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DISTRICT II

December 26, 2024

To:

Hon. David W. Paulson
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Rudolph J. Kuss
Electronic Notice

Michael West
Electronic Notice

Steffanie West
12008 Rising Oaks Dr. E.
Jacksonville, FL 32223

You are hereby notified that the Court has entered the following opinion and order:

2023AP248 Johnnie Mielcarek v. Michael West (L.C. #2020CV1159)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael and Steffanie West appeal from the circuit court's denial of their motion to reopen a default judgment against them. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] Because the Wests did not file their motion within the prescribed statutory timeframes and have not shown that extraordinary circumstances merit reopening their case outside of those timeframes, we summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Johnnie and Ashley Mielcarek filed a civil complaint in 2020 against the Wests due to defects in a chimney on real property sold to the Mielcareks by the Wests. The Mielcareks allege that the Wests intentionally misrepresented the chimney's condition in the Real Estate Condition Report. A professional process server filed an affidavit of service saying that she served the Mielcareks' complaint on Michael West personally at his North Carolina home. The circuit court granted a $48,046.05 default judgment in the Mielcareks' favor when the Wests did not respond to the complaint within the forty-five-day statutory period. *See* WIS. STAT. § 802.06(1)(a).

The Wests filed a motion to reopen the case and for relief from judgment in the circuit court two years after that judgment had been entered. They argued that the process server had not personally delivered the Mielcareks' complaint, contrary to the affidavit of service; that the Wests had meritorious defenses against the Mielcareks' claims; and that liberally construing WIS. STAT. § 806.07 justified reopening the case.

The circuit court orally denied the Wests' motion to reopen as untimely. The court noted the presumption of proper service based on the affidavit of service. The court also noted that the improper service allegedly occurred more than two years prior to the motion to reopen, and it went on to say that motions to reopen filed under WIS. STAT. § 806.07 must be brought within a reasonable time. *See* § 806.07(2). The court emphasized that motions to reopen ordinarily cannot be brought more than one year after the judgment was entered unless, under § 806.07(1)(h), there is a reason justifying release from judgment. The court concluded that the Wests failed to file their motion within a one-year timeframe and that no reason justified releasing the Wests from the judgment.

The Wests appeal, asserting that (1) the complaint was improperly served because the process server failed to personally serve Michael West; (2) that they had a meritorious defense against the Mielcareks' claims by virtue of a chimney inspection report; (3) and that they are entitled to relief from the judgment because they were not notified about the complaint and the default, their late response was made promptly and in good faith, and the Mielcareks and their attorney have acted in bad faith throughout the case.

Orders denying relief under WIS. STAT. § 806.07 are reviewed for erroneous exercise of discretion. *See* ***Thoma v. Village of Slinger***, 2018 WI 45, ¶11, 381 Wis. 2d 311, 912 N.W.2d 56. We will affirm discretionary rulings when the circuit court has examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

To determine whether the Wests are entitled to relief under WIS. STAT. § 806.07, we first assess whether the Wests have rebutted the presumption of proper service. We then turn to whether the Wests' motion to reopen was timely. Finally, we examine whether extraordinary circumstances justify reopening the default judgment under § 806.07(1)(h)'s catch-all provision.

The Wests have not shown that the circuit court erroneously exercised its discretion by concluding that the Wests had been presumptively served. An affidavit of service is entitled to a presumption of correctness. ***Culver v. Kaza***, 2021 WI App 57, ¶15, 399 Wis. 2d 131, 963 N.W.2d 865; *see also* WIS. STAT. § 891.18. "If the affidavit sets forth prima facie evidence of proper service, the defendant must provide proof that clearly and satisfactorily disputes the facts set forth." ***Culver***, 399 Wis. 2d 131, ¶15.

The Wests "vehemently dispute[]" that Michael West was served at his home, but they provide scant evidence to rebut the server's affidavit. They merely rely on Michael West's affidavit stating that service was impossible because he was "pick[ing] up a sandwich on his way home" at the time of service identified by the process server. This affidavit was the only evidence the Wests submitted attempting to rebut the presumption of service. The circuit court did not regard West's averments as sufficient to rebut the presumption of service, characterizing West's assertions as merely arguing that he never accepted service. Given the lack of evidence establishing nonservice, we cannot say that the court erroneously exercised its discretion by holding that the Wests failed to rebut presumption of service under WIS. STAT. § 891.18.

Having addressed presumption of service, we now turn to the timeliness of the Wests' WIS. STAT. § 806.07 motion. Motions to reopen based on "[m]istake, inadvertence, surprise, or excusable neglect" must be filed no "more than one year after the judgment was entered." Sec. 806.07(1)(a) and (2). Since the Wests filed their motion to reopen two years after the judgment was entered, they are time-barred from reopening the case under § 806.07(1)(a). Therefore, their motion can only be timely under the catch-all provision of § 806.07(1)(h).

Motions filed under WIS. STAT. § 806.07(1)(h) are not subject to the "more than one year" restriction; instead, they must be made within a reasonable time. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶9, 282 Wis. 2d 46, 56, 698 N.W.2d 610. The defendant's intelligence is one factor courts use to determine whether it was unreasonable for the defendant to not reply to a summons promptly. ***Rhodes v. Terry***, 91 Wis. 2d 165, 174, 280 N.W.2d 248 (1979). Section 806.07(1)(h) permits courts to reopen a case for "[a]ny other reasons justifying relief from the operation of the judgment," but it is appropriately used only in extraordinary circumstances, where "the sanctity of the final judgment is outweighed by 'the incessant command of the court's

conscience that justice be done in light of *all* the facts,'" ***Mogged v. Mogged***, 2000 WI App 39, ¶13, 233 Wis. 2d 90, 607 N.W.2d 662 (per curiam) (quoted source omitted).

Courts consider the following five factors to determine whether extraordinary circumstances exist:

> [W]hether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

State ex rel. M.L.B. v. D.G.H., 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985). The defendant has the burden of showing how these factors apply. *See* ***Connor v. Connor***, 2001 WI 49, ¶28, 243 Wis. 2d 279, 627 N.W.2d 182 (citing ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977)).

The circuit court did not erroneously exercise its discretion when it held that the judgment could not be reopened under WIS. STAT. § 806.07(1)(h). First, the Wests did not file their motion within a reasonable time, even under the more permissive framework of § 806.07(1)(h). The motion to reopen was filed two years after the judgment was entered. The Wests justify the time lapse by arguing that they only found out that judgment had been entered after a lien on their North Carolina home was discovered in 2022. Michael West, however, sent a letter to the circuit court and the Mielcareks' attorney in October 2020 arguing against entering judgment, and the Wests merely assumed that the case had been dropped based on that letter. Michael West is an intelligent person: his own affidavit points out his degrees, which include a doctorate in higher education; that he has had multiple leadership positions in universities across

the country; and that he previously worked as a meteorologist. Therefore, the circuit court properly exercised its discretion by concluding that someone with West's intelligence should have followed up from a court notice promptly rather than sit on a case for two years under the assumption that a single letter had resolved it. *See* ***Rhodes***, 91 Wis. 2d at 174; ***Martindale***, 246 Wis. 2d 67, ¶28.

Even if the Wests had filed their motion to reopen within a reasonable time, the circuit court did not erroneously exercise its discretion by denying the Wests' motion because the Wests' briefing inadequately addressed the five WIS. STAT. § 806.07(1)(h) factors. The Wests' arguments for applying subsec. (1)(h) focus on their claimed meritorious defense to the action and intervening circumstances. Specifically, as intervening circumstances, the Wests cite improper service; good faith behavior on their part; and that the Mielcareks and their counsel created procedural irregularities.

These intervening circumstances are not so extraordinary as to warrant reopening the case. *See* ***State ex rel. M.L.B.***, 122 Wis. 2d at 553-54 (holding that extraordinary circumstances existed in a paternity case where it was shown that the plaintiff lied to the court, the defendant was not told about his right to consult an attorney or have a blood test conducted before signing a paternity agreement, and a blood test conclusively showed that the defendant was not the father of the plaintiff's child). First, the Wests, as explained above, have not rebutted the presumption of service. *See* WIS. STAT. § 891.18. Second, the Wests' supposed good-faith efforts came after two years of neglecting to follow up on the case against them. Third, the Wests have failed to demonstrate that the Mielcareks created procedural irregularities. *Cf.* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶58, 326 Wis. 2d 640, 785 N.W.2d 493 (holding that extraordinary circumstances justified reopening a case where plaintiff's counsel and circuit court staff had

demonstrably created procedural irregularities). Even if we assume that the chimney inspection report supports a meritorious defense against the Mielcareks' claims, the Wests' argument for how the other four factors apply is undeveloped.

Based upon the foregoing,

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals