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DISTRICT II

October 30, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2687

Johnson Bank v. BV Nicolet LLC (L.C. # 2010CV1445)

Before Brown, C.J., Reilly and Gundrum, JJ.

BV Nicolet, LLC and Albert Belmonte appeal an order denying their motion to reopen a default judgment entered in favor of Johnson Bank. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the order of the circuit court.

This appeal arises out of a complaint filed by Johnson Bank in July 2010, seeking a judgment of foreclosure against BV Nicolet and Belmonte. BV Nicolet and Belmonte failed to timely answer the complaint, and Johnson Bank moved for a default judgment against them. In

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

response, BV Nicolet and Belmonte moved to enlarge the time to answer the complaint, arguing that their failure to timely answer was due to excusable neglect.

Following a hearing, the circuit court denied BV Nicolet and Belmonte's motion to enlarge the time to answer and instead granted a default judgment in favor of Johnson Bank. BV Nicolet and Belmonte then moved to reopen the default judgment pursuant to WIS. STAT. § 806.07(1)(h).² The circuit court denied the motion. BV Nicolet and Belmonte appealed.

On appeal, this court concluded that the circuit court failed to properly exercise its discretion in denying the motion to reopen the default judgment pursuant to WIS. STAT. § 806.07(1)(h). *See Johnson Bank v. BV Nicolet, LLC*, No. 2011AP2186, unpublished slip op. (WI App May 8, 2012). Specifically, we faulted the court for failing to apply the five interest of justice factors set forth in *Miller v. Hanover Insurance Co.*, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493.³ Accordingly, we reversed and remanded the matter for the circuit court to apply the interest of justice factors.

² WISCONSIN STAT. § 806.07(1)(h) is a catch-all provision that allows the circuit court to grant a party relief for “[a]ny other reasons justifying relief from the operation of the judgment.”

³ The five interest of justice factors are:

[1] whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; [2] whether the claimant received the effective assistance of counsel; [3] 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; [4] whether there is a meritorious defense to the claim; and [5] whether there are intervening circumstances making it inequitable to grant relief.

Miller v. Hanover Ins. Co., 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493 (citation omitted).

On remand, the case was transferred to a new judge. Following another hearing, the circuit court again denied the motion to reopen the default judgment pursuant to WIS. STAT. § 806.07(1)(h). In doing so, the court expressly applied the five interest of justice factors set forth in *Miller*, 326 Wis. 2d 640, ¶36. This appeal follows.

On appeal, BV Nicolet and Belmonte contend that the circuit court erroneously exercised its discretion in failing to grant their motion to reopen the default judgment. Whether to grant relief from a judgment under WIS. STAT. § 806.07(1)(h) is a discretionary determination, and we will not reverse the circuit court's decision absent an erroneous exercise of discretion. *Miller*, 326 Wis. 2d 640, ¶¶29-30.

Here, we are satisfied that the circuit court properly exercised its discretion in denying BV Nicolet and Belmonte's motion. As noted, the court expressly applied the interest of justice factors as directed by this court. It analyzed each one and reasoned to a decision on the weight of each factor based on the facts of record. To the extent that BV Nicolet and Belmonte are arguing that the court needed to do more, they are mistaken. The court did not need to do more in denying their motion.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals