**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 29, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2314** **Cir. Ct. No. 2012CV425**

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

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**BAYTREE LENDING COMPANY,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK B. BELOKON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. When Mark Belokon did not appear for trial, the circuit court granted his counsel's motion to withdraw and declined to let Belokon offer his discovery deposition at trial in lieu of his testimony. The circuit court

properly exercised its discretion. Accordingly, we affirm the judgment of foreclosure from which Belokon appeals.

¶2 Belokon defaulted on his Baytree Lending Company mortgage. In his answer to Baytree's foreclosure complaint, Belokon alleged eight counterclaims. In August 2012, the circuit court scheduled the trial for August 12, 2013. When Belokon did not respond to Baytree's April 2013 discovery, Baytree filed a motion on July 23, 2013, to compel a response to the discovery.

¶3 At an August 2, 2013 hearing on its motion to compel, Baytree informed the circuit court that after it noticed Belokon's deposition for May 6, Belokon's counsel advised that Belokon suffers from a panic anxiety disorder and could not appear in legal settings. The parties agreed to adjourn the deposition, but Belokon did not appear. After settlement negotiations failed, Baytree scheduled Belokon's deposition for July 23. Again, Belokon declined to appear and demanded a reasonable accommodation for his disability. The court noted that Belokon had not sought a protective order from the court in connection with his refusal to attend the scheduled deposition. The court ordered Belokon to appear for his deposition on August 7.

¶4 On August 6, the circuit court heard Belokon's motion for a protective order relating to his August 7 deposition. Belokon asserted that the burden was upon Baytree to offer a reasonable accommodation, but Belokon did not suggest any reasonable accommodation. The circuit court concluded that the Americans with Disabilities Act, 42 U.S.C.A. § 12132 (the ADA), does not apply

to disputes between parties in civil litigation.[1] After considering various factors, the circuit court denied Belokon's motion for a protective order.[2] Belokon appeared for a three-hour deposition on August 7.

¶5 On August 12, the parties gathered for trial. Belokon did not appear; his counsel appeared on his behalf. Belokon's counsel represented that Belokon had informed him that he was unable to appear. The circuit court noted the proof problems inherent in the absence of the defendant-counterclaimant. The court stated: "[I]t's up to [Belokon's counsel]. If he doesn't believe he can go forward without his client, he has every right I think to maybe move to withdraw or dismiss it." Counsel telephoned Belokon who informed counsel that he could not come to court, and he did not oppose counsel's motion to withdraw if the court denied Belokon's motion to admit his discovery deposition in lieu of his trial testimony.

¶6 The court considered whether Belokon's deposition could be used at trial pursuant to WIS. STAT. § 804.07 (2011-12).[3] As proof of his need to avoid

[1] We observe that no matter the type of case, state courts are bound by the Americans with Disabilities Act, 42 U.S.C.A. § 12132 (the ADA). ***Strook v. Kedinger***, 2009 WI App 31, ¶15, 316 Wis. 2d 548, 766 N.W.2d 219. Nevertheless, we need not address this issue to resolve this appeal. Baytree deposed Belokon before trial, and Belokon did not later seek relief from the deposition he gave on the grounds that he was impaired when he gave it. As we hold below, Belokon did not carry his burden to show that he required a reasonable ADA accommodation for trial.

[2] Belokon argues that the circuit court had a duty to provide him with a reasonable accommodation for his deposition. In the absence of any indication that Belokon was unable to testify at his deposition, we deem this issue moot, and we will not address it. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989) (we do not decide matters that "cannot have a practical effect on an existing controversy").

[3] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

appearing in court, Belokon offered a May 14, 2013 letter from his psychologist. The letter stated:

> Please be advised that Mr. Belokon remains in treatment with me for severe Anxiety Disorder with panic attacks and Depressive Disorder, with symptoms worsening in any legal setting or involvement in any legal activities. He remains on psychotropic medications as prescribed by his psychiatrist.
>
> In my opinion, because of these symptoms, Mr. Belokon is not able to testify in a courtroom setting. Accommodations should be considered such as obtaining his testimony and evidence outside of a court setting.

¶7 Baytree responded that Belokon had very recently appeared for a three-hour deposition, and he was able to function in that setting. Belokon's counsel responded that admitting the deposition in lieu of trial testimony would be a reasonable accommodation under the ADA.

¶8 The circuit court considered whether there were "exceptional circumstances … that make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used" at trial. WIS. STAT. § 804.07(1)(c)1.e. The court considered the psychologist's letter, but noted that none of Belokon's claims of incapacity were made in a timely fashion to allow the court to take evidence, find facts, determine whether a reasonable accommodation was necessary, and what form such an accommodation would take. Rather, on the day of trial, Belokon declined to appear. The court found that Belokon recently appeared for a lengthy deposition, and he was able to function in that setting. The court found that Belokon did not show either "exceptional circumstances" or a matter that invoked the "interest of justice."

¶9 The circuit court then turned to whether Belokon could satisfy WIS. STAT. § 804.07(1)(c)1.c., illness. The court relied upon the uncontested representations of Baytree's counsel that Belokon recently gave a three-hour deposition. The court did not credit the psychologist's letter because it was a blanket statement without proper support or testimony. The court found that Belokon had not established that he had an illness that precluded his appearance in court and required the use of his deposition in lieu of his trial testimony. Because the circuit court had denied Belokon's request to use his deposition at trial, Belokon's counsel withdrew Belokon's counterclaims and withdrew as counsel based on Belokon's prior authorization to do so. The court then granted a default foreclosure judgment to Baytree.

¶10 On August 30, new counsel for Belokon filed a notice of appearance and stated an intent to object to the proposed findings of fact, conclusions of law and judgment of foreclosure. However, new counsel never filed any pleadings. Belokon appeals from the judgment of foreclosure.

¶11 On appeal, Belokon argues that the circuit court erred in three ways: (1) permitting his counsel to withdraw; (2) failing to make a reasonable accommodation or hold a hearing on his request for a reasonable accommodation; and (3) denying his request to admit his deposition in lieu of his trial testimony.

¶12 The circuit court did not err in permitting Belokon's counsel to withdraw based upon counsel's representation that Belokon had agreed that he could withdraw if the circuit court declined to admit his deposition at trial. In Belokon's absence, his counsel had no proof to offer on the counterclaims or to

oppose Baytree's claims.[4] There is nothing in this record that refutes Belokon's consent.[5] For the first time on appeal, Belokon argues that permitting counsel to withdraw was at odds with the circuit court's duties when faced with a motion to withdraw. We do not address issues raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). We address this issue no further.

¶13 Belokon next argues that the circuit court failed to make a reasonable accommodation or hold a hearing on his request for a reasonable accommodation. We see no error. The court found that Belokon did not timely seek a reasonable accommodation for his appearance at trial or request that his deposition be used at trial. *See* ***Strook v. Kedinger***, 2009 WI App 31, ¶23, 316 Wis. 2d 548, 766 N.W.2d 219 (a party needs to timely alert the circuit court to the need for an accommodation so that the circuit court may "determine the need for an accommodation in an orderly and efficient manner and to make whatever factual inquiry is necessary" so that an accommodation may be made "*before* the date of the substantive proceeding…. It simply makes no sense, from a judicial efficiency standpoint, to have the accommodation hearing on the same day as the

[4] Default judgment was appropriate under these circumstances. WIS. STAT. § 806.02(5) (default judgment is appropriate against a defendant who has appeared in the action but fails to appear at trial).

[5] Belokon relies heavily on ***Sherman v. Heiser***, 85 Wis. 2d 246, 270 N.W.2d 397 (1978), for his claim that the circuit court erred when it permitted his counsel to withdraw. ***Sherman*** is distinguishable because, in that case, Sherman's counsel did not have consent from his client to withdraw on the day of trial, and Sherman later moved the court to reopen the judgment. ***Id.*** at 248-50. In this case, Belokon consented to counsel's request to withdraw, and Belokon did not seek any postjudgment relief on the question of whether he actually consented or whether the circuit court otherwise erred in permitting counsel to withdraw.

substantive hearing if the disabled person has self-identified and asked for an accommodation beforehand").

¶14 This is not a ***Strook*** case. On the scheduled trial date, the circuit court thoroughly addressed Belokon's request for a reasonable accommodation. Belokon did not offer anything to dissuade the circuit court from its finding that he had not timely sought a reasonable accommodation given his firm and long-standing belief that his health issues would preclude his trial appearance.[6] Circuit courts have inherent discretionary "power to control their dockets to achieve economy of time and effort." ***Lentz v. Young***, 195 Wis. 2d 457, 465-66, 536 N.W.2d 451 (Ct. App. 1995).

¶15 Finally, Belokon argues that the circuit court erred when it declined to admit his deposition in lieu of his trial testimony. We disagree. The circuit court correctly analyzed the issue before it. The court considered the psychologist's letter, which the court did not find sufficient, that Belokon had managed to give a three-hour deposition five days earlier, and that Belokon did not timely raise his claim that he could not attend the trial. These were all relevant and appropriate considerations under WIS. STAT. § 804.07.

¶16 Evidentiary rulings are within the circuit court's discretion. ***Weborg v. Jenny***, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191. WISCONSIN STAT. § 804.07(1) clearly states when a deposition may be used at trial, and the circuit court considered the appropriate factors. The record supports the circuit court's

[6] When the circuit court heard Belokon's claim that he could not appear for his deposition, Belokon did not, at that time, suggest a reasonable accommodation for the deposition or indicate that he would require a reasonable accommodation at trial.

determinations that Belokon neither timely sought a reasonable accommodation nor offered sufficient proof of a health condition requiring that he be excused from trial.

¶17 We conclude with this observation. We are particularly struck by Belokon's failure to timely alert Baytree and the circuit court to his claim that he could not participate in a deposition or appear at trial. Belokon first made this claim on August 2, 2013, ten days before the scheduled trial and in response to Baytree's attempt to depose him. On the day of trial, Belokon declined to appear in court for reasons clearly known to him as of May 2013 when his psychologist opined in writing that Belokon could not appear in court. Had Belokon timely raised this claim, Baytree and Belokon would have had the opportunity to conduct a videotaped, evidentiary deposition which could have substituted for Belokon's trial testimony, should the circuit court have found that Belokon satisfied the requirements of WIS. STAT. § 804.07.

*By the Court.*—Judgment affirmed.

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