COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1049-FT

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

J & W INSTRUMENTS, INC.,
a Minnesota Corporation,

Plaintiff-Respondent,

v.

TURBO INSTRUMENTS, INC.,

Defendant-Appellant.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Turbo Instruments, Inc., appeals a postjudgment order that denied its § 806.07, STATS., motion to vacate a $31,100.12 judgment in favor of J & W Instruments, Inc.[1] The trial court issued the judgment after

[1] This is an expedited appeal under RULE 809.17, STATS.

Turbo failed to respond to J & W's motion for judgment on the pleadings on its lawsuit for breach of contract and Wisconsin Fair Dealership Law violations. Turbo moved to vacate the judgment on the ground that it never received notice of J & W's motion for judgment on the pleadings and many other key J & W trial court filings.

Turbo claimed that this made its failure to respond the result of inadvertence, surprise, mistake, and excusable neglect. Turbo also alleged that J & W's original pleadings did not establish a substantive legal right to judgment. The trial court rejected Turbo's arguments, finding that Turbo had received all documents in the original proceedings. On appeal, Turbo argues that the trial court misjudged the evidence. We reject Turbo's arguments and affirm the postjudgment order.

Turbo could reopen the original proceedings if it showed inadvertence, surprise, mistake, or excusable neglect. *See* § 806.07, STATS. The trial court's decision was discretionary. ***Schauer v. DeNeveu Homeowners Ass'n***, 194 Wis.2d 62, 70, 533 N.W.2d 470, 473 (1995). Here, the trial court correctly exercised its discretion. Its finding that Turbo received all documents was not clearly erroneous. ***Fryer v. Conant***, 159 Wis.2d 739, 744, 465 N.W.2d 517, 519-20 (Ct. App. 1990). For many documents, J & W submitted direct testimony and office record entries specifically identifying documents that J & W's counsel mailed to Turbo and the dates that counsel mailed them. J & W also provided extensive evidence of its counsel's standard office practice on document mailing and litigation correspondence. This evidence circumstantially proved that J & W's counsel's mailed and Turbo received all documents. *See* ***State ex rel. Flores v. State***, 183 Wis.2d 587, 612, 516 N.W.2d 362, 370 (1994).

Further, Turbo executed a certified mail return receipt that acknowledged receipt of one document. This supplied additional circumstantial proof that Turbo received all documents J & W sent by ordinary mail. It verified that J & W had the correct address for Turbo and that documents had found their way through the U.S. postal system to Turbo. Taken together, J & W's evidence permitted the trial court to reject Turbo's general manager's categorical testimony that Turbo never received the documents. Despite Turbo's unqualified denial, the trial court could rationally conclude from J & W's evidence that Turbo more likely received the documents.

As a result, the trial court's finding was not clearly erroneous. In sum, the trial court had no duty to reopen the merits of the lawsuit.

We also reject Turbo's attempt to vacate the judgment on the ground that the trial court wrongly granted J & W judgment on the pleadings, in violation of Wisconsin's rules of civil procedure. *See* § 802.06(3), STATS. Turbo states that the trial court erroneously disregarded a bona fide defense Turbo had raised in its answer to J & W's complaint. Turbo also states that J & W provided Turbo untimely notice of the precise amount of damages it sought to recover, in violation of the procedural deadlines applicable to motions for judgment on the pleadings, and committed other procedural violations. According to Turbo, these issues gave it a legal basis to collaterally attack the judgment by postjudgment trial court motion. On the untimely notice issue, Turbo partially relies on the decision in ***Stein v. Illinois State Assistance Commission***, 194 Wis.2d 775, 535 N.W.2d 101 (Ct. App. 1995).

Turbo's arguments seek to use the merits of the judgment themselves as grounds to vacate the judgment. Turbo's arguments essentially seek to litigate the propriety of the trial court's decision, in the first instance, to grant J & W judgment on the pleadings. These arguments can be raised only in an appeal from the judgment. They supply no basis to collaterally attack the judgment by postjudgment motion. Neither prejudgment bona fide defenses nor prejudgment procedural defects provide grounds, by themselves, for a collateral attack. In order to sustain a collateral attack, Turbo needed to show one of the threshold factors under § 806.07 that would predicate a collateral attack, such as inadvertence, surprise, mistake, or excusable neglect. Inasmuch as Turbo did not show inadvertence, surprise, mistake, excusable neglect, or some other collateral attack threshold factor, we and the trial court have no obligation to consider these arguments further.

In addition, ***Stein*** does not support Turbo's position. In ***Stein***, the plaintiff obtained a default judgment without providing the defendant any notice of the specific amount of damages it sought to recover. The ***Stein*** court ruled that the absence of prejudgment notice made the default judgment void and that the defendant could collaterally attack the judgment on that basis. Here, Turbo claims that just as the ***Stein*** plaintiff's failure to give prejudgment notice permitted a collateral attack, J & W's decision to give untimely prejudgment notice likewise permitted a collateral attack. We read ***Stein***

differently. ***Stein*** concerned the total failure of notice, not mere delay in notice. We see nothing in ***Stein*** requiring courts to equate delayed prejudgment notice with no prejudgment notice as a judgment nullifier. In short, Turbo lost its chance to allege untimely prejudgment notice when it failed to appeal the judgment.

By the Court.—Order affirmed.

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