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DISTRICT II

May 22, 2019

To:

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1616-FT Wilmington Savings Fund Society, FSB v. Erik R. Seyfert
and Angela Seyfert (L.C. #2017CV174)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Erik R. Seyfert and Angela Seyfert appeal from a circuit court order denying their motion to reopen a foreclosure judgment entered in favor of the Wilmington Savings Fund Society, FSB. Pursuant to a presubmission conference and this court's order of September 11, 2018, the parties

submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2017-18).¹ Upon review of those memoranda and the record, we summarily affirm the order. WIS. STAT. RULE 809.21.

The Seyferts defaulted on a note held by Wilmington and secured by a mortgage on their home. Wilmington sought foreclosure. In April 2017, the Seyferts were personally served with the summons and complaint and failed to answer within twenty days as required by the summons. On August 31, 2017, Wilmington filed an affidavit of default along with proposed findings of fact, conclusions of law and judgment. The Seyferts did not file a response or any opposition to the affidavit of default. The circuit court granted default judgment to Wilmington by order entered September 5, 2017. The nondeficiency default judgment provided a six-month redemption period.

The redemption period expired. The sheriff's sale scheduled for March 13, 2018, was canceled due to the Seyferts having filed for bankruptcy three days earlier, on March 10, 2018. The Seyferts filed an objection to Wilmington's proof of claim in the bankruptcy action and Wilmington filed an opposing response. The Seyferts then filed a motion under WIS. STAT. § 806.07(1)(a), (g), and (h), to reopen the default judgment of foreclosure. After reviewing the parties' written submissions and following a hearing, the circuit court denied the motion. The Seyferts appeal.

A circuit court may vacate or relieve a party from judgment under various circumstances set forth in WIS. STAT. § 806.07. The circuit court's decision on a motion for relief from judgment is reviewed for an erroneous exercise of discretion. *Sukala v. Heritage Mut. Ins. Co.*,

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. 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. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493. We generally look for reasons to sustain a discretionary determination. *Id.*

In their motion to reopen, the Seyferts asserted that they mistakenly thought they had forty-five days to answer, and that they erroneously believed they electronically filed (e-filed) an answer, albeit late, in June 2017. The circuit court decided that this was not “excusable neglect” under WIS. STAT. § 806.07(1)(a). Excusable neglect is neglect that “might have been the act of a reasonably prudent person under the same circumstances” and is “not synonymous with neglect, carelessness or inattentiveness.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted).

The circuit court determined that the failure to file a timely answer was not reasonable: the Seyferts were personally served with the summons and complaint which specified that the answer deadline was twenty days; they did not file any response, request an extension, or otherwise seek help during the nearly four months between service of the summons and complaint and the default judgment; assuming they truly had an issue with the e-filing mechanics, they did not seek assistance or take further action; this was their third foreclosure action and they had filed an answer in an earlier case; and, upon learning of the affidavit of default, they did not object or take any responsive action. The burden of establishing excusable neglect is on the party seeking relief from a default judgment. *Carmain v. Affiliated Capital Corp.*, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265. The circuit court applied the

correct law to the facts and reasonably determined that “no plausible basis” for a finding of excusable neglect sufficient to reopen the judgment “even remotely exists here; not even faintly.”

Nor did the circuit court erroneously exercise its discretion in determining there was no equitable basis to vacate the judgment under WIS. STAT. § 806.07(1)(g), which contemplates a change in circumstances from the time of judgment, *see Connor v. Connor*, 2001 WI 49, ¶40, 243 Wis. 2d 279, 627 N.W.2d 182, and permits reopening where “[i]t is no longer equitable that the judgment should have prospective application.” Section 806.07(1)(g). Nothing in the facts asserted by the Seyferts satisfies this equitable standard.

Similarly, the Seyferts have not set forth anything approaching the “extraordinary circumstances” required to justify relief in the interest of justice under the catchall provision in WIS. STAT. § 806.07(1)(h). *See Miller*, 326 Wis. 2d 640, ¶¶34-35. As discussed above, the Seyferts were provided the opportunity to be heard but made no appearance during the action’s pendency, even after the affidavit of default was filed. Once they became aware of the default foreclosure judgment, they did not appeal and, in fact, took no further court action during the six-month redemption period. Instead, the Seyferts filed for bankruptcy to stay the imminent sheriff’s sale. Only after Wilmington raised defenses in the bankruptcy case did the Seyferts file the instant motion to reopen the foreclosure judgment. The record supports the circuit court’s determination that the Seyferts’ motion to reopen was “self-serving” and “baseless.”

Finally, we reject the Seyferts’ claim that the amount due alleged in the complaint is inconsistent with the judgment amount. The complaint indicated that there was an amount due and owing in the principal sum of \$122,533.83, together with interest beginning March 1, 2013, and that Wilmington was entitled to interest, reasonable attorney fees and costs, costs of sale and

any advances made for the benefit and preservation of the premises until confirmation. The judgment is consistent with the complaint's demands. Therefore,

IT IS ORDERED that the order of the circuit court is summary affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals