motion for default judgment and ordering a judgment of foreclosure. She contends that the circuit court: (1) erroneously exercised its discretion when it denied her request for a

court-appointed attorney; (2) did not have personal jurisdiction over her; and (3) failed to consider whether Cardoso's failure to file a timely answer amounted to "excusable neglect" before entering the default judgment order. Because Cardoso's arguments are either entirely without merit or were not raised before the circuit court, thereby depriving us of a full factual record upon which to decide them, we affirm.

BACKGROUND

¶2 On June 27, 2013, the Manchester Village Owner's Association, Inc. ("MVOA") filed a condominium lien against Cardoso's unit for failure to pay assessments and other amounts owed. The next day, MVOA mailed Cardoso a letter notifying her of the lien and informing her that if she did not pay her outstanding assessments, interest, and the associated attorney's fees within ten days, MVOA would commence a foreclosure action against her unit. Cardoso admits she received the letter.

¶3 On July 16, 2013, having received no payment from Cardoso, MVOA filed the complaint in this action, seeking, in part, a money judgment for the past due assessments and a judgment of foreclosure against Cardoso's unit.

¶4 A process server made six attempts to serve Cardoso with the summons and complaint at her home between July 22, 2013, and August 4, 2013. These attempts were made over an approximate two-week period, including weekdays and weekends, ranging from 7:00 in the morning to 6:30 at night. Three times the process server successfully entered the lobby and made it to Cardoso's unit door, but she did not answer. Three times the process server was stopped at the locked lobby door when no one responded to the buzzer.

¶5 During two of the attempts, the process server left his card, informing Cardoso that he was a process server with a delivery for her and providing her with a phone number to contact him. The process server left the first card on Cardoso's unit door after the first attempt to serve her on July 22, 2013. On July 25, 2013, during the process server's second attempt, the process server again made it to Cardoso's unit door and noticed that the card had been removed. The process server left the second card in the lobby during the third attempt on July 27, 2013. Cardoso admits she received at least one of the cards and did not act on the information.

¶6 Because MVOA was unable to personally serve Cardoso, it mailed a copy of the authenticated summons and complaint to her on August 21, 2013. MVOA then attempted service by publication, publishing notice of the lawsuit on August 23, 2013; August 30, 2013; and September 6, 2013.

¶7 On October 24, 2013, more than three months after it had filed its complaint, MVOA moved for default judgment because Cardoso had failed to file an answer or otherwise acknowledge the complaint. MVOA mailed a notice of the motion to Cardoso. She admits she received a copy of the motion on October 25, 2013.

¶8 On October 31, 2013, Cardoso, proceeding *pro se*, responded to MVOA's complaint for the first time, filing two letters addressed to the circuit court. In one of the letters, Cardoso told the court that she "was unaware that the case had been started" but that she had "been consulting with legal aid attorneys on this matter since August." She also told the court in one of the October 31, 2013 letters that she would "personally get a copy of the complaint later today."

¶9 The circuit court set a hearing on MVOA's motion for default judgment for November 25, 2013. Prior to the motion hearing, Cardoso filed the following documents with the circuit court:

- November 5, 2013: a letter purporting "to bring to the court's attention three incidents/developments in this case that I believe are relevant and paradigmatic," along with attachments;

- November 12, 2013: a letter purporting to "bring to the court's attention … five points for consideration," along with attachments, totaling ninety-two pages;

- November 15, 2013: a motion for appointed counsel, along with a notice of motion, supporting affidavit, supporting memorandum, and proposed orders;

- November 21, 2013: a purported answer and affidavit of mailing;

- November 21, 2013: an affidavit in which Cardoso claims she did not receive a copy of the complaint until November 5, 2013, along with attachments;

- November 22, 2013: a letter to the circuit court, requesting "ADA accommodations," including attachments; and

- November 25, 2013: another letter to the circuit court, including attachments, totaling 216 pages.

¶10 At the November 25, 2013 motion hearing, Cardoso appeared *pro se* and participated. The circuit court denied Cardoso's motion for appointed counsel. The circuit court began by noting that Cardoso did not have a constitutional right to appointed counsel in a civil matter, and that the court's clerk had referred Cardoso to many free resources in the community if she wished to seek assistance. In addition, the court noted that the documents submitted by Cardoso were sophisticated, and demonstrated that Cardoso was not only educated but had some legal capabilities or assistance.

¶11 Then turning to MVOA's motion for default judgment, the circuit court asked Cardoso to set forth for the court her "legal defense" to MVOA's motion. Cardoso responded:

> I consulted with Legal Action, and that took a little time, you know, because the person I needed to speak with was not there that day, and I think it was a Friday or towards the weekend, she would only come back on Monday the following week, and -- because I needed some advice. And that's why this was filed late.

¶12 The circuit court found that Cardoso's excuse for her late answer was not "satisfactory." It also noted again that Cardoso's numerous filings with the court demonstrated "some legal acumen" and that they indicated that she was educated or had some legal assistance. Furthermore, the court found that none of her submissions, including the document purporting to be her answer, amounted to a legally sufficient answer. The circuit court then granted MVOA's motion for a default judgment. Cardoso appeals.

DISCUSSION

¶13 Through counsel, Cardoso now raises three issues on appeal: (1) that the circuit court erroneously exercised its discretion when it denied her request for a court-appointed attorney; (2) that the circuit court "erred in finding personal jurisdiction"; and (3) that the circuit court erroneously exercised its discretion when it failed to consider whether Cardoso's failure to file an answer to the complaint amounted to "excusable neglect" before entering the default judgment order. We address each issue in turn.

I. Cardoso does not have a right to court-appointed counsel, and the circuit court did not erroneously exercise its discretion when it denied her request for court-appointed counsel.

¶14 Cardoso contends that the circuit court erroneously exercised its discretion when it denied her request for a court-appointed attorney. MVOA argues that Cardoso is not entitled to court-appointed counsel in this civil action and that the circuit court used a proper exercise of discretion. We affirm.

¶15 Civil litigants typically do not have a constitutional right to appointed counsel. *See* ***Piper v. Popp***, 167 Wis. 2d 633, 637, 482 N.W.2d 353 (1992) ("[A] presumption exists against appointment of counsel for an indigent civil litigant when the litigant, such as the litigant in this case, will not likely be deprived of personal liberty if unsuccessful in the litigation."). However, a "court may use its inherent discretionary authority to appoint counsel" when the appointment is necessary "for the orderly and fair presentation of a case." ***Joni B. v. State***, 202 Wis. 2d 1, 11, 549 N.W.2d 411 (1996). We will sustain a circuit court's discretionary decision if it is "a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16

(1981). If necessary, we search the record for reasons to sustain a circuit court's discretionary decision. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695.

¶16 The Fourteenth Amendment guarantees courts will not deny any person a fundamentally fair trial. ***Piper***, 167 Wis. 2d at 650. To determine whether due process requires court-appointed counsel, the court must balance three elements: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. ***Id.*** at 647.

¶17 Here, the circuit court's decision to deny Cardoso's motion for counsel is clearly supported by the record and is "a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning." *See* ***Hartung***, 102 Wis. 2d at 66.

¶18 First, the private interest in this case is MVOA's interest in recovering money damages for Cardoso's failure to pay her condominium assessment fees and Cardoso's property interest in her condominium unit. These are not liberty interests and are not any more compelling than "those at stake in the every day civil tort actions brought for money damages." *See* ***Piper***, 167 Wis. 2d at 649.

¶19 Second, the government's interest in this case is minimal and limited to its interest in having a correct judicial determination. *See* ***id.*** at 650.

¶20 Finally, the procedure in this case, a simple foreclosure action based upon a failure to pay condominium fees, is not so complex so as to create a risk of an incorrect decision should one party not be represented by counsel. This is particularly true in light of the circuit court's finding, supported by our review of

the record, that Cardoso's submissions to the court were sophisticated and demonstrated that she was highly educated.

¶21 Because Cardoso does not have a right to court-appointed counsel and because the circuit court did not erroneously exercise its discretion when it denied her motion for court-appointed counsel, we affirm.

II. Cardoso waived her objection to personal jurisdiction and insufficiency of service when she failed to raise the issue in her many written filings and when she appeared before the circuit court on November 25.

¶22 Cardoso contends that the circuit court "erred in finding personal jurisdiction" over her because she alleges that MVOA failed to exercise reasonable diligence in attempting to personally serve her before resorting to publication, as is required by WIS. STAT. § 801.11(1)(c) (2011-12).[1] MVOA argues that Cardoso waived her objection to personal jurisdiction and proper service when she failed to properly present that objection to the circuit court and when she entered an appearance on November 25 and filed her purported answer. We affirm.

¶23 Due process requires that a court have personal jurisdiction over a defendant in a civil suit. ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. "Fundamental to that due process requirement is the provision of notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" ***Id.*** (citation omitted). WISCONSIN STAT. § 801.11 governs the circuit court's jurisdiction over and the service of process upon a

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

defendant. It requires that personal service be attempted with "reasonable diligence" before an alternative method of service is utilized. *See* ***Loppnow***, 324 Wis. 2d 803, ¶10. Reasonable diligence is that diligence "'which is reasonable under the circumstances and not all possible diligence which may be conceived.'" ***Haselow v. Gauthier***, 212 Wis. 2d 580, 589, 569 N.W.2d 97 (Ct. App. 1997) (citation omitted). The statute authorizes publication as an alternative method of service where reasonable diligence has not succeeded. WIS. STAT. § 801.11(1)(c).

¶24 A defense of lack of personal jurisdiction and insufficiency of service is waived if not raised in a defendant's answer, in a motion filed before the answer, or in a responsive pleading. WIS. STAT. § 802.06(2), (8)(a). Additionally, where an appearance is made and relief is sought on other matters, a defendant's objection to lack of personal jurisdiction is waived. ***Artis–Wergin v. Artis–Wergin***, 151 Wis. 2d 445, 452, 444 N.W.2d 750 (Ct. App. 1989).

¶25 Here, Cardoso failed to raise the issue of personal jurisdiction and insufficiency of service in her many filings to the court. Nor did she raise the issue when she appeared at the November 25 motion hearing, or in her purported answer. By failing to raise this issue as required by statute, Cardoso subjected herself to the court's jurisdiction and waived any issues regarding personal jurisdiction or service.

¶26 We reject Cardoso's claim in her reply brief that she *did* raise the issue of personal jurisdiction before the circuit court in her submissions to the court on October 31, 2013, November 5, 2013, and November 22, 2013. She admits that her references to jurisdiction and service were in "layman's terms," stating in her submissions only that she was "unaware that the case had been

started and had moved so far along," that she was not mailed a copy of the complaint, and that she did not understand that the process server had attempted to serve her. Our review of the submissions reveals that Cardoso's statements were insufficient to signal to the court that she was raising the issue of personal jurisdiction or insufficiency of service. We note that she does not claim that she raised the issue in her alleged answer. Her subsequent appearance in court and filing of a purported answer waived any personal jurisdiction issue as noted above. *See* WIS. STAT. § 802.06(2), (8)(a). Consequently, we affirm.

III. Cardoso waived her right to raise the issue of "excusable neglect."

¶27 Finally, Cardoso contends that the circuit court wrongfully granted MVOA's motion for default judgment because it did not account for her excusable neglect. In response, MVOA argues that Cardoso waived the issue of excusable neglect when she failed to raise the issue with the circuit court and that the record does not support Cardoso's claim of excusable neglect. We affirm.

¶28 Defendants have an "unequivocal duty" to timely answer a complaint. ***Estate of Otto v. Physicians Ins. Co. of Wis., Inc.***, 2008 WI 78, ¶56, 311 Wis. 2d 84, 751 N.W.2d 805. The circuit court may enlarge the time for serving an answer "on motion for cause shown and upon just terms." WIS. STAT. § 801.15(2)(a). But the court's power is limited: "If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect." ***Id.***

¶29 Excusable neglect is the neglect that "'might have been the act of a reasonably prudent person under the same circumstances.'" ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). "It is 'not synonymous with neglect, carelessness or inattentiveness.'" ***Id.*** (citation

omitted). The burden of establishing excusable neglect is on the party seeking an enlargement of time for filing an answer or relief from a default judgment. ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶50, 253 Wis. 2d 238, 646 N.W.2d 19 (enlargement of time); ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265 (relief from judgment).

¶30 A circuit court's decision to grant or deny a motion for enlargement of time is a discretionary one, ***Hedtcke***, 109 Wis. 2d at 467, as is the decision to grant or vacate a default judgment, ***Oostburg State Bank v. United Savings & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). We review such determinations under the erroneous exercise of discretion standard. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We will not reverse a discretionary determination if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Id.***, ¶30. We generally look for reasons to sustain a discretionary determination. ***Id.***

¶31 The problem we face in this case is that there is no discretionary decision to review. Again, the circuit court did not make findings of facts with respect to whether Cardoso's failure to timely file an answer was the result of "excusable neglect" because Cardoso did not file a motion in the circuit court requesting additional time to file her answer or otherwise argue that her failure to timely file an answer was the result of excusable neglect. "[A]s a matter of judicial policy, we decline to consider legal arguments that are posed for the first time on appeal and which were not raised in the [circuit] court." ***Wisconsin Dep't of Taxation v. Scherffius***, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974). The reasons for this position are longstanding and plain:

> If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court.

Cappon v. O'Day, 165 Wis. 486, 490-91, 162 N.W. 655 (1917). That is the case here, and therefore, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.