COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1778 **Cir. Ct. No. 2015SC1348**

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

ESTATE OF DOROTHY MATTESON, C/O ZACHERL, O'MALLEY & ENDEJAN,

PLAINTIFF-RESPONDENT,

V.

MARK NELSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] A judgment was entered against Mark Nelson upon his default in failing to answer the complaint or appear in this small claims

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

action. Nelson petitioned to reopen the judgment on the ground that he did not receive notice of the summons and complaint. The circuit court denied Nelson's motion, and, on appeal, we affirmed that determination. *See* ***Estate of Matteson v. Nelson***, No. 2015AP1669, unpublished slip op. ¶1 (WI App Dec. 30, 2015). Several months later, Nelson moved a second time to reopen the judgment, arguing that he had new evidence that showed that Estate of Dorothy Matteson, c/o Zacherl, O'Malley & Endejan (the Estate), obtained the judgment by fraud. The circuit court denied the motion, concluding that Nelson's motion was "[w]oefully late" and he did not have a meritorious defense.

¶2 The Estate commenced this small claims action against Nelson, alleging that Nelson's child damaged the Estate's property when he threw a football through a window and took a hammer to a fence. Attached to the summons and complaint was a proposal estimating the cost to repair the damage Nelson's child had allegedly caused. Nelson failed to answer the complaint or appear on the return date. As a result, on July 14, 2015, a default judgment was entered against him in the amount of $2964.16.[2]

¶3 About a week later, Nelson petitioned to reopen the judgment on the ground he did not receive the summons and complaint. After a hearing, the circuit court concluded that it was more likely than not that Nelson had received the summons and complaint and, thus, rejected his petition. We affirmed on December 30, 2015, concluding that Nelson's denial of receipt was conclusory and the circuit court found that denial not credible. ***Id.***, ¶6.

[2] It was alleged that Nelson's child damaged the Estate's property along with another child who lived next door to the Estate's property. That child's father, through his homeowner's insurance policy, paid the Estate $4000.

¶4 On June 20, 2016, Nelson moved pursuant to WIS. STAT. § 806.07(1)(b) and (c) to reopen the default judgment, arguing that he had new evidence that showed the judgment was obtained by fraud. Specifically, after the hearing on his prior petition, he learned that his child had not been responsible for the damages that occurred to the Estate's property, that there were no damages consistent with the Estate's claim, and that the cost of the repairs the Estate was quoted never occurred. As part of his moving papers, Nelson submitted a series of photographs he took in April 2016 to show that the areas the Estate claimed were damaged were "in the same aged and neglected state, and have not been replaced." In short, these photographs established that the damages the Estate claimed "never even occurred."

¶5 After a hearing, the circuit court denied Nelson's motion. The court noted that these photographs could have been taken at any time, making his motion now "[w]oefully late." The photographs could have been presented at the time Nelson first moved to reopen the judgment. The court also was not convinced that Nelson had a meritorious defense. In that regard, the court noted, the Estate, through Robert Matteson's representations at the hearing, disputed Nelson's claim that his child did not cause the damage to the Estate's property. Nelson appeals.

¶6 The time limits for filing a motion for relief from a judgment are set out in WIS. STAT. § 806.07(2).[3] The motion must be filed within a reasonable time, and, as here, if based on fraud, misrepresentation or other misconduct pursuant to § 806.07(1)(c), not more than one year after the judgment was entered. Notwithstanding the outer time limit of one year, the intention behind the "'reasonable time' requirement was 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." ***Rhodes v. Terry***, 91 Wis. 2d 165, 173, 280 N.W.2d 248 (1979). Whether a motion pursuant to § 806.07(1)(c) was brought within a "reasonable time" requires consideration of "the particular facts and circumstances of the case." ***Rhodes***, 91 Wis. 2d at 173**.** The circuit court's decision on the timeliness of this motion is committed to its discretion. ***Id.*** at 170. A circuit court properly exercises its discretion if it examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 848, 593 N.W.2d 103 (Ct. App. 1999).

[3] We note that WIS. STAT. § 799.29 is the "exclusive procedure for reopening a default judgment in small claims proceedings." ***King v. Moore***, 95 Wis. 2d 686, 690, 291 N.W.2d 304 (Ct. App. 1980). We question whether it is appropriate for Nelson to go outside § 799.29 and use WIS. STAT. § 806.07 to collaterally attack the judgment as procured by fraud, but, since neither party raises this issue, and we affirm on other grounds, we need not reach the issue. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶10, 318 Wis. 2d 216, 768 N.W.2d 53 ("Section 806.07 does not apply to small claims cases.").

In his motion for relief from the judgment, Nelson cited WIS. STAT. § 806.07(1)(b) and (c), however, he develops no argument in his brief about the timeliness of the former nor the merits of it, that is, whether the photographs constitute newly discovered evidence within the meaning of § 806.07(1)(b). *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that an appellate court need not consider undeveloped arguments). In any case, Nelson did not show that his failure to discover this evidence was not owing to a "lack of diligence in seeking to discover it," as the circuit court found. WIS. STAT. § 805.15(3)(b).

¶7 Here, we cannot conclude that the circuit court erroneously exercised its discretion. Nelson's motion pursuant to WIS. STAT. § 806.07(1)(c) for relief from the judgment was made nearly a year after the default judgment was entered against him. In the interim, he moved to vacate the default judgment based on lack of service, which the circuit court denied and we affirmed on appeal. As the circuit court concluded, Nelson's motion could have been brought at the time he moved to vacate the default judgment based on lack of service. The fact Nelson made a prior motion showed that notwithstanding being pro se, Nelson had some familiarity with legal procedures. *See* ***Rhodes***, 91 Wis. 2d at 174. A single motion would have better preserved the resources and time of the court and the parties. *See* ***id.*** at 173 ("It 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."). Further, Nelson never offered an excuse as to why he waited until April 2016 to take photographs of the Estate's property.

¶8 Thus, the circuit court examined the relevant facts, applied a proper legal standard, and reached a rational conclusion. Accordingly, we have no basis to disturb the circuit court's proper exercise of its discretion.[4]

[4] In light of our determination, we need not decide whether Nelson established "a plain case of fraud." ***Burmeister v. Vondrachek***, 86 Wis. 2d 650, 664, 273 N.W.2d 242 (1979) (citation omitted).

By the Court.—Order affirmed.

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