COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3331-FT **Cir. Ct. No. 01-CV-659**

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

KELLY DIESTLER AND LYNELLE DIESTLER,

PLAINTIFFS-APPELLANTS,

V.

THOMAS J. JUZA CUSTOM HOME & DESIGN, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

JEFF EASTMAN D/B/A JEFF EASTMAN PAINTING,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kelly and Lynelle Diestler appeal a judgment dismissing their claims against Thomas J. Juza Custom Home & Design, Inc., and assessing $1,828.66 costs.[1] The Diestlers argue that the trial court erroneously exercised its discretion when it vacated a default judgment against Juza. They also argue that the court erroneously dismissed their complaint because they failed to appear on the first day of an anticipated two-day trial. They further contend the court improperly limited their offer of proof to two witnesses and found that Juza would be entitled to a directed verdict had the trial proceeded. Because the record supports the trial court's determination, we affirm the judgment.

BACKGROUND

¶2 The Diestlers brought this action against their building contractor, Juza, for breach of a contract to construct their custom home. They complained that the interior paint did not adhere to the plaster and was peeling off the walls and ceilings. The Diestlers obtained a default judgment against Juza, which the trial court later vacated upon a finding of excusable neglect.

¶3 At the hearing on his motion to vacate the default judgment, Juza testified that during ongoing discussions to resolve the dispute without legal action, the Diestlers had served him with a summons and complaint. Juza was aware he had forty-five days to answer the complaint but did not answer it because "I was back and forth with Kelly, and about the 43rd, 44th day Kelly said, 'Don't call my attorney while we're trying to get this worked out. I'll make him aware of this, that we're working this out.'" Juza explained that he and Kelly were

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

neighbors and he wanted to work out their dispute. Juza further testified he told Kelly "we have a 45-day window here" and wanted to settle before he had to hire an attorney. Juza stated that Kelly said he would instruct his attorney "to hold off on the lawsuit so we could settle the matter."

¶4 Based upon their conversations, Juza believed that Kelly would accept his offers to settle and the dispute would be resolved without litigation, and "I was led to believe that we would be able to settle this out of court." Juza claimed it was not until the day of the default hearing that Kelly notified him that Kelly no longer wanted to attempt to settle the dispute out of court.

¶5 Kelly, on the other hand, testified that it would be "incorrect" to say he gave specific directions to his attorney to hold off proceeding with the lawsuit pending settlement negotiations. Kelly agreed, however, that he told Juza that "I hoped we would" resolve the dispute without a lawsuit. Kelly explained that once the lawsuit was filed, Juza called with more offers and "asked me to tell you [the Diestlers' attorney] that he had been making offers, and that's when I called into your office to find out if—you know—what—what that meant." Kelly claimed he did not enter into any agreement with Juza and gave no impression it was unnecessary to comply with time frames. Nonetheless, Kelly testified that he told Juza that he would convey Juza's offers to his attorney, "because they were trying to again, you know, hoping we could get resolution without the courts."

¶6 The trial court found that from a time before the Diestlers filed their lawsuit and extending until the day of their default hearing, the parties engaged in settlement discussions. The court found these conversations were not "all that clear," but Juza construed Kelly's statements to mean that the dispute would be settled out of court. The court determined that Juza acted immediately upon

learning of the default judgment and that the Diestlers would not be prejudiced by vacating the judgment. The court found excusable neglect and that the interests of justice demanded the judgment be set aside. The court vacated the default judgment.

¶7 Juza impleaded the painter, Jeff Eastman, as third-party defendant.[2] Subsequently, on the morning of the jury trial, the Diestlers did not appear in court. Their attorney explained that the Diestlers had been out of the country on business and were delayed due to mechanical problems with the airplane. He requested a short continuance or, alternatively, to proceed in their absence. Because the jury was waiting to be impaneled, the trial court was concerned about proceeding with the trial when the evidence may be insufficient to prove the Diestlers' case. Therefore, the court permitted the Diestlers' attorney to make an offer of proof. Diestlers' counsel stated:

> [M]y offer of proof is simply that Mr. Juza [is] going to acknowledge the fact that this was an unacceptable paint condition. It was something that he had represented to the Diestlers he was going to fix. He has been unable to fix that, and Mr. Eastman will similarly testify that he has gone back to do a substantial amount of work, and we have experts that are going to prove up damages.

The court proposed that "unless the lawyers have another suggestion," Juza and Eastman should testify outside the jury's presence on the issue of breach of contract "so that we can make a complete record here." Diestlers' counsel responded: "And, Judge, just so the court is aware, I'm not limited to those two parties. We also have the plasterer who's going to appear here today and Mr. Alberts who will testify as to what happened." The trial court replied, "But

[2] Eastman is not a party to the appeal.

your expert can't testify to the contract … how can he say there's a dispute between the parties?" Counsel answered that Juza "acknowledges the fact that there was a breach."

¶8 Counsel called Juza and Eastman to the stand. Both testified that there was no breach of contract, and that the failure of the paint to adhere was caused by the Diestlers' failure to follow their recommendation not to sand the plaster. Juza explained, "[A]gainst our opinions, their decorator wanted to have a smooth finish." Eastman testified: "When the decorator, the plasterer, and the Diestlers all wanted the plaster to be sanded, and I was very adamant that it not be sanded, I was concerned with an adhesion problem. That's what these people were told." Following their testimony, the Diestlers' counsel stated "just so the court is clear, too, there's a lot of other witnesses here other than my clients that will be used to prove the plaintiffs' case." Counsel did not suggest that the other witnesses would testify to the issue of breach of contract.

¶9 The court then ruled that it had allowed Diestlers' counsel, in the absence of his clients, to make an offer of proof to determine whether he could "present a sufficient quantum of proof that would carry the plaintiffs' burden … both defendants deny there was a breach and … damages." The court recognized that potentially there could be a dispute but that the Diestlers were not present to present their side of the story. The court dismissed their complaint.[3] The court based the dismissal on two grounds: first, the Diestlers' nonappearance; and, second, based on the offer of proof, if the trial were to proceed in their absence, Juza would be entitled to a directed verdict.

[3] The court also found that no deposition testimony was offered. This ruling is not challenged on appeal.

DISCUSSION

1. Default Judgment

¶10 The Diestlers first argue that the circuit court erroneously vacated the default judgment. We are unpersuaded. In considering whether to vacate a default judgment, the trial court is required to bear in mind three factors: (1) WIS. STAT. § 806.07, the statute relating to vacating default judgments, is remedial and should be liberally construed; (2) generally, the law favors giving litigants their day in court; and (3) default judgments are regarded with disfavor in the eyes of the law. ***Baird Contracting v. Mid Wisconsin Bank***, 189 Wis. 2d 321, 325, 525 N.W.2d 276 (Ct. App. 1994). The prompt action of the defendant in seeking relief from judgment is also a factor to be considered. ***Id.***

¶11 WISCONSIN STAT. § 806.07 provides: "On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect." Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. ***Gerth v. American Star Ins. Co.***, 166 Wis. 2d 1000, 1007, 480 N.W.2d 836 (Ct. App. 1992). Rather, excusable neglect is that which might have been the act of a reasonably prudent person under similar circumstances. ***Id.*** "In determining whether the 'reasonably prudent person' standard has been met, the trial court should consider whether the person has acted promptly to remedy his situation and whether vacation of the judgment is necessary to prevent a miscarriage of justice." ***Charolais Breeding Ranches, Ltd. v. Wiegel***, 92 Wis. 2d 498, 512, 285 N.W.2d 720 (1979).

¶12 A motion to vacate a judgment on the ground that it was obtained through mistake, inadvertence, surprise or excusable neglect is addressed to trial court discretion. ***Howard v. Duersten***, 81 Wis. 2d 301, 305, 260 N.W.2d 274 (1977). We may search the record for reasons to support a discretionary decision. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). This court will affirm a circuit court's discretionary determination if it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). It is well established that a trial court, in the exercise of its discretion, may reasonably reach a conclusion that another court would not. ***Liddle v. Liddle***, 140 Wis. 2d 132, 156, 410 NW.2d 196 (Ct. App. 1987).

¶13 The Diestlers contend that the trial court found that Juza had merely engaged in "wishful thinking" and therefore erroneously found excusable neglect. We are unpersuaded. While the record shows that the trial court took note of Juza's "wishful thinking," the court did not stop there. The trial court expressly found that the parties engaged in ongoing discussions in an attempt to resolve their dispute without a trial. The court found it unnecessary to resolve credibility, apparently because the court's determination finds support in both parties' testimony. For example, Kelly conceded that Juza called him numerous times to discuss settlement of the dispute and asked him to convey this information to his attorney. Kelly further testified he told Juza that he would convey Juza's offers to his attorney, "because they were trying to again, you know, hoping we could get resolution without the courts."

¶14 We are satisfied the record supports the trial court's implicit finding that Juza reasonably believed settlement negotiations were progressing and the

Diestlers would not enforce the forty-five-day time frame to answer the complaint.[4] Also, there is no dispute that Juza acted promptly in seeking relief. Further, the Diestlers make no showing of prejudice.[5] Consequently, the record reflects a reasonable exercise of discretion, and we do not overturn the court's ruling to vacate the default judgment.

2. Dismissal of Complaint

¶15 Next, the Diestlers argue that the trial court erroneously dismissed their complaint when they failed to appear on the day of trial. The Diestlers contend that because their failure to appear was not egregious, it did not warrant the harshest sanction of dismissal. Further, they argue that to the extent the court dismissed their action for failure of proof, the court "clearly erred." Because the court's dismissal for failure of proof is dispositive, we do not address the issue of dismissal for nonappearance. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

¶16 The Diestlers elaborate their argument, contending:

> [Juza and Eastman] argue that the trial court's decision was proper because Diestlers' counsel was allowed to make an offer of proof by examining Mr. Juza and Mr. Eastman, "the only available witnesses." Contrary to this assertion,

[4] As we said in ***Englewood Comm. Apts. P'ship v. Alexander Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984): "[A] remand directing the trial court to make an explicit finding where it has already made unmistakable but implicit findings to the same effect would be both superfluous and a waste of judicial resources." Here, the trial court made an "unmistakable but implicit finding" that Juza's belief was reasonable.

[5] The Diestlers criticize the court's failure to make a specific finding regarding a meritorious defense. The Diestlers fail to indicate, and the record does not reveal, that they made this objection to the circuit court. A party who appeals has the burden to establish "by reference to the record, that the issue was raised before the circuit court." *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (citation omitted).

> several witnesses were available to testify on behalf of the Diestlers, and Mr. Diestler would have been available to testify the following day, prior to the close of plaintiffs' case in chief.

The Diestlers argue "Donald Collier, Michael Krueger and Keith Fuller had all been served with subpoenas to testify at trial, and John Alberts would have appeared voluntarily." They contend: "These fact and expert witnesses would have testified that the failure of the paint was caused by painting too early and/or the primers selected by Mr. Eastman, either of which would have been a breach of contract." They also argue: "Instead, Diestlers' counsel was only allowed to examine outside the presence of the jury two adverse witnesses who, not surprisingly, denied any liability."

¶17 This argument lacks support in the record. First, in view of the Diestlers' counsel's representation to the trial court, Juza and Eastman's denial of liability was surprising. Counsel stated that Juza "acknowledges the fact that there was a breach." His offer of proof was "simply that Mr. Juza's going to acknowledge the fact that this was an unacceptable paint condition" and "Mr. Eastman will similarly testify that he has gone back to do a substantial amount of work, and we have experts that are going to prove up damages." Although counsel added that the plasterer and Alberts would "testify as to what happened," counsel did not indicate that these other witnesses would testify to liability. Instead, counsel's statements to the court suggested that their testimony went to the issue of damages. For example, when the trial court asked, "But your expert can't testify to the contract … how can he say there's a dispute between the parties," counsel responded that Juza would acknowledge the breach of contract.

¶18 Second, the Diestlers' counsel's offer of proof at trial did not indicate that Collier, Krueger, Fuller and Alberts would have testified as to

liability. Rather, counsel's statement that Juza and Eastman would testifiy to the breach, "and we have experts that are going to prove up damages" indicates these witnesses were experts to testify as to damages.

¶19 Third, counsel does not identify, and our review fails to disclose, any place in the record where the court denied counsel's offer to call these four witnesses on the issue of liability. Instead, after Juza and Eastman testified, the court found that "both defendants deny there was a breach" of contract. Diestlers' counsel did not object and did not offer any additional evidence on the issue of liability. The record indicates that not until counsel filed a supplemental affidavit in support of a "motion for relief and reconsideration" did counsel squarely bring this complaint to the trial court's attention.

¶20 In ***State v. Rogers***, 196 Wis. 2d 817, 829, 539 N.W.2d 897 (Ct. App. 1995), we stated, "[T]he appellant [must] articulate each of its theories to the trial court" to preserve its right to appeal an erroneous ruling. Akin to this rule, for purposes of trial court proceedings, is the principle that a party must raise an issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Here, the record fails to support the Diestlers' assertion that on the day of the trial, the court denied the Diestlers the right to call additional fact witnesses on the issue of liability. Consequently, we reject their argument.

By the Court.—Judgment affirmed.

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