COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP46 **Cir. Ct. No. 2016SC231**

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

ROGER BYRD,

PLAINTIFF-RESPONDENT,

V.

RICHARD HOEFT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Price County: ANN KNOX-BAUER, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Richard Hoeft, pro se, appeals an order denying his petition to reopen a small claims default judgment entered against him and in favor of Roger Byrd. We affirm.

[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 noted.

¶2 Byrd filed a small claims action against Hoeft, alleging that Hoeft failed to pay for a Hawk loader/slasher vehicle, which Hoeft had purchased from Byrd pursuant to a motor vehicle bill of sale. Byrd sought judgment for an unpaid purchase price balance of $6,505 and for replevin of a 540 B grapple skidder that Hoeft granted as collateral to secure payment of the purchase price. Hoeft, pro se, denied the complaint's allegations and moved to dismiss for failure to state a claim. A bench trial was scheduled for December 15, 2016. Hoeft received notice of the trial on December 2.

¶3 Byrd appeared at the trial through counsel, but Hoeft did not appear. The circuit court entered a default judgment for $6,776.50—the unpaid balance plus court fees—and awarded Byrd the right to recover the grapple skidder from Hoeft. A transcript of the December 15, 2016 proceedings is not in the record.

¶4 On December 27, 2016, Hoeft filed a petition to reopen the judgment. He contended that cold weather prevented his appearance and that the circuit court did not allow him to appear for the hearing by telephone. Hoeft also alleged in his petition that he had several defenses to Byrd's complaint. The court rejected Hoeft's petition in a written order. The circuit court's order stated that after Hoeft could not be contacted by telephone, the court held a "hearing for the default[,] … made specific findings and found [Hoeft] in default." Hoeft appeals.[2]

¶5 We understand Hoeft to argue that the circuit court erroneously exercised its discretion when it denied his motion to reopen the default judgment.

[2] Byrd did not file a response brief. Under WIS. STAT RULE 809.83(2), this court may sanction Byrd with summary reversal due to this default. However, we have determined summary reversal is not appropriate on this record.

If a defendant fails to appear on a trial date in small claims court, a court may enter a default judgment "upon due proof of facts which show the plaintiff entitled thereto." WIS. STAT. § 799.22(2). A court "may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown," as long as the notice of motion is made within twelve months after entry of the judgment. WIS. STAT. § 799.29(1)(a), (c). We review a circuit court's decision on whether to vacate a default judgment for an erroneous exercise of discretion. *See* ***Baird Contracting, Inc. v. Mid Wis. Bank of Medford***, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). We also uphold a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶6 Hoeft asserts that his failure to appear at the trial was due to "excusable neglect." *See* WIS. STAT. § 806.07(1)(a). Excusable neglect "is that neglect which might have been the act of a reasonably prudent person under the circumstances." ***Baird Contracting***, 189 Wis. 2d at 324. It is not synonymous with simple carelessness or inattentiveness. ***Mohns, Inc. v. TCF Nat'l Bank***, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 714 N.W.2d 245. The burden of showing excusable neglect is on the party seeking relief from the default judgment. *See* ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977).

¶7 Hoeft offers two reasons to justify his nonappearance. He first contends that the "temperature was colder than -25 at [his] house" on the day of the trial, which prevented his vehicle from starting and him from reaching the courthouse. He then argues that the circuit court disallowed him from appearing by telephone as an alternative to appearing in person.

¶8 The circuit court's factual findings in its postjudgment order refute Hoeft's arguments, and these findings are not clearly erroneous. Regarding the

weather, the court found that "[t]he area was in a cold snap that had been predicted well in advance," so Hoeft had notice of adverse weather and it was not a valid reason for failing to appear in person for the hearing. Moreover, the court found Hoeft called before the trial to inform the court of his inability to start his truck. However, when the court directed the clerk of court to call Hoeft back at the start of the hearing and inform him he could appear by telephone, the clerk "received an answering machine[,] … left a message" and was unable to reach him.

¶9 Hoeft contests these findings, and he insists "there's absolutely no offers of proof th[at] the clerk called back." However, if the clerk's call to Hoeft was done in open court, the transcript of the hearing would reflect that. It was Hoeft's duty, as the appellant, to ensure a transcript of the December 15, 2016 proceedings was in the appellate record. Because it is not, we assume the hearing transcript would support the court's finding that the clerk called Hoeft and its ultimate exercise of discretion in declining to reopen the judgment. Missing material in the record is assumed to support the circuit court's decision. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). On this record, the court properly exercised its discretion when it determined that Hoeft failed to show excusable neglect.

¶10 Even if we were to assume Hoeft's failure to appear was due to "excusable neglect," Hoeft must additionally provide a meritorious defense in order for the default judgment to be reopened. *See* ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 184, 271 N.W.2d 872 (1978). On appeal, Hoeft poses the following alleged defenses: (1) the bill of sale was unconscionable; (2) the bill of sale was invalid because "a consumer credit transaction requires at least 4 payments" under WIS. STAT. ch. 421; (3) Hoeft never owned the grapple skidder and could not offer it as collateral; and (4) the circuit court was biased against

Hoeft. Hoeft did not raise the second and fourth arguments in his petition to reopen the judgment, and he has thus forfeited those issues on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded on other grounds by statute*.

¶11 Hoeft's first and third defenses do not have merit. On the first defense, Hoeft claims that the collateral—the grapple skidder—was worth $25,000, in contrast to the $7,500 value of the purchased loader/slasher. He appears to contend that this valuation discrepancy between the collateral and the purchased vehicle renders the bill of sale void as "unconscionable" under the Wisconsin Consumer Act. However, Hoeft failed to provide any record support for his valuation of the grapple skidder, and he does not support this "unconscionability" claim with any legal authority or coherent reasoning. We therefore decline to further consider his first defense. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶12 Finally, we cannot evaluate Hoeft's third purported defense. As the circuit court observed in its order, Hoeft failed to raise nonownership of the collateral as a defense in answering the complaint. *See* WIS. STAT. §§ 802.06(2)(a), 799.20(1) And aside from this flaw, we cannot evaluate his argument because nothing in the record evidences that anyone other than Hoeft held title or rights to the grapple skidder at the time Hoeft offered it for collateral, other than Hoeft's unsubstantiated claims in his briefing and in his postjudgment petition. Those claims were not supported by any affidavit averring, under oath,

that he did not own the grapple skidder.[3] Accordingly, we conclude the circuit court properly exercised its discretion in declining to reopen the judgment.

By the Court.—Order affirmed.

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

[3] Hoeft argues that "if the [debtor] doesn't own the collateral, the collateral cannot be seized," and he cites ***National Pawn Brokers Unlimited v. Osterman, Inc.***, 176 Wis. 2d 418, 500 N.W.2d 407 (Ct. App. 1993), in support of that proposition. Given this citation, we understand Hoeft to argue that a security interest never attached to the grapple skidder and became enforceable. *See* WIS. STAT. § 409.203(1)-(2). But for attachment to occur, the debtor must retain *rights* in the collateral, and these rights "do not depend on whether the debtor has title." ***National Pawn Brokers***, 176 Wis. 2d at 428 (citations omitted). Thus, Hoeft's argument that he did not *own* the grapple skidder—aside from the lack of record facts—is legally incomplete and will not be addressed further.