COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1442 **Cir. Ct. No. 2002CV10617**

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

CYNTHIA SANCHEZ AND WILLIAM SANCHEZ,

PLAINTIFFS-RESPONDENTS,

WILLIAM SANCHEZ, JR., CHRISTIAN A. SANCHEZ AND MARISELA Y. SANCHEZ,

PLAINTIFFS,

UNITED HEALTHCARE OF WI, INC. AND BLUE CROSS BLUE SHIELD OF ALABAMA,

INVOLUNTARY PLAINTIFFS,

V.

FINLAY FINE JEWELRY CORP.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

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

¶1 CURLEY, J. Finlay Fine Jewelry Corporation appeals from a final judgment entered in favor of William and Cynthia Sanchez, after the trial court entered a default judgment against Finlay and held a damages hearing, awarding the Sanchezes $101,000 plus taxable costs and interest. Finlay contends that: (1) default judgment was not appropriate since a New York court issued an order enjoining parties to lawsuits against Finlay from applying for judgments; (2) Finlay should have been granted relief from default judgment because its failure to timely answer resulted from excusable neglect; and (3) it should have been granted an enlargement of time within which to answer. Because the trial court properly exercised its discretion in finding that Finlay's failure to timely answer was not justified by excusable neglect, and in implicitly finding that the New York order does not apply here, we affirm.

I. BACKGROUND.

¶2 On October 31, 2002, the Sanchezes filed a complaint against Finlay asserting damages resulting from injuries that were allegedly incurred when Cynthia slipped and fell while shopping.[1] Finlay was effectively served with the

[1] Finlay is a foreign corporation headquartered in New York that operated a jewelry counter in a Boston Store located in Milwaukee.

summons and complaint on November 8, 2002.[2] When Finlay failed to timely file an answer to the complaint, the Sanchezes moved for default judgment in February 2003. After the February 24, 2003 hearing was adjourned at Finlay's request, over the Sanchezes' objection, the motion was eventually heard on March 31, 2003, at which time the trial court denied Finlay's motion to enlarge the time within which to answer and granted the Sanchezes motion for default judgment.

¶3 What happened between November 2002 and February 2003, however, is the heart of the matter. The Sanchezes heard nothing from Finlay from the day they served the complaint until six days after Finlay was served with the motion for default, which was approximately three months later. On that day, February 12, 2003, according to the Sanchezes' counsel, an attorney from Finlay contacted her and requested that a copy of the summons and complaint be faxed to him. After local counsel was retained on Finlay's behalf, an answer was finally filed on February 21, 2003.

¶4 From the affidavits supplied by Finlay, it appears that once the complaint reached Bonni Davis, Finlay's Vice President, Secretary and General Counsel, on November 14, 2002, it was forwarded to Finlay's insurance broker,

[2] Though both the trial court and Finlay refer to November 14, 2002, as the date on which Finlay was served, presumably because that is the date on which Bonni G. Davis, the Vice President, Secretary, and General Counsel of Finlay asserts that she received a copy of the summons and complaint, it appears that the complaint was initially served on National Corporate Research, Ltd., Finlay's statutory agent for service of process in Wisconsin, on November 8, 2002. It appears that the Sanchezes used the November 8 date in calculating the requisite forty-five-day time period. In any event, because the motion for default judgment was filed well after the forty-five-day deadline, the exact date of service—whether it be November 8 or 12—is irrelevant.

MLW Services, Inc.[3] After receiving the complaint on December 4, 2002, MLW immediately forwarded it to Reliance Insurance Company,[4] Finlay's insolvent insurance carrier.[5] At that point, Finlay asserts that it did not hear anything more about the case until it received the motion for default judgment in February.

¶5 In her affidavit, Davis asserts that she forwarded the motion for default judgment to MLW on February 14, 2003. The affidavit of MLW's employee, Dorothy Hall, indicates, however, that on February 13, 2003, she received a phone call from a Finlay employee, during which he informed her that he had received a motion for default judgment. Hall then contacted Reliance and was informed that GAB Business Services Co. had taken over responsibility for claims against Reliance's insureds. Accordingly, Hall's affidavit indicates that she sent a copy of the summons and complaint, and the motion for default judgment, to GAB on February 13, 2003.

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[3] It is not entirely clear from the affidavits, however, exactly who sent the complaint to MLW. In her affidavit, Davis indicates that on November 14, 2002, she sent the complaint to Finlay's Director of Benefits, Melanie Reilly, so that Reilly could send it to MLW. The affidavit of Dorothy Hall, an MLW employee, indicates that she received the complaint directly from Davis on December 4, 2002.

[4] The Hall affidavit also indicates that "[i]t is the standard procedure of [her] department to immediately for[ward] all summons and complaints of insureds to the insurance carrier."

[5] It appears that Reliance is domiciled in Pennsylvania, but was also licensed in New York as a property and casualty insurer, and conducted an insurance business in New York. In any event, the record indicates that Reliance was declared insolvent and placed in liquidation on October 3, 2001, more than a year before this action was filed.

Interestingly, Finlay also notes, in its reply brief, that "Reliance's liquidation is two to three times larger than any previous insolvency. In fact, commentators have noted that Reliance's liquidation is 'perhaps the largest insurance receivership in history.'" (Citation omitted.) Reliance's insolvency was well known.

¶6 On that same day, Leslie Lovell, an employee of GAB, asserts that she received a call from an MLW employee, Ken Thompson, informing her that a claim had been filed against Finlay and that a motion for default judgment had also been filed. After receiving the complaint and motion, Lovell sent the file to the State of New York Insurance Department Liquidation Bureau so that counsel could be assigned to handle the claim.

¶7 On Friday, February 21, 2003, Finlay's local (and appellate) counsel received a call from the Liquidation Bureau requesting assistance with this case. Finlay's attorney received the complaint and some other materials around noon of that day and filed an answer. Though the motion for default judgment was to be heard on Monday, February 24, 2003, it was adjourned at Finlay's request. Finlay also subsequently filed a motion to enlarge the time within which to answer.

¶8 In opposition to the motion for default and in support of its motion for enlargement of time, Finlay made a number of related arguments. Finlay noted that because of the complexity associated with Reliance's insolvency, a New York court had issued an injunction staying all actions against Reliance's policyholders, and the Liquidation Bureau had assigned all claims involving Reliance's insureds to GAB for handling. Finlay asserted, however, that it was unaware that all claims had been assigned to GAB, and thus forwarded the summons and complaint only to Reliance with the expectation that a response would be generated. Finlay insisted that because of the liquidation, the confusion surrounding the payment of claims, and the "unknown assignment of claims to GAB," the failure to timely answer was the result of excusable neglect. Moreover, Finlay argued that the trial court should enforce the injunction issued in New York, which Finlay claims prevents default judgments from being taken against Reliance's policyholders. Finlay insisted that the injunction's purpose was to ensure that the rights of

policyholders are adequately protected during the course of litigation, a matter of public policy also recognized by Wisconsin law, and that "principles of comity direct that [the trial court] should enforce the injunction" against the Sanchezes. Finally, Finlay asserted that it was entitled to an enlargement of time within which to answer the complaint, contending that the facts warrant a finding of "excusable neglect," it has a meritorious defense, and the Sanchezes have not been prejudiced by the short delay.

¶9 Though noting that it was a close case, the trial court did not find excusable neglect:

> You know, it's a very close case. If Reliance was here as a party, there's no question that they'd be out the door. They blew it big time, and there was no excusable neglect on their part. The question is whether there is such excusable neglect on the part of Finlay.
>
> The Court – you know, I don't think that the other grounds upon which you've requested the Court to enlarge the time to answer are compelling.
>
> But the only one that the Court is really reviewing is … the question of whether they have met the minimum standard of excusable neglect.
>
> And I think that it's true that the counsel for Finlay acted in good faith when they sent this along, and the fact that they didn't send it along immediately is not anything that we require of practitioners in the bar….
>
> But the fact is that there was very little follow up after that, and there was knowledge of the – as everyone has referred to it, the disarray of the insurance company at the time and for one year prior to the matter being sent on, and then it was not until after the motion for default that Finlay Jewelry decided they better pop up and get active again.

> And based on that, they've asked the Court to excuse their lack of response and to extend the time to answer until the time it was actually filed, which was February 21st, approximately two months beyond the deadline for answering.
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> And as I say, it's very close, but I don't think that this is excusable. I think that there has to be more to prove an action than just sitting on it and doing nothing.
>
> And proving action, in this Court's view, means that somebody really stayed minimally on top of the ball and found out before two months had passed that it was completely beyond the deadline.
>
> And that I would so find that also that Finlay is not without recourse. I think they were let down by their insurer, but they put themselves in a position to be let down by just not following through to see whether this company in total disarray was going to be able to be totally responsible.
>
> It's unlikely a company in that position would be totally responsible and timely, and I think an attorney in the practice of law, whether a litigator or not, would have to take those things into consideration and watch things a little closer.

A hearing was subsequently held to determine the amount of damages, and final judgment was entered. Finlay now appeals.

II. ANALYSIS.

¶10 Finlay contends that the default judgment was not appropriate because a New York court issued an order enjoining parties to lawsuits against Finlay from applying for judgments. It argues that the purpose of the injunction is to ensure that Reliance's policyholders, like Finlay, would be protected during the liquidation, and insists that by entering a default and permitting the case to proceed to a trial on damages, the trial court wrongfully elevated the interests of the Sanchezes above others making claims against Reliance's assets. Finlay also insists that although the Sanchezes chose to sue Finlay, and not its insurer, "this

tactical decision cannot, and does not, deprive Finlay from its right to call upon Reliance or its statutory successor to defend it from the Sanchezes' claims." Finlay maintains that comity dictates that the trial court should have honored the injunction:

> Because Finlay, as a policyholder of Reliance, falls squarely within the protections afforded by the New York injunction and because, as a policyholder of an insolvent insurer, it falls within the protections of the laws of New York, Pennsylvania, and Wisconsin, the [trial] court abused its discretion in failing to honor the New York injunction.

¶11 Finlay also argues that its failure to timely answer resulted from excusable neglect, and as such, the default motion should not have been granted. Finlay insists that Wisconsin public policy strongly favors giving litigants their day in court and that, here, there is no entitlement to a default judgment. Finlay asserts that "excusable neglect" does not require perfection, and a number of factors establish excusable neglect, including: (1) the temporary injunction entered by the New York court, which "created a sense of security that no adverse action could or would be taken against Reliance's insured that, in turn, establishes a reasonable basis for the acts and omissions leading to Finlay's untimely answer"; and (2) a convergence of unusual factors, most of which were beyond its control, that caused Finlay's usual procedure for dealing with legal process to fail.

¶12 A default judgment may be rendered if the defendant has not responded to the complaint within the requisite time period for doing so. *See* WIS. STAT. § 806.02 (2003-04).[6] "The decision to grant a default judgment is, like the decision to vacate a default judgment, addressed to the discretion of the trial court,

[6] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and should be reversed only upon [an erroneous exercise] of discretion." ***Martin v. Griffin***, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984) (citations omitted). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). "[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions." ***Id.*** at 591 (citation omitted). Thus, while the "trial court should bear in mind that the law views default judgments with disfavor[,]" we will affirm the trial court, "[e]ven if the evidence favoring a default judgment is slight[,] … unless it was impossible for the trial court to grant the judgment in the exercise of its discretion." ***Martin***, 117 Wis. 2d at 442.

¶13 The power to enlarge the time within which to answer a complaint is also a matter left to the discretion of the trial court. *See* WIS. STAT. § 801.15(2)(a),[7] ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982). Relief is warranted if the trial court

> finds reasonable grounds for noncompliance with the statutory time period (which the statute and this court refer to as excusable neglect) and if the interests of justice would be served by the enlargement of time, *e.g.*, that the party seeking an enlargement of time has acted in good faith and that the opposing party is not prejudiced by the time delay.

[7] WISCONSIN STAT. § 801.15(2)(a) provides, in relevant part:

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. … If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect.

Hedtcke, 109 Wis. 2d at 468. Excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" ***Id.*** (citation omitted). Excusable neglect is not just "'neglect, carelessness or inattentiveness.'" ***Id.*** (citation omitted).

¶14 We cannot conclude that the trial court erroneously exercised its discretion in denying Finlay's motion for enlargement of time, and granting the Sanchezes motion for default judgment. The trial court reasonably determined that Finlay's actions, in failing to follow up in light of the "disarray" of the insurance company, were not those that might have been the actions of a reasonably prudent person under the same circumstances. The trial court essentially concluded that, armed with the knowledge of Reliance's insolvency, carelessness and inattentiveness are really what plagued Finlay: "I think that there has to be more to prove an action than just sitting on it and doing nothing. … And proving action, in this Court's view, means that somebody really stayed minimally on top of the ball and found out before two months had passed that it was completely beyond the deadline." The trial court also noted that Finlay was not without recourse, and that although they were let down by their insurance company, "they put themselves in a position to be let down by just not following through to see whether this company in total disarray was going to be able to be totally responsible." A reasonable attorney, the trial court concluded, "would have to take those things into consideration and watch things a little closer." After a review of the record, it is clear that the trial court properly exercised its discretion when it reasonably concluded that Finlay had not established excusable neglect for

its failure to timely answer the complaint.[8] Though Reliance's actions, or lack thereof, are lamentable, Finlay's procedure for dealing with legal process apparently failed because nobody at Finlay or MLW followed up or paid any attention to the status of the complaint until it was too late.

¶15 We also find Finlay's assertion that "nothing in the record suggests Finlay had experienced any other problems with the handling of its claims or that it knew Reliance was in liquidation and/or not defending claims" unavailing. Reliance was insolvent for over a year before the Sanchezes filed their complaint. It is hard to believe that neither Finlay nor its insurance broker had any idea that Reliance had been insolvent for over a year. Indeed, Finlay conceded at the hearing that Dorothy Hall was aware that Reliance was insolvent at the time of her involvement with the suit.

[8] In support of its argument for excusable neglect, Finlay also cites two cases, ***Passarella v. Hilton International Co.***, 810 F.2d 674 (7th Cir. 1987), and ***Young v. Shull***, 385 N.W.2d 789 (Mich. Ct. App. 1986), in support of its contention that "courts in other jurisdictions have held that excusable neglect exists where an insured relies upon an insurer to answer a complaint." However, such a broad contention is hard to discern from the outcomes of these cases. Further, inasmuch as both cases are factually distinguishable and quite inapposite to the case at hand, they should not be applied to the facts here.

¶16 Finally, the trial court was presumably unpersuaded by the argument that the New York order prohibited the entry of default judgment in this case,[9] and a close reading of the injunction does indeed belie Finlay's argument in that regard. The New York order provides, in relevant part:

> All parties *to law suits* [sic] *in this state* are hereby enjoined and restrained from proceeding with any … application for judgment or proceeding on judgment or settlements in such actions at law, suits in equity … in which [Reliance] is obligated to defend a party insured … for a period of 180 days from the date of entry of this order.

That order was entered on December 14, 2001, and was renewed several times thereafter. Though Finlay concedes that the order is not a "model of clarity," it nonetheless contends that the principles of comity direct that the injunction should be enforced against the Sanchezes. However, the plain language of the order refers to lawsuits "in this state." "This state" is New York. Had the order omitted the words "in this state," the situation may have been quite different. Furthermore, any argument asserting that the existence of the injunction, and any potential reliance thereon, established excusable neglect ignores the basic fact that Finlay failed to follow through and stay even "minimally on top of the ball" until the default judgment motion was filed, almost three months after service of the summons and complaint, and the filing deadline had passed. Knowing that Reliance was insolvent, Finlay should have followed up on the complaint, and had the injunction been a viable consideration, it could or should have been raised as

[9] In rendering its decision, the trial court stated: "I don't think that the other grounds upon which you've requested the Court to enlarge the time to answer are compelling. But the only one that the Court is really reviewing is … the question of whether they have met the minimum standard of excusable neglect." The trial court did not directly address the argument that the New York order prohibited the entry of default judgment in this case, but it was implicitly rejected when the trial court granted the Sanchezes' motion.

an issue well before the default.[10] For these reasons, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[10] Moreover, the primary Wisconsin case Finlay relies upon for its comity argument, ***Isermann v. MBL Life Assurance Corp.***, 231 Wis. 2d 136, 605 N.W.2d 210 (Ct. App. 1999), a complicated and fact intensive case in which we concluded that principles of comity compelled us to follow a New Jersey court's rehabilitation plan, and honor the court's assertion of exclusive jurisdiction, in evaluating a Wisconsin policyholder's claim under a policy issued by a liquidated New Jersey insurance company, does not lead us to the same conclusion here. ***Isermann*** is factually distinguishable from this case. In ***Isermann***, the policyholder submitted a direct claim to the insurance company for disability coverage, and after the insurance company denied coverage under one of Isermann's policies, Isermann brought an action for breach of contract and bad faith refusal to pay benefits against the insurance company's rehabilitator several years later. ***Id.*** at 145. The insurance company had been placed in rehabilitation in New Jersey, during which time several orders were entered by the New Jersey court that, *inter alia*, ordered the rehabilitator to begin conducting the insurance company's business and enjoined all policyholders from bringing lawsuits against the insurance company or its rehabilitator. *See* ***id.*** at 143-44. Furthermore, under the rehabilitation plan, the New Jersey court retained exclusive jurisdiction to hear and determine all disputes that might arise between any "claim holder" and the insurance company, its rehabilitator, the liquidator, or "the Trusts." ***Id.*** at 144. In any event, after evaluating whether Wisconsin and New Jersey were "reciprocal states" in terms of their respective insurance rehabilitation and liquidation acts, the rehabilitation plan, and Isermann's arguments, we essentially concluded that the principles of comity barred the Wisconsin trial court from exercising jurisdiction over the claims in light of the New Jersey court's assertion of exclusive jurisdiction. Here, we are concerned with a lawsuit in which the Sanchezes sued Finlay, not Reliance, for damages resulting from injuries incurred when Cynthia slipped and fell while shopping. This is not a case based on a policyholder's claim against a liquidated insurance company, and no assertion of exclusive jurisdiction has been made by any court. We cannot stretch ***Isermann*** to the facts of this case.