COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2012

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. 2011AP2186

Cir. Ct. No. 2010CV1445

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JOHNSON BANK,

PLAINTIFF-RESPONDENT,

V.

BV NICOLET, LLC AND ALBERT BELMONTE,

DEFENDANTS-APPELLANTS,

BRENDAN L. SULLIVAN AND LAWRENCE J. STARKMAN,

DEFENDANTS.

APPEAL from an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. BV Nicolet, LLC and Albert Belmonte appeal an order denying their motion to reopen a default judgment entered in favor of

Johnson Bank. The circuit court concluded BV Nicolet and Belmonte failed to establish extraordinary circumstances that would warrant reopening the default judgment under WIS. STAT. § 806.07(1)(h).[1] However, the court did not apply the five interest of justice factors set forth in ***Miller v. Hanover Insurance Co.***, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493. The court therefore failed to properly exercise its discretion. Accordingly, we reverse the order denying BV Nicolet and Belmonte's motion to reopen, and we remand for the circuit court to apply the interest of justice factors.

BACKGROUND

¶2 BV Nicolet is a limited liability company with two members, Albert Belmonte and Lawrence Starkman. In June 2007, BV Nicolet purchased property in Grand Chute, Wisconsin, containing a number of townhomes. To finance the purchase, Johnson Bank loaned BV Nicolet $3,365,000. The loan was secured by a mortgage on the Grand Chute property. Additionally, Belmonte, Starkman, and Brendan Sullivan executed continuing commercial guaranties, by which they agreed to be personally liable for BV Nicolet's debts to Johnson Bank.

¶3 The Johnson Bank loan matured on June 19, 2009, at which time the terms of the note required BV Nicolet to pay the loan's outstanding balance. However, BV Nicolet failed to make the required payment. Consequently, on July 1, 2010, Johnson Bank filed a summons and complaint seeking to foreclose on the Grand Chute property and to enforce Belmonte's, Starkman's, and Sullivan's guaranties. BV Nicolet and Belmonte failed to timely answer the

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

complaint, and Johnson Bank moved for a default judgment against them.[2] In response, BV Nicolet and Belmonte moved to enlarge the time to answer the complaint, arguing their failure to timely answer was due to excusable neglect.

¶4 Specifically, BV Nicolet alleged that, because its principal place of business was in Illinois, it retained CSC-Lawyers Incorporating Service Company to act as its registered agent in Wisconsin. CSC was supposed to forward all legal papers it received to BV Nicolet's Illinois attorney, who would then notify Belmonte. Although Johnson Bank properly served its complaint on CSC, Belmonte alleged he could not recall BV Nicolet's Illinois counsel ever informing him about the complaint. Belmonte was properly served in his individual capacity in July 2010, when his son accepted service of the summons and complaint. However, he alleged that, at that time, he thought the service was defective because he had not been personally served.

¶5 Following a hearing, the circuit court denied BV Nicolet and Belmonte's motion to enlarge the time to answer and instead granted a default judgment in favor of Johnson Bank. BV Nicolet and Belmonte then moved to reopen the default judgment, arguing they should be relieved from the judgment because of "[f]raud, misrepresentation, or other misconduct of an adverse party," *see* WIS. STAT. § 806.07(1)(c), and because extraordinary circumstances warranted relief, *see* WIS. STAT. § 806.07(1)(h) and ***Miller***, 326 Wis. 2d 640, ¶35.

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[2] Johnson Bank also sought a default judgment against Sullivan, which the circuit court ultimately granted. Sullivan has not appealed that judgment.

Johnson Bank did not seek a default judgment against Starkman because it was initially unable to obtain service on him. Starkman was eventually served with an amended summons and complaint, which he timely answered. Johnson Bank's claim against Starkman is still pending in the circuit court.

¶6 In support of their motion, BV Nicolet and Belmonte offered an affidavit in which Starkman alleged that, before BV Nicolet purchased the Grand Chute property, Robert Wheeler, a Johnson Bank officer, provided Starkman with a "Reconstructed Operating Statement Year Projection" for the property. According to Starkman, Wheeler represented that Johnson Bank was the receiver for the Grand Chute property and that the statement was created using actual data acquired through Johnson Bank's receivership. The statement showed that the property generated $34,100 in gross income each month. Starkman alleged BV Nicolet relied on the statement in purchasing the property, but it later learned the property generated less than $20,000 in gross income each month. Starkman contended, "[T]he misrepresentations made by Johnson Bank … regarding the rental income … were a direct cause of BV Nicolet[] failing to meet its obligations as required under the Note and Mortgage."

¶7 In response, Johnson Bank offered an affidavit of Robert Wheeler. Wheeler averred that Johnson Bank had never been appointed receiver for the Grand Chute property. He asserted he did not create the "Reconstructed Operating Statement Year Projection" or provide it to BV Nicolet. He also contended that, by the time BV Nicolet purchased the Grand Chute property, it was "well aware" that the rental income from the property would be insufficient to satisfy the mortgage and other expenses.

¶8 Applying WIS. STAT. § 806.07(1)(c), the circuit court concluded Johnson Bank did not engage in fraud or misrepresentation. Applying § 806.07(1)(h), the court determined there were no extraordinary circumstances that would justify reopening the case. Accordingly, the court denied BV Nicolet and Belmonte's motion to reopen the default judgment.

DISCUSSION

¶9 On appeal, BV Nicolet and Belmonte argue the circuit court should have reopened the default judgment pursuant to WIS. STAT. § 806.07(1)(h).[3] Section 806.07(1) provides that a court may relieve a party from a judgment or order for eight reasons, listed in paragraphs (a) through (h). Paragraphs (a) through (g) describe specific circumstances in which the court may grant relief, but paragraph (h) is a "catch-all" provision allowing relief from judgment for "[a]ny other reasons justifying relief[.]" *See* WIS. STAT. § 806.07(1)(h); ***Miller***, 326 Wis. 2d 640, ¶32 (citation omitted). "A court appropriately grants relief from a default judgment under [§ 806.07(1)(h)] when extraordinary circumstances are present justifying relief in the interest of justice." ***Miller***, 326 Wis. 2d 640, ¶35.

¶10 Whether to grant relief from a judgment under WIS. STAT. § 806.07(1)(h) is a discretionary determination, and we will not reverse the circuit court's decision absent an erroneous exercise of discretion. ***Id.***, ¶29. A circuit court properly exercises its discretion when its decision is based on the facts of record and the application of a correct legal standard. ***Id.*** In exercising its discretion under § 806.07(1)(h), the court should "'consider a wide range of factors' … always keeping in mind the competing interests of finality of judgments and fairness in the resolution of the dispute." ***Id.***, ¶36 (quoting ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 552, 363 N.W.2d 419 (1985)).

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[3] BV Nicolet and Belmonte do not argue on appeal that the court should have reopened the judgment pursuant to WIS. STAT. § 806.07(1)(c). "[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned." ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). Accordingly, we do not address § 806.07(1)(c).

Although other factors may be relevant, the court must consider five "interest of justice" factors, which are:

> whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

See ***id.***, ¶¶36, 41 (quoting ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶11, 282 Wis. 2d 46, 698 N.W.2d 610). A court erroneously exercises its discretion by failing to apply these five factors. *See* ***id.***, ¶¶41, 47.

¶11 Here, the circuit court failed to apply the five interest of justice factors in determining whether extraordinary circumstances warranted reopening the default judgment. The court noted that, in assessing whether extraordinary circumstances exist, it must "make a comprehensive review of all relevant factors" and must consider "a wide range of factors" that vary from case to case. Citing ***Miller***, the court also noted that it must "be cognizant of three general considerations": (1) that WIS. STAT. § 806.07(1) is remedial in nature, and should be liberally construed; (2) that the law prefers, whenever reasonably possible, to afford litigants a day in court; and (3) that default judgments are regarded with particular disfavor. *See* ***Miller***, 326 Wis. 2d 640, ¶31.

¶12 The court then stated:

> This court is hard-pressed to find any extraordinary circumstances entitling [BV Nicolet and Belmonte] to relief under [WIS. STAT. §] 806.07(1)(h). [Johnson Bank] submits that the arguments made by the defendants would be the same arguments made by all parties seeking relief

> from a default judgment; that they should have had their day in court.
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> [Johnson Bank] cites [***Miller***, 326 Wis. 2d 640, ¶81], in which Justice Bradley, in her concurring opinion states, "I conclude that most default judgments are ordinary rather than extraordinary, and will not warrant relief. By failing to actually require extraordinary circumstances, the majority ignores the ***M.L.B.***[4] court's caution that [subsection] (h) 'should be used sparingly' and should not be interpreted 'so broadly as to erode the concept of finality.'"
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> In this case this Court found that the defendant's failure to timely file an answer in this section was determined to be without excusable neglect. I don't find any other circumstances in this case that have been presented that are extraordinary. In this case they didn't get to go to court and present their case, but that would be true in any other— any other case in which a default judgment was entered.
>
> And I'm satisfied that … there are no extraordinary circumstances that would justify the Court in its exercise of equity jurisdiction in reopening this case.

¶13 Thus, the circuit court failed to consider the five interest of justice factors in determining that BV Nicolet and Belmonte were not entitled to relief under WIS. STAT. § 806.07(1)(h). Because ***Miller*** states that a court must consider the interest of justice factors when applying § 806.07(1)(h), *see* ***Miller***, 326 Wis. 2d 640, ¶41, the circuit court failed to properly exercise its discretion.

¶14 When a circuit court fails to properly exercise its discretion, we may independently review the record to determine whether application of the proper legal standard to the facts of record supports the court's ruling. *See* ***State v. Gary M.B.***, 2003 WI App 72, ¶27, 261 Wis. 2d 811, 661 N.W.2d 435. In ***Miller***, after concluding the circuit court failed to properly exercise its discretion when it

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[4] ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 363 N.W.2d 419 (1985).

neglected to apply the five interest of justice factors, the supreme court independently reviewed the record and applied those factors to the facts of the case. ***Miller***, 326 Wis. 2d 640, ¶¶47, 49. However, the ***Miller*** court's independent review was fairly straightforward because all five factors clearly favored reopening the judgment.

¶15 Here, application of the five-factor analysis is less clear than it was in ***Miller***. We therefore decline to independently review the record and apply the five interest of justice factors. Instead, we reverse the order denying BV Nicolet and Belmonte's motion to reopen the default judgment and remand to the circuit court with instructions to apply the interest of justice factors. In so doing, we note that, while the court must apply these five factors, it should also consider "any other factors bearing upon the equities of the case," *see* ***id.***, ¶58 (quoting ***Sukala***, 282 Wis. 2d 46, ¶10), along with Wisconsin's general policy of disfavoring default judgments, *see* ***id.***, ¶¶31, 59.

¶16 Additionally, nothing in ***Miller*** suggests that the decision whether or not to reopen requires a quantitative majority of the five interest of justice factors. In other words, ***Miller*** does not state that, if at least three of the five factors favor the party seeking to reopen, the court must reopen the judgment. Instead, we read ***Miller*** to permit a circuit court to perform a qualitative analysis, weighing the five factors and giving additional weight to those factors the court deems most important or persuasive in the particular case. Moreover, the court may determine that other relevant factors weigh either in favor of or against reopening the judgment, despite the outcome of the five-factor test. However, to exercise its discretion properly, the court must include the five interest of justice factors in its analysis.

By the Court.—Order reversed and cause remanded with directions.

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