COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1016 **Cir. Ct. No. 1998CV412**

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

DAVID W. AMES,

PLAINTIFF-RESPONDENT,

V.

GEORGE R. ATKINSON AND GREEN VALLEY FARMS, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. George R. Atkinson and Green Valley Farms, Inc., appeal from an order denying a motion to reopen a 2002 default judgment in favor of David W. Ames for over $4 million. Along with claims attacking the default

judgment, Atkinson argues that his motion for relief from judgment was timely filed and that he was denied due process when the circuit court decided his motion at a hearing noticed as a "status conference." We conclude that the circuit court did not erroneously exercise its discretion in denying the motion for Atkinson's failure to prosecute. However, in the interest of justice, we require the circuit court to correct error in the judgment's award of damages. Therefore, we reverse the order in part and remand the matter to the circuit court with directions.

¶2 The procedural history of this matter is long. It concerns the dissolution of a farming partnership, G & D Farms Partnership, between Ames and Atkinson. Atkinson ran income and expenses related to partnership farming operations through the bank account for his solely owned corporation, Green Valley Farms, Inc. When Atkinson failed to produce an accounting demanded by Ames, Ames commenced this action in June 1998 for dissolution of the partnership. In August 1999, Ames moved for partial default judgment declaring the partnership dissolved and requiring an accounting. The motion was granted on Atkinson's failure to answer. Ames filed an amended complaint seeking, in addition to dissolution of the partnership, damages for Atkinson's alleged fraudulent transfers of partnership assets to Green Valley, misappropriation by theft, including treble damages under WIS. STAT. § 895.80(3) (2003-04),[1] and embezzlement, including punitive damages for the breach of a fiduciary duty.

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

¶3 On December 1, 1999, Atkinson filed an answer to the amended complaint.[2] The parties engaged in discovery and discovery disputes arose. A December 2000 motion to compel discovery was granted and resulted in requests for admissions being deemed admitted because Atkinson failed to timely respond. In August and October 2001, Ames moved for discovery sanctions, including a default judgment, on the ground that Atkinson had not complied with the court's earlier order to respond to requests for the production of documents. A December 12, 2001 order granted Ames attorney fees and required Atkinson to produce a 1998 acreage report.

¶4 Atkinson's attorney moved to withdraw on April 1, 2002. The motion was heard April 30, 2002. Atkinson did not appear. An affidavit of mailing indicated that a copy of the motion was mailed to Atkinson's home at 3129 S. Madison Avenue, Beloit, Wisconsin. During the hearing, Atkinson's attorney explained that he had experienced "a pattern of less than full cooperation in this matter." He also explained that he had not heard from Atkinson when he demanded that the expert witness fees be paid and indicated that he might be required to withdraw if payment was not made. At the time of the hearing, the case was set for trial commencing July 15, 2002. The motion to withdraw was granted and a status conference was set for June 11, 2002. The order required the parties to appear personally or through counsel at the status conference and included the proviso that "[i]f either party fails to appear as above, then the Court may entertain default motions for opposing parties." As directed by the court,

[2] The complaint alleged that Atkinson resided at 3129 S. Madison Avenue, Beloit, Wisconsin. The answer admitted the allegation noting that Atkinson's correct address is 3129 S. Madison Road.

Atkinson's former attorney mailed a copy of the order to Atkinson. The order was mailed to 3129 S. Madison Avenue.

¶5 Atkinson did not appear at the June 11, 2002 status conference. The circuit court granted a default judgment. Judgment was entered July 2, 2002, on all counts of the complaint for $4,017,606.20. Notice of entry of judgment was sent to Atkinson at 3129 S. Madison Avenue.

¶6 On August 15, 2002, Atkinson, by newly retained counsel, filed a notice of appeal from the default judgment. Atkinson also filed a motion for relief from the judgment under WIS. STAT. § 806.07(1)(a) and (h), on the ground that he never got notice of the circuit court's May 17, 2002 order permitting counsel to withdraw and requiring Atkinson's appearance at the June 11, 2002 status conference. He also challenged the damages as duplicative, beyond the scope of the complaint, and improper punitive damages.

¶7 The motion for relief was to be heard January 21, 2003, with the parties filing briefs by January 10, 2003. In early January 2003, based on Atkinson's intent to file bankruptcy, the parties stipulated to vacating the briefing requirement and the January 21, 2003 hearing date because a bankruptcy filing would automatically stay the action. Atkinson did not file for bankruptcy until April 25, 2003. The bankruptcy proceeding was dismissed October 6, 2003.

¶8 When this court received notice that the bankruptcy case was dismissed, an order of October 22, 2003, required Atkinson to inform the court whether he intended to pursue the appeal and do so by filing his appellant's brief within thirty days. Atkinson wrote this court and the circuit court suggesting that

the issues to be raised in both courts would be the same.[3] He sought advice on how and where to proceed. This court responded that it could not give advice on how to proceed but noted that the circuit court was authorized to hear a WIS. STAT. § 806.07 motion while an appeal was pending.[4] *See* WIS. STAT. § 808.075(1). The appeal was fully briefed. The default judgment was summarily affirmed because the circuit court had not ruled on the § 806.07 motion and this court could not exercise discretion to vacate the default judgment which was vested in the circuit court. ***Ames v. Atkinson***, No. 2002AP2191, unpublished order at 2 (Wis. Ct. App. May 26, 2004). Remittitur occurred June 30, 2004.

¶9 By a letter dated November 30, 2004, Atkinson asked the circuit court to place his WIS. STAT. § 806.07 motion on the calendar for a status conference.[5] Ames opposed the hearing of the motion on the ground that Atkinson was dilatory in pursuing the matter. The circuit court sent notice of a status conference on February 22, 2005. Prior to the hearing, Ames filed a motion to dismiss the motion for relief from judgment for lack of prosecution.

¶10 At the February 22, 2005 hearing, the circuit court denied the motion for relief from judgment based upon elapsed time. It found that the time between August 2002 and February 2005 "has far exceeded any reasonable time to reopen

[3] The October 28, 2003 letter to both courts indicated, for the first time, that Atkinson's former attorney had been sending correspondence to the wrong address and that Atkinson never received the correspondence.

[4] Our October 30, 2003 order also noted that if the circuit court were to act on the judgment subject to the appeal, the appeal might be unnecessary.

[5] Atkinson made a similar request to the circuit court by a letter dated April 21, 2004, after the appeal was fully briefed and awaiting a decision. Apparently there was no response from the circuit court and Atkinson did not pursue a hearing.

[the] judgment." In the interest of the finality of judgments, the court found that there had been enough dilatory conduct and simply "enough is enough." Atkinson appeals the denial of his motion for relief from the default judgment.

¶11 Atkinson sought relief from judgment under WIS. STAT. § 806.07(1)(a), which allows the court to relieve a party from a judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. Granting relief under § 806.07 is a matter of discretion for the circuit court. ***Franke v. Franke***, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832. We review the circuit court's determination for an erroneous exercise of discretion and will affirm the discretionary decision as long as the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (citation omitted). The circuit court's findings of fact are reviewed under the clearly erroneous standard. WIS. STAT. § 805.17(2).

¶12 Atkinson argues that the circuit court's decision rests on an error of fact and law because the court believed that the motion for relief from judgment had not been timely filed within one year of the default judgment. *See* WIS. STAT. § 806.07(2) (a motion for relief under § 806.07(1)(a) shall be made not more than one year after the judgment was entered). It is undisputed that the motion was filed August 15, 2002, just over one month after entry of the default judgment. At times during the February 22, 2005 hearing, the circuit court appeared to entertain the notion that the motion had not been timely filed. However, we read the circuit court's denial as based on the failure to prosecute the motion rather than a determination that it was untimely filed. The circuit court was concerned over the amount of time that had passed since the motion had been filed.

¶13 Circuit courts have both inherent and statutory authority to sanction a party for the failure to prosecute. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991); WIS. STAT. § 805.03. We review the circuit court's exercise of discretion with respect to a party's failure to prosecute. *See* ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 392, 497 N.W.2d 756 (Ct. App. 1993). The sanction-based action will be sustained if there is a reasonable basis for the circuit court's determination that the party's dilatory conduct was egregious or in bad faith and that there was no clear and justifiable excuse for the party's conduct. *See* ***Johnson***, 162 Wis. 2d at 275-77.

¶14 Atkinson offers no excuse for his failure to prosecute his WIS. STAT. § 806.07 motion between its filing on August 15, 2002, and his November 30, 2004 letter which prompted the motion to be set for hearing. Of course, his bankruptcy intervened and an automatic stay was in effect. However, Atkinson elected not to seek relief from the automatic stay so that he could pursue his claim that the default judgment was improper.[6] The bankruptcy was dismissed in October 2003. Atkinson took no action when he received no response to his letter to the circuit court about how and where to proceed after dismissal of the bankruptcy. Although he wrote the circuit court in April 2004 asking for a status conference, he did nothing when he got no response. Atkinson cannot rely on the pending appeal as a basis to excuse his failure to pursue his motion. Under WIS. STAT. § 808.075(1), the circuit court has authority to act on a motion under

[6] Atkinson's January 9, 2003 letter to the circuit court explaining the parties' stipulation to vacate the hearing on the pending WIS. STAT. § 806.07 motion acknowledged the possibility that he could move for relief from the automatic stay.

§ 806.07 despite the pendency of an appeal.[7] Again Atkinson elected not to pursue the motion when he could have.[8] Even after the appeal was decided May 26, 2004, Atkinson waited almost six months before notifying the circuit court that he sought a ruling on his motion.

> The principle is firmly established that in order to demonstrate that a dismissal order based upon the failure to prosecute was an abuse of discretion, the aggrieved party must show "a clear and justifiable excuse" for the delay. This strict standard (clear and justifiable excuse for the delay) is applied as it is the "duty" of trial courts, "independent of statute," to discourage protraction of litigation and to "refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence."

Trispel v. Haefer, 89 Wis. 2d 725, 733, 279 N.W.2d 242 (1979) (citations omitted). Atkinson has not met his burden of showing a clear and justifiable excuse for not timely prosecuting his motion for relief from the default judgment.

¶15 We turn to consider whether there was egregious conduct or bad faith to support the sanction-based denial of Atkinson's motion for relief from judgment. *See* ***Johnson***, 162 Wis. 2d at 275 (sanction of dismissal may be based either on bad faith or on egregious conduct). The circuit court's reference to the history of the litigation, including the two prior default judgments and Atkinson's failure to comply with discovery demands, as "enough dilatory conduct" was an implicit finding that Atkinson's conduct in not timely pursuing the motion for

[7] WISCONSIN STAT. § 808.075(6) allows this court to remand the record to the circuit court for additional proceedings while the appeal is pending.

[8] We acknowledge that the circuit court was wrong when it indicated that the appeal was never prosecuted and defaulted. However, this error is of no consequence because the appeal had no bearing on Atkinson's ability to pursue his motion for relief from judgment.

relief was in bad faith. *See* ***Englewood Cmty. Apartments Ltd. P'ship v. Alexander Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984) (observing that the circuit court implicitly found bad faith when it characterized a party's conduct as a "pattern of abuse," "dilatory," and reflective of a "cavalier approach").

¶16 Twenty-seven months passed between the filing of the motion for relief from judgment and the November 2004 request prompting the setting of a hearing. This itself, or even the delay of thirteen months between the dismissal of the bankruptcy and the November 2004 request for a hearing, demonstrates bad faith failure to prosecute given the size of the judgment and the length of time the case had been pending. As reasoned in ***Prahl v. Brosamle***, 142 Wis. 2d 658, 670-71, 420 N.W.2d 372 (Ct. App. 1987), a person who has invoked the judicial process to advance a claim may not sit back and wait for someone else to take the initiative, and then be heard to argue that the claim should not be dismissed for lack of prosecution. "[D]elay is one of the basic impediments to the fair administration of justice." ***Id.*** at 670. The remedy for the failure to prosecute "is designed 'to punish the suitor who sleeps away his [or her] day in court.'" ***Id.*** at 671 (citation omitted). Atkinson was content to let his motion for relief from judgment languish undecided.

¶17 Even if the months of delay were not alone sufficient, the circuit court found that delay to be part of a pattern of dilatory conduct Atkinson displayed throughout the litigation. The history of the litigation is a proper consideration when applying a sanction. *See* ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶28, 252 Wis. 2d 426, 643 N.W.2d 98 (circuit court may consider a party's history of discovery abuse when exercising the court's authority to control the orderly and prompt processing of a case). In addition to the two

prior default judgments, the discovery sanction motions and resulting sanction orders, the record is marked by vast periods of inactive litigation caused by Atkinson's inattentiveness.

¶18 The circuit court's finding of bad faith is not clearly erroneous. Denial of the motion for relief from judgment was a reasonable sanction for the bad faith failure to prosecute it. The circuit court properly exercised its discretion.

¶19 Atkinson claims that he was denied due process because the February 22, 2005 hearing was noticed as a "status conference" but the circuit court proceeded to make a determination on the merits. Atkinson correctly asserts that a fundamental requirement of due process is notice. ***Neylan v. Vorwald***, 124 Wis. 2d 85, 90, 368 N.W.2d 648 (1985). The due process notice requirement is to provide a party with the opportunity to respond. *See* ***CTI of Ne. Wis., LLC v. Herrell***, 2003 WI App 19, ¶10, 259 Wis. 2d 756, 656 N.W.2d 794. What constitutes a reasonable opportunity to respond varies from case to case. ***Id.***

¶20 The issue of a lack of notice is a nonstarter. Prior to the hearing, Atkinson wrote the circuit court indicating uncertainty about whether the court intended to issue a decision at the hearing or if a briefing schedule would be established. Atkinson provided the circuit court with a copy of his appellant's brief indicating that it "adequately outlines the issues in this case." At the outset of the hearing, the circuit court acknowledged that "it is not clear what we intend to do here" and that a great deal of written material had been presented to the court. The court then allowed the parties to argue on the merits. Atkinson never objected to the discussion of the merits and did not request an evidentiary hearing. Atkinson had already provided the court with a written brief on his issues and is precluded from arguing a lack of notice. *See* ***id.*** ("[B]ecause sometimes parties do

respond without prompting from the trial court, they may occasionally be precluded from arguing a lack of notice or opportunity to reply.").

¶21 Having concluded that it was proper to deny the motion for relief from the judgment for the failure to prosecute it, we need not address Atkinson's principle argument attacking the validity of the default judgment—that the notice of June 11, 2002 status conference was sent to the wrong address. We deem it sufficient to observe that the circuit court made a finding that Atkinson received notice of the June 11, 2002 status conference. It stated, "His attorney, Mr. Harvey, sent him notice apparently." This finding is not clearly erroneous in light of the conceded fact that Atkinson received notice of entry of judgment sent to the Madison Avenue address. Although Atkinson attorney's theorized that correspondence to Madison Avenue might reach Atkinson depending on whether or not the mail carrier knew the location of Atkinson's residence and would deliver it regardless of the error, Atkinson never offered any evidence to contradict the concession that he had received mail addressed to Madison Avenue. The circuit court only had Atkinson's self-serving affidavit that he did not receive notice of the hearing. Atkinson's former attorney, Attorney Steven Harvey, was in the courtroom during the February 22, 2005 hearing, but was not called as a witness to explore whether he had mail bounce back to him or other troubles with using the Madison Avenue rather than Madison Road address. Atkinson never asked for an evidentiary hearing or suggested he had evidence to present on his nonreceipt of the hearing notice.

¶22 The remainder of Atkinson's claims attack the amount of damages awarded by the default judgment. We would not reach those issues without a basis for relief from the default judgment. However, there are obvious errors in the award of damages. The amended complaint alleged four causes of action:

dissolution of the partnership with the demand for an accounting, fraudulent transfer of partnership assets and property, theft as a violation of WIS. STAT. § 943.20 by the misappropriation of partnership assets and property, and embezzlement by a fiduciary of partnership assets and property. Ames asked for and was granted damages of $398,245.87 on each cause of action based on affidavits demonstrating that certain checks were paid to Atkinson and that Atkinson took title to a tractor and grain buggy purchased by the partnership. Ames recovered the same damages four times. Double recovery is not permitted under alternative theories of recovery.[9] "[I]t goes without saying that the courts can and should preclude double recovery by an individual." ***Olstad v. Microsoft Corp.***, 2005 WI 121, ¶82, 284 Wis. 2d 224, 700 N.W.2d 139, quoting ***E.E.O.C. v. Waffle House, Inc.***, 534 U.S. 279, 297 (2002). *See* ***Lambert v. Wrensch***, 135 Wis. 2d 105, 129, 399 N.W.2d 369 (1987) (there can be only one recovery for a single harm). Although the doctrine of election of remedies is disfavored, it must be utilized to foster its real purpose of preventing double or, as here, quadruple recovery. *See* ***Tuchalski v. Moczynski***, 152 Wis. 2d 517, 520, 449 N.W.2d 292 (Ct. App. 1989).

¶23 With respect to the cause of action for theft, the circuit court awarded treble damages and attorney fees under WIS. STAT. § 895.80(3)(c). The circuit court also awarded punitive damages on the cause of action for embezzlement by a fiduciary. The punitive damages equaled the amount of the

[9] Ames argues that quadruple recovery can be justified by Atkinson's conduct in the litigation that made it difficult to ascertain the actual damages on the causes of action. A damage award cannot be based on speculation. Moreover, the circuit court did not make a finding that Atkinson's conduct in the litigation made the determination of damages so difficult that an additional sanction of quadruple recovery would be allowed.

treble damages and attorney fees awarded under § 895.80(3)(c). This again was impermissible double recovery. "Two penalties on the same or different theories for the same act violates basic fairness and thus due process of law." ***John Mohr & Sons, Inc. v. Jahnke***, 55 Wis. 2d 402, 412, 198 N.W.2d 363 (1972), *superseded by statute on other grounds*, ***Olstad***, 284 Wis. 2d 224, ¶¶23, 74. ***John Mohr*** recognizes that a person should not be able to recover both under a statute providing treble damages and punitive damages.[10] *See* ***id.***

¶24 Further, "a circuit court entering a default judgment on a punitive damages claim must make inquiry beyond the complaint to determine the merits of the punitive damages claim and the amount of punitive damages, if any, to be awarded." ***Apex Elects. Corp. v. Gee***, 217 Wis. 2d 378, 390, 577 N.W.2d 23 (1998). Although the circuit court's order for default judgment recites that punitive damages are awarded "due to outrageous, wanton, and willful conduct of the defendants in the theft of partnership funds," the record here shows no inquiry by the circuit court as to the actual conduct justifying punitive damages. Punitive damages may not be automatically awarded. ***Id.*** at 389. Requisite findings were not made and the court simply accepted Ames's request for the amount of punitive damages. *See* ***id.*** at 389-90 (the fact finder must decide whether to award punitive damages, the fact finder must determine amount of punitive damages calculated to accomplish the purposes of punitive damages, and the court must evaluate the various factors to be considered in awarding punitive damages).

[10] Ames argues that under ***Peissig v. Wisconsin Gas Co.***, 155 Wis. 2d 686, 696, 456 N.W.2d 348 (1990), punitive damages could be awarded alongside of statutory damages. Although ***Peissig*** recognized that statutory multiple damages are distinct from punitive damages, it was not a case where both types of damages were awarded for the same conduct. ***Peissig*** has no application here.

¶25 We recognize that Atkinson's appeal from the default judgment challenged the damages. We deemed the issues waived because they had not been raised before the circuit court by a WIS. STAT. § 806.07 motion. *See* ***Olson v. Dunbar***, 149 Wis. 2d 213, 218-19, 440 N.W.2d 792 (Ct. App. 1989). Waiver is a rule of judicial administration. ***Waukesha County v. Pewaukee Marina, Inc.***, 187 Wis. 2d 18, 22, 522 N.W.2d 536 (Ct. App. 1994). Whether we apply the waiver rule is addressed to our discretion. *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987). We may reach questions of law which we would otherwise deem waived if the interests of justice require it. ***Id.***; WIS. STAT. § 752.35. To take such action we must be convinced, on the record as a whole, that there has been a probable miscarriage of justice. ***Ford Motor Co.***, 137 Wis. 2d at 418.

¶26 We were not persuaded in the first appeal that the demands of justice required overlooking Atkinson's failure to present his issues to the circuit court by a WIS. STAT. § 806.07 motion because of the possibility that the circuit court would act to correct the error in the judgment. Here, however, we cannot ignore that justice has miscarried if the grossly inflated default judgment is allowed to stand. "Courts must always be able to review error regardless of waiver where 'the error is so plain or fundamental as to affect substantial rights of the defendant.'" ***Vollmer v. Luety***, 156 Wis. 2d 1, 21 n.5, 456 N.W.2d 797 (1990) (citation omitted). Thus, in the interests of justice, we reverse in part the order denying relief from the judgment because relief should have been afforded to prevent the duplication of damages.[11] We remand the matter to the circuit court

[11] To the extent that we have not addressed Atkinson's other arguments with respect to damages, we deem them to not present error subject to review in the interests of justice.

with directions to enter an amended judgment on the third cause of action for $1,609,514.49.[12]

¶27 No costs to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

[12] Judgment on the third cause of action covers all aspects of recovery against Atkinson: compensatory damages, penalty damages by a statutory treble award, and the recovery of attorney fees.