

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2013AP2614

Cir. Ct. No. 2009CV1838

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JPMORGAN CHASE BANK NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

JOHN D. NIEMCZYK,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

PAUL RATHKAMP INS. AGENCY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. John Niemczyk appeals a summary judgment of foreclosure entered against him and in favor of JPMorgan Chase Bank National Association (“Chase”). He also appeals an order granting summary judgment in favor of third-party defendant Paul Rathkamp Ins. Agency c/o American Family Mutual Ins. Co. (“Rathkamp”). On appeal, Niemczyk argues that the circuit court should have granted him default judgment against Rathkamp and that the court should have investigated Niemczyk’s allegation that Chase’s attorneys had a conflict of interest. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Chase initiated this foreclosure action against Niemczyk, alleging that Niemczyk had violated terms of the note and mortgage pertaining to rental property he owned, located at 3835-37 North Morris Boulevard in Shorewood, Wisconsin. The mortgage held by Chase required, among other obligations, that Niemczyk provide proof of hazard insurance on the property.

¶3 Chase moved for summary judgment. Niemczyk subsequently filed a third-party complaint against Rathkamp, which was his insurance agency, “c/o American Family Mutual Insurance Company.” The third-party complaint alleged that Rathkamp failed to provide proof of insurance to Niemczyk, despite repeated requests. Niemczyk alleged that this resulted in Chase having to acquire “[u]nnecessary force place[d]” insurance on the property. The third-party complaint further alleged that Niemczyk paid monies to Rathkamp for insurance, but that Rathkamp fraudulently failed to make sure that insurance was issued for the property. A timely answer to the third-party complaint was filed on behalf of both Rathkamp and American Family.

¶4 Rathkamp and American Family moved for summary judgment, and Chase renewed its motion for summary judgment. The circuit court held a hearing on the motions on October 23, 2013. The court granted both motions for summary judgment.

DISCUSSION

¶5 Niemczyk makes two main arguments on appeal. First, he argues that the circuit court should have considered and granted his motion for default judgment against Rathkamp. Second, he argues that the circuit court should have investigated his allegations that Chase's lawyers had a conflict of interest. For the reasons discussed below, we reject both of these arguments.

¶6 We turn first to Niemczyk's argument regarding default judgment as to Rathkamp. Niemczyk complains that the circuit court never scheduled the default judgment motion to be heard. However, Niemczyk fails to point to any evidence in the record indicating that he provided notice of the motion for default judgment to the court and opposing counsel. Even if we assume, without deciding, that Niemczyk did provide proper notice of a motion for default judgment, such a motion fails on its merits for the reason we discuss next.

¶7 The basis for Niemczyk's default judgment argument is his assertion that Rathkamp did not file an answer to his third-party complaint. This assertion is directly contradicted by the record, which clearly indicates that Rathkamp and American Family filed a timely answer to the third-party complaint on July 30, 2010. Niemczyk appears to argue that the two entities were required to file two separate answers. However, he does not cite any legal authority in support of that argument, and we are not aware of any such authority. Accordingly, we are satisfied that the circuit court properly denied Niemczyk's motion for default

judgment because the record reflects that Rathkamp answered the third-party complaint.

¶8 We turn next to Niemczyk's conflict of interest argument. Niemczyk asserts that a non-attorney employee of Michael Best & Friedrich law firm, which represents Chase, resided at the subject rental property. Niemczyk contends that this fact presents at least an appearance of a conflict of interest on the part of the law firm, which the circuit court should have investigated.

¶9 Chase responds that, when Niemczyk raised the conflict of interest issue in the circuit court, Niemczyk did not move for disqualification of Chase's attorneys, which ordinarily is the remedy for an alleged conflict of interest. *See, e.g., State v. Medina*, 2006 WI App 76, ¶22, 292 Wis. 2d 453, 713 N.W.2d 172 (discussing the importance of bringing a motion to disqualify so that the circuit court can address the potential conflict at the earliest stage possible). Rather, Niemczyk filed a motion to dismiss the complaint after the deadline for filing dispositive motions had passed. And, Chase asserts, the circuit court properly exercised its discretion when it refused to consider the untimely dismissal motion.

¶10 Upon considering the facts in the record, we agree with Chase's position. The circuit court has discretion to determine whether and to what extent it would enforce the deadlines in its own scheduling orders. *See Kustelski v. Taylor*, 2003 WI App 194, ¶15, 266 Wis. 2d 940, 669 N.W.2d 780. Here, the circuit court entered a scheduling order on June 6, 2012, stating that "all dispositive motions shall be filed" by February 6, 2013. Niemczyk did not file his motion to dismiss until February 19, 2013, the same day a hearing was scheduled on a discovery motion filed by Rathkamp. At the hearing, Chase's counsel moved to strike Niemczyk's motion to dismiss as untimely. The court set a briefing

schedule for the parties to address the issue of whether the deadline for Niemczyk to file a dispositive motion should be extended. At the summary judgment motion hearing on October 23, 2013, the circuit court found that there was nothing in the record indicating that Niemczyk had followed the briefing schedule or submitted any argument as to why he should be allowed to file a late dispositive motion. The court further found that there was no basis for excusable neglect on the part of Niemczyk. Niemczyk does not challenge these findings on appeal. Therefore, we are satisfied, based on the undisputed facts in the record, that the circuit court did not erroneously exercise its discretion in denying Niemczyk leave to file a late dispositive motion.

¶11 Chase also correctly points out that Niemczyk fails to present any argument that Chase was not entitled to a judgment of foreclosure on the property. Niemczyk does not present any facts indicating that there was a material dispute that he defaulted under the note or that Chase was entitled to foreclosure under the mortgage. Nor does Niemczyk point to any admissible evidence to support his theory that he paid insurance premiums to Rathkamp but that Rathkamp failed to forward those payments to American Family to secure insurance coverage on the property. Rathkamp's brief, on the other hand, refers to a number of documents in the summary judgment record in support of its position that Niemczyk did not make his premium payments in full.

¶12 Whether the circuit court properly granted summary judgment is a question of law that we review independently, applying the same standards used by the circuit court. *Tatera v. FMC Corp.*, 2010 WI 90, ¶15, 328 Wis. 2d 320, 786 N.W.2d 810. In this case, the circuit court had ample evidence before it in support of Chase's and Rathkamp's summary judgment motions. Niemczyk did not counter with any admissible evidence to support his position, attempting

instead to present his version of the facts orally at the motion hearing. Based upon the admissible evidence that was before the circuit court, we conclude that Chase's and Rathkamp's summary judgment motions were properly granted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

