COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1973 **Cir. Ct. No. 2011CV926**

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

EAU CLAIRE COUNTY,

PLAINTIFF-RESPONDENT,

V.

CLEMENS F. BORNTREGER, CHRISTINE J. BORNTREGER, HENRY MAST AND JOHN AND JANE DOE TENANTS,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Clemens Borntreger, Christine Borntreger, Henry Mast, and John and Jane Doe Tenants (collectively, Borntreger) appeal an order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

denying their motion to reopen a default judgment. Borntreger argues the circuit court erred by failing to grant his motion to reopen because he committed excusable neglect and has a meritorious defense to the complaint. We affirm.

BACKGROUND

¶2 On November 15, 2011, Eau Claire County filed a complaint against Borntreger. The complaint alleged that Borntreger had applied for a building permit for a single family residence, an engineer determined the building was not structurally sound, and Borntreger failed to remedy the structural issues and obtain an occupancy permit before allowing individuals to occupy the property. The complaint also alleged the County told Borntreger he was not permitted to build a chicken barn until the primary residence had been approved for occupancy, but Borntreger nevertheless constructed a chicken barn. The complaint requested that Borntreger be ordered to "bring[] the property into compliance with … the Eau Claire Building Code by making the residence structurally sound" and to "vacate … the property including the residence and chicken barn until … there is compliance with the Eau Claire County Code of Ordinances."

¶3 Borntreger did not respond to the County's complaint. An individual named Donna Douglas, who was neither a defendant in the lawsuit nor an attorney, wrote three letters to the County in November 2011, advising the County that the defendants were Amish, believed there were no safety concerns regarding the property, and wanted to investigate whether the County's building code interfered with their religion.

¶4 On March 16, 2012, the County moved for a default judgment against Borntreger. On April 10, 2012, the circuit court granted the County's

motion, finding that the defendants had been served and failed to respond to the complaint.

¶5 On April 25, Henry Mast wrote to the court, stating the defendants had responded to the complaint in November 2011. Mast requested a hearing to explain their side. On April 26, Borntreger wrote to the court, responding to each allegation in the County's complaint. Borntreger also requested a hearing. The court denied Borntreger's and Mast's requests.

¶6 On May 23, the defendants, now represented by counsel, moved to reopen the court's default judgment pursuant to WIS. STAT. § 806.07(1)(a), (g) and (h). In support, Borntreger argued he had mistakenly responded only to the County and not the court in November 2011, and that he had a meritorious defense to the complaint—specifically, he could not comply with the building code for religious purposes. He also alleged the constitutional religious issues amounted to extraordinary circumstances that justified relief from the judgment.

¶7 Following an evidentiary hearing, the court denied Borntreger's motion to reopen. The court noted that to reopen a judgment pursuant to WIS. STAT. § 806.07(1)(a), Borntreger needed to show both excusable neglect and the existence of a meritorious defense. As for excusable neglect, the court noted that the summons Borntreger received explicitly stated that he must personally respond with a written statement to the court and the County within twenty days and failure to do so would result in a default judgment. The court determined Douglas's letters to the County did not amount to a response because she was not an attorney and was only acting as an intermediary. It concluded that Borntreger's failure to respond to the complaint for approximately five months did not amount to excusable neglect.

¶8 The court also determined that, even if Borntreger's inaction amounted to excusable neglect, Borntreger did not have a meritorious religious defense. The court stated that, to bring a meritorious religious defense, Borntreger needed to show he had a sincerely held religious belief that prohibited him from complying with the building code's structural and permit requirements. The court noted that, at the evidentiary hearing, nothing was presented showing the church's rules, or Ordnung,[2] conflicted with the building code, and the evidence showed that other members of the Old Order Amish religion had applied for building permits and complied with the code without violating the Ordnung. The court also observed that Borntreger had originally attempted to comply with the code by obtaining the required permits, and, once the occupancy permit was denied because the house was not structurally sound, Borntreger attempted to get the building in compliance but did not follow through, which the court reasoned was not a defense. The court found that Borntreger's religious beliefs did not prevent him from complying with the building code.[3]

[2] Felty Borntreger, who testified he is a bishop in the Amish Church, explained that the Ordnung is the rules of the church. *See also* ***Wisconsin v. Yoder***, 406 U.S. 205, 210 (1972) (Members of the Old Order Amish have their conduct "regulated in great detail by the Ordnung, or rules, of the church community.").

[3] The court took its analysis further and also determined that the County had a compelling interest in ensuring that its residents live in structurally sound buildings that will not collapse and that there was no less restrictive alternative because a building is either structurally safe or structurally unsafe.

¶9 The court also denied Borntreger's request to reopen the judgment pursuant to WIS. STAT. § 806.07(1)(h), concluding there were no extraordinary circumstances that justified relief.[4] Borntreger appeals.

DISCUSSION

¶10 A circuit court has wide discretion in determining whether to grant relief from a judgment under WIS. STAT. § 806.07. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We review such a determination under the erroneous exercise of discretion standard. ***Id.*** We will not reverse a discretionary decision if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Id.***, ¶30. We generally look for reasons to sustain a circuit court's discretionary determination. ***Id.***

¶11 WISCONSIN STAT. § 806.07(1)(a) provides that a court may relieve a party from a judgment on the basis of mistake, inadvertence, surprise, or excusable neglect. "[A] party moving to vacate a default judgment pursuant to § 806.07(1)(a) must: (1) demonstrate that the judgment against him or her was obtained as a result of mistake, inadvertence, surprise or excusable neglect; and (2) demonstrate that he or she has a meritorious defense to the action." ***J.L. Phillips & Assocs. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998). Borntreger argues the circuit court erred by denying his motion to reopen

[4] The court did not separately address Borntreger's assertion that the judgment should be reopened pursuant to WIS. STAT. § 806.07(1)(g), which provides the court may grant relief if: "It is no longer equitable that the judgment should have prospective application." However, at the motion hearing, when asked for his argument under § 806.07(1)(g), Borntreger stated that his argument in favor of § 806.07(1)(g) was the same as the argument he advanced for § 806.07(1)(h).

because his failure to respond to the complaint amounted to excusable neglect and he has a meritorious defense.

¶12 We begin by considering whether Borntreger established a meritorious defense to the County's complaint. A meritorious defense is any defense that is "good at law." ***Id.*** at 360. A defense that is good at law "is a defense that requires no more and no less than that which is needed in a timely-filed answer to survive a motion for judgment on the pleadings." ***Id.*** Here, the parties agree that to establish a law violates an individual's constitutional right to freedom of religion, the challenger must prove:

> (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

State v. Miller, 202 Wis. 2d 56, 66, 549 N.W.2d 235 (1996).

¶13 On appeal, Borntreger argues he established a meritorious defense—specifically, that he cannot comply with the building code, in its entirety, because of his religious beliefs. As an example of how the building code burdens his religious beliefs, Borntreger points to the answer he filed after the default judgment, where he asserted he cannot install the required smoke detectors because members of his faith do not use smoke detectors "for religious reasons based on God's 1st commandment …."

¶14 However, any smoke detector requirement is not an issue in this case. The County's complaint did not ask the circuit court to order Borntreger to install smoke detectors—it requested that Borntreger make the residential property structurally sound and obtain a chicken barn permit. We cannot conclude

Borntreger has a meritorious religious defense to the structurally sound building and permit requirements based on his religious objections to smoke detectors. Moreover, even if we determined a smoke detector requirement unconstitutionally burdened Borntreger's right to freedom of religion, it would not follow that the entire building code would be unconstitutional as applied to Borntreger. Each remaining provision of the code would be subject to its own constitutional analysis. *See* ***id.***

¶15 Therefore, we are left with determining whether Borntreger raised a meritorious defense to the County's assertions that he failed to make the residence structurally sound and failed to obtain a chicken barn permit. Borntreger has not made any allegation that these specific requirements burden his religious faith. Indeed, as the circuit court found, the evidence at the hearing established that other members of Borntreger's faith were able to comply with these requirements without violating their religious tenets and Borntreger, himself, at least initially complied with the permit requirements. It was not until the single family residence was deemed structurally unsound and Borntreger failed to remedy the defects that this became a matter of religious controversy. We conclude Borntreger has not established a meritorious religious defense to the structurally sound building or permit requirements. We emphasize, however, that this determination does not mean Borntreger lacks a valid religious-based defense to other provisions in the building code that the County seeks to enforce.

¶16 Borntreger also argues that he has an additional meritorious defense to the structurally sound building requirement. He points out that, in the answer he filed after the default judgment, he asserted that the structural engineer never told him what was required to fix the structure and the engineer never came back to re-inspect the property. This, however, is not a defense to the allegation that the

residence remains structurally unsound. Borntreger also points to his offer of proof at the hearing to vacate the default judgment, where he advised the court he made the corrections that the engineer wanted him to make. Because Borntreger asserted in his answer that the engineer never told him how to fix the structure, we are left to assume that, after the default judgment was entered, Borntreger determined what structural elements needed to be fixed and made those changes. However, any postjudgment structural modification is not a defense to the underlying complaint.

¶17 Because Borntreger has not established a meritorious defense to the County's complaint, we need not consider whether Borntreger's failure to respond to the complaint before the court issued its default judgment amounts to excusable neglect. *See* ***J.L. Phillips***, 217 Wis. 2d at 358. We conclude the circuit court properly denied Borntreger's motion to reopen the default judgment pursuant to WIS. STAT. § 806.07(1)(a).

¶18 Finally, in his reply brief, Borntreger points out that he "filed this matter under both [WIS. STAT.] § 806.07(1)(a) and (h)." He asserts that, even if we determine he is not entitled to relief pursuant to § 806.07(1)(a), we should reverse in the interest of justice pursuant to § 806.07(1)(h). Borntreger, however, did not make a legal argument in support of reversal under (1)(h) in his brief-in-chief.[5] The only argument in his brief-in-chief was that he committed excusable

[5] A court appropriately grants relief from a default judgment under WIS. STAT. § 806.07(1)(h) when extraordinary circumstances are present justifying relief in the interest of justice. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶35, 326 Wis. 2d 640, 658, 785 N.W.2d 493. "The party seeking relief bears the burden to prove that extraordinary circumstances exist." ***Id.***, ¶34. "'[E]xtraordinary circumstances are those where the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts.'" ***Id.***, ¶35 (*quoting* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶12, 282 Wis. 2d 46, 698 N.W.2d 610) (internal quotations and citations omitted).

neglect and had a meritorious defense. *See* WIS. STAT. § 806.07(1)(a); ***J.L. Phillips***, 217 Wis. 2d at 358. We will not now consider whether, pursuant to § 806.07(1)(h), extraordinary circumstances justify relief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

By the Court.—Order affirmed.

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