COURT OF APPEALS
DECISION
DATED AND FILED

December 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2685 **Cir. Ct. No. 2013CV820**

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

STATE OF WISCONSIN EX REL. ROGER HOEPPNER,

PLAINTIFF-APPELLANT,

V.

JESSE GRAVEEN, ALLAN NORDSTROM AND DAWN KRUEGER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Roger Hoeppner appeals an order denying a motion for relief from judgment. We affirm.

¶2 On April 2, 2013, the Town of Stettin held a general election. Jesse Graveen and Allan Nordstrom were elected as town board supervisors, and Dawn Krueger was elected as town clerk. Due to a clerical oversight, the officials did not take and file the official oath within five days, as required by law, but each assumed their elected positions. Upon learning of the oversight, the officials took and filed their official oaths. Hoeppner, through counsel, commenced this quo warranto action under WIS. STAT. § 784.04,[1] seeking to have the positions declared vacant because the town officials did not take or file an official oath within five days of notification of election.

¶3 Following Hoeppner's WIS. STAT. § 784.04 action, the town clerk provided notice of vacancy pursuant to WIS. STAT. § 17.17. Graveen and Krueger were duly appointed to fill the position of supervisor and clerk, respectively, by majority vote of the town board.

¶4 Graveen and Krueger filed a motion to dismiss Hoeppner's action as moot.[2] The circuit court issued a briefing schedule requiring Hoeppner to file his responsive brief by February 24, 2014. On March 24, a month after the due date, Hoeppner filed a "Motion for Extension of Time To File Brief and Affidavits." Hoeppner sought to stay the matter until this court decided an appeal of a prior

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The record is unclear as to Nordstrom's involvement in this matter. On January 8, 2014, a notice of appearance was filed by separate counsel. The Order of Partial Dismissal fails to indicate an appearance by Nordstrom or his counsel at the status conference. The record also shows that neither Nordstrom nor his counsel appeared at the July 21, 2014 hearing regarding the WIS. STAT. § 802.05 motion. The Order Denying Plaintiff's Motion For Relief From Judgment states that Nordstrom was present at the September 10, 2014 hearing on the motion for relief from judgment, but not his attorney.

matter initiated by Hoeppner involving the identical issue. In the alternative, Hoeppner requested an extension of time to file his brief. Graveen and Krueger filed a motion under WIS. STAT. § 802.05, seeking sanctions for a frivolous lawsuit.

¶5 On May 21, 2014, we dismissed Hoeppner's appeal in the prior matter. On June 4, 2014, the circuit court granted partial dismissal in the present case, noting the parties had agreed our decision in the prior Hoeppner suit would determine the disposition of the complaint in the present matter. The request for a frivolous finding under WIS. STAT. § 802.05 remained pending. On June 24, 2014, a status conference was held. The court scheduled the § 802.05 motion to be heard on July 21.

¶6 At the July 21, 2014 hearing, only Graveen and Krueger appeared. The circuit court granted the motion for WIS. STAT. § 802.05 sanctions. Hoeppner subsequently filed a motion for relief from judgment, claiming mistake or excusable neglect under WIS. STAT. § 806.07(1)(a) and (h). After a hearing, the court denied the motion for relief. Hoeppner now appeals.

¶7 Whether to grant relief from judgment is within the sound discretion of the circuit court. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). We generally look for reasons to sustain the circuit court's discretion. *See* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and reached a conclusion a reasonable judge could reach using a demonstrated rational process. ***Liddle v. Liddle***, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987).

¶8 Hoeppner's attorney, Ryan Lister, averred in an affidavit to the circuit court that he received notice on July 4, 2014, that his mother had passed away unexpectedly. Lister drove to Houston, Texas, to attend the July 7 funeral and "then drove back to Wausau, WI." Lister claimed "[a]s a result of said turmoil, and changes in Affiant's calendar, said hearing was not correctly entered on Affiant's calendar." According to Hoeppner, the failure to correctly enter the hearing date on counsel's calendar was "certainly a mistake." He further argues, "[G]iven the fact of the turmoil created by Lister's mother's death, the error in calendaring this hearing was excusable neglect."

¶9 However, the circuit court found the events surrounding the funeral of Lister's mother did not excuse his neglect in calendaring or his failure to attend the motion hearing. The circuit court noted Lister was present at the June 24, 2014 status conference when it was established the WIS. STAT. § 802.05 motion would be heard on July 21.[3] That was ten days prior to the July 4 notification of the death of Lister's mother. Hoeppner failed to explain why the hearing date was not placed on Lister's calendar prior to July 4.

¶10 The circuit court also emphasized:

> Now, this incident of nonappearance does not stand alone in counsel's failure to honor Court-established obligations in the recent past.
>
> ….
>
> The point is this: The Hoeppner matter now before the Court is not an isolated incident. As I've set forth in the record just in the recent past, there have been a number of times when the Court set conditions for counsel to

[3] The court also provided written notice of the July 21 hearing.

> accomplish and they were not accomplished by the time counsel had notice of.
>
> So I find the matter before the Court today is not an isolated incident. It is not neglect that is worthy of excuse; rather, it fits into a pattern of, at best, nonconcern about meeting obligations established by the Court; obligations that needlessly consume court time, litigants' time, and counsels' time.

¶11 Hoeppner insists the circuit court's decision failed "to demonstrate a rational process" of reasoning. We disagree. The court considered the facts of the case and reached a reasoned decision in finding the excuses offered for Lister's failure to appear did not rise to the level of mistake or excusable neglect under WIS. STAT. § 806.07(1)(a). The court's determination that Lister had ample time to calendar the motion hearing prior to the news of his mother's death was a sufficient basis to deny the motion for relief from judgment. *See* ***Wagner v. Springaire Corp.***, 50 Wis. 2d 212, 218, 184 N.W.2d 88 (1971) (pressure of work and personal affairs including distress by reason of prolonged illness of attorney's wife during the preceding three months did not constitute excusable neglect). Lister complains the circuit court relied upon its experience with counsel outside of the record in this case to determine his failure to appear was not an isolated incident and showed a pattern of "nonconcern" about timely meeting court obligations. However, it is apparent the court found the other instances relevant to the credibility of the proffered reasons for the neglect, not as independent bases for denying the motion. In addition, Hoeppner himself has given no reason why he was not present at the July 21, 2014 hearing, nor has he argued excusable neglect for his own nonappearance. We see no reason to disturb the court's findings.

¶12 Hoeppner also argues it is undisputed he should not be responsible for any costs of litigation prior to receipt of a "safe harbor" letter.[4] *See* WIS. STAT. § 802.05(3)(a). However, this issue is disputed. Graveen and Krueger correctly argue the "safe harbor" argument is irrelevant to "whether Hoeppner's counsel established excusable neglect or some other equitable reason for relief from the judgment." Hoeppner did not file a reply brief and we therefore consider the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In any event, Hoeppner's argument concerning responsibility for litigation costs incurred prior to the safe harbor letter is undeveloped and unsupported, and we will therefore not consider it further.[5] *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶13 Finally, Hoeppner argues fundamental fairness requires relief from judgment under WIS. STAT. § 806.07(1)(h). However, he provides no valid reasons by which to conclude the denial of relief from judgment was fundamentally unfair.

[4] On January 23, 2014, Graveen and Krueger sent a "safe harbor" or "21-day letter," indicating the prior litigation had been dismissed and "these are the exact same grounds and the same factual situation …." The safe harbor letter indicated continued prosecution of this matter against Graveen and Krueger lacked any basis in fact or law, and provided an opportunity to dismiss the present matter within twenty-one days, or face potential sanctions under WIS. STAT. § 802.05. Hoeppner's deadline to respond to the motion to dismiss was a month after receiving the safe harbor letter. Hoeppner failed to file any responsive pleadings to the motion to dismiss by the February 24 deadline. In fact, he filed a request for an extension of time on March 24.

[5] Hoeppner uses the phrase "Plaintiff-Appellant," in violation of WIS. STAT. RULE 809.19(1)(i), which requires reference to the parties by name rather than by party designation.

By the Court.—Order affirmed.

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