COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2597 **Cir. Ct. No. 2005CV677**

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

CJ MANAGEMENT, LLC,

PLAINTIFF-RESPONDENT,

V.

M & M GENERAL CONTRACTORS, ROBERT MONCEK, AND THOMAS MARKLEY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. M & M General Contractors, and its owners, Robert Moncek and Thomas Markley, appeal from an order denying their motion

under WIS. STAT. § 806.07 (2005-06)[1] to vacate the judgment in favor of CJ Management, LLC for damages under a construction contract. M & M argues that its failure to oppose CJ's summary judgment motion was due to excusable neglect, that the judgment is the product of mistake or fraud, and that exceptional circumstances exist to grant relief from the judgment. We conclude that the circuit court properly exercised its discretion in denying the motion for relief from the judgment and affirm the court's order.

¶2 CJ's complaint alleged that it paid all monies owed to M & M under a contract to renovate a building, that M & M failed to pay subcontractors and CJ was forced to pay some subcontractors directly, and that M & M failed to complete the job. M & M filed a pro se answer to the complaint. It denied that it served as the general contractor, that it failed to pay subcontractors, and that it did not complete the work. M & M asserted that because CJ had not paid all monies due under the contract, M & M was unable to pay the subcontractors it had hired.

¶3 Four months after the pro se answer was filed, CJ moved for summary judgment in the amount of $87,921 for unpaid subcontractor invoices, $78,665 for sums overpaid to M & M, treble damages, and actual attorney fees. An affidavit in support of the motion included every check that was issued to M & M and directly to subcontractors. A brief in support of the motion for summary judgment was also filed. The motion was served on M & M by mail on February 16, 2006, along with notice that the hearing on the motion was set for March 6, 2006.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 M & M filed nothing in response to the motion for summary judgment.[2] At the March 6, 2006 hearing, Markley appeared pro se and asserted that CJ had the facts "all wrong" and were using "wrong data." He referred to the answer filed earlier in the action. He requested a continuance in order to get a lawyer stating, "Because, you know, I called several lawyers and they all refused because of, ah, conflict of interest."[3] He also indicated that Moncek, who ran the job and knew everything about it, would be out of town for another ten weeks. The circuit court told Markley, "You don't walk in the day of and ask for a continuance. You have to do something in advance." The court denied the request for a continuance and granted summary judgment to CJ. Judgment was entered March 15, 2006 for $372,429, plus costs and actual attorney fees.

¶5 On June 9, 2006, M & M, by counsel, filed its motion to vacate the judgment under WIS. STAT. § 806.07(1)(a), (c) and (h). The motion included the "affidavit" of Moncek addressing the merits of the claims stated in the complaint and the calculation of damages.[4] The motion was heard September 6, 2006, and denied.

¶6 A motion for relief from judgment under WIS. STAT. § 806.07 is addressed to the sound discretion of the circuit court. ***Brown v. Mosser Lee Co.***,

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[2] CJ filed a motion for sanctions for Moncek's failure to appear at a February 17, 2006 deposition under a subpoena duces tecum. That motion was also scheduled to be heard March 6, 2006. By a letter dated February 24, 2006, Moncek wrote the court's clerk indicating that had not received notice of the deposition and would not be able to appear at the hearing. He indicated he had no money to hire an attorney "nor could I find one before since no attorney wants to defend against another attorney." He requested that all correspondence be sent to Markley.

[3] One member of CJ is a practicing attorney in Walworth County.

[4] The "affidavit" of Moncek was not notarized.

164 Wis. 2d 612, 616-17, 476 N.W.2d 294 (Ct. App. 1991). We will not reverse the court's discretionary determination if the record shows that discretion was in fact exercised and a reasonable basis exists for the court's decision. ***Id.*** at 617.

¶7 Both parties first address whether the motion to vacate was timely because WIS. STAT. § 806.07 provides that the motion must be brought within a "reasonable time," and no later than one year for motions under § 806.07(1)(a) and (c). Sec. 806.07(2). M & M's motion was filed approximately two months and three weeks after summary judgment was entered. Although the circuit court questioned the timeliness of the motion to vacate, it did not make a definite ruling that the motion was untimely. We are without findings to show that the facts and circumstances relevant to determining whether the motion was filed within a reasonable time, including the reasons for the moving party's delay as well as the prejudice visited upon the nonmoving party, were thoroughly considered. *See* ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 627-30, 511 N.W.2d 868 (1994). In the absence of a definitive ruling, we consider the motion as timely filed for the purpose of appellate review.

¶8 M & M argues that its failure to file anything in opposition to the motion for summary judgment or to comprehend that a request for a continuance should have been made in advance of the hearing was excusable neglect under WIS. STAT. § 806.07(1)(a). Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the circumstances. *See* ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). The question is whether the circuit court in its discretion could reasonably conclude that there was no excusable neglect for failing to oppose the motion for summary judgment. *See* ***Martin v. Griffin***, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984).

¶9 At the summary judgment hearing the circuit court found that M & M did nothing when faced with an action and summary judgment motion seeking a large judgment. The court observed that Moncek and Markley were businessmen and should have appreciated the significance of the lawsuit against them. Excusable neglect is not synonymous with carelessness or inattentiveness. ***Id.*** at 443. Whether M & M believed its answer was sufficient to prevent judgment being taken against it,[5] or that a continuance would be granted at the last moment, a party's misapprehension of the law is not excusable neglect. *See* ***Gerth v. American Star Ins. Co.***, 166 Wis. 2d 1000, 1008, 480 N.W.2d 836 (Ct. App. 1992); *see also* ***Martin***, 117 Wis. 2d at 443-44. Moreover, while some leniency may be allowed to pro se litigants, the circuit court does not have a duty to walk them through the procedural requirements, *see* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992), or forgive their failure to comply with those requirements.

¶10 M & M complained that it had difficulty hiring counsel because one member of CJ was a practicing lawyer in the county. At no time did M & M attempt to show just how difficult it was—there was no proof of the number of lawyers contacted, when they were contacted, or any other fact surrounding the failed attempt to get counsel. M & M wanted the circuit court to speculate that a real effort had been made and failed for the reasons stated. We agree with the circuit court's finding that M & M failed to act as a reasonably prudent person

[5] The opponent of a summary judgment motion may not rest on mere denials or conjecture that evidence in support of the motion may not be accurate or reliable; the opponent must affirmatively counter with evidentiary materials demonstrating a factual dispute. ***Dawson v. Goldammer***, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106, *review dismissed*, 2006 WI 126, 297 Wis. 2d 323, 724 N.W.2d 206 (WI Sept. 27, 2006) (Nos. 2004AP2507, 2004AP3335).

would when faced with a potentially large judgment. The court's conclusion that there was no excusable neglect is a proper exercise of discretion.[6]

¶11 M & M contends that the judgment should be vacated under WIS. STAT. § 806.07(1)(c), which permits relief from a judgment on the ground of fraud, misrepresentation or other misconduct of an adverse party. M & M argues CJ submitted false information about the amount of damages. Again, our standard of review is whether the circuit court erroneously exercised its discretion in denying the motion under § 806.07(1)(c). *See* ***Milwaukee Women's Med. Serv. Inc. v. Scheidler***, 228 Wis. 2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999).

¶12 To obtain relief under WIS. STAT. § 806.07(1)(c), a party must show a plain case of misrepresentation. ***Johnson v. Johnson***, 157 Wis. 2d 490, 498, 460 N.W.2d 166 (Ct. App. 1990). There was nothing misleading in the manner in which CJ obtained its judgment against M & M. A motion for summary judgment outlining CJ's claim for damages was filed and served on the parties. In support of its motion to vacate the judgment, M & M submitted evidentiary materials to the circuit court that should have been submitted in opposition to the motion for summary judgment. At best those materials establish disputed issues of fact. The time to alert the court to facts in dispute was during the summary judgment proceeding. A motion for relief from the judgment cannot serve as a substitute for what the party failed to timely do in the first place. CJ's advancement of its position on disputed matters does not constitute fraud or misconduct supporting

[6] In addition to establishing excusable neglect, a party moving to vacate a default judgment under WIS. STAT. § 806.07(1)(a) must also demonstrate that he or she has a meritorious defense to the action. ***J.L. Phillips & Assocs. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998). M & M argues that it has a meritorious defense to the action but we need not address the issue because excusable neglect does not exist.

relief from the judgment. The circuit court properly exercised its discretion in denying M & M's motion under § 806.07(1)(c).

¶13 Under WIS. STAT. § 806.07(1)(h), the circuit court may grant relief from a judgment for "[a]ny other reasons justifying relief." The "extraordinary circumstances" test applies and the circuit court must determine whether, in view of all the facts, "extraordinary circumstances" exist which justify relief in the interest of justice. ***Cynthia M.S.***, 181 Wis. 2d at 625-26. Relief under subsec. (1)(h) should be granted sparingly and only "when the circumstances are such that 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.'" ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 550, 363 N.W.2d 419 (1985) (quoted source omitted).

> In exercising its discretion, the circuit court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following: whether 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.

Id. at 552-553.

¶14 M & M argues that consideration of all the identified factors weighs in favor of granting it relief from the judgment. However, most of its analysis of the factors rests on circumstances rejected as supporting relief from the judgment, most notably its claim that CJ made misrepresentations to the circuit court

regarding damages. Further, we disagree with M & M's assessment that there was not an adjudication on the merits. This was not a default judgment but a judgment based on a motion for summary judgment which contained evidentiary proofs. It was M & M's decision to not oppose the motion for summary judgment. M & M's pro se status does not alone establish extraordinary circumstances. The circuit court balanced the competing interests and determined that the finality of judgment takes precedence in this case. The denial of relief under WIS. STAT. § 806.07(1)(h) is a proper exercise of discretion.

¶15 M & M challenges the summary judgment on the merits arguing that CJ's proofs were insufficient to establish entitlement to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). We lack appellate jurisdiction to review the summary judgment. Although a timely notice of appeal was filed after entry of the final judgment, the appeal was voluntarily dismissed. An appeal from an order subsequent to a final judgment only brings before the court all prior *nonfinal* judgments or orders. *See* WIS. STAT. RULE 809.10(4). This appeal does not bring the final summary judgment before the court for review.[7] *See* ***Appleton Chinese Food Serv. Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 811 n.10, 519 N.W.2d 674

[7] M & M argues that CJ is judicially estopped from claiming that we lack appellate jurisdiction with respect to the summary judgment because in a motion to strike the WIS. STAT. § 806.07 motion, CJ asserted that M & M could not commence an appeal and seek § 806.07 relief at the same time. Indeed CJ's motion to strike suggested that by filing the § 806.07 motion, M & M had converted the final judgment to a nonfinal one. Both parties were mistaken as to the law. Under WIS. STAT. § 808.075(1), the circuit court had authority to hear a § 806.07 motion irrespective of the pendency of an appeal. Regardless of whether CJ is now taking an inconsistent position with respect to the finality of the judgment, it remains that we lack appellate jurisdiction with respect to the summary judgment. Jurisdiction cannot be conferred by waiver or consent of the parties. *See* ***State ex rel. Skinkis v. Treffert***, 90 Wis. 2d 528, 535, 280 N.W.2d 316 (Ct. App. 1979).

(Ct. App. 1994) (the judgment remains final even when a WIS. STAT. § 806.07 motion is pending).

By the Court.—Order affirmed.

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