COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1432 **Cir. Ct. No. 2013SC8930**

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

CHASTITY YOUNG,

PLAINTIFF-APPELLANT,

V.

LANDSTAR INVESTMENTS LLC,

DEFENDANT,

DUANE BRANEK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Chastity Young appeals from an order of the circuit court denying her motion to vacate an amended judgment. Respondent Duane Branek, despite notice of delinquency issued by the clerk of this court on January 18, 2017, has failed to file a response brief in this appeal. The notice of delinquency warned Branek that failure to file the brief within five days could result in summary reversal under WIS. STAT. RULE 809.83(2). By order of February 3, 2017, this appeal was submitted to me "to determine whether the case may be decided based solely upon the appellant's brief and the record." I determine that the case can be decided solely upon the appellant's brief and the record and I affirm.[2]

BACKGROUND

¶2 The underlying facts are summarized in this court's opinion in the previous appeal in this case, ***Young v. Landstar Investments, LLC***, No. 2014AP2507, unpublished slip op. (WI App Dec. 3, 2015) (***Young I***). Young filed a small claims complaint against Landstar Investments, LLC and Branek, alleging that Landstar and Branek were her landlords and that they wrongfully withheld her security deposit and failed to provide a written accounting of the amount withheld, in violation of WIS. ADMIN. CODE § ATCP 134.06. Landstar counterclaimed for back rent accrued after Young vacated the apartment until the end of her lease

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

[2] An appellate court "may, at [its] discretion, summarily reverse if the respondent fails to brief an appeal if [the court] determine[s] that [the respondent] has abandoned the appeal or has acted egregiously or in bad faith." ***Daniels v. Wisconsin Chiropractic Examining Bd.***, 2008 WI App 59, ¶3 n.3, 309 Wis. 2d 485, 750 N.W.2d 951. However, upon my review of the record, I chose to address the merits of this appeal.

term. Young responded that the lease was void. After a bench trial, the circuit court entered a judgment in favor of Young as to the security deposit and awarded Young double her security deposit plus reasonable attorney's fees. The circuit court held Branek jointly and severally liable with Landstar for the judgment as an agent of Landstar. *See* § ATCP 134.02(5) (defining landlord as including both the landlord and the agent acting on the landlord's behalf). As to the counterclaim, the circuit court held that the lease was not void and awarded Landstar damages. Branek appealed and Young cross-appealed. *See* ***Young I***, ¶¶4-7.

¶3 In ***Young I***, this court affirmed on the cross-appeal, agreeing that the lease was not void. *See* ***Young I***, ¶20. However, we reversed on Branek's direct appeal, concluding that Branek was not jointly and severally liable for the return of the security deposit because he was not an agent of the landlord for purposes of returning the security deposit or making the accounting. ***Id.***, ¶11.

¶4 On October 24, 2014, the same date the notice of appeal was filed in ***Young I***, Branek moved the circuit court for an order dismissing Branek from the judgment in favor of Young. At the hearing on Branek's motion, the circuit court orally ruled that Branek remained jointly and severally liable under WIS. ADMIN. CODE § ATCP 134.06. However, on February 2, 2016, the circuit court entered an amended judgment in favor of Young and against only Landstar, consistent with this court's decision in ***Young I***.

¶5 On April 5, 2016, Young moved the circuit court to vacate the February 2, 2016 amended judgment.[3] The circuit court denied Young's motion following a hearing. Young appeals.

DISCUSSION

¶6 Young contends the circuit court erred in denying her motion to vacate the February 2, 2016 amended judgment. As previously stated, Branek has not filed a responsive brief in this appeal. In the absence of a respondent's brief, I look to the circuit court's decision and its reasons for that decision.

¶7 In the order denying Young's motion to vacate the amended judgment, the circuit court gave two reasons for denying Young's motion. First, the amended judgment had been satisfied by that time and the court could see no purpose to putting Branek's name on a satisfied judgment. Second, the court determined that it was bound by this court's decision in ***Young I.*** The court pointed out that this court could have supplemented the appellate record with the circuit court's proceedings on Branek's October 24, 2014 motion to be dismissed from the original judgment, which the circuit court had previously denied, but that this court declined to supplement the record with those proceedings.

¶8 The first step in understanding this case is to clarify what is being appealed. According to Young's notice of appeal, Young appeals "a part of" an order entered on May 27, 2016 "wherein the [circuit] court … denied a motion for relief/motion to vacate a judgment that was improperly amended in violation of

[3] Young's motion referred to the circuit court's February 2, 2016 amended judgment as an order, but it was in fact a judgment.

the decision issued by the Court of Appeals." In other words, it is the denial of Young's motion to vacate the amended judgment that is being appealed, not the action of the court amending the judgment to dismiss Branek. [4]

¶9 A motion for relief from a judgment or an order is brought under WIS. STAT. § 806.07. Section 806.07(1) specifies eight different grounds for relief, numbered consecutively (a) through (h). In the present case, Young's motion to vacate specified that the motion was brought pursuant to § 806.07(1)(b) and (j).[5] Section 806.07(1) does not contain a paragraph (j). Accordingly, the sole ground for vacating the amended judgment would be (b), which provides that a party may be relieved from an order based upon "[n]ewly-discovered evidence which entitles a party to a new trial under [WIS. STAT. §] 805.15(3)."

¶10 The Wisconsin Supreme Court addressed vacating a judgment for newly discovered evidence in ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 186-87, 271 N.W.2d 872 (1978). In ***Hollingsworth***, our supreme court stated that "[t]o warrant relief from a judgment, newly discovered evidence must meet certain criteria, one being that the evidence would probably change the result." ***Id.*** at 186.

[4] The amendment of the judgment took place on February 2, 2016. A "Notice of Entry of Judgment" was filed on February 29, 2016. The notice of appeal was filed on July 8, 2016, outside of the forty-five day appeal period for the amendment of judgment. *See* WIS. STAT. § 808.04(1).

[5] The motion to vacate also states that it is brought pursuant to WIS. STAT. §§ 808.08(3) and 808.09. Section 808.08(3) concerns the actions a circuit court should take on an order of the court of appeals upon remittitur. As the circuit court pointed out in its decision denying Young's motion to vacate, no such order was made by this court. Section 808.09 requires that upon remittitur, "the court below shall proceed in accordance with the judgment or decision." This is what the circuit court said in its opinion that it had done. Neither would seem to provide a procedure for the court to vacate its amended judgment.

¶11 In the present case, Young asserted in her motion to vacate the amended judgment that the new evidence was presented at the December 3, 2014 hearing on Branek's motion to dismiss himself from the judgment. Although that evidence was sufficient to convince the circuit court at that time that Branek was jointly and severally liable, thereby satisfying the requirement that the newly discovered evidence "probably [would] change the result," *see* ***id.***, the circuit court later determined when it denied Young's motion to vacate the amended judgment that it was bound by this court's decision in ***Young I***.

¶12 Young asserts that the circuit court's decision to amend the judgment was error. However, that is not the issue before me on appeal. The issue before me is whether the circuit court properly denied Young's motion to vacate that amendment of judgment based upon newly discovered evidence, and as noted in footnote 4, any challenge of the amended judgment is untimely.

¶13 Whether or not all of the requirements of newly discovered evidence sufficient to warrant a new trial are met is not fully developed in the briefing, and I decline to develop the issue for Young.[6] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we conclude that his argument is insufficiently developed to warrant a response).

[6] WISCONSIN STAT. § 805.15(3) provides, in relevant part, that "a new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

(a) The evidence has come to the moving party's notice after trial; and
(b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
(c) The evidence is material and not cumulative; and
(d) The new evidence would probably change the result."

Nothing in the record or the briefing would provide a basis for me to decide whether these requirements had been met.

¶14 Rather than address the undeveloped matter of newly discovered evidence, I will assume without deciding that Young did adequately put forth grounds for relief from the order. Whether or not to grant that relief, even where the grounds are established, is within the discretion of the circuit court. ***Hollingsworth***, 86 Wis. 2d at 184. "We will not reverse a discretionary determination ... if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶15 Here, the circuit court clearly set forth its reasons for denying the motion to vacate. The court stated on the record that "[e]ssentially, what I was willing to do was to carry through on the mandate of the Court of Appeals." Given that this is what WIS. STAT. § 808.09 expressly requires,[7] it can hardly be an erroneous exercise of the court's discretion. In addition, the circuit court had earlier noted that the judgment had been satisfied, stating "[a]ll right. So that ends it, right? Judgment. Satisfaction. Boom. There's nothing left." That alone would have been adequate grounds for an exercise of discretion.

CONCLUSION

¶16 For the reasons discussed above, I affirm.

By the Court.—Order affirmed.

[7] "In all cases an appellate court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance with the judgment or decision." WIS. STAT. § 808.09.

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