COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2838 **Cir. Ct. No. 02-CV-323**

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

BANK ONE, WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENEVA SVS, INC. F/K/A C.T.I. INC., B & M INVESTMENTS, A WISCONSIN GENERAL PARTNERSHIP A/K/A B & M INVESTMENTS, A WISCONSIN PARTNERSHIP, RONALD E. BENDER AND JAMES F. MULLEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 BROWN, J. Ronald E. Bender, James F. Mullen, Geneva SVS, Inc. and B & M Investments (collectively, "the appellants") appeal from a default

judgment entered in favor of Bank One, Wisconsin. The appellants raise two arguments on appeal. First, they argue that the trial court erroneously exercised its discretion when it entered the default judgment. Second, they contend that the trial court should not have granted Bank One's equitable reformation claim. We reject both arguments and affirm.

¶2 Bender and Mullen are the sole partners of B & M Investments. B & M Investments is a Wisconsin general partnership. Bender and Mullen own 100% of the common stock of Geneva between them. Geneva borrowed $1.95 million from Bank One pursuant to a written loan agreement, as amended. Bender and Mullen guaranteed the loan. B & M Investments granted Bank One a mortgage on the real property at issue to secure payment on the loan. Geneva leased the real property from B & M Investments for use in its business. Geneva defaulted on the loan by not making payments to Bank One for almost fourteen months. At the time the complaint was filed, the arrears on the loan totaled $1,334,539.02.

¶3 On April 12, 2002, Bank One commenced the foreclosure action underlying this appeal. It is undisputed that on April 17, Mullen, Bender, and Geneva were served with the summons and complaint. On April 23, when a process server returned to serve duplicate service on Mullen, he refused to accept service and directed that B & M Investment's attorney and registered agent, Richard Torhorst, be served.

¶4 On May 17, Bank One filed and recorded its first lis pendens describing the property affected by the foreclosure action. On June 6, the appellants filed an answer to the complaint. On June 12, Bank One moved to strike the answer as untimely, arguing that the appellants' responsive pleading was

due on June 3, and sought default judgment and judgment of foreclosure against the appellants. In July, the appellants filed a memorandum with the court in opposition to Bank One's motion for default judgment, arguing that only Geneva, Bender and Mullen were served on April 17 and that B & M Investments was not served until April 23. The appellants also filed an affidavit in which Torhorst averred that he "inadvertently neglected to ascertain the date each of the other defendants were served."

¶5 The trial court rejected the appellants' argument, finding that once Bender and Mullen were served, so was B & M Investments. Accordingly, the trial court granted the default judgment. On August 1, Bank One filed its revised Order for Judgment, Judgment of Foreclosure and a second lis pendens, which related to Bank One's equitable reformation claim. The appellants filed a motion for an evidentiary hearing. On September 13, the trial court held a hearing on Bank One's motion. The trial court determined that all of the property described in both the May 17 lis pendens and the August 1 lis pendens was abandoned. Furthermore, the trial court sustained Bank One's equitable reformation claim contained in its original pleadings. This appeal followed.

¶6 The appellants argue that the trial court erroneously exercised its discretion when it entered the default judgment. The trial court's decision on whether to grant a default judgment is reviewed under an erroneous exercise of discretion standard. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 125 Wis. 2d 224, 238, 372 N.W.2d 471 (Ct. App. 1985); *aff'd, see also* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 470, 326 N.W.2d 727 (1982). A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320

N.W.2d 175 (1982). We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶7 The appellants challenge the entry of the default judgment on two grounds. They first argue that B & M Investments was not served until April 23 when the process server served Torhorst, the partnership's attorney, with the summons and complaint and, as a result, their June 6 answer was timely. The appellants observe that the summons only identified Bender and Mullen with specificity, but not B & M Investments.

¶8 WISCONSIN STAT. § 801.11(6) (2001-02)[1] concerns the service of a summons on partners and partnerships. Section 801.11(6) provides:

> PARTNERS AND PARTNERSHIPS. A summons shall be served individually upon each general partner known to the plaintiff by service in any manner prescribed in sub. (1), (2) or (5) where the claim sued upon arises out of or relates to partnership activities within this state sufficient to subject a defendant to personal jurisdiction under s. 801.05(2) to (10). A judgment rendered under such circumstances is a binding adjudication individually against each partner so served and is a binding adjudication against the partnership as to its assets anywhere.

In ***CH2M Hill, Inc. v. Black & Veatch***, 206 Wis. 2d 370, 375, 385, 557 N.W.2d 829 (Ct. App. 1996), the leading case interpreting § 801.11(6), we held that service of a summons and complaint on some partners in a general partnership is sufficient to commence a civil action that will be binding on the partnership assets

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and those partners who are served. *See* ***CH2M Hill***, 206 Wis. 2d at 375, 385. In reaching our conclusion, we reasoned that in construing § 801.11(6) we could not ignore the provisions of the Uniform Partnership Act codified in Wisconsin as WIS. STAT. § 178.09. ***CH2M Hill***, 206 Wis. 2d at 380-81. We explained that § 178.09 is entitled "Notice to or knowledge of partner charges partnership" and dictates:

> Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to the partner's mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

CH2M Hill, 206 Wis. 2d at 380-81. *See also* § 178.09.

¶9 Applying these principles to this case, it is clear that when Bender and Mullen were served on April 17, B & M Investments was served as well. By virtue of the April 17 service, both partners had notice of the action. Acceptance of the appellants' argument would require service multiple times on the same person who is sued in his or her individual and partnership capacities to comply with WIS. STAT. § 801.11. Such an interpretation runs counter both to our teachings in ***CH2M Hill*** and to partnership law. Accordingly, we reject the appellants' argument that their response was timely.

¶10 The appellants next argue that the duplicative service was confusing and, therefore, their failure to file the answer in a timely manner is excusable and default judgment was unwarranted. A party is entitled to relief from a default judgment if the judgment was the product of excusable neglect. WIS. STAT.

§ 806.07(1)(a). The burden is on the defendant to show that excusable neglect exists. ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977).

¶11 Excusable neglect is that "neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Hedtcke***, 109 Wis. 2d at 468 (citation omitted). It is not synonymous with carelessness or inattentiveness, and it is not sufficient that the failure to answer in a timely manner be unintentional and in that sense a mistake or inadvertent, "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (citation omitted). Applying this standard, we have upheld a trial court determination that a party's failure to timely answer did not constitute excusable neglect when it was due to the failure of the client to forward the service on to the person or persons responsible for answering, ***id.*** at 443-44, and where a lawyer claimed that he was preoccupied by other legal business without stating specific incidents and a persuasive explanation, ***Hedtcke***, 109 Wis. 2d at 473.

¶12 With this precedent in mind, our review of the record demonstrates that the trial court properly exercised its discretion in finding that excusable neglect was not present. The appellants' argument for excusable neglect essentially rests on Torhorst's bare assertion that he "inadvertently neglected to ascertain the date each of the other defendants were served." The appellants offer no further explanation as to why Torhorst failed to communicate with his clients to confirm service. In a similar vein, the appellants provide no explanation as to why Bender and Mullen did not contact Torhorst upon receiving the summons and complaint. From the record, it appears that the appellants' failure to answer in a timely manner amounted to nothing more than carelessness and inattentiveness on the part of the parties involved and thus does not constitute excusable neglect.

¶13 The appellants respond that their responsive pleadings were filed and served only three days late. They observe that the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues and argue that the three-day delay had not prejudiced Bank One and they had asserted several meritorious defenses warranting a trial. While the interests of justice require the court to be aware that a failure to find excusable neglect could result in default judgment and that the law generally disfavors default judgments and prefers a trial on the merits, a trial court has great discretion in granting relief based on excusable neglect. ***Id.*** at 468-69. Even if the evidence favoring a default judgment is slight, an appellate court must affirm unless it was impossible for the trial court to grant the judgment in the exercise of its discretion. ***Martin***, 117 Wis. 2d at 442.

¶14 From the record, it is evident that the trial court properly took into consideration the appellants' interests of justice arguments when it made its determination that excusable neglect was not present. Further, the trial court examined the appellants' defenses and concluded, as we do here, that they were unfounded. Given the circumstances of the case, the trial court reasonably concluded that the appellants had not demonstrated excusable neglect and simply were not entitled to relief from the default judgment. We, therefore, affirm the default judgment entered against the appellants.

¶15 Lastly, the appellants argue that the default judgment encompassed property not listed in the original complaint or in the original lis pendens and they had no notice that Bank One was seeking the equitable reformation of the property description set forth in the mortgage between Bank One and the appellants. The appellants further contend that the trial court failed to hold a hearing adjudicating this issue. These arguments are without merit.

¶16 First, Bank One not only alleged equitable reformation in the complaint, but also filed two separate lis pendens describing the property. A cause of action entitled "equitable reformation of legal description" is set forth in paragraphs 28 and 29 of the complaint. Furthermore, Bank One filed a second lis pendens containing a legal description of the real estate not described in the complaint—putting the appellants on notice of the property subject to the default judgment. Also, contrary to the appellants' assertions, the trial court did hold an evidentiary hearing specifically to adjudicate the issues of abandonment and equitable reformation. The appellants chose not to offer any testimony from witnesses, make an offer of proof or otherwise inform the trial court that additional facts were necessary to decide the issue before the court. Accordingly, we reject the appellants' assertions and affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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