COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2885 **Cir. Ct. No. 2012CV1950**

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

HSBC MORTGAGE SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

NADIR N. DAYA AND SHANTI DAYA,

DEFENDANTS-RESPONDENTS,

HSBC MORTGAGE SERVICES, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge.[1] *Affirmed.*

[1] The Honorable J. Mac Davis presided in this case until August 1, 2013, at which time, through standard judicial rotation, it was assigned to the Honorable Patrick C. Haughney, who presided for the balance of the proceedings to date.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. In March 2013, shortly before a scheduled contested hearing, the parties in this foreclosure action jointly represented to the circuit court that all claims and counterclaims in the case had been "fully resolve[d]" and the parties merely needed to finalize settlement papers. As a result, the circuit court struck scheduled events in the case. In late May 2013, having heard nothing further from the parties, the court dismissed the case with prejudice. In August 2013, plaintiff HSBC Mortgage Services, Inc., moved to vacate the May dismissal and reopen the case. The court denied the motion. In November 2013, HSBC again moved to vacate the May dismissal. The court declined to take any action on this second motion.

¶2 HSBC now appeals the two decisions not to vacate the May dismissal. We conclude that the court did not erroneously exercise its discretion in denying HSBC's August motion or in deciding to take no action on the November motion. Accordingly, we affirm.

BACKGROUND

¶3 HSBC filed a foreclosure complaint against the Dayas in June 2012, alleging that the Dayas were in default on a note and mortgage assigned to HBSC and secured by residential property.

¶4 The court scheduled a hearing for March 25, 2013, to address HSBC's claims and counterclaims filed by the Dayas.

¶5 On March 21, 2013, counsel for HSBC wrote to the court, following up on a conference call with the court held the day before, stating that "the parties have reached a settlement agreement that fully resolves this case." On this basis,

counsel asked the court to strike the March 25 hearing date. Counsel also requested that the court "continue this matter[,] allowing [the parties] sufficient time to prepare and finalize the required settlement papers."

¶6 Over nine weeks later, on May 29, 2013, having heard nothing from the parties since the March 21 communication, the court made a finding that the court had received notice that the case was settled, but that no dismissal order had been submitted. On that basis, the court dismissed the action in its entirety, encompassing both claims and counterclaims, "with prejudice."

¶7 Twelve weeks later, on August 21, 2013, HSBC filed a motion to vacate the dismissal order. In support of its motion, HSBC cited WIS. STAT. § 806.07 (2011-12),[2] which provides for relief from a judgment or order on specific grounds listed in subparts of § 806.07(1). However, HSBC's motion did not cite any specific subpart of § 806.07(1). The motion reaffirmed that the parties had "reached an agreement to settle" before HSBC submitted the March 21 letter to the court, but represented that, "just recently," and "because of the Court's entry of the Dismissal Order," the Dayas were "refusing to proceed with executing the settlement documents." Among the attachments to HSBC's motion were four pages purporting to be copies of email exchanges between opposing counsel.

¶8 In a response filed on September 23, 2013, the Dayas did not oppose entry of an order vacating the May dismissal order "to allow for reopening this case and to allow the parties reasonable time to complete discussions to consummate a final written settlement agreement in princip[le] and in accordance

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

with certain provisions." However, the Dayas also represented that they had "heard nothing from HSBC" regarding a written settlement agreement from the time the parties completed their "preliminary settlement discussion" in March 2013 to "the middle of August 2013," when HSBC sent the Dayas a proposed written settlement agreement.[3] The Dayas represented that "the parties are in discussion as to the terms and conditions of the written Agreement."

¶9 The court denied HSBC's motion on September 25, 2013, providing the following grounds. HSBC failed to identify a specific subpart of WIS. STAT. § 806.07(1) that provided a basis for relief. This left the court "to guess, for instance, whether" the basis for the motion was "surprise under (1)(a) or fraud under (1)(c) or whether a judgment has been reversed or otherwise vacated under (1)(f)." The attachments to the motion did not provide a self-evident basis for the court to focus on any particular subpart of § 806.07(1). Moreover, these defects in the motion made it difficult for the Dayas to know how to respond, and therefore it would not be appropriate to set a hearing or request a response from the Dayas (even though, as stated above, the Dayas had filed a response).

¶10 More than eight weeks later, on November 25, 2013, HSBC filed 156 pages with the circuit court, moving for relief from the May dismissal order or for reconsideration of the September denial of HSBC's motion for relief, based on four identified subparts of WIS. STAT. § 806.07(1). HSBC argued that new information, namely that the Dayas allegedly refused to execute the allegedly

[3] Consistent with the Dayas' position in the circuit court, HSBC appears to concede on appeal that it failed to provide a draft settlement agreement to the Dayas until August 13, 2013.

previously agreed upon settlement agreement, called for the court to reconsider its September 2013 order.

¶11 On December 19, 2013, the court issued a letter to the parties, acknowledging receipt of HSBC's November submission, and stating: "This court will not set the matter for a hearing, nor will this court sign a new order for this latest filing."

¶12 HSBC appeals from both the September order and the December decision not to set the matter for a hearing or sign a new order.

DISCUSSION

¶13 HSBC argues that the circuit court improperly exercised its discretion in denying its August and November motions to reopen and, thus, that this court should reverse those decisions. The Dayas respond that the circuit court properly exercised its discretion in denying both motions.

I. LEGAL STANDARDS

A. Relief from judgment or order under WIS. STAT. § 806.07

¶14 By its terms, WIS. STAT. § 806.07 sets forth seven specific categories that may justify reopening a judgment or order, with an eighth "catchall" category.[4]

[4] WISCONSIN STAT. § 806.07 reads in pertinent part as follows, with our emphasis on the subparts of § 806.07(1) that HSBC eventually identified to the circuit court:

> **(1)** On motion and upon such terms as are just, the court, subject to sub[]. (2) …, may relieve a party or legal

(continued)

¶15 Significant to our discussion below, motions for relief under WIS. STAT. § 806.07 must be reasonably timely filed. Under the terms of § 806.07(2), motions under § 806.07(1) "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 or the order or stipulation was made."

¶16 The purpose of the "reasonable time" filing requirement is "to shorten the time period for filing a motion to vacate rather than allowing these motions to be filed up to a year after entry of the judgment as permitted by the

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> representative from a judgment, order or stipulation for the following reasons:
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> *(a) Mistake, inadvertence, surprise, or excusable neglect;*
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> *(c) Fraud, misrepresentation, or other misconduct of an adverse party*;
>
> (d) The judgment is void;
>
> (e) The judgment has been satisfied, released or discharged;
>
> (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
>
> *(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*.
>
> **(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 or the order or stipulation was made.

former statute." ***Rhodes v. Terry***, 91 Wis. 2d 165, 173, 280 N.W.2d 248 (1979). The court in ***Rhodes*** further explained that "[i]t is necessary to restrict the time for filing a motion to vacate in order to insure the orderly disposition of cases and encourage the finality of judgments, thus improving the administration of justice." ***Id.*** The circuit court should consider the "particular facts and circumstances of the case in deciding whether the motion was brought within a reasonable time." ***Id.*** An assessment as to whether the submission was reasonably timely depends on a broad range of factors, including the basis for the moving party's delay and prejudice to the party opposing the motion. *See* ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 626-28, 511 N.W.2d 868 (1994).

B. Standard of Review

¶17 A circuit court's order denying a motion for relief under WIS. STAT. § 806.07 will not be reversed on appeal unless the court has improperly exercised its discretion. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985) ("unless there has been a clear abuse of discretion"). We determine under this standard whether the decision applies a correct legal standard to the facts of record. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493.

¶18 So long as the record reflects "'that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision,'" we will not reverse. ***Id.***, ¶30 (quoted source omitted). If the circuit court "sets forth no reasons or inadequate reasons for its decision, we will independently review the record to determine whether the circuit court properly exercised its discretion and whether the facts provide support for the court's decision." ***Id.***

II. DENIAL OF THE AUGUST 2013 MOTION

¶19 HSBC argues that the circuit court improperly exercised its discretion in its order denying HSBC's August motion to vacate the May order of dismissal. We reject this argument for two, independent reasons: (1) HSBC fails to persuade us that the circuit court improperly exercised its discretion in concluding that the August motion failed to present a developed legal argument, and (2) HSBC failed to provide the circuit court with an explanation for its persistent lack of diligence in failing to secure the settlement agreement that the parties committed to promptly execute in March, resulting in an untimely filing.

¶20 The August motion alleged that the Dayas had recently informed HSBC that "the fact that the Court has already dismissed this case based on the parties' settlement means that they do not need to actually proceed with the settlement," and therefore the court should vacate the May dismissal order "to preserve HSBC's rights and its valid claims and, more optimistically, facilitate the parties' settlement agreement."

¶21 However, the motion failed to present a legal argument tied to one or more provisions of WIS. STAT. § 806.07. Nowhere does the motion speak in terms of "mistake, inadvertence, surprise, or excusable neglect," in terms of "fraud, misrepresentation, or other misconduct of an adverse party," or in terms of specific equitable principles, nor does it attempt to invoke or rule out any of the other specific grounds for relief listed in § 806.07. It was not the circuit court's role to act as an advocate for HSBC, filling in needed elements of the only argument that HSBC submitted to the court. The court was not obligated to invite HSBC to substitute an adequate motion or to schedule a hearing to allow HSBC to present an adequate argument. Put differently, HSBC forfeited the arguments it now

makes on appeal regarding its August motion, because it failed to preserve a developed legal argument before the circuit court. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining forfeiture as a rule of judicial administration that may be applied to a party's argument on appeal that was not raised before the circuit court).

¶22 In addition, there is a significant deficiency in the August motion that provides an independent basis to affirm. The August motion failed to provide an explanation for the persistent lack of diligence HSBC exhibited in failing to secure the settlement agreement that the parties committed to promptly execute in March or to communicate earlier with the court about obstacles to execution of an agreement. Thus, even if HSBC's August motion for relief had stated a basis for vacating the May dismissal, such as surprise regarding the parties' inability to secure an agreement, the circuit court could have reasonably concluded that the motion was not reasonably timely given HSBC's persistent lack of diligence. *See* WIS. STAT. § 806.07(2).

¶23 HSBC stated that the court should grant the motion in order "to facilitate the parties' settlement agreement." However, this reopen-to-facilitate-settlement request came a full five months after the parties had informed the court that "the parties have reached a settlement agreement that fully resolves this case," and needed only "sufficient time to prepare and finalize the required settlement papers." The assertion also came nearly three months after the court dismissed the action with prejudice based on the parties' representation of full resolution.

¶24 HSBC effectively asked the court in August to reopen to provide a forum in which HSBC could regain the leverage over the Dayas that HSBC knowingly, voluntarily, and explicitly surrendered in March. The circuit court

could reasonably have concluded that HSBC's initial lack of diligence, between March 21, 2013, and May 29, 2013, in failing to see to the submission of a written stipulation based on an agreement was significantly compounded by its further lack of diligence, shortly after the May 29, 2013 dismissal, in failing to ask the court to reopen the case, and by its continued lack of diligence at any point from May 29, 2013 to August 21, 2013, in failing even to execute a settlement agreement.[5]

¶25 HSBC contends that the court erred in part because the court "obviously did not realize" and "failed to recognize and consider that the Dayas had agreed to HSBC's request to vacate the Dismissal Order" and, therefore, that the Dayas would not be prejudiced by a reopening of the case. The court dictated its decision before the Dayas filed their response, apparently assuming that they were not going to file a response. It is true that the court did not explicitly refer to the Dayas' response in the order, which the court issued after receiving the response. However, regardless of the Dayas' position on reopening the case, the court still could have reasonably concluded that HSBC's motion was untimely.

¶26 Support for this view is found in features of the Dayas' response that support the court's decision. The Dayas made references suggesting that the parties had not reached agreement in March and were still not close to reaching a final agreement in September. The Dayas referred to the March settlement

[5] As noted above, HSBC did not provide a draft settlement agreement to the Dayas until August 13, 2013. This was *145 days* after the parties asked the court to strike all of the court's scheduled proceedings based on full resolution, and *76 days* after the court dismissed the case with prejudice. HSBC fails to provide a satisfactory explanation, even now in its appellate briefing, as to why it did not provide the Dayas with a draft settlement agreement months earlier, much less does HSBC point us to a clear explanation that it provided to the circuit court on this topic.

discussions as having been "preliminary," and stated that reopening the case would allow time to "*complete discussions* to consummate a final written settlement agreement *in princip[le]* and in accordance with *certain provisions*." (Emphasis added.) Moreover, the Dayas represented that HSBC had "failed to proceed with producing any written settlement agreement pursuant to discussions with and representations by counsel in a timely manner," including a complete failure to produce a written agreement between March and August 2013.

¶27 Summarizing, we affirm the court's September order because the record reflects that the court in fact properly exercised its discretion in denying HSBC's August motion. HSBC forfeited the arguments it now makes by failing to present them as developed legal arguments for reopening based on specific subparts of WIS. STAT. 806.07(1) and the court could have reasonably concluded that HSBC's motion was not reasonably timely.

III. DENIAL OF THE NOVEMBER MOTION

¶28 HSBC argues that the circuit court improperly exercised its discretion in denying HSBC's second motion for relief. We see multiple potential defects in this argument, but consistent with the discussion above, we rest our decision on one reasonable basis for denial of the second motion, namely that HSBC waited an unreasonable length of time to bring it. That is, the record reflects such a persistent lack of diligence by HSBC at multiple, critical junctures before November 25, 2013, that the circuit court could reasonably have decided that HSBC failed to bring its November motion within a "reasonable time" relative to the May dismissal order, given all facts before the court.

¶29 HSBC points to the court's concise statement that it would not act on the November motion and, from that, asks us to assume that the court "failed to

consider" and "refused to examine" the merits of its November motion. However, as with the court's alleged failure to consider the Dayas' submission in August, we also have insufficient reason to believe that the court did not review the November motion. Nothing in the court's brief comment in the December letter suggests that the court did not consider the November motion before making its decision. Moreover, whether or not the court actually reviewed the motion documents, under the legal standard we quote above, we are to search the record for reasons to support the court's conclusion that it should not take action on the second motion.

¶30 Neither party presents us with a compelling argument on the question of whether an order granting HSBC's November motion would have unfairly prejudiced the Dayas, and therefore we do not consider this topic to weigh heavily for either party. *See* ***Cynthia M.S.***, 181 Wis. 2d at 627 (prejudice is a factor in determining what is a "reasonable time" in which to bring a motion). On this topic, HSBC points to the August submission of the Dayas, in which they stated they were not opposed to an order vacating the May dismissal order. However, HSBC does not establish that this was in fact the Dayas' position three months later, in November.

¶31 HSBC also argues, regarding the prejudice issue, that if we were to reverse the circuit court and vacate the May dismissal order, the Dayas could either choose to "live up to" the settlement agreement they agreed to in March, or else revert to "the same position they were in when they represented to the circuit court that they had settled the case." The problem with this argument is there was no guarantee, given the history before the court, that if the case had been reopened in November, the Dayas would in fact have obtained any or all of the benefits of the settlement they apparently believed they were getting when they agreed to a settlement back in March.

¶32 HSBC speaks in terms of the Dayas "living up to" the March agreement, but this ignores the fact that the parties did not execute a final agreement between March and November, due at least in part to a persistent lack of diligence by HSBC. One significant fact that the circuit court had before it in November was a clear statement by HSBC in the materials submitted by HSBC that it committed to the Dayas, on March 6, 2013, that HSBC would assume responsibility in settlement discussions for explaining to the Dayas "how HSBC intends to memorialize the new terms of the mortgage loan," and would provide the Dayas "with a draft settlement agreement." By all appearances, HSBC ignored this responsibility to provide the necessary papers for months, creating uncertainty as to whether the Dayas would be able to obtain the benefits of a favorable settlement if the case were reopened.

¶33 Turning from the prejudice factor to the extent of HSBC's delays in bringing the November motion, we conclude that this is a weighty factor supporting the court's decision. *See* ***Cynthia M.S.***, 181 Wis. 2d at 627 (reason for delay is a factor in determining what is a "reasonable time" in which to bring a motion). As already discussed above, there was a persistent lack of diligence by HSBC, which continued to November. HSBC missed one opportunity after another to allow the court to resolve the case in a timely manner, either by way of settlement or through decisions on the merits. By November, the circuit court could reasonably have decided that the record suggested two possibilities as to what occurred here, both of which involve a persistent lack of diligence by HSBC.

¶34 The first possibility was that the parties, intentionally or not, misled the circuit court in March, when they represented that the case was "fully resolve[d]." The court could reasonably have construed the March letter from the parties to convey that every issue had been buttoned down, and that all that

remained were the ministerial tasks of committing the agreed terms to paper and filing a stipulation with the court. However, if in fact the parties had *not* agreed on all terms of a settlement at the time they asserted full resolution of the case, then central premises of both the August and November motions by HSBC were faulty. Those premises were that HSBC had in good faith joined in the announcement of full resolution and that HSBC had been acting diligently with respect to these matters in March and thereafter.

¶35 Put differently, the court was not obligated to reopen the case in November if the court concluded that the parties had induced the court in March to halt orderly advancement of the case, on the eve of a contested hearing and with a pretrial conference scheduled in the near future, and then allowed the court to dismiss the action in May, all based on an inaccurate representation of the status of negotiations. And, if something like this occurred resulting in apparent misunderstanding by the court, at a minimum, HSBC was obligated to have promptly contacted the court after receiving the May notice of dismissal to explain that the parties' March submission appeared to have misled the court and the case needed to be reopened because a settlement had not yet been reached.

¶36 The second possibility is that it was true that the case was "fully resolve[d]" in March 2013, with only settlement papers to be prepared and filed. This is the version of events that HSBC strenuously urges us to adopt on appeal. However, in that circumstance, HSBC showed a persistent lack of diligence in either finalizing the settlement or asking the court to reopen litigation:

- From March to May, HSBC failed to either (1) see to the execution of an agreement and the filing of a stipulation with the court, or (2) promptly return to court to explain that the Dayas were refusing to sign an agreement with the already agreed upon settlement terms.

Hearing not a word from the parties for over two months, the court dismissed the action.

- In May or early June, HSBC failed to respond promptly to the late May dismissal order, again by either seeing to the execution of settlement papers or alerting the court to the fact that the case could not for some reason be settled.

- From June to August, HSBC apparently took no significant action whatsoever in these matters. Thus, the court continued to hear not a word from the parties from the time the court dismissed the action in May until the arrival of HSBC's flawed August motion.

- In August, HSBC finally contacted the court, only to submit an inadequate motion for relief.

- From September 25, 2013, when the court rejected the inadequate motion, to November 25, 2013, HSBC delayed in presenting the circuit court with arguments for relief tied to specific statutory provisions.

Regarding the especially notable June to August period, the Dayas could hardly have refused to sign an agreement that was not even presented to them.

¶37 HSBC asks us to conclude that the circuit court erred in failing to understand HSBC's position that the Dayas played games that resulted in confusion and delay in executing a settlement agreement. HSBC suggests that the Dayas zigged and zagged from agreement (March) to disagreement (August) to renewed agreement (September) to renewed disagreement (November). For example, as to the August-November period, HSBC now asserts: "From the time HSBC filed its August motion until just days before filing its November motion, HSBC had absolutely no reason to believe that the Dayas would deny the existence of the settlement agreement." HSBC argues that the record demonstrates that, as of late September, "the parties were squarely on track to effectuate the settlement which formed the basis of the Dismissal Order." And,

"[i]t was not until November 14, 2013, that the Dayas denied the existence of any agreement and demanded new princip[le] settlement terms."

¶38 However, this argument is inconsistent with other positions HSBC now takes. On appeal, HSBC characterizes as "duplicitous" an email that the Dayas' counsel sent to HSBC on August 14, 2013, in which opposing counsel stated in part: "I assumed Judge Davis got sick of waiting for some activity and threw the case out because you did not communicate with him. At this point it does not appear there is any reason for my clients to do anything. Let me know your thoughts."

¶39 We need not decide whether it is fair to call this communication duplicitous. Working strictly from HSBC's own characterization, we observe that when opposing counsel sends a "duplicitous" email that threatens to undermine settlement approximately *five months* after settlement was announced to the court, and *2-1/2 months* after the court has dismissed the action based on a representation of full resolution, this qualifies as a reason to be concerned. Indeed, as stated above, HSBC itself represented to the circuit court in its flawed August motion that the Dayas were then "*refusing to proceed* with executing the settlement documents." (Emphasis added.) If HSBC became concerned that the Dayas were refusing to proceed with settlement, it should have, at the least, moved the court to reconsider its September order immediately after it was issued, rather than waiting until November to do so.

¶40 Moreover, discussions between the parties in late September could not have been, under an ordinary view of the calendar, "squarely on track" with the parties' unambiguous March representations to the court. The court could have reasonably concluded in November that it was unreasonably late for HSBC

to prevail on a motion to reopen based primarily on November communications between the parties, regardless of the details of those communications.

¶41 HSBC bases its argument in part on the premise that the court dismissed this action in May "based solely on the fact that" the parties had jointly informed the court of full resolution of the case, and that this exclusive basis for dismissal was suddenly absent in August, when the Dayas' counsel signaled that they might not agree to final settlement terms. However, this premise fails to come to grips with an early stage of the series of significant delays we describe above. It is obvious that the court dismissed the action in late May because the parties had announced full resolution of the case *more than nine weeks earlier*. HSBC's argument would only make sense in a world in which the passage of time had no meaning after the parties announced full settlement in March. In contrast, in the world in which busy circuit courts must actually function, the passage of time has significant meaning in the advancement or termination of litigation, and is a key factor for the court to consider in deciding whether or not to reopen a judgment under WIS. STAT. § 806.07(1).

¶42 HSBC emphasizes that motions made under WIS. STAT. § 806.07(1)(a) and (h) are to be liberally construed to allow relief "whenever appropriate to accomplish justice." *See* ***Price v. Hart***, 166 Wis. 2d 182, 195, 480 N.W.2d 249 (Ct. App. 1991). However, even assuming a liberal construction of the phrase "within a reasonable time," the circuit court could have reasonably concluded that HSBC's lack of diligence was unreasonable.

¶43 In sum, assuming without deciding that HSBC could have articulated a viable basis for relief under one or more subparts of WIS. STAT. § 806.07(1) for some reasonable period of time after May 29, 2013, the circuit

court could have reasonably concluded that HSBC was unreasonable in waiting until November 25, 2013, to present the arguments for relief that it offered at that time.

CONCLUSION

¶44 For these reasons, we affirm the circuit court's order of September 25, 2013, denying HSBC's motion for relief, and its decision, conveyed by letter dated December 19, 2013, that it would not set the matter for a hearing or sign a new order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.