COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1887 **Cir. Ct. No. 2011SC3165**

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

FOX RIVER STATE BANK,

PLAINTIFF-RESPONDENT,

V.

MORRISON TRANSPORT, INC. AND JEFFERY R. CLEMENTS,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Morrison Transport, Inc. and Jeffery R. Clements appeal from a small claims default replevin judgment against them. The

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

judgment was entered after they failed to appear at a hearing or file an answer to the complaint. Morrison Transport and Clements argue that they are entitled to relief on several grounds, most of which involve Fox River State Bank's alleged violation of various provisions of the Wisconsin Consumer Act. Those arguments are unpersuasive. We affirm.

¶2 The complaint alleges that on May 30, 2008, Morrison Transport[2] purchased a tow truck from Lynch Truck Center for $116,435 in Waterford, Wisconsin. A promissory note for approximately $90,000 signed by Fox River, was secured using the tow truck as collateral. According to Fox River, Morrison Transport fell behind on payments in June 2011. A summons and complaint were filed September 21, 2011, and served on Morrison Transport. The summons stated that a hearing was set for October 10, 2011.

¶3 Morrison Transport failed to appear at the scheduled hearing or file a timely answer to the complaint. A writ of replevin was therefore issued in its absence. On October 24, 2011, Morrison Transport filed a motion to vacate the default judgment, arguing primarily that the plaintiff's complaint had not adhered to statutory requirements. That motion was ultimately denied, and Morrison Transport appeals. It is undisputed that the tow truck was returned to Morrison Transport and that the loan has been current since November 1, 2011.

¶4 There is only one issue in this case: whether the circuit court erred in failing to vacate the default judgment against defendants. The determination whether to vacate a default judgment lies within the sound discretion of the circuit

[2] We refer to the defendants collectively as Morrison Transport for the remainder of this opinion.

court. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). A circuit court exercises its discretion when it examines the relevant facts, applies a proper standard of law, and using a demonstrated rational process, reaches a decision that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). If the circuit court sets forth no reasons or inadequate reasons for its decision, we independently review the record to determine whether the facts provide support for the court's decision and whether discretion was properly exercised. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493.

¶5 In exercising discretion relative to default judgments, circuit courts must be cognizant of three general considerations. ***Id.***, ¶31. First, the statute governing relief from judgments, WIS. STAT. § 806.07(1), "is remedial in nature and should be liberally construed." ***Miller***, 326 Wis. 2d 640, ¶31. Second, "the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues." ***Id.*** (quoting ***Dugenske***, 80 Wis. 2d at 68). Third, "default judgments are regarded with particular disfavor." ***Id.***

¶6 WISCONSIN STAT. § 806.07(1) lists the circumstances in which circuit courts may vacate default judgments. *See* ***Miller***, 326 Wis. 2d 640, ¶31. Relevant to this case, § 806.07(1) reads:

> On motion and upon such terms as are just, the court … may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> ….
>
> (d) The judgment is void;
>
> ….

> (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.

¶7 Morrison Transport offers only one argument that relates to its failure to appear at the October 10 hearing or file a timely answer to the complaint. It claims that when it contacted Fox River's attorney and explained that it had mailed a check to cure the alleged default, Fox River's attorney stated that the hearing would be cancelled pending verification of the payment. Based on that claim, it argues that it is entitled to relief under WIS. STAT. § 806.07(1)(a) because its nonappearance was due to mistake, inadvertence, surprise, and excusable neglect.

¶8 In addition to the affidavit referenced by Morrison Transport, there is a contradictory affidavit in the record from Fox River's attorney. He claims that he told Morrison Transport that he did not have the authority to cancel or reschedule the hearing and that Morrison Transport would have to verify that the account was current with another Fox River employee. That affidavit is explicitly referenced in the order denying Morrison Transport's motion. Thus, although the circuit court did not explicitly address WIS. STAT. § 806.07(1)(a) in its decision, our independent review of the record reveals evidence to support the circuit court's denial of the motion on that basis. *See* ***Miller***, 326 Wis. 2d 640, ¶30. Furthermore, even if Morrison Transport's affidavit was unrebutted, we fail to see how a failure to appear at a hearing based on opposing counsel's statements over the telephone constitutes excusable neglect. *See* ***id.***

¶9 The remainder of Morrison Transport's arguments relate to the strength of its case if the case had been decided on the merits. It spends much of

its brief arguing that the Wisconsin Consumer Act (WCA) is applicable to its transaction with Fox River and that various violations of the WCA warrant vacation of the default judgment. We need not decide whether the WCA applies because we conclude that regardless of its application, Morrison Transport is not entitled to relief. We address Morrison Transport's remaining WIS. STAT. § 806.07(1) arguments below.

¶10 Referencing WIS. STAT. § 806.07(1)(d), Morrison argues that relief should have been granted because the judgment was void based on various WCA statutory violations. That argument misconstrues what renders a judgment void. As we have stated in the past, "[a]n order is not 'void' under [§] 806.07(1)(d) unless the court rendering it lacked subject matter or personal jurisdiction or denied a party due process." ***Dustardy H. v. Bethany H.***, 2011 WI App 2, ¶15, 331 Wis. 2d 158, 794 N.W.2d 230 (2010). The authority Morrison contends would entitle it to prevail had the case been decided on the merits provides no support for its contention that the alleged WCA statutory violations render the default judgment void.

¶11 In a related argument, Morrison Transport contends that if the WCA does not apply, then the small claims court lacked competency to proceed because the tow truck had a value greater than $10,000. *See* WIS. STAT. § 799.01(1)(c). However, "a judgment rendered by a court lacking competency is 'not void for the lack of subject matter jurisdiction but invalid for the lack of competency to proceed to judgment.'" ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶14, 273 Wis. 2d 76, 681 N.W.2d 190. Therefore, regardless of the circuit court's competency to proceed, the judgment would not be void under WIS. STAT. § 806.07(1)(d). Moreover, § 799.01(1)(c) applies small claims procedure to replevin actions "where the value of the property claimed does not exceed

$10,000." The complaint indicates that Morrison Transport owed nearly $40,000 on the loan when the action was filed, but seeks a deficiency judgment in addition to a replevin judgment, implying it believed the vehicle to be worth less than the amount owed. Other than that, there is simply nothing in the record to conclude the amount owing after sale of the vehicle would have been more than $10,000, and therefore nothing in the record that would allow us to determine that the circuit court lacked competency to proceed.

¶12 Morrison Transport next claims, based on WIS. STAT. § 806.07(1)(g), that it was entitled to relief because the judgment against it has no prospective application. Section 806.07(1)(g) allows relief in situations where "[i]t is no longer equitable that the judgment should have prospective application." In ***Nelson v. Taff***, 175 Wis. 2d 178, 187-88, 499 N.W.2d 685 (Ct. App. 1993), we explained that § 806.07(1)(g) "applies only to equitable actions in which the decree has prospective effect." Morrison Transport does not argue that the judgment has prospective effect, and even goes so far as to claim that it is entitled to relief *because* the judgment has *no* prospective effect. Section 806.07(1)(g) is simply not applicable to the facts of this case.

¶13 Morrison Transport argues that it was entitled to relief under WIS. STAT. § 806.07(1)(h), a catch-all provision allowing for relief for "[a]ny other reasons justifying relief from the operation of the judgment." *See also* ***Miller***, 326 Wis. 2d 640, ¶32. Under § 806.07(1)(h), relief is only appropriate when extraordinary circumstances are present. *See also* ***Miller***, 326 Wis. 2d 640, ¶35. When determining whether extraordinary circumstances are present, circuit courts must consider several factors, including:

> 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.

Id., ¶36 (citation omitted).

¶14 Morrison Transport alleges on appeal that the circuit court failed to apply the factors outlined in ***Miller***. We agree that the circuit court did not explicitly reference the factors. Nonetheless, we decline to reverse on that basis because Morrison Transport did not mention those factors or their application to this case in its motion or briefs to the circuit court. Even on appeal, Morrison Transport only argues one factor—meritorious defenses. We may decline to review issues that were not raised to the circuit court, *see* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*, and issues that are not adequately briefed, *see* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶20, 261 Wis. 2d 769, 661 N.W.2d 476. We do so in this case.

¶15 Finally, Morrison Transport asks that we use WIS. STAT. § 752.35 discretionary reversal power in the interest of justice. This formidable power is to be used sparingly and with great caution, *see* ***State v. Jensen***, 2011 WI App 3, ¶97, 331 Wis. 2d 440, 794 N.W.2d 482 (2010), and we will not use it here.[3]

[3] The appellant's brief in this case was long and at times difficult to follow. We have done what we can to discern and address the arguments that were raised. However, to the extent we have not addressed arguments raised in this appeal, those arguments are deemed rejected. *See* ***Roberts v. Manitowoc Cnty. Bd. of Adjustment***, 2006 WI App 169, ¶35, 295 Wis. 2d 522, 721 N.W.2d 499.

By the Court.—Order affirmed.

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