COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 96-3668

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

HERITAGE BANK & TRUST,
A DOMESTIC CORPORATION,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

DUANE DIETSCHE,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order and a judgment of the circuit court for Kenosha County: ROBERT V. BAKER, Judge; MARY KAY WAGNER-MALLOY, Judge. *Order affirmed; judgment reversed and cause remanded with directions.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. While several issues are involved in this appeal and cross-appeal, all grow out of Heritage Bank & Trust's claim for foreclosure of two mortgages against the debtor, Duane Dietsche. The primary issue is whether Dietsche properly followed the rules of civil procedure in claiming a set-off based on the alleged fraud of a Heritage lending officer. Heritage was able to convince a successor trial judge that Dietsche should not be able to put in evidence of fraud during the foreclosure trial because Dietsche never pled it as an affirmative defense. However, our reading of the record prior to the new trial judge taking over the case convinces us that the foreclosure action and a separate action by Dietsche against Heritage for fraud had been consolidated so as to merge the separate actions into one action, pleadings and all. We reverse and remand for a new trial with directions that follow.

In June 1992, Heritage claimed that Dietsche had defaulted on over $100,000 of loans and filed an action to foreclose on two mortgages held as security. Dietsche retained an attorney, but no response was filed and Heritage moved for default judgment. Dietsche again did not respond. Heritage moved for default judgment, which was granted, and a sheriff's sale was scheduled. Dietsche then filed a petition for bankruptcy thereby staying the sheriff's sale

Eventually, for reasons that are not relevant to the issues on appeal, the bankruptcy court granted a motion by Heritage to lift the automatic stay so it could proceed in circuit court with a sheriff's sale. But the bankruptcy court also modified the stay with respect to Dietsche to allow him to file a motion in circuit court to reopen the foreclosure judgment.

In September 1995, Dietsche filed a motion in circuit court to reopen the 1992 default judgment, claiming that the default judgment was obtained

through the fraud of Heritage and its former employee, Frank Fuhrmann. Essentially, Dietsche contended that he only owed Heritage $60,000. Dietsche asserted that any remaining amount of money claimed was borrowed by him as a result of fraud on the part of Fuhrmann, who, following Dietsche's default on the foreclosure, had been indicted by the federal government for fraudulent bank dealings.

Heritage fought the motion to reopen. It asserted to the trial court that a motion to reopen a judgment on account of fraud must be filed within one year pursuant to § 806.07(2), STATS. Judge Robert V. Baker was the presiding judge. While Judge Baker did not disagree with Heritage's statement of the law regarding § 806.07(2), he nonetheless vacated the default judgment pursuant to § 806.07(1)(h), which allows for the reopening of judgments based upon extraordinary circumstances. We think it is important to set forth a substantial portion of Judge Baker's decision because it drives the engine which eventually results in our reversal of this case. Judge Baker said in part:

> The Defendant alleges that he only owes Plaintiff $60,000, whereas the Default Judgment is for over $100,000. The Defendant alleges that the Plaintiff through then President Frank Fuhrmann defrauded him. Mr. Fuhrmann is presently under indictment by the Federal Government for fraud in connection with his bank dealings.… [T]he Court has no proof as to whether the Defendant dealt with Mr. Fuhrmann and if he did, to what extent.
>
> The Court has examined Defendant's affidavit dated September 15, 1995. Defendant states throughout the affidavit that he did not receive substantial amounts of money that the Plaintiff stated was loaned to the Defendant.
>
> In this case, the Court is going to vacate the Judgment pursuant to Section 806.07 (h), Wis. Stats. mainly because there are just too many questions of fact to be determined, and that there are serious allegations of fraud that may be well founded. The first question to be answered is whether the Defendant received the money allegedly loaned. If he did, the Bank should be able to prove same by "readable

> documents," and testimony, notwithstanding Frank Fuhrmann's problems. If Mr. Fuhrmann did something wrong, the Plaintiff should want to clear the matter up. If Frank Fuhrmann had nothing to do with the matter and the money is due and owing, the foreclosure will go forward.
>
> The matter will be set for trial. The Clerk will be calling the attorneys in a few days for a trial date mutually agreeable by the attorneys. [Emphasis in the original.]

Prior to Judge Baker's decision on the motion to reopen the foreclosure judgment, Dietsche filed a separate suit against Heritage and Fuhrmann alleging fraud, misrepresentation, usury and violations of the R.I.C.O. statute, 18 U.S.C. § 1962 and asking for damages. After Judge Baker's order reopening the foreclosure case and as an obvious follow-up to the analysis set forth in the decision, Dietsche moved to consolidate the foreclosure action with his separate fraud action then assigned to another branch of the court. Judge Baker granted the motion and the two actions were consolidated pursuant to § 805.05, STATS., and a date set for trial.

Judge Baker retired prior to the trial date and the case was eventually transferred to Judge Mary Kay Wagner-Malloy. At a pretrial hearing, Heritage provided the court with a brief summary of how it viewed the procedural history of the case. Among other things, Heritage referred to the cases as "consolidated ... for purposes of trial." Dietsche did not raise any objections to this summary. The court then asked the parties how they wished to proceed. Heritage suggested that the foreclosure issue, which would be a bench trial, be tried first and the fraud claims, on which Dietsche was entitled to a jury trial, be tried afterward. Dietsche agreed to this plan and the court set a trial date for the foreclosure claim.

At the trial on the foreclosure claim, Dietsche attempted to introduce his evidence of fraud. Heritage, however, claimed that because Dietsche had not

raised fraud as an affirmative defense to the foreclosure claim, he had waived that defense and could not raise it at trial. Dietsche tried to explain that Judge Baker had previously joined the issues of foreclosure and fraud. Dietsche's counsel stated that he understood Judge Baker's rationale, which was explained in the decision to reopen the default and the resulting order for consolidation, to be a judicial pronouncement that the two issues were to be tried together. Judge Wagner-Malloy responded:

> That's Judge Baker. We're in a different court. We're here to have this trial. The trial that is in this proceeding and is alleged in the answers that have been filed are about this note and we have to stick to what's been brought to the court at this time. Tell me where in your pleadings you talk at all about this [fraud claim].

When Dietsche's counsel told Judge Wagner-Malloy that the pleadings were contained in the other case—meaning the fraud case—and that the issues were consolidated, Judge Wagner-Malloy replied in pertinent part:

> It's not part of this action. This action is in—regarding a foreclosure of a note for $103,000 which is sitting before me, apparently with Mr. Dietsche's signature.
>
> ….
>
> Mr. Dietsche has not once in this file raised any ... affirmative defenses.
>
> ….
>
> That was your legal decision to file another action.… You had the option of bringing a motion to ask for amended pleadings.
>
> ….
>
> You still have to plead according to the rules of procedure.
>
> ….
>
> [S]imply because a case is consolidated does not mean that you sort of shuffle all the pleadings together like a

> deck of cards and say they all apply to the same two files.... That's not my understanding.

Following the trial, and without any evidence presented on the fraud claim, the court then entered judgment for Heritage on the foreclosure.

Dietsche appeals the judgment of foreclosure, claiming that the trial court erred when it did not allow him to introduce evidence of fraud at the trial on the foreclosure issue. Heritage cross-appeals, contending that the court erred when it vacated the original default judgment.

We address Heritage's cross-appeal first because chronologically Judge Baker's decision to reopen the default judgment occurred first. A trial court's order granting relief from a judgment under § 806.07, STATS., will not be reversed on appeal unless it erroneously exercised its discretion. *See* ***State ex rel. M.L.B. v. D.G.H.,*** 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985). We will not find an erroneous exercise of discretion if the record shows that the trial court exercised its discretion and that there is a reasonable basis for the court's determination. *See* ***id.*** at 542, 363 N.W.2d at 422.

> Section 806.07, STATS., states in relevant part:
>
> **(1)** On motion and upon such terms as are just, the court may relieve a party ... from a judgment ... for the following reasons:
>
> ....
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(2)** The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered ....

Heritage notes that under § 806.07(1)(c) and (2), STATS., a party asking for relief from a judgment based on a claim of fraud by the adverse party must bring the motion within one year after the entry of judgment. Therefore, it argues that Dietsche's motion to vacate was untimely under § 806.07(2) and should not have been granted because it was brought approximately three years after the entry of the default judgment. But Judge Baker vacated the judgment pursuant to § 806.07(1)(h), not § 806.07(1)(c). Thus, we decline to address Heritage's argument that the motion was untimely. Instead, we confine our discussion to Heritage's alternative claim that Judge Baker improperly exercised his discretion under § 806.07(1)(h).

Our supreme court has stated that "[s]ubsection (h) should be applied when the petition alleging factors arguably within (a), (b), or (c) also alleges *extraordinary circumstances* that constitute equitable reasons for relief." ***M.L.B.,*** 122 Wis.2d at 549-50, 363 N.W.2d at 425-26 (emphasis added). Although there is no hard and fast test defining extraordinary circumstances, the supreme court established some general guidelines for courts to follow.

First, the court noted that although final judgments should not be hastily disturbed, § 806.07(1)(h), STATS., should be construed to do substantial justice. *See* ***M.L.B.,*** 122 Wis.2d at 552, 363 N.W.2d at 427. Next, the court stated that when determining whether extraordinary circumstances exist in a particular case, several factors relevant to the competing interests of finality of judgments and relief from unjust judgments should be considered. *See* ***id.*** Such factors include: 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.*** at 552-53, 363 N.W.2d at 427. Finally, the court observed that although courts should not apply subsec. (h) so broadly as to erode the concept of finality, they should also avoid interpreting extraordinary circumstances so narrowly that subsec. (h) does not provide relief for truly deserving claimants. *See* ***id.*** at 552, 363 N.W.2d at 427.

We now apply the foregoing analysis to the present case. Heritage claims that the facts of this case do not rise to the level of extraordinary circumstances. It points out that Dietsche was represented by counsel at the time the default judgment was entered and that a substantial amount of time had passed since the entry of judgment and the motion to vacate. Further, it claims that however serious the claims of fraud might have been, "[T]hose allegations constituted no more than the garden variety species" of fraud governed by § 806.07(1)(c), STATS., and the one-year time limitation in § 806.07(2). Heritage contends that the circumstances do not rise to the level of extraordinary circumstances justifying relief under § 806.07(1)(h).

We conclude, however, that Judge Baker did not erroneously exercise his discretion when vacating the judgment. Far from being a "garden variety species" of fraud, Dietsche's affidavit supporting the motion to reopen gave a detailed accounting of "how" he was defrauded by Fuhrmann and how it related to the amounts claimed to be owed in the foreclosure complaint. Bank records were also presented along with an allegation that the fraudulent conduct went uncontested by Fuhrmann in federal court. Dietsche claimed that Fuhrmann was his loan officer at Heritage and further claimed that he was a victim of Fuhrmann's fraudulent actions. Judge Baker stated that he was vacating the

default judgment "because there are just too many questions of fact to be determined, and that there are serious allegations of fraud that may be well founded." He believed that if Fuhrmann did defraud Dietsche, that matter should be cleared up. However, if Fuhrmann had nothing to do with the matter and Dietsche owed the money, the foreclosure would go forward. Obviously, Judge Baker determined that given the nature of the allegations of fraud in this case, the interests of vacating a default judgment and deciding the case on the merits outweighed any interests in the finality of judgments. That determination does not constitute an erroneous exercise of discretion.

We now turn to the issues Dietsche raises on appeal. Dietsche argues that after Judge Baker consolidated the actions, the two cases became as one and the parties knew or should have known that the pleadings in the fraud action would serve as an affirmative defense to the pleadings in the foreclosure action. Thus, contends Dietsche, Judge Wagner-Malloy erred when she ruled that he could not raise fraud as a defense to the foreclosure claim and erred by acting in a manner contrary to Judge Baker's orders.

Part of our review of Judge Wagner-Malloy's decision presents an issue of law because her view that pleadings from one case file cannot be mixed with pleadings from another case file concerns an interpretation of the law of civil procedure. We review that issue de novo. *See* ***State v. Turner,*** 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). However, Dietsche also claims that Judge Wagner-Malloy effectively reversed the orders of Judge Baker without demonstrating a cogent rationale for this deviation. This issue is a claim that Judge Wagner-Malloy erroneously exercised her discretion. We will overturn an exercise of discretion only if the record fails to support the court's decision or the court applied the wrong standard of law. *See* ***Oostburg State Bank v. United Sav.***

& Loan Ass'n, 130 Wis.2d 4, 11-12, 386 N.W.2d 53, 57 (1986). We will apply these standards of review as we discuss the two issues.

Under § 805.05, STATS., a court may order all of the actions consolidated into one or it may order the actions consolidated for purposes of trial only. The type of consolidation ordered is important as the distinction between the two carries significant consequences. If a court consolidates separate causes of action, there remains but one action and one set of pleadings for purposes of trial. *See* ***Wisconsin Brick & Block Corp. v. Vogel,*** 54 Wis.2d 321, 325, 195 N.W.2d 664, 666 (1972). The actions, including their pleadings, are merged and the consolidated action proceeds as a single action, resulting in but one set of findings and one judgment. *See* ***First Trust Co. v. Holden,*** 168 Wis. 1, 7, 168 N.W. 402, 404 (1918). However, if the actions are consolidated for purposes of trial only, the actions keep their separate existence and require separate judgments. *See* ***Wisconsin Brick,*** 54 Wis.2d at 325, 195 N.W.2d at 667. Therefore, in a consolidation for trial, the pleadings do not merge as the parties to one suit are not made parties to the other suit. *See* ***id.***

Based on the state of the law, we can make the following observations. First, if Judge Baker consolidated the actions for trial only, then the two cases and their pleadings would have retained their separate status. If this were the case, Heritage would be correct in its view that because Dietsche failed to plead fraud as an affirmative defense in the foreclosure action, he could not raise the issue of fraud as a defense. *See, e.g.,* ***Helmbrecht v. St. Paul Ins. Co.,*** 122 Wis.2d 94, 121, 362 N.W.2d 118, 132 (1985) (affirmative defenses not raised in the pleadings are deemed waived). However, if Judge Baker consolidated the separate causes of action into one action, then the foreclosure and fraud actions, along with their pleadings, merged. If Judge Baker meant to do this, then

Dietsche's failure to plead fraud as an affirmative defense in the foreclosure action would not prevent him from raising the issue. We conclude that Judge Wagner-Malloy erred when she concluded that pleadings from two separate case files can never be merged.

The next question is whether Judge Wagner-Malloy erroneously exercised her discretion by not adhering to Judge Baker's order of consolidation. Actually, Judge Wagner-Malloy never outright decided to contradict Judge Baker's order. She obviously believed that when a matter is consolidated, it is consolidated for trial only. Nonetheless, the issue of how we interpret Judge Baker's decision is integral to the ultimate determination of this case. If we decide, as Heritage contends, that we should construe Judge Baker's order consolidating the cases to mean the cases were consolidated for trial only, then we can uphold Judge Wagner-Malloy's decision as a proper choice based upon the facts of record. If not, then we must reverse because of Judge Wagner-Malloy's failure to follow the record. We point out that the appellate court is in just as good a position as the trial court to read the bench decisions and written decisions of another trial judge. *See* ***State v. Schober,*** 167 Wis.2d 371, 385, 481 N.W.2d 689, 695 (Ct. App. 1992) (citing Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 250 (1991)).

Heritage argues that because Judge Baker continued to employ a combined caption with separate case numbers and separate captions, the judge meant for the cases to maintain their separate identities. But whether a court employs a combined caption having separate case numbers and separate captions is just one factor to consider when determining whether a court consolidated the causes of action. *See, e.g.,* ***Holden,*** 168 Wis. at 7, 168 N.W. at 404 (effect of consolidation was to merge the actions into one even though the parties retained

the titles of the original actions and treated them as separate and distinct actions after consolidation). Standing alone it is not dispositive of the issue. Here, we conclude that there are several factors apart from the combined caption which conclusively demonstrate Judge Baker's intention to consolidate the separate actions into one.

First, Judge Baker's order consolidating the actions plainly stated that Dietsche's fraud action "will be consolidated *with* the [foreclosure] action." (Emphasis added.) The preposition "with" indicates addition or supplement. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2626 (1976). As such, it leads to the conclusion that the two actions have been combined or merged; it does not suggest that the actions are to be kept separate and independent. Moreover, we note that Judge Baker planned for both actions to be heard on the same day and at the same time. This is persuasive to us for it indicates that Judge Baker did not plan to hold separate trials and issue separate judgments. It demonstrates that Judge Baker intended to hear the fraud and foreclosure issues together in order to determine whether Dietsche's allegations of fraud were materially connected to the money claimed by Heritage in its foreclosure claim and, if so, the amount of the set-off. We think it is particularly noteworthy that the rationale for Judge Baker's reopening of the default judgment was based upon the premise that the foreclosure issue and the fraud allegation should be joined together so that the true facts would emerge. We believe that, from the point of Judge Baker's decision forward, the parties knew that foreclosure would be defended against on the grounds of fraud. The parties knew the issues were joined. We conclude that Judge Baker's order to consolidate the separate causes of action was an outgrowth of the rationale contained in his decision to reopen and that by his consolidation

order he intended to merge the two cases into one action having one set of pleadings.

Heritage argues that even if we conclude that Judge Baker meant to merge the two claims into one, the pretrial hearing before Judge Wagner-Malloy resulted in what Heritage claims was a "decoupling" of the consolidation. This occurred when Heritage moved to schedule a trial on the foreclosure claim first and schedule a jury trial on Dietsche's fraud claims afterward. This motion, met without objection by Dietsche, demonstrates that everyone understood the two actions were originally consolidated for trial and now were unconsolidated.

But, apart from its own statement in the briefs to this court that the cases were consolidated for trial only, Heritage fails to point to any part of the trial transcript or record that shows a meeting of the minds about whether the cases were originally consolidated for purposes of trial only. There is also no motion or court order modifying the original consolidation order. Moreover, we find no support in the record for Heritage's claim that when the parties agreed to try the foreclosure and fraud claims separately, they also agreed to "decouple" the consolidation.

Instead, we need only look to the pleadings. In his fraud action, Dietsche is claiming damages from the fraud, not just a set-off. The issue of set-off would be part of the foreclosure case. But damages due to fraud and R.I.C.O violations could extend well beyond a set-off. In this posture, the record supports a conclusion that the agreement to separate the fraud and foreclosure claims was simply an agreement to proceed in the most efficient way. As we previously noted, Dietsche was entitled to a have a jury determine whether any damages based upon fraud, over and above the set-off, would be due him. Foreclosure is

equitable in nature and only the set-off would be relevant to that action. Thus, the mere fact that the parties and the trial court agreed to try the foreclosure issue first does not mean the consolidation was "decoupled." We affirm the decision reopening the default judgment. We reverse the foreclosure judgment. We remand with directions that there be a new trial on the foreclosure and that Dietsche is entitled to raise fraud as a defense.[1]

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

Not recommended for publication in the official reports.

[1] Dietsche also claims that even if the court did not consolidate the causes of action, he is nonetheless entitled to a new trial because the court failed to issue a pretrial order. Because we have reversed the court's judgment and remanded, we decline to address this issue. *See* ***Sweet v. Berge,*** 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (appellate court will not address other issues raised if decision on one point disposes of the appeal).