COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2233

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

LBY AND ASSOCIATES, INC.,

PLAINTIFF-RESPONDENT,

V.

WARREN LEE BRANDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Warren Lee Brandt appeals an order denying his motion to reopen a default judgment of $1,999.40.[2] Brandt claims that the circuit

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

court erroneously exercised its discretion by determining that Brandt did not have good cause for failing to appear at a pretrial conference. In the alternative, Brandt requests this court to invoke its discretionary power under WIS. STAT. § 752.35 to reopen the judgment in the interest of justice. Brandt does not explain why the circuit court erroneously exercised its discretion by denying the motion to reopen. He has also failed to satisfy this court that discretionary reversal is appropriate. The order denying Brandt's motion to reopen the default judgment is therefore affirmed.

¶2 LBY and Associates, Inc., provided services to Brandt's law office pursuant to an oral agreement. Brandt was invoiced on a weekly basis. At some point, Brandt refused to make further payments, claiming that LBY was demanding a greater amount than originally agreed upon. Eventually, LBY filed a small claims action requesting $1,545.90 in damages for unpaid invoices, plus legal fees incurred in the attempt to collect the amount it claimed was due, for a total of $1,933.40.

¶3 Brandt failed to file an answer or to appear on the small claims return date, and default judgment was therefore entered against him. *See* WIS. STAT. §§ 799.20(1), 799.206(1) and 799.22(1) and (4). Brandt filed a motion to reopen, asserting both a defense to LBY's claim and a counterclaim.[3] At the hearing on the motion, Brandt testified that he failed to appear or answer the complaint because:

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[2] The notice of appeal indicates that Brandt is appealing "from the whole final judgment entered on August 19, 1999 …." His brief, however, addresses the trial court's denial on August 19 of Brandt's motion to reopen the default judgment granted and entered on May 14, 1999.

[3] The counterclaim alleged conversion of office property and "employee cost."

> I—With regard to the matter being mailed, the matter wasn't, was received at the office but not given me, and because it was the personal matter and not scheduled on the calendar, and I didn't receive[] it[,] so that it was just a matter of I didn't get my mail.

¶4 Brandt also testified as to correspondence between the parties establishing that he had disputed LBY's claim before the small claims action was filed. Brandt's reason for failing to make a timely appearance in the action notwithstanding,[4] the trial court ordered the judgment vacated, primarily on the basis that the court frowns on default judgments, but also because Brandt had alleged a viable defense. The court ordered that the matter be set for a pretrial in front of the court commissioner, and noted, "if it can't be resolved, then we will have our trial."

¶5 Although Brandt's brief is silent on the subject, it appears from the record that on the day the circuit court granted Brandt's motion to reopen, it signed a document entitled "Procedures For Small Claims Court." This document set the date and time of the pretrial and notified Brandt that the plaintiff would receive judgment if Brandt failed to appear at the pretrial conference. The document

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[4] Brandt's motion to reopen did not assert a basis under WIS. STAT. § 806.07(1)(a), which appears to be the grounds for relief he advanced at the hearing and, therefore, implicitly upon which the trial court granted the motion. It has been held that, for example, the pressures of a busy law office, generally asserted and standing alone, do not justify an attorney's failure to meet a statutory deadline. *See generally* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 69, 257 N.W.2d 865 (1977). In ***Dugenske***, the supreme court held that the trial court did not err by finding that misfiling of legal documents because of confusion caused by the attorney moving his office did not constitute excusable neglect. *See* ***id.*** Nonetheless, the determination whether to vacate a default judgment is within the sound discretion of the trial court, *see* ***id.*** at 68, and LBY did not appeal the order to reopen.

Brandt's motion to reopen does assert, in a single word, "fraud." Fraud may constitute a basis upon which to reopen a judgment, but the fraud must have been in procuring the judgment. *See, e.g.,* ***Estate of Baumgarten***, 12 Wis. 2d 212, 222-23, 107 N.W.2d 169 (1961). Neither Brandt's motion to reopen nor his testimony made such a contention.

contained the notation "cc Both parties in Court," and thus presumably both LBY and Brandt received a copy.

¶6 Brandt next failed to appear at the pretrial due, according to his brief, and without explanation, to "mistake." His affidavit before the circuit court simply stated that "[y]our affiant wrote the pretrial date wrong and did not appear." The court commissioner entered a default judgment in favor of LBY for the amount requested in its complaint, plus costs.

¶7 Shortly thereafter, Brandt moved the court to reopen the default judgment. The circuit court denied Brandt's motion. It determined that reopening the judgment would be unfair to the plaintiff. Brandt appeals that order.

ANALYSIS

¶8 Brandt complains that the circuit court erroneously exercised its discretion by failing to reopen the second default judgment entered against him in this action. He claims that he had meritorious defenses and that the court's decision declining to reopen the case did not "adhere to any rule with an eye to serving justice." This court disagrees.

¶9 WISCONSIN STAT. § 799.29(1)(a) provides the exclusive procedure for reopening a default judgment in small claims proceedings. *See* ***King v. Moore***, 95 Wis. 2d 686, 690, 291 N.W.2d 304 (Ct. App. 1980). It provides: "There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown."

¶10 The determination whether to vacate a default judgment is within the sound discretion of the circuit court. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64,

68, 257 N.W.2d 865 (1978). A circuit court's exercise of discretion will be sustained if it has applied the proper law to the established facts and if there is any reasonable basis for the circuit court's ruling. *See* ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W2d 426 (1982). An appellate court will generally look for reasons to sustain a discretionary determination. *See* ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185, 503 N.W.2d 156 (Ct. App. 1993). This court may independently search the record to determine whether additional reasons exist to support the circuit court's exercise of discretion. *See* ***Stan's Lumber v. Fleming***, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1993).

¶11 The supreme court has set forth three principles guiding the exercise of the circuit court's discretion: (1) The statute relating to vacating default judgments is remedial and should be liberally construed; (2) the law favors affording litigants their day in court; and (3) default judgments are particularly disfavored. *See* ***Dugenske***, 80 Wis. 2d at 68. The supreme court has also recognized "countervailing factors of public policy which favor finality of judgments and discourage litigation delay and negligence of counsel." ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 184, 271 N.W.2d 872 (1978). Additionally, this court has indicated that small claims practice is summary and designed to be terminated more readily than other kinds of civil actions. *See* ***King***, 95 Wis. 2d at 690.

¶12 No Wisconsin appellate case has defined good cause in the context of reopening a small claims default judgment. This court determines that a court may consider the factors set forth in WIS. STAT. § 806.07(1) in considering whether good cause has been shown for reopening a default judgment under WIS.

STAT. § 799.29(1)(a).[5] Because Brandt contends that he mistakenly wrote the wrong date for the pretrial, the inquiry is limited to whether his mistake, inadvertence or neglect was excusable, thereby providing good cause for reopening the default judgment.

¶13 In ***Hollingsworth***, the supreme court said:

> Relief on … ground[s] [of inadvertence, mistake or excusable neglect] requires a showing of two distinct elements: (1) that the judgment was the product of mistake, inadvertence, or excusable neglect; and (2) that there is a meritorious defense. If there is no showing of the first, the court need not reach the second. The first question is whether the movant's conduct was excusable under the circumstances. Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances."

Id. at 184-85 (citations omitted).

¶14 Against this backdrop, we consider the circuit court's exercise of discretion in denying Brandt's motion to reopen. The court determined that reopening the default would be unfair to LBY. This was Brandt's second request

[5] WISCONSIN STAT. § 806.07(1) provides the following reasons for granting relief from an order or judgment:

> (a) Mistake, inadvertence, surprise, or excusable neglect;
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
> (d) The judgment is void;
> (e) The judgment has been satisfied, released or discharged;
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
> (g) It is no longer equitable that the judgment should have prospective application; or
> (h) Any other reasons justifying relief from the operation of the judgment.

to reopen a default judgment resulting from his own negligence. The plaintiff's representative was present at both proceedings that Brandt failed to attend.

¶15 Brandt does not discuss why reopening the judgment would not be unfair to LBY. Nor does he explain, before the circuit court or on appeal, why his "mistake" is excusable. His affidavit simply states he wrote the date wrong, and fails to inform where or when he wrote the date wrong or why he neglected to refer to the notice given him in court. Brandt merely claims that because he has valid defenses and LBY's claim is based on fraud, mistake and conversion, justice is served only by reopening the default judgment.

¶16 The circuit court could reasonably conclude, based both on the applicable law and Brandt's failure to explain why his neglect was excusable, that Brandt failed to show good cause. The circuit court did not erroneously exercise its discretion by refusing to reopen the default judgment.

¶17 As an alternative to his WIS. STAT. § 799.29 motion, Brandt proposes that this court utilize its discretionary powers granted in WIS. STAT. § 752.35. He requests that this court reverse the order denying his motion to reopen the default judgment on the grounds that the real controversy was not fully tried and that it is probable that justice has miscarried.

¶18 WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such

> procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

"The exercise of our discretionary power to grant a new trial is to be done infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

¶19 Brandt claims both that the real controversy was not fully tried and that justice miscarried. As to his first contention, Brandt argues that because the circuit court erroneously entered a default judgment against him, the real controversy was not tried and he is entitled to a new trial. As to the second contention, Brandt posits that because the case was hotly contested, he had meritorious defenses, and LBY had committed a fraud upon him, justice has miscarried. This court is not persuaded by either argument.

¶20 It was Brandt's neglect that resulted in the default judgment. Brandt, an attorney, had a previous default reopened and was notified that failure to appear at the pretrial conference would result in judgment for LBY. Nevertheless, he failed to attend the pretrial. He offered no reason to the circuit court or this court for his failure to appear, other than to state without explanation that he "wrote the pretrial date wrong." Brandt is solely responsible for the loss of his right to have a trial.

¶21 This court is also unimpressed with Brandt's assertion that justice has miscarried because he has defenses to the action and LBY committed a fraud upon him. Again, there is no evidence that LBY committed fraud in procuring the default judgment. The essence of Brandt's argument seems to be that any time a party claims that it has a meritorious defense or the other party committed a fraud, this court should reverse a circuit court's refusal to reopen a default judgment.

That is not the law of this state. Good cause to reopen this default judgment requires a reason that excuses Brandt's failure to appear; none exists here.

¶22 Brandt also claims that he is entitled to a discretionary reversal because the judgment granted was for more than that indicated in the complaint. He intimates that the discrepancy is the result of unjustified attorney fees. Brandt's argument is unfounded. The complaint demanded $1,933.40, which included attorney fees. The difference between the $1,933.40 requested and the actual judgment of $1,999.40 is the costs for filing the action, service of the summons and complaint, and docketing the judgment. Brandt makes no argument that these items were not appropriately added to the judgment.[6] This court does not find this case to be an appropriate one to authorize a new trial under WIS. STAT. § 752.35. Accordingly, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[6] Brandt might have made an argument under WIS. STAT. § 806.02(5) that the court commissioner should have held a hearing to determine LBY's claimed legal expenses, but Brandt advances no such argument and we decline to develop it for him on appeal. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (Appellate courts need not and ordinarily will not consider or decide issues which are not specifically raised on appeal.).