COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0254

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

YASMIN HORVATH,

PLAINTIFF-RESPONDENT,

V.

CRAIG E. MILLER, ESQ.,
MILLER & STANSBURY, S.C.,
JAMES B. CHASE,

DEFENDANTS,

COLLOPY & COMPANY, INC.
N/K/A SOUTH BEACH CAPITAL
MARKETS INCORPORATED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Remanded*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. South Beach Capital Markets Incorporated appeals from the circuit court judgment confirming an arbitration award of $175,000 to Yasmin Horvath and amending the caption of the case to change the defendant's name from "Collopy & Company, Inc." to "Collopy & Company, Inc. n/k/a South Beach Capital Markets Incorporated," and from the order denying its motion to vacate that judgment. South Beach argues that its failure to appear at the hearing on the motion to confirm the award and amend the caption was the result of excusable neglect and, further, that the motion to vacate should have been granted in the interests of justice. South Beach asks this court to conclude that the circuit court erred in amending the caption or, in the alternative, to remand the case to the circuit court, directing it to vacate the judgment and remand to arbitration.

¶2 Because the appellate record reveals a significant factual dispute about what occurred at the arbitration hearing, and because resolution of that dispute may be reached with review of a transcript of that hearing, and because resolution of that dispute, in all likelihood, will prove pivotal in resolving the issues on appeal, we remand this case to the circuit court for amplification of the record and further consideration of South Beach's motion to vacate the judgment.

I. BACKGROUND

¶3 Almost all the facts relevant to resolution of this appeal are undisputed. Horvath, after being awarded a substantial investment portfolio as damages in settlement of a personal injury lawsuit, lost virtually all she had recovered, due to alleged improprieties related to management of the portfolio. Horvath then filed the action underlying this appeal, against her attorney and his law firm, and against James B. Chase and his company, Collopy & Company, Inc., to whom her attorney had referred her for investment advice and management.

Horvath claimed: professional negligence against her attorney; intentional misrepresentation against Chase; and intentional misrepresentation against Collopy & Company, under the doctrine of respondeat superior.

¶4 Chase, the investment broker who handled Horvath's account, had purchased Collopy & Company from John F. Collopy in 1995. Chase owned Collopy & Company during the period relevant to Horvath's claims, and then sold the company back to Collopy in 1997. In 1999, Collopy & Company changed its name to South Beach Capital Markets Incorporated.

¶5 John F. Collopy was not named as a defendant in Horvath's action. He also was not a lawyer. As president of Collopy & Company, however, he did file a letter with the circuit court titled, "Response to Facts Applicable to All Claims." In his letter, Collopy stated, among other things:

> From July, 1995 through May, 1997 Mr. Chase was the owner of Collopy & Company inc.[1] as well as, I presume, an officer and director.
>
> ….
>
> … I am not sure if [defendant] Collopy is an individual, or the corporation, but certainly Collopy, the individual, has no responsibility for any of the claims.
>
> ….
>
> In reading the complaint, as it pertains to Collopy & Company inc., it seems that Mr. Chase and Collopy & Company inc. are one and the same during the period referenced in plaintiff's charges.
>
> I am responding as the current principal of Collopy & Company inc. since Mr. Chase is no longer associated with [the] firm.

[1] The stationery on which John F. Collopy generated his letter, as well as all his references to his company, use a lower-case "i" in "inc." Throughout this opinion, we will use "inc." or "Inc." according to the exact references in the record.

(Footnote added.)

¶6 The court record of the early stages of the Horvath suit, while extensive with respect to other defendants, includes nothing about Collopy or his company, except for his above-referenced letter response. On July 29, 1998, however, approximately three months after the Horvath complaint was filed, Collopy again wrote to the circuit court, stating that he "was not the owner of [Collopy & Company inc.] during the relevant time period," and enclosing "a letter from Mr. Chase's attorney confirming that fact." The enclosed letter, from Chase's attorney to Collopy, stated:

> Jim Chase has brought it to my attention that you have been receiving copies of pleadings and other papers in this matter. I have mistakenly sent you copies of these documents because Collopy & Company is a party to the lawsuit. It is my understanding that Jim Chase owned Collopy & Company during the relevant time period. As long as you have not been formally served with a Summons and Complaint in this case, you can ignore the correspondence I have sent you. I have taken you off our mailing list so you should receive no further papers from this law firm.
>
> If you continue to receive papers from other counsel of record, you may want to notify them that you are not a party to this suit.

Accordingly, in his letter, Collopy advised the court: "Therefore, I am requesting that my name, if it is included, be removed from these proceedings." The record includes no response to Collopy's request, from the court or any party.

¶7 On September 1, 1998, the circuit court issued a decision denying Chase's motion to dismiss the action against him, but granting Chase's motion to compel arbitration. The order concludes, in part: "THIS COURT ORDERS that this action is stayed and FURTHER ORDERS arbitration to resolve Yasmin

Horvath's claims against James Chase." The order says nothing about arbitration with respect to Collopy & Company.

¶8 The record then contains nothing directly related to Collopy & Company until two letters from Collopy to the court—the first filed on March 18, 1999, the second on November 30, 1999. The March letter, written on "COLLOPY & COMPANY inc." stationery, advised the court, "The attorneys involved in the [Horvath action] agree that it is not necessary that I be in attendance at the March 19, 1999 schedule hearing either in person or by telephone." The letter was signed, "John F. Collopy[,] COLLOPY & COMPANY inc." The November letter, written on "SOUTH BEACH CAPITAL MARKETS INCORPORATED" stationery, advised the court, "Collopy & Company inc. has changed its name to South Beach Capital Markets Incorporated." It provided the address, in Florida, for South Beach, and then closed by saying, "As an aside we are not sure why we're included in this mailing." The letter was signed, "John F. Collopy[,] President."

¶9 Horvath's action against her previous attorney and his firm was settled, and the attorney and his firm were not involved in the arbitration. Although the circuit court's order for arbitration referred only to "Horvath's claims against James Chase," both Collopy & Company and John F. Collopy ultimately were named as respondents in the arbitration proceedings. What exactly took place at the arbitration, regarding John Collopy's participation, remains in dispute.

¶10 According to the arbitration "Award" document of NASD Dispute Resolution, Inc.: (1) "Respondent[] … John F. Collopy, 'J. Collopy[,'] … appeared pro se"; and (2) "Respondent, Collopy & Company, Inc., 'Collopy &

Co.[,'] was not represented by counsel and was not represented at the hearing. James B. Chase represented Collopy & Co. prior to the hearing." The "Award" also reflects that "J. Collopy" filed a "Statement of Answer" and signed the "Uniform Submission Agreement." Further, the "Award" states:

> The Panel denied the Motion[] to Dismiss of Respondent[] … J. Collopy. J. Collopy renewed his Motion twice, and the Panel denied the Motion each time.
>
> Claimant filed a Motion to Bar Respondent Collopy & Co. from Presenting any Facts or Defenses at the Hearing. The Panel denied this Motion. Additionally, Claimant filed a Motion to add South Beach Capital as a Respondent[.] The Panel denied this Motion, and, upon Claimant's renewal of the Motion, denied it a second time.
>
> On or about April 17, 2000, Claimant settled all outstanding claims against each remaining Respondent except J. Collopy and Collopy & Co….
>
> Claimant withdrew all claims against J. Collopy prior to the hearing and proceeded to hearing with claims outstanding only against Collopy & Co.
>
> Respondent, Collopy & Co., was not represented at the hearing. However, the Panel finds that Collopy & Co. received service of the Statement of Claim and proper notice of the hearing. Therefore, Collopy & Company, Inc. is bound by the determination of the Panel on all claims in the Statement of Claim.

¶11 Thus, while the appellate record fails to explain some of the procedural history and fails to clarify why and in what capacity Collopy ultimately appeared at the arbitration, the record seems to establish at least three facts of significance to this appeal: (1) John Collopy came to be considered as a separate respondent who appeared at the arbitration hearing, only to have all claims against him withdrawn; (2) Collopy & Company, somehow "represented" by Chase prior to the arbitration hearing, was not represented by anyone at the arbitration; and (3) South Beach was not added as a party at the arbitration hearing. What remains in dispute, however, is the nature of John Collopy's participation at the arbitration

hearing and, specifically, the communication between him and the arbitration panel at the hearing.

¶12 According to Collopy's affidavit:

> What happened is that I flew up from Florida to Milwaukee for the arbitration hearing. When I got to the arbitration, I was told by one of the panelists that the claimant had dismissed the case against me. I was also told that Jeffrey Dean, the NASD case administrator in Chicago should have contacted me before the hearing to tell me not to come. I was told I could leave.
>
> … Before I left, I said to the arbitration panel that I didn't want this turned around against my company, South Beach Capital Markets[—]that I wanted to confirm that South Beach Capital Markets was not going to be named in the arbitration. One of the panelists said "that's right." The lawyer for the claimant didn't say anything. I think this is when the panel denied the motion to add South Beach Capital Markets a second time.
>
> ….
>
> … I am not a lawyer. I believed that the denial, twice, of a motion to add South Beach Capital Markets, Incorporated meant that South Beach Capital Markets, Incorporated would not be adversely affected by the arbitration and would not have a judgment entered against it based on the arbitration. I relied on the arbitrator's statements that I could leave and that South Beach Capital Markets, Incorporated would not be named.

¶13 James J. Eccleston, co-counsel for Horvath regarding the arbitration, disputed Collopy's account of what took place at the arbitration hearing. According to Eccleston's affidavit:

> The arbitration hearing took place on July 24, 2000[,] from approximately 9:00 a.m. to 3:00 p.m., and Mr. Collopy was present for the entire hearing.
>
> ….
>
> … At the arbitration (and previously), Mr. Amato [Horvath's co-counsel regarding the arbitration] and I made a motion to add South Beach as a separate respondent (defendant). We erroneously believed, based on records from the SEC, that South Beach was a separate entity from

> Collopy & Co.[,] but that South Beach was potentially liable as a successor in interest to Collopy & Co.
>
> … We believe the arbitrators denied our motion to add South Beach as a distinct defendant because it would have delayed the hearing to add a separate defendant and institute proper service and notice again.
>
> … Mr. Collopy implies in his affidavit that one of the three arbitrators (whom he fails to identify) confirmed to him that South Beach would not be adversely affected by any adverse arbitration award against Collopy & Company. That did not happen. No arbitrator ever told Mr. Collopy that South Beach (or Collopy & Company) was not going to be affected adversely by the arbitration award.
>
> … In fact, at the arbitration hearing I personally made clear to the arbitration panel and to Mr. Collopy that claimant fully intended to make every effort to collect any award rendered in her favor, including proceeding against South Beach.
>
> … Mr. Collopy was present when I made the above-mentioned statements. He never asked for a continuance. He never asked permission to hire counsel, either for himself, for Collopy & Co., or for South Beach.

¶14 After the arbitration, Horvath filed a motion in the circuit court to confirm the arbitration award, and to amend the case caption to reflect that Collopy & Company had changed its name to South Beach Capital Markets Incorporated. Collopy received notice of the motion setting the hearing for October 23, 2000. Instead of coming to court or having counsel appear for South Beach, however, Collopy wrote a letter to the court, dated October 17, 2000, stating, in part:

> On Wednesday, October 11, 2000, … as I was leaving town for 5 days, I was served with a "Notice of Motion and Motion for Confirmation of Arbitration Award and Motion to Amend Caption[."] I returned today and have just read this Motion.
>
> ….
>
> I am aware of the arbitration, … as I was named in the original complaint. However, I am not aware of any amount awarded to the Plaintiff since I was dismissed from the proceedings by the Plaintiff and my firm, South Beach

> Capital Markets Incorporated [(SBC)], was not named in the proceedings. [Counsel for the plaintiff] seems to believe that SBC is a proxy for Collopy & Company inc. and is liable for the award.
>
> This implication seems disingenuous since in Exhibit "A" to [plaintiff's counsel's] Affidavit under "Other Issues Considered and Decided[,"] the Panel did not believe that SBC and Collopy & Company inc. were the same since it twice denied a motion by the Plaintiff to name SBC as a Respondent….
>
> This is a long-winded response to [plaintiff's counsel's] Motion. It is impossible for either my representative or me to be in your court on such short notice. If you think our presence would be beneficial, we will make every effort to do so, but it will have to be at a later date. Not being a member of the Bar, I am curious? Does a Milwaukee Circuit Court have jurisdiction over a Florida corporation?

¶15 When no one appeared for Collopy & Company, then known as South Beach Capital Markets Incorporated, at the October 23 hearing, the circuit court granted the motion to confirm the arbitration award and amend the caption and, on November 3, 2000, entered judgment to that effect. Subsequently, in a motion filed on December 8, 2000, South Beach, represented by counsel, moved to vacate the judgment. In his brief in support of the motion to vacate, counsel for South Beach, drawing on Collopy's affidavit, wrote:

> The judgment is based upon an arbitration award that issued **after** the arbitrators denied a motion by plaintiff/claimant Yasmin Horvath to add South Beach to the arbitration, and **after** the arbitrators told South Beach's president, John Collopy, that Collopy was not needed and could leave the arbitration, and **after** the arbitrators assured Collopy that South Beach would not be added to the arbitration once he left.
>
> … According to the arbitration award, Collopy & Company, inc. did not appear at the hearing, but that statement is not entirely accurate, because John Collopy had been present until he was told he could leave….
>
> John Collopy, the president of South Beach, was present at the commencement of the arbitration. Collopy had also been named as a respondent in the arbitration,

> although he had not been named as a defendant in this action.… Collopy flew up from Florida to Milwaukee for the arbitration hearing; however, when he arrived at the arbitration, he was told by one of the arbitrators that the plaintiff/claimant had dismissed the case against him. He was also told that Jeffrey Dean, the NASD case administrator in Chicago, was supposed to have contacted him before the hearing to tell him not to come to Milwaukee. **The arbitrators told Collopy that he could leave**.
>
> ….
>
> When the arbitrators told Collopy he could leave, Collopy first confirmed that if he left, South Beach would not be added to arbitration after he left. Before he left, Collopy said to the arbitration panel that he didn't want this "turned around" against his company, South Beach[—]that he wanted to confirm that South Beach was not going to be named in the arbitration. One of the arbitrator panelists said, "That's right." The lawyer for the claimant did not say anything. The award recites that twice the panel denied motions to add South Beach.…
>
> John Collopy is not a lawyer. He believed that the denial, twice, of a motion to add South Beach as a party to the arbitration meant that South Beach would not be adversely affected by the arbitration and would not have a judgment entered against it based on the arbitration. Collopy relied on the arbitrator's statements that he could leave and that South Beach would not be named.
>
> ….
>
> … The plaintiff/claimant did not name Collopy personally in this … action, and although the plaintiff/claimant did name Collopy personally in the arbitration, the plaintiff/claimant later voluntarily dismissed Collopy from the arbitration. Thus, when the arbitrators denied the motions to add South Beach, told Collopy he could leave, and stated that South Beach would not be added, Collopy reasonably believed that neither he nor his corporation, South Beach, would be adversely affected by the arbitration.

(Citations omitted.)

¶16 Peter K. Richardson, Horvath's counsel, in his brief opposing South Beach's motion to vacate, reiterated what Attorney Eccleston had expressed in his affidavit, countering Collopy's claim. Attorney Richardson wrote: "No arbitrator

ever told Mr. Collopy that Collopy & Co. was not going to be affected adversely by the arbitration. No arbitrator ever told Mr. Collopy that South Beach was not going to be affected adversely by the arbitration." (Citations omitted.)

¶17 At the December 18, 2000 hearing on South Beach's motion to vacate, the lawyers' oral arguments opened additional areas of uncertainty about exactly what transpired at the arbitration hearing. Counsel for South Beach, while maintaining that Collopy and the arbitrators communicated with each other, twice commented that Collopy "did not participate" in the arbitration hearing.[2] Counsel for Horvath asserted that Collopy's affidavit "makes up things that supposedly give him a basis for thinking that he didn't have to show up [at the October 23, 2000 hearing]" and, further, that Collopy "was present for the entire [arbitration] hearing." Thus, these additional thick clouds obscure our view of whether Collopy participated in the arbitration hearing at all, and whether Collopy, if given permission to leave, actually did leave before the hearing concluded.

¶18 Denying the motion to vacate, the circuit court concluded that South Beach had not established excusable neglect for its failure to appear at the hearing on Horvath's motion to confirm the arbitration award and amend the case caption. The court explained, "I don't understand how I could conceivably find excusable neglect" because South Beach's failure to appear "was a willful act," as reflected by Collopy's letter. In particular, the court noted that Collopy's letter failed to explain *why* Collopy could not appear.

[2] In his brief to this court, Horvath's counsel writes, "Although he was present for the [arbitration] hearing and no longer personally named as a defendant, Mr. Collopy … did not participate in the arbitration."

II. DISCUSSION

¶19 A circuit court has authority to exercise discretion to relieve a party from a judgment because of the party's "excusable neglect" in not attending a hearing. *See* WIS. STAT. § 806.07(1)(a) (1999-2000);[3] ***Johns v. County of Oneida***, 201 Wis. 2d 600, 607, 549 N.W.2d 269 (Ct. App. 1996). Under "extraordinary circumstances," a court also may exercise discretion to grant such relief for "[a]ny other reasons justifying relief from the operation of the judgment." *See* WIS. STAT. § 806.07(1)(h); ***Eau Claire County v. Employers Ins. of Wausau***, 146 Wis. 2d 101, 109, 430 N.W.2d 579 (Ct. App. 1988). We will not disturb a circuit court's determination of whether a party's failure to appear should be excused, absent the court's erroneous exercise of discretion. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). The exercise of discretion involves a process of reasoning which draws on the relevant facts of record and renders a conclusion based on sound logic and proper legal standards. ***Id***. at 542. Where, however, it appears that the circuit court made its determination without an adequate factual foundation, this court may remand the case for the circuit court's "further findings and conclusions." ***Darryl T.-H. v. Margaret H.***, 2000 WI 42, ¶¶37-38, 234 Wis. 2d 606, 610 N.W.2d 475.

¶20 "Excusable neglect," under WIS. STAT. § 806.07(1)(a), is defined as what a reasonably prudent person might have done under the same circumstances. ***J.L. Phillips & Assocs. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 362 n.5, 577 N.W.2d 13 (1998). "[O]ther reasons justifying relief," under § 806.07(1)(h), are

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

measured by whether "extraordinary circumstances exist which justify relief in the interests of justice." ***Johns***, 201 Wis. 2d at 607. Here, it is undisputed that South Beach's failure to appear at the hearing on the motion to confirm the arbitration award and amend the case caption was connected to Collopy's assessment of whether South Beach was a party that could be affected by the arbitration award, and whether his assessment was reasonable. Whether Collopy's assessment was reasonable depends, in turn, on: (1) the nature and extent of Collopy's participation at the arbitration hearing; and (2) the exact communication between Collopy and the arbitrators.

¶21 While we recognize the possible merit of Horvath's argument that, regardless of Collopy's assessment, he had little if any excuse for merely responding to the motion with his letter to the court, we conclude that, in this case, fairness requires further scrutiny of the underlying facts. After all, Collopy had been communicating with the court by letter, without counsel. He had consistently maintained contact with the court and the parties. He may have had reason to believe that South Beach might not be affected by the arbitration. And he did promptly advise the court that he would not be able to appear at the hearing on the motion to confirm and amend.

¶22 Thus, conceivably, a reasonably prudent person in Collopy's position might have believed that a letter, expressing what Collopy conveyed in his letter of October 17, 2000, would either result in an adjournment or elicit a

response from the court or counsel.[4] Whether that is so, however, may depend on exactly what transpired at the arbitration hearing.[5]

¶23 Accordingly, we conclude that it is appropriate to remand this matter to the circuit court for its consideration of the record of the arbitration hearing. Upon reviewing that record, in combination with all the other relevant facts and circumstances, the circuit court shall determine whether South Beach's failure to appear at the hearing on the motion to confirm and amend may be excused, under either WIS. STAT. § 806.07(1)(a) or (h), such that South Beach would be relieved from the judgment.[6]

By the Court.—Cause remanded.

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

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[4] We do not retreat from the proposition that a letter stating that one cannot appear does not, standing alone, establish excusable neglect. *See* ***Buchanan v. Gen. Cas. Co.***, 191 Wis. 2d 1, 11, 528 N.W.2d 457 (Ct. App. 1995) ("A party cannot choose to not appear in court by pronouncing that unless it hears from the court otherwise, it deems itself excused. [This] is insufficient to excuse a party from appearing and … is a dangerous practice."). In the instant case, however, we are mindful that Collopy, never represented by counsel, had always communicated with the court by letter and, further, had appeared at the arbitration hearing where, he says, he received important assurances on which he had relied.

[5] Horvath's counsel, in argument before the circuit court on South Beach's motion to vacate, protested, "[Collopy's affidavit says that he] didn't get a copy of the [arbitration] hearing transcript[; the hearing is] taped[. H]e could have gotten a copy of the record of the hearing. He didn't do that." We appreciate counsel's frustration. On balance, however, we think it best to now allow for production of that record in order to assure a full and fair opportunity for the circuit court's consideration.

[6] At this point, of course, we do not address the additional arguments the parties have presented regarding whether, on the merits, the arbitration award against South Beach should stand.