COURT OF APPEALS
DECISION
DATED AND FILED

July 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2032 **Cir. Ct. No. 2016CV86**

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

PELLA MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

GARY HARGROVE AND JODY HARGROVE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Gary and Jody Hargrove appeal an order denying their motion for relief from a default judgment declaring that the Hargroves are not entitled to coverage under an insurance policy issued by Pella Mutual Insurance Company. The Hargroves argue they are entitled to relief from the default judgment pursuant to WIS. STAT. § 806.07(1)(a), (g), and (h) (2015-16).[1] We reject the Hargroves' arguments and affirm.

BACKGROUND

¶2 The Hargroves own a residential property in Tigerton. On October 21, 2015, the Hargroves' property sustained substantial damage due to a fire. At the time of the fire, the property was insured under a homeowner's insurance policy issued by Pella Mutual. The Hargroves submitted a claim under that policy; however, on April 5, 2016, Pella Mutual formally denied coverage for the Hargroves' claim.

¶3 On April 19, 2016, Pella Mutual filed the instant lawsuit, seeking a declaratory judgment that the Hargroves were not entitled to coverage because they had breached their contractual duty to cooperate with Pella Mutual's investigation. Both of the Hargroves were served with the summons and complaint on April 26, 2016. Jody was personally served at the Hargroves' home in Northridge, California, and Gary was served by substituted service—that is, by leaving a copy of the summons and complaint with Jody at their residence. *See* WIS. STAT. § 801.11(1)(b). The summons expressly stated, "Within twenty (20)

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statute [sic], to the Complaint."

¶4 Pursuant to the twenty-day deadline set forth in the summons, the Hargroves were required to answer Pella Mutual's complaint by May 16, 2016. They failed to do so. Accordingly, on May 27, 2016, Pella Mutual filed a motion for default judgment. The circuit court granted Pella Mutual's motion on June 28, 2016, following a hearing at which the Hargroves appeared pro se.

¶5 On July 19, 2016, attorney Andrew Wagener notified the circuit court he had been retained to represent the Hargroves. On the same day, the Hargroves filed an answer to Pella Mutual's complaint, along with a motion for relief from the default judgment. The motion asserted the Hargroves were entitled to relief because their failure to timely answer the complaint was the result of mistake, inadvertence, surprise, or excusable neglect; because it was no longer equitable that the default judgment should have prospective application; and for other reasons justifying relief from the operation of the default judgment.

¶6 In support of the Hargroves' motion for relief from the default judgment, Gary submitted an affidavit setting forth the following facts. Gary was traveling for work when the summons and complaint were served at the Hargroves' residence on April 26, 2016, and as a result he did not receive them until May 3. He was also in the process of relocating his family from California to Texas at that time. On May 3, Gary contacted attorney John Kramer by phone and email. On May 6, Kramer informed Gary he had a conflict and could not represent the Hargroves.

¶7 On May 6, Gary contacted attorney Greg Strausser's office and read the summons to Strausser's assistant.[2] She informed Gary the Hargroves actually had twenty business days, rather than twenty calendar days, to respond to the complaint. On May 10, Strausser's office contacted Gary and informed him they had a conflict.

¶8 On May 19, Gary contacted the State Bar of Wisconsin's Lawyer Referral and Information Service, which referred him to attorney Michael Lawrynk. Gary spoke with Lawrynk's assistant the same day, and she indicated Lawrynk would respond by May 23. When Lawrynk failed to respond, Gary again called his office on May 26, at which point he learned Lawrynk was in the same law firm as the attorney representing Pella Mutual.

¶9 On May 27, Gary contacted attorney Andrea Murdock. She requested that Gary send her information regarding the case. However, Gary was in Texas at the time, and most of the documents Murdock needed were in California. Gary "was ill and returned to California as soon as possible." He sent the documents to Murdock on June 10 via overnight mail. He emailed Murdock on June 15 and received no response. On June 21, Gary called Murdock, who said she would review the documents and call him back the next day. The following day, Murdock emailed Gary telling him she could not take the case because the hearing on Pella Mutual's motion for default judgment was only a few days away.

[2] There is no attorney by the name of "Greg Strausser" listed in the State Bar of Wisconsin's attorney directory. We assume the Hargroves intend to refer to now-Judge Gregory Strasser. However, consistent with the Hargroves' briefs, we use "Strausser" throughout this opinion.

¶10 On June 27, the Hargroves contacted attorney David Winter, but he was unable to take the case. Gary then called five additional attorneys. One of those attorneys, Andrew Wagener, agreed to represent the Hargroves. However, he was unable to attend the hearing on Pella Mutual's motion for default judgment, which was scheduled for the following day.

¶11 The circuit court denied the Hargroves' motion for relief from the default judgment, following a nonevidentiary hearing. In its oral ruling, the court first concluded the Hargroves' failure to timely answer Pella Mutual's complaint was not due to "excusable neglect" under WIS. STAT. § 806.07(1)(a). The court rejected the Hargroves' argument that they should be granted relief because they mistakenly believed they had twenty business days to file an answer, rather than twenty calendar days. The court explained that mistaken belief might have supported a finding of excusable neglect if the Hargroves had actually filed an answer within twenty business days; however, they failed to meet even that deadline.

¶12 The circuit court next acknowledged that "people are busy" and that the Hargroves had contacted "a number of attorneys." Nonetheless, the court stated, "I can't believe that any attorney who would look at this and say: Well you have to file an answer within twenty (20) days, that none of those attorneys who they spoke to didn't advise them that if they don't they're going to have a potential default judgment." Furthermore, the court found that Gary was "not without sophistication" and was "a gentleman who should have been able to understand documents he's reading."

¶13 Finally, the circuit court acknowledged there were "some allegations … that this is no longer equitable, the judgment should no longer stand."

However, the court rejected that argument, reasoning, "[N]othing really has been shown to the satisfaction of the Court that it wouldn't be equitable to uphold judgment in this matter based upon the case law and based upon the arguments and based upon what I heard in court at the time that I granted this default judgment."

¶14 A written order denying the Hargroves' motion for relief from the default judgment was entered on August 23, 2016. The Hargroves now appeal.

DISCUSSION

¶15 Whether to grant relief from judgment under WIS. STAT. § 806.07(1) is within the circuit court's discretion. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. A court properly exercises its discretion when its decision is based on the facts of record and on the application of a correct legal standard. ***Id.*** We look for reasons to sustain a circuit court's discretionary determination. ***Id.***, ¶30. "We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Id.*** (quoting ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610).

I. WISCONSIN STAT. § 806.07(1)(a)

¶16 The Hargroves first argue the circuit court erroneously exercised its discretion by declining to grant them relief from the default judgment under WIS. STAT. § 806.07(1)(a). The Hargroves contend they are entitled to relief under that paragraph because the evidence shows that their failure to timely answer Pella Mutual's complaint was the result of "excusable neglect."

¶17 Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (quoting ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982)). It is not synonymous with neglect, carelessness, or inattentiveness. ***Id.*** Rather, when determining whether excusable neglect exists, "the basic question is whether the dilatory party's conduct was excusable under the circumstances, 'since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.'" ***Id.*** (quoting ***Hansher v. Kaishian***, 79 Wis. 2d 374, 391, 255 N.W.2d 564 (1977)).

¶18 The Hargroves do not dispute that they were properly served with the summons and complaint. In addition, they do not deny that the summons expressly stated they were required to file an answer within twenty days of receipt. Instead, the Hargroves stress that, after being served with the summons, they contacted multiple attorneys in an attempt to obtain legal representation. The Hargroves argue the circuit court erroneously exercised its discretion by failing to consider their attempts to obtain counsel.

¶19 Contrary to the Hargroves' contention, the record shows that the circuit court did, in fact, consider their attempts to obtain counsel. As noted above, the court expressly acknowledged the Hargroves had contacted "a number of attorneys." Nevertheless, the court concluded those efforts did not establish excusable neglect because it was unbelievable that none of the attorneys the Hargroves contacted would have alerted them to the need to file an answer within twenty days and the potential for a default judgment if they failed to do so. The Hargroves' argument that the circuit court erred by failing to consider their attempts to obtain counsel is therefore meritless.

¶20 In addition, other facts support the circuit court's conclusion that, despite the Hargroves' efforts to obtain counsel, their failure to timely answer the complaint was not due to excusable neglect. The record shows the Hargroves were served with the summons and complaint on April 26, 2016. Yet, according to Gary's affidavit, he did not attempt to contact an attorney until May 3—seven days later. Gary's affidavit also states he learned on May 10 that attorney Strausser would be unable to represent the Hargroves. However, Gary did not make any subsequent attempt to obtain counsel until May 19—nine days later. These significant gaps, during which the Hargroves apparently took no action to obtain counsel, support the circuit court's conclusion that their failure to timely answer the complaint was not due to excusable neglect.

¶21 The Hargroves assert their initial delay in seeking counsel was due to the fact that Gary was traveling for work when the summons and complaint were served on April 26 and, as a result, he did not receive them until May 3. However, in ***Gerth v. American Star Insurance Co.***, 166 Wis. 2d 1000, 1007, 480 N.W.2d 836 (Ct. App. 1992), an insurer argued its failure to timely answer a complaint was due to excusable neglect because the summons and complaint had to be transferred to the company's San Francisco office after they were served at its Waukesha office, and the transfer took nineteen days. We rejected that argument, citing the insurance company's "remarkable absence of explanation why it took nineteen days, in the era of overnight express mail and telefacsimile machines, for this important document to travel from the Waukesha office to the San Francisco office." ***Id.*** at 1008. The Hargroves have similarly failed to explain why—in the present era of scanning, email, laptops, and cell phones—it took seven days for Gary to receive the summons and complaint. Moreover, although Gary did not receive the summons and complaint until May 3, it is undisputed that

Jody received them on April 26. The Hargroves do not explain why Jody failed to take any action to obtain counsel after being served with the summons and complaint.

¶22 The Hargroves also assert, more generally, that their delay in filing an answer was caused by the demands of Gary's job and the fact that the family was in the process of relocating from California to Texas. Similarly, in ***Hedtcke***, the defendant's attorney submitted an affidavit stating the "press of other legal business" prevented him from timely filing an answer. ***Hedtcke***, 109 Wis. 2d at 472. In rejecting that argument, our supreme court noted it had "often held that the circuit court did not abuse its discretion in holding that the pressures of a busy law office, generally asserted and standing alone, do not justify an attorney's failure to meet a statutory deadline." ***Id.*** at 473. The court further stated excusable neglect "should be predicated not on a mere statement of the press of other business but on specific incidents and a persuasive explanation which justify the attorney's neglect during the entire period of his or her inattention." ***Id.*** Here, the Hargroves have merely provided a general assertion that the pressures of Gary's work and the family's move contributed to their delay in filing an answer. They have not identified specific facts or incidents in support of that assertion. On this record, Gary's work pressures and the family's move do not convince us the circuit court erroneously exercised its discretion by concluding the Hargroves failed to establish excusable neglect.[3]

[3] The Hargroves also assert their failure to timely answer the complaint was "a result of [Gary's] medical condition." However, the Hargroves do not explain what that medical condition was or how it affected the Hargroves' ability to obtain counsel and/or answer Pella Mutual's complaint. The Hargroves' vague reference to Gary's medical condition therefore does not convince us the circuit court erroneously exercised its discretion.

¶23 The Hargroves emphasize they were told by attorney Strausser's assistant on May 6 that they had twenty business days to answer Pella Mutual's complaint, rather than twenty calendar days. Like the circuit court, we might find this argument compelling had the Hargroves filed an answer within twenty business days after they received the summons and complaint—that is, by May 24. However, the Hargroves did not file an answer until July 19, which is fifty-eight business days (and eighty-four calendar days) after they received the summons and complaint. This strongly suggests that the Hargroves' failure to timely answer the complaint was not due to their mistaken belief they had twenty business days, rather than twenty calendar days, to file an answer.

¶24 Lastly, we note the Hargroves do not address the circuit court's finding that Gary possessed some degree of business acumen and therefore "should have been able to understand" the summons and complaint. Gary's business acumen was a proper factor for the court to consider when assessing whether the Hargroves established excusable neglect. On the whole, the court's oral decision shows that it considered the facts of record and applied the correct legal standard. *See* ***Miller***, 326 Wis. 2d 640, ¶29. The Hargroves' arguments on appeal do not convince us the court's conclusion that the Hargroves failed to establish excusable neglect was an erroneous exercise of discretion.

II. WISCONSIN STAT. § 806.07(1)(g)

¶25 In the alternative, the Hargroves argue the circuit court should have granted them relief from the default judgment under WIS. STAT. § 806.07(1)(g). That paragraph allows a court to grant relief from a judgment when "[i]t is no longer equitable that the judgment should have prospective application." ***Id.*** The Hargroves' argument regarding para. (1)(g) is as follows:

> [A] Declaratory Ruling is primarily equitable in nature. …. In this case, [Pella Mutual] has filed an action for declaratory ruling allowing a court to decide what, in essence, is a contractual obligation. Whether or not the Hargroves complied with their contractual obligations should, in the normal course of events, be a breach of contract action rather than a declaratory ruling action. In essence, the format that [Pella Mutual] used to file this action denies the Hargroves of their legal remedies pursuant to the insurance contract. …. Given this equitable remedy that was provided by the trial court in light of the fact that a legal remedy exists, it is unfair and unjust to maintain this equitable judgment against the Hargroves when [Pella Mutual] clearly filed a declaratory ruling to deny the Hargroves of their contractual legal remedies. The general principle is that equitable remedies are inappropriate when a legal remedy exists.[4]

¶26 We reject the Hargroves' argument regarding WIS. STAT. § 806.07(1)(g) for two reasons. First, the Uniform Declaratory Judgments Act expressly provides that "[a]ny person interested under a … written contract … may have determined any question of construction or validity arising under the … contract … and obtain a declaration of rights, status or other legal relations thereunder." WIS. STAT. § 806.04(2). The Act further provides that a contract may be construed either before or after it has been breached. Sec. 806.04(3). An

[4] Pella Mutual argues the Hargroves forfeited their argument regarding WIS. STAT. § 806.07(1)(g) by failing to raise it in the circuit court. However, the Hargroves' motion for relief from the default judgment asserted relief was proper because "[i]t is no longer equitable that the judgment should have prospective application," which is a clear reference to para. (1)(g). In addition, the circuit court specifically indicated during its oral ruling that it had considered whether the Hargroves were entitled to relief under para. (1)(g). Under these circumstances, we reject Pella Mutual's forfeiture argument.

The circuit court did not provide an extensive analysis supporting its conclusion that the Hargroves were not entitled to relief under WIS. STAT. § 806.07(1)(g). *See supra* ¶13. Nonetheless, the court's explanation was not necessarily inadequate, given that the Hargroves did not present a well-developed argument regarding para. (1)(g). Moreover, even where a circuit court provides an inadequate explanation for a discretionary decision, we may search the record to determine whether it supports the court's exercise of discretion. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

insurance policy is a contract. ***Day v. Allstate Indem. Co.***, 2011 WI 24, ¶25, 332 Wis. 2d 571, 798 N.W.2d 199. Moreover, case law demonstrates that an insurer may file a declaratory judgment action asking a court to determine its coverage obligations. *See, e.g.*, ***Progressive Cas. Ins. Co. v. Bauer***, 2007 WI App 122, ¶4, 301 Wis. 2d 491, 731 N.W.2d 378; ***Continental W. Ins. Co. v. Paul Reid, LLP***, 2006 WI App 89, ¶3, 292 Wis. 2d 674, 715 N.W.2d 689; ***Baumann v. Elliott***, 2005 WI App 186, ¶8, 286 Wis. 2d 667, 704 N.W.2d 361. The Hargroves' assertion that Pella Mutual somehow acted inappropriately by filing the instant declaratory judgment action is therefore baseless.

¶27 Second, WIS. STAT. § 806.07(1)(g) permits a court to grant relief from a judgment when the prospective application of that judgment is "no longer equitable." Our supreme court has explained that this "clear language" requires a party to allege "a change in circumstances" that has made it inequitable to apply the judgment going forward. ***Connor v. Connor***, 2001 WI 49, ¶40, 243 Wis. 2d 279, 627 N.W.2d 182. The Hargroves have failed to allege any such change in circumstances and have therefore failed to demonstrate that the circuit court erroneously exercised its discretion by declining to grant them relief under para. (1)(g).

III. WISCONSIN STAT. § 806.07(1)(h)

¶28 Finally, the Hargroves argue they are entitled to relief from the default judgment pursuant to WIS. STAT. § 806.07(1)(h), which permits a court to grant relief based on "[a]ny other reasons justifying relief from the operation of

the judgment."[5] Paragraph (1)(h) should be used "sparingly," and only in those cases where "the sanctity of the final judgment is outweighed by 'the incessant command of the court's conscience that justice be done in light of *all* the facts.'" ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 550, 363 N.W.2d 419 (1985) (quoting ***Bankers Mortg. Co. v. United States***, 423 F.2d 73, 77 (5th Cir. 1970)). Stated differently, relief under para. (1)(h) is proper only when "extraordinary circumstances are present justifying relief in the interest of justice." ***Miller***, 326 Wis. 2d 640, ¶35.

¶29 Factors to consider when deciding whether to grant relief under WIS. STAT. § 806.07(1)(h) include: (1) whether the judgment was the result of the conscientious, deliberate, and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) 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; (4) whether there is a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. ***Miller***, 326 Wis. 2d 640, ¶36.

¶30 The Hargroves argue two of these factors support granting relief from the default judgment. First, they contend they did not receive the effective assistance of counsel because they were given erroneous advice that they had twenty business days, rather than twenty calendar days, to answer the complaint

[5] The circuit court failed to explain its conclusion that the Hargroves were not entitled to relief under WIS. STAT. § 806.07(1)(h). However, as noted above, when a circuit court fails to adequately explain its reasoning, we may search the record to determine whether it supports the court's discretionary decision. ***Randall***, 235 Wis. 2d 1, ¶7.

and because "one attorney sat on the review for a month prior to refusing to take the case." Second, the Hargroves assert they "have a defense and a valid counterclaim to this case for their insured loss."

¶31 The Hargroves' arguments regarding WIS. STAT. § 806.07(1)(h) are unpersuasive. As noted above, the Hargroves' claim that they were erroneously advised they had twenty business days to answer the complaint is not particularly compelling, given that they failed to file an answer within twenty business days. In addition, while the Hargroves assert one attorney "sat on the review" for one month before refusing to take their case, they do not provide any record citation in support of that assertion, and Gary's affidavit does not support it. Furthermore, even assuming one of the attorneys the Hargroves contacted failed to respond for one month, the Hargroves fail to explain why it was reasonable for them to continue waiting for that attorney's response instead of taking other steps to obtain counsel or filing a pro se answer. Under these circumstances, and given the Hargroves' failure to develop any argument regarding three of the ***Miller*** factors, the fact that the Hargroves may have had a valid defense to Pella Mutual's declaratory judgment claim is insufficient to convince us this case presents the sort of "extraordinary circumstances" required to grant relief from a judgment under para. (1)(h). *See* ***Miller***, 326 Wis. 2d 640, ¶35.

By the Court.—Order affirmed.

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