COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2227 **Cir. Ct. No. 2008CV650**

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

RUTH ANNE PECHA AND EDWARD A. PECHA,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

GREGORY S. MIERS, AUTO CLUB INSURANCE ASSOCIATION - MICHIGAN, OPERATING ENGINEERS LOCAL 139 HEALTH BENEFIT FUND AND AUTO-OWNERS INSURANCE COMPANY,

DEFENDANTS,

BANK OF AMERICA CORPORATION,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Barron County: JAMES D. BABBITT, Judge. *Reversed and cause remanded*.

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

¶1 PER CURIAM. Bank of America Corporation appeals a default judgment awarding Ruth and Edward Pecha $450,000 in their personal injury suit. Bank of America argues the circuit court erroneously rejected its motion to vacate the default judgment. Bank of America further argues it is entitled to a new damages hearing. Ruth and Edward Pecha cross-appeal, arguing the court erroneously capped the amount of their damages. We hold that the circuit court applied an erroneous legal standard when determining whether to vacate the default judgment. We therefore reverse and remand for the court to reconsider whether to reopen the case. In light of our reversal, we do not reach the parties' respective arguments concerning damages.[1]

BACKGROUND

¶2 The Pechas sued Gregory Miers, his insurer, and his employer. The Pechas alleged Miers was negligent with respect to a motor vehicle accident that injured Edward. The Pechas later amended their summons and complaint to substitute Bank of America as Miers's employer.[2] Bank of America failed to answer, and the Pechas obtained a default judgment against it on December 9, 2009.[3] The judgment was for $450,000, which was the amount requested in the Pechas' affidavit in support of their motion for default judgment.

[1] *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[2] Bank of America was further identified with a "doing business as" designation.

[3] Prior to default judgment, the case against Miers and his insurer settled for $100,000.

¶3 The Pechas served notice of the default judgment by certified mail on December 11. The notice was sent to both the Bank's legal department and its designated agent for service of process. Bank of America's legal department received the notice of default judgment on December 17. Bank of America further acknowledged it had "actual notice" by January 10, 2010.

¶4 On August 9, 2010, Bank of America moved to vacate the default judgment and to enlarge the time to file an answer or, in the alternative, to allow it to challenge the amount of damages. The motion to vacate was premised on WIS. STAT. § 806.07(1)(a), (1)(d), and (1)(h).[4] Among other things, the motion asserted the Bank had never employed Miers. Following a hearing, the court issued a written decision denying the motion to vacate, holding that the motion was not filed within a reasonable time as required by § 806.07(2). However, the court allowed Bank of America to conduct discovery and challenge the amount of damages. Damages were found to be in excess of $900,000, but the court held the Pechas were limited to the amount requested in their motion for default judgment. Ultimately, a judgment was rendered for $450,000, plus costs and interest. Both parties now appeal.

DISCUSSION

¶5 Bank of America argues the court erroneously denied its WIS. STAT. § 806.07 motion to vacate the default judgment. Our review of a decision on a motion to vacate is limited to the question of whether there has been an erroneous exercise of discretion. ***State ex rel. Cynthia M.S. v. Michael F.C***, 181 Wis. 2d

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

618, 624, 511 N.W.2d 868 (1994). "The term 'discretion' contemplates a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards." ***Id.*** As relevant here, § 806.07 provides:

> **(1)** On motion and upon such terms as are just, the court, subject to subs. (2)[,] … may relieve a party ... from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> ….
>
> (d) The judgment is void;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.
>
> **(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.

¶6 At the motion hearing, Bank of America explained that some investigatory actions were taken following receipt of the notice of default judgment. However, counsel acknowledged, "I think at some point there was delay because it—the best response I have to it, that it fell through … the cracks …."

¶7 In the circuit court's decision denying Bank of America's motion, it reasoned:

> It is beyond dispute that a threshold question, prior to consideration of the merits of a [WIS. STAT.] § 806.07(1) claim, whether brought under subsections (a), (d), or (h), is that the motion to reopen be made within a reasonable time. [WIS. STAT.] § 806.07(2).
>
> ….

> In the instant case, [Bank of America] waited 7-8 months before filing an answer and the motion to reopen. They claim only that because of [their] large size …, the paperwork "slipped between the cracks."
>
> ….
>
> This court finds that the excuse of the paperwork "slipping between the cracks" is woefully insufficient and does not meet the "reasonableness" requirement of § 806.07(2). As such, the motion must be denied.
>
> As such, this court need not address the merits of the defense claims that the judgment is void, that extraordinary circumstances exist or that [Bank of America's] failure to timely answer was justifiable due to "mistake or excusable neglect."

¶8 We agree with Bank of America that, pursuant to ***Cynthia M.S.***, the circuit court erred by considering only whether the length of, and reason for, the delay was reasonable. The WIS. STAT. § 806.07(2) "reasonable time" standard differs depending on which paragraph of subsection (1) it is applied to.[5] When, as here, a party's motion is based on paragraph (1)(h), the court must consider additional relevant factors. *See* ***Cynthia M.S.***, 181 Wis. 2d at 627-28.

¶9 Motions under WIS. STAT. § 806.07(1)(h) must satisfy both substantive and time criteria. ***Cynthia M.S.***, 181 Wis. 2d at 625. With respect to the substantive inquiry, courts apply an "extraordinary circumstances" test to determine whether relief is justified in the interests of justice. ***Id.*** at 625-26. Regarding the reasonable time inquiry, courts are required to conduct "a case by case analysis of all relevant factors." ***Id.*** at 627.

[5] Indeed, the WIS. STAT. § 806.07(2) "reasonable time" requirement is inapplicable to motions under paragraph (1)(d) if the underlying judgment is void. ***Neylan v. Vorwald***, 124 Wis. 2d 85, 100, 368 N.W.2d 648 (1985). While here Bank of America also sought relief under subsection (1)(d), it argues only that the court erred with respect to subsection (1)(h). We therefore do not rely on ***Neylan*** as a basis for reversal.

¶10 "What factors are 'relevant' to the reasonableness inquiry will of course vary from case to case." ***Id.*** "In some instances, such factors will include those 'extraordinary circumstances' which justify relief on substantive grounds." ***Id.*** at 628. "[T]he two analyses, while separate, cannot be completely divorced." ***Id.*** Regardless, in every case, a court must consider more than just the reasons for the moving party's delay. ***Id.*** at 627. "[A]ny credible evaluation of a motion's timeliness will necessarily [also] consider … the prejudice visited upon the non-moving party." ***Id.***

¶11 Further, in ***Cynthia M.S.***, the court explicitly rejected an argument that under ***Rhodes v. Terry***, 91 Wis. 2d 165, 280 N.W.2d 248 (1979), the reasonable time requirement was "a 'threshold' analysis completely independent from the 'extraordinary circumstances' test …." ***Cynthia M.S.***, 181 Wis. 2d at 630. The court explained, "In fact, to the degree that ***Rhodes*** is relevant at all to this discussion, it supports our view that 'reasonableness' can only be determined after a thorough review of all relevant facts." ***Id.***[6]

¶12 Here, the court treated the reasonable time requirement as a threshold analysis without considering any prejudice to the Pechas or addressing whether any other factors were relevant. For whatever else one can say about the ***Cynthia M.S.*** decision, this much is clear: a court must consider the issue of prejudice to the nonmoving party. *See* ***id.*** at 627. The court therefore erroneously exercised its discretion by applying an improper legal standard. *See* ***id.*** at 624.

[6] In ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 620-22, 511 N.W.2d 868 (1994), a delay exceeding ten years was found to satisfy the reasonable time standard.

¶13 We generally have a duty to determine whether the record supports a circuit court's discretionary decision. ***S.P.A. ex rel. Ball v. Grinnell Mut. Reins. Co.***, 2011 WI App 31, ¶14, 332 Wis. 2d 134, 796 N.W.2d 874. However, "'there are cases where independent review may be too onerous for the appellate court to undertake, or may be inappropriate under the circumstances presented.'" ***Id.***, ¶16 (quoting ***State v. Hunt***, 2003 WI 81, ¶45 n.14, 263 Wis. 2d 1, 666 N.W.2d 771). Because the court applied an improper legal standard, it would be inappropriate here to independently determine whether Bank of America's motion was brought within a reasonable time. Since the case-specific standard was treated as a threshold inquiry, the record is inadequately developed. The parties did not present any evidence concerning prejudice to the Pechas, or otherwise develop their respective positions concerning any additional factors, if any, that were relevant to the inquiry.

By the Court.—Judgment reversed and cause remanded.

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