COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2011AP2796 **Cir. Ct. No. 2011CV1037**

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

BANK FIRST NATIONAL,

PLAINTIFF-RESPONDENT,

V.

BRUCE A. GERONDALE,

DEFENDANT-APPELLANT,

UPPER PENINSULA STATE BANK, BROWN COUNTY, WISCONSIN DEPARTMENT OF REVENUE, ASSOCIATED BANK NATIONAL ASSOCIATION AND CITIBANK SOUTH DAKOTA NA,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Bruce Gerondale, pro se, appeals a foreclosure judgment. We conclude the circuit court properly entered judgment against Gerondale as a result of his failure to respond to Bank First National's summary judgment motion as required by the court's scheduling order. We also conclude the court properly denied Gerondale's motion to reopen. Accordingly, we affirm.

¶2 On April 26, 2011, Bank First National commenced a foreclosure action against Gerondale under the terms of a note and mortgage. On June 23, 2011, the circuit court issued a notice of telephone scheduling conference for September 1. The scheduling order provided that Bank First National "file motion(s) within 30 days" and also scheduled a calendar call for October 17, 2011.[1]

¶3 On September 8, 2011, Bank First National submitted its motion for summary judgment, together with an affidavit and brief in support. On September 12, the Honorable Mark Hammer, sua sponte, recused himself from the case, and the Honorable Mark Warpinski was assigned.

¶4 On September 15, 2011, Judge Warpinski issued a "Briefing Format & Scheduling Order," acknowledging Bank First National's summary judgment motion and ordering Gerondale's response brief be filed on or before October 14, 2011. The order indicated the matter would be decided on the briefs, and also stated:

> ** Noncompliance with this Briefing Procedure and Schedule may be the basis for the imposition of sanctions

[1] Gerondale submitted a scheduling conference statement dated August 31, but which was filed on September 7. Gerondale was apparently involved in the scheduling conference by telephone.

> including dismissal, striking of papers, imposition of terms, and such other appropriate sanctions.

¶5 Gerondale failed to respond to Bank First National's summary judgment motion. On November 2, 2011, the court entered Findings of Fact, Conclusions of Law and Judgment of Foreclosure.

¶6 On November 9, 2011, Gerondale filed a letter with the circuit court asserting:

> I was researching my case on CCAP on Thursday and noticed a default judgment was issued in reference to my case with Bank First National. I was not aware of anything scheduled after Judge Marc Hammer released himself from [t]he case."

¶7 Gerondale also contended he was "unaware of any scheduling, because I never received notice." The circuit court construed Gerondale's letter as a motion to reopen, and scheduled a hearing for November 30, 2011.

¶8 At the hearing, Gerondale conceded notices of court proceedings were sent to his home address, and that he was living at that address. However, Gerondale stated he had "difficulties with my ex-wife picking up most of my mail. That's why I don't have any mail going to that address except, you know, miscellaneous junk mail." Gerondale also asserted that he corresponded with Bank First National's attorney and "requested that they send all the notification to my business address at that point."

¶9 Bank First National entered into evidence as Exhibit 1 an internal memorandum prepared by its attorney following the telephone scheduling conference on September 1. The memo stated in part as follows:

> Mr. Gerondale has requested that all mailings be sent to him at his office rather than his residence. The Court directed Mr. Gerondale to take the steps needed in order to officially change his address with the Clerk of Court if he so chooses.

¶10 Gerondale conceded he had not contacted the clerk of courts to change his address. When asked if he was told by the court to do that, Gerondale replied: "I wasn't aware of that, no."

¶11 The following colloquy then ensued:

> THE COURT: How did you find out to be in contact with Judge Hammer for the scheduling conference?
>
> THE DEFENDANT: On CCAP.
>
> THE COURT: So you just looked it up on CCAP and discovered you were supposed to be there?
>
> THE DEFENDANT: Well, I've been following it, kind of regularly looking at it because I just look at making sure that I wasn't missing any dates or anything.

¶12 The circuit court found a lack of excusable neglect to reopen the judgment. Gerondale now appeals.

¶13 A circuit court has discretion to render a judgment by default for failure to comply with a scheduling order. *See* ***Gaertner v. 880 Corp.***, 131 Wis. 2d 492, 497, 389 N.W.2d 59 (Ct. App. 1986). Whether to grant relief from judgment is also a decision within the discretion of the circuit court. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We will not reverse a discretionary determination if the record shows discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Id.***, ¶30**.** We generally look for reasons to sustain a court's discretionary decision. ***Id.***

¶14 We conclude the circuit court properly exercised its discretion. It is undisputed that proper notices of court proceedings were sent to Gerondale's

home address. As the court observed, Gerondale offered no actual evidence that he had trouble receiving mail at his home address, or that he had notified the clerk of courts of a change of address. Although Gerondale claimed he was "not aware" that he was to notify the clerk's office of a change of address request, and that he checked CCAP regularly to be sure he did not miss court dates, the circuit court essentially disbelieved him. Indeed, the court noted that if Gerondale had regularly checked CCAP as he stated, he would have noticed Bank First National's summary judgment submissions and the court's scheduling order requiring him to file a response within thirty days of the date of the scheduling order.

¶15 Moreover, the circuit court's ruling is also correct because Gerondale failed to make any showing of a meritorious defense to the circuit court, a necessary element before relief from judgment may be provided in the context of excusable neglect. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 67, 257 N.W.2d 865 (1977).

¶16 Nevertheless, Gerondale insists Judge Hammer knew or should have known that the judge represented his ex-wife in their divorce proceedings, and therefore Judge Hammer was required to recuse himself immediately upon being assigned the present case, pursuant to WIS. STAT. §§ 757.19(2)(g) and (4).[2] According to Gerondale:

> Any and all scheduling, directions, decisions, and rulings that were made by Judge Hammer's court are null and void due to the statutory requirement that he must have recused himself as of April 27, 2011 …. [T]he action must be

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> unwound to the beginning thus returning Mr. Gerondale to the position that he was in on April 27, 2011. Therefore, it follows that anything that was issued by Judge Hammer and was then utilized by the new Judge, Judge Warpinski, is also null and void.

¶17 Gerondale failed to raise these issues in the circuit court, and we generally do not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Regardless, the disqualification statute, WIS. STAT. § 757.19(2), establishes seven situations in which a judge shall disqualify himself from an act or proceeding. Paragraph (g) requires disqualification "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." The judge's determination in this regard is subjective. *See* ***Sharpley v. Sharpley***, 2002 WI App 201, ¶16, 257 Wis. 2d 152, 653 N.W.2d 124.[3] The present case was therefore not a mandatory recusal situation.

¶18 Moreover, Gerondale fails to demonstrate how a delay in Judge Hammer's recusal caused him to treat Gerondale unfairly, or in any way prejudiced Gerondale. Judge Hammer merely entered a scheduling order requiring the filing of motions by a date certain. Gerondale was specifically aware of this scheduling conference, as he submitted a scheduling conference statement, but did not request Judge Hammer recuse himself or move for his disqualification. In addition, there is nothing to suggest that Gerondale's failure to comply with

[3] Gerondale relies upon WIS. STAT. § 757.19(4) to contend that Judge Hammer was required to recuse himself when the factors creating disqualification under WIS. STAT. § 757.19(2)(g) first became known to the judge. Gerondale insists Judge Hammer was required to recuse himself when the case was first assigned to him. However, Gerondale's premise is invalid. The decision to disqualify under § 757.19(2)(g) is subjective, therefore Judge Hammer was not required to disqualify himself when the case was first assigned to him.

Judge Warpinski's subsequent scheduling order had anything to do with Judge Hammer.

¶19 Gerondale also argues that Judge Warpinski should have recused himself because Judge Warpinski was also involved in a prior matter involving Gerondale, and therefore "prejudged" him. However, Gerondale has made no showing of judicial bias or partiality by Judge Warpinski. We also note Gerondale never requested that Judge Warpinski recuse himself, or moved for his disqualification.

¶20 There is a presumption that a judge is free of bias and prejudice. ***State v. McBride***, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). Here, Gerondale essentially requests a holding that as a matter of law circuit judges who sat on prior cases involving a party cannot preside in a subsequent proceeding involving that party. Such a position is contrary to Wisconsin law.

By the Court.—Judgment affirmed.

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