COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2497 **Cir. Ct. No. 2016CV66**

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

CHARLES L. SCHUNK, JR.,

PLAINTIFF-RESPONDENT,

V.

ROCK & TAIT EXTERIORS, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: JOHN F. MANYDEEDS, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

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

¶1 PER CURIAM. Rock and Tait Exteriors, LLC (Rock and Tait) appeals a default judgment entered in favor of Charles Schunk, Jr. Schunk sued Rock and Tait, alleging a breach of contract related to Rock and Tait's replacement of the roof on Schunk's home. The circuit court granted Schunk a default judgment in the amount of $28,648 after Rock and Tait failed to answer the complaint and instead filed a motion to stay the proceedings and to compel compliance with the contractor notice and opportunity to cure statute, WIS. STAT. § 895.07 (2015-16).[1] After Schunk filed a motion for default judgment, Rock and Tait filed a motion to enlarge the time to answer the complaint. The circuit court denied Rock and Tait's motions to stay and to enlarge the time to answer, and it granted Schunk's motion for default judgment.

¶2 Rock and Tait argues the circuit court erred when it: (1) denied Rock and Tait's motion to enlarge the time to answer and granted Schunk's motion for default judgment; (2) failed to order Schunk to comply with the mandatory stay provision of WIS. STAT. § 895.07; and (3) awarded damages to Schunk without a hearing. We affirm both the court's denial of Rock and Tait's motion to enlarge the time to answer and the entry of the default judgment.[2] We reverse the award of damages and remand the case for the circuit court to hold an evidentiary hearing to determine the damages to be awarded to Schunk on his breach of contract claim.

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

[2] Because we conclude the circuit court properly exercised its discretion in granting Schunk's motion for default judgment and denying Rock and Tait's motion to enlarge time, we need not address Rock and Tait's argument pursuant to WIS. STAT. § 895.07. We decide cases on the narrowest possible grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

BACKGROUND

¶3 In 2010, Schunk contracted with Rock and Tait for the installation of a new roof on his home. Schunk paid $9,488 to Rock and Tait for the roof replacement. Later in 2010, Schunk complained of skylight construction defects, and Rock and Tait returned to replace the skylight. Schunk continued to complain to Rock and Tait that the roof leaked, and in 2014, Rock and Tait again returned to make repairs. Then, in 2015, Schunk hired a different contractor to replace the roof. Schunk paid the second contractor $19,160 to replace the roof. In February 2016, Schunk commenced this action for breach of contract. He did so without first giving Rock and Tait notice and an opportunity to cure the defect pursuant to WIS. STAT. § 895.07(2).[3]

¶4 Rather than answering the complaint, Rock and Tait filed a motion to stay within twenty days of service of the summons and complaint, arguing Schunk had not complied with WIS. STAT. § 895.07. In May 2016, Schunk filed a motion for default judgment, and in September 2016, Rock and Tait filed a motion

[3] Under WIS. STAT. § 895.07(2), a claimant must give notice and an opportunity to repair before commencing an action against a contractor. Section 895.07(2)(a) provides:

> Before commencing an action against a contractor or supplier regarding a construction defect, a claimant shall do all of the following:
>
> 1. No later than 90 working days before commencing the action, deliver written notice to the contractor containing a description of the claim in sufficient detail to explain the nature of the alleged defect and a description of the evidence that the claimant knows or possesses, including expert reports, that substantiates the nature and cause of the alleged construction defect.
>
> 2. Provide the contractor or supplier with the opportunity to repair or to remedy the alleged construction defect.

to enlarge the time to answer the complaint. Schunk did not oppose Rock and Tait's motion to enlarge time, and he stated he would withdraw his motion for default judgment should the court enlarge the time to answer. After a hearing on all pending motions, the circuit court denied Rock and Tait's motions to stay and to enlarge time, granted Schunk's motion for default judgment, and awarded Schunk a money judgment in the amount of $28,648. Rock and Tait now appeals.

DISCUSSION

I. Default judgment

¶5 Wisconsin's default judgment statute provides, in part, that "[a] default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired." WIS. STAT. § 806.02(1). Rock and Tait contends the circuit court erred in granting Schunk's motion for default judgment because Rock and Tait had filed a timely responsive pleading that raised an issue of law. The issue of law that Rock and Tait contends was raised by its motion to stay is Schunk's noncompliance with the contractor notice and opportunity to cure the defect provisions under WIS. STAT. § 895.07.

¶6 Whether a defendant's filing was sufficient to join issue under WIS. STAT. § 806.02(1) involves the application of statutory language to undisputed facts, which we review independently. *See* ***Johns v. County of Oneida***, 201 Wis. 2d 600, 605, 549 N.W.2d 269 (Ct. App. 1996). If a defendant has failed to join an issue of law or fact, whether to grant a default judgment under § 806.02(1) presents the circuit court with a discretionary decision, which we will affirm on appeal unless the defaulting party shows there was a clearly erroneous exercise of discretion. *See* ***id.***

¶7 An issue is joined when the parties to a cause arrive at that stage in their pleadings where one asserts a fact or legal proposition to be so, and the other denies it. *See* ***Snowberry v. Zellmer***, 22 Wis. 2d 356, 358, 126 N.W.2d 26 (1964). Rock and Tait argues its motion to stay joined an issue of law.

¶8 We conclude that Rock and Tait's motion did not join an issue of law. Schunk's complaint alleged he was damaged by a breach of contract due to Rock and Tait's "fail[ure] to perform the roof replacement in a workmanlike manner …." Rock and Tait's motion to stay simply alleged that Schunk had not given Rock and Tait the statutorily required notice and an opportunity to cure the alleged defects prior to filing his complaint. *See* WIS. STAT. § 895.07(2)(a). Rock and Tait's motion to stay failed to deny or otherwise dispute any of the allegations in Schunk's complaint. Simply stating in a motion that Schunk did not follow the condition precedent in § 895.07 did not deny any fact or legal proposition alleged in the complaint.

¶9 Furthermore, Rock and Tait does not explain how the filing of a motion to stay in this context relieves it from serving an answer. Nor does it argue that its motion to stay raised a valid defense under § 802.06(2)(a), which would permit the filing of a motion in lieu of an answer. The circuit court correctly concluded it did not. While Rock and Tait contends it believed its motion to stay was meritorious, it fails to cite any basis to support a claim that filing a meritorious motion, other than those permitted in § 802.06(2)(a), in lieu of a required answer does not subject it to being in default.

¶10 In sum, Rock and Tait failed to join an issue of law or fact because it failed to address the factual and legal allegations in the complaint. It also failed to

file a responsive pleading permitted under the law, including WIS. STAT. § 802.06. As a result, the circuit court properly granted a default judgment.

II. Motion to enlarge time to answer the complaint

¶11 It is undisputed that Rock and Tait was required to serve an answer within twenty days after service of Schunk's complaint, and that Rock and Tait did not do so. *See* WIS. STAT. § 802.06. Instead, as explained above, Rock and Tait did not file an answer but instead filed, within twenty days of service, a motion to stay the proceedings pending compliance with WIS. STAT. § 895.07. Given this context, Rock and Tait contends the circuit court erroneously exercised its discretion in denying Rock and Tait's motion to enlarge the time within which to answer the complaint. Rock and Tait contends that its motion to enlarge time should have been granted because it had "promptly" filed a motion to stay and Schunk had no objection to the motion to enlarge time.

¶12 Time periods set by statute may be enlarged upon motion. *See* WIS. STAT. § 801.15(2)(a). "If the motion [to enlarge time] is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect." ***Id.*** Excusable neglect is conduct that might have been the act of a reasonably prudent person under the same circumstances—it is not the same as neglect, carelessness, or inattentiveness. ***Keene v. Sippel***, 2007 WI App 261, ¶8, 306 Wis. 2d 643, 743 N.W.2d 838. The power conferred upon the circuit court by § 801.15(2)(a) is highly discretionary. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982). We will not disturb a circuit court's decision under § 801.15(2)(a) unless an erroneous exercise of discretion is clearly shown. ***Id.*** at 470.

¶13 Rock and Tait has not shown the circuit court erroneously exercised its discretion when it found no excusable neglect in Rock and Tait's failure to timely file an answer. The circuit court found that "waiting that amount of time after having filed a motion, not an answer, a motion, is insufficient as far as [it was] concerned." Rock and Tait argues that its "prompt" filing of a motion to stay demonstrates excusable neglect. However, as explained above, Rock and Tait does not explain or cite any authority supporting the notion that its filing of a motion to stay in this context relieves it from serving an answer, or why it was reasonable for Rock and Tait to conclude as much. The circuit court correctly determined Rock and Tait's motion to stay did not raise a valid defense under WIS. STAT. § 802.06(2)(a), which is true regardless of whether an issue regarding compliance with WIS. STAT. § 895.07(2)(a) may have been meritorious. The defense should have been raised in a timely answer to the complaint. Further, Rock and Tait fails to explain how the court erroneously exercised its discretion in concluding Rock and Tait's delay of more than six months from the date its answer was due to file a motion to enlarge the time to answer was unreasonable. Moreover, the motion to enlarge the time to answer was filed three months after the default judgment motion, which was a consideration the court could reasonably rely upon.

¶14 Rock and Tait argues that Schunk did not oppose its motion to enlarge time and, therefore, the circuit court erroneously exercised its discretion in refusing to grant its motion. We fail to see how Schunk's response to Rock and Tait's motion to enlarge time had any bearing on whether Rock and Tait demonstrated excusable neglect in the first instance. Rock and Tait fails to cite any authority demonstrating that the fact that Schunk's lack of opposition to the motion to enlarge time should have affected the circuit court's discretion as to

whether to enlarge a defendant's time to answer.[4] The failure to answer is fatal unless excusable neglect is shown. *See* WIS. STAT. § 801.15(2)(a). Rock and Tait offers no other excusable neglect for its failure to file and serve an answer. We therefore conclude that the circuit court properly exercised its discretion in denying Rock and Tait's motion to enlarge the time to answer.

III. Damages

¶15 Lastly, Rock and Tait contends the circuit court erroneously exercised its discretion by awarding the amount of $28,648 as damages. The court, without allowing Rock and Tait an opportunity to present evidence or additional argument as to damages, awarded Schunk both the amount he paid to Rock and Tait for the original roof replacement ($9,488) and the amount Schunk paid to the second contractor for the second roof replacement ($19,160). Rock and Tait contends this total award is an amount greater than allowed by law, and it places Schunk in a better position than if the contract had been performed. Rock and Tait contested the damages during the default judgment hearing, and it contends it was therefore entitled to a hearing to determine damages, even following the grant of a default judgment. *See* ***Smith v. Golde***, 224 Wis. 2d 518, 530, 592 N.W.2d 287 (Ct. App. 1999). In ***Golde***, we reasoned:

> Under § 806.02, STATS., upon the entry of a default judgment, the court may hold a hearing or inquiry to determine damages. If the defendant contests the amount of damages, he may appear at the hearing to assess damages, cross-examine the plaintiff's witnesses, and present evidence to mitigate or be heard as to the diminution of damages. ... [T]he trial court need not hold a hearing if the amount of damages are alleged in the

[4] Schunk did not affirmatively withdraw his motion for default judgment but, rather (and understandably), stated he would withdraw his motion if the circuit court enlarged the time for Rock and Tait to answer.

> complaint and the defendant fails to contest the amount. If additional proof is necessary, however, the court may hold a hearing, and the defendant has the right to participate and present evidence on his behalf.

Id. (citations omitted). Because Rock and Tait contested the damages, the court erroneously exercised its discretion in failing to hold a hearing on damages before determining the damages in the default judgment.

¶16 In addition, we can conclude on this record that the circuit court erroneously exercised its discretion by awarding Schunk $28,648 in damages. A party aggrieved by a breach of contract is entitled only to a remedy that puts him or her in as good a position as if the contract had been fully performed. ***Champion Cos. of Wis. v. Stafford Dev., LLC***, 2011 WI App 8, ¶11, 331 Wis. 2d 208, 794 N.W.2d 916. One measure of damages is the cost of repair. ***Id.***, ¶12. Another measure of damages is the diminished property value calculation, which is "the difference between the value the building would have had if properly constructed and the value that the building does have as constructed." ***Id.*** (quoting ***W. G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc.***, 62 Wis. 2d 220, 226, 214 N.W.2d 413 (1974)). Here, the circuit court simply awarded Schunk both the amount he paid to Rock and Tait and the cost to replace the roof a second time. That appears to be in excess of an amount that will put Schunk in as good a position as if the contract had been fully performed by Rock and Tait. Rock and Tait correctly argues the amount awarded is a windfall to Schunk, who would effectively receive a free roof under the default judgment.

¶17 In all events, we agree that Rock and Tait is entitled to a hearing on damages at which the court is to determine the appropriate measure and amount of damages. We therefore reverse and remand for a hearing on damages.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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