

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 2008

David R. Schanker
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. 2007AP1376

Cir. Ct. No. 2006CV10863

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MANCHESTER VILLAGE OWNERS ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

v.

VLADIMIR KALUGIN AND IZOLDA KALUGIN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 KESSLER, J. Vladimir and Izolda Kalugin appeal from a default judgment granted in favor of Manchester Village Owners Association, Inc. (“Manchester”). They argue that the trial court erroneously exercised its

discretion when it denied their motion to enlarge the time to answer the complaint and when it granted the default judgment. Because the Kalugins failed to file a WIS. STAT. § 806.07 (2005-06)¹ motion for relief from the default judgment, we conclude that they waived their right to challenge the judgment. We also reject the Kalugins' request that we reverse the judgment in the interest of justice. We affirm the judgment and remand to the trial court for a determination of reasonable appellate attorney fees incurred by Manchester responding to this appeal.

BACKGROUND

¶2 At the outset, we note that counsel for the Kalugins asserts that the Kalugins are Russian immigrants with limited English speaking ability and no ability to read English. Although the Kalugins did not file affidavits asserting these facts and never appeared in court, we will assume for purposes of this opinion that these representations are correct.

¶3 The Kalugins purchased a condo unit in Manchester Condominium Village and moved in on July 28, 2006. As condominium unit owners, the Kalugins became members of the Manchester Village Owners Association, Inc. and were required to abide by the condominium Declaration and Bylaws. Manchester asserts that as members, the Kalugins were required to supply certain information to Manchester. This included completing an Owner Information form, a Certificate of Voting form, and a form identifying the holder of the mortgage on their unit. The information Manchester sought included identification of the owner of record, identification of the people living in the unit,

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

vehicle information, emergency contact numbers, designation of a representative for voting purposes, the unit owner's name and current mailing address, and any mortgage holders of the unit.

¶4 According to Manchester, it sent multiple letters asking the Kalugins to complete the forms. The third letter, which is in the record, was dated September 22, 2006. It stated that Manchester had twice previously asked the Kalugins to complete necessary forms and paperwork. It sought an answer by September 25.

¶5 The fourth letter, dated September 27, 2006, gave the Kalugins forty-eight additional hours to contact Manchester about the forms. It indicated that if no action was taken, Manchester would immediately initiate legal action, and that Manchester's attorney fees, court costs and other fees would be the Kalugins' responsibility.

¶6 The fifth letter, dated October 19, 2006, was sent directly from Manchester's counsel to the Kalugins. It provided references to the Declaration and Bylaws, explaining what information the Kalugins were required to provide. It provided additional copies of the forms. It gave the Kalugins until October 30, 2006, to complete and return the forms to Manchester. It indicated that unless the deadline was met, legal action would be taken. The letter explained that pursuant to the attached Second Amendment to Restatement of Declaration (hereafter, "Declaration"), the Kalugins would be responsible for legal fees Manchester incurred attempting to enforce the reporting requirements.

¶7 The Kalugins failed to respond to any of the letters or file the necessary paperwork. On November 7, 2006, Manchester filed a summons and complaint seeking a declaratory judgment that the Kalugins had to file the

paperwork, and an injunction requiring them to do so. It also sought actual attorney fees, costs and disbursements pursuant to the Declaration. This complaint was personally served on both of the Kalugins on November 15, 2006.

¶8 According to Manchester, the Kalugins filed the completed paperwork on November 16, 2006, the day after they were served. Thus, the only remaining issue in the lawsuit was payment of the attorney fees Manchester incurred to induce the Kalugins to complete their paperwork.

¶9 There are assertions in the record that the Kalugins on their own, and then through counsel, attempted to negotiate a settlement of the attorney fees with Manchester in November 2006 and January 2007. No agreement was reached.

¶10 The next court filing in this matter occurred on April 10, 2007, when Manchester moved for default judgment. The motion acknowledged that the Kalugins had, after being served, filled out the requisite paperwork. The motion sought \$4,288.50 for attorney fees, costs and disbursements. The motion hearing was scheduled for May 29, 2007.

¶11 On May 7, 2007, counsel for the Kalugins filed a notice of appearance.² Counsel asked for the motion hearing to be rescheduled to allow time to file a brief opposing the default judgment and a motion to extend time to file an answer. The hearing was rescheduled for June 7, 2007.

¶12 On May 29, 2007, the Kalugins' attorney filed a document entitled "Defendant's [sic] Opposition to Plaintiff's Motion for Default Judgement [sic]

² This was a different attorney than the one who attempted to negotiate a settlement for the Kalugins in January 2007.

and Defendant's [sic] Motion to Enlarge Time to File Answer Pursuant to Sec. 801.15(2)(a) Wis. Stats." The filing included assertions about why the Kalugins failed to respond to the litigation and to the requests to complete the paperwork. It asserted that the Kalugins do not speak or read English, that Izolda Kalugin is very ill and is unable to leave her home, and that Manchester should have given the Kalugins their documents written in Russian, given that the Kalugins and many of their condominium neighbors speak Russian.

¶13 On June 1, 2007, Manchester filed a reply brief in support of its motion for default judgment and opposing the Kalugins' motion to enlarge time to file an answer. It also provided argument on why it was entitled to attorney fees.

¶14 On June 6, 2007, the day before the scheduled hearing on Manchester's motion for default judgment, the Kalugins filed an answer. On June 7, 2007, counsel for the parties appeared for the hearing. At the outset, counsel for the Kalugins indicated that he was very ill and asked for an adjournment. It was agreed the matter would be set for four days later, at 8:30 a.m. Monday.

¶15 On Monday, June 11, 2007, at 8:41 a.m., the case was called. Neither the Kalugins nor their counsel appeared. The court granted Manchester's motion for default judgment, noting that Manchester had "put in ample proof to support that judgement [sic]." With respect to the motion to enlarge time to answer, the trial court stated that if counsel for the Kalugins had appeared, the trial court was going to deny the motion.³ The trial court said it did not believe the Kalugins' language barrier was a sufficient reason not to answer, explaining that

³ Both parties interpret the trial court's comments as a denial of the motion to enlarge time to answer. We agree with this interpretation.

the burden is on the Kalugins “to take appropriate measures to understand what’s happening to them legally, in spite of their language barrier.” Default judgment was granted, awarding Manchester \$4,288.50 in actual attorney fees, costs and disbursements.

¶16 According to the court docket notes, counsel for the Kalugins appeared at 8:50 a.m. The notes state:

Court was hearing a different matter at this time, but went off the record to inform [counsel] that his case had already been heard and a Default Judgment was granted against his clients. [Counsel] informed the Court that he called and left a message that he was running late. Court informed [counsel] that today’s court date was scheduled per his request and he should have been here on time. The Default Judgment stands.

¶17 The next day, the Kalugins filed a notice of appeal. They did not file a WIS. STAT. § 806.07 motion seeking relief from judgment. In August and September 2007, they moved to modify the record on appeal (by adding affidavits not filed before the default judgment was granted) and to stay enforcement of the judgment pending the appeal. The trial court denied those motions.

DISCUSSION

¶18 The Kalugins argue that the trial court erroneously exercised its discretion when it: (1) denied the Kalugins’ motion to enlarge time to file their answer; and (2) granted Manchester’s motion for default judgment. They also seek reversal of the default judgment in the interest of justice.

¶19 In response, Manchester argues that the trial court properly exercised its discretion and that reversal is not warranted. Manchester also asserts it is

entitled to appellate attorney fees pursuant to the Declaration that allowed it to receive actual attorney fees for the trial court proceedings.

¶20 The parties argue the merits of the default judgment and the motion to enlarge time to answer. However, we need not reach those issues, because we conclude the Kalugins waived their right to challenge the judgment, and the nonfinal orders entered prior to it, by failing to file a WIS. STAT. § 806.07 motion seeking relief from the judgment.⁴ See *Olson v. Dunbar*, 149 Wis. 2d 213, 218-

⁴ WISCONSIN STAT. § 806.07 provides in relevant part:

Relief from judgment or order. (1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released or discharged;
- (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
- (g) It is no longer equitable that the judgment should have prospective application; or
- (h) Any other reasons justifying relief from the operation of the judgment.

(continued)

19, 440 N.W.2d 792 (Ct. App. 1989) (challenge to default judgment deemed waived because party failed to move trial court to reopen default judgment, which would have allowed trial court to exercise discretion).

¶21 “A decision to vacate a default judgment is addressed to the discretion of the trial court.” *Id.* This court may not exercise the discretion that is solely vested in the trial court. *Id.* at 219. Here, the Kalugins never afforded the trial court the opportunity to exercise discretion. The court did not hear argument on why the default judgment should be reopened, or the Kalugins’ argument, mentioned numerous times in their brief, that their counsel’s tardiness on the day the default was granted should have been excused. The Kalugins’ failure to move to reopen is fatal. We conclude their challenge to the default judgment is waived. *See id.*

¶22 In addition, because we deem the Kalugins’ challenge to the default judgment waived by the Kalugins’ failure to move to reopen the judgment, we decline to address the Kalugins’ challenge to the denial of their motion to enlarge time to answer. *See id.* at 218-19 (dismissing a variety of issues where party failed to seek relief from default judgment in the trial court).

(2) The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

¶23 The Kalugins also seek reversal pursuant to WIS. STAT. § 752.35, which permits us to grant relief if we are convinced “that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” We conclude that relief is not justified in this case. Any failure to proceed to a factfinding hearing in this case lies with the Kalugins, who failed to file an answer for nearly six months after they were served.

¶24 The court is sympathetic to the practical problems faced by immigrants to our country who do not, on their arrival, understand, speak, read or write English. The parents and grandparents of many current residents of Wisconsin fit into that category. But coming to a new country does not absolve our immigrants from the responsibility for taking reasonable steps to understand the meaning of documents they receive in the mail, or which are hand delivered to them.

¶25 The Kalugins argue that justice has miscarried because they have been ordered to pay \$4,288.50 in attorney fees, costs and disbursements. Yet the Kalugins were notified, on more than one occasion, prior to the commencement of the lawsuit, that they would be responsible for attorney fees associated with filing suit to compel them to sign the requisite condominium documents. At the outset, those fees were surely less than \$4,288.50, but Manchester incurred additional fees as the Kalugins attempted to negotiate a settlement of the fees, then opposed the motion for default judgment and moved to enlarge the time to answer. Now, having failed to preserve the right to contest the default judgment by filing a WIS. STAT. § 806.07 motion for relief from judgment, the Kalugins may be liable for additional attorney fees, as we address below. This is extremely unfortunate, especially because the original goal of the lawsuit—getting the Kalugins to sign the requisite paperwork—was accomplished the day after they were served.

However unfortunate the circumstances, we do not believe that justice has miscarried and we decline to reverse in the interest of justice.

¶26 The only remaining issue is that of appellate attorney fees. Manchester asserted in its response brief that it is entitled to them and the Kalugins offered no response in their reply brief. Manchester appears to be entitled to attorney fees pursuant to the Declaration. Generally, attorney fees are not limited to fees incurred at trial, but include appellate fees as well. *See Radford v. J.J.B. Enters. Ltd.*, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991) (allowing appellate attorney fees where party was awarded attorney fees at trial court). We remand to the trial court for a determination of reasonable appellate attorney fees incurred by Manchester responding to this appeal.

By the Court.—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

