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DISTRICT II

June 4, 2014

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

2014AP40-FT

BAC Home Loans Servicing, LP v. Nickolas A. Janovski
(L.C. #2010CV934)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Nickolas A. Janovski appeals from circuit court orders denying his motions to vacate a default judgment and deny a confirmation of sale. He contends that the circuit court erroneously exercised its discretion in denying him relief. Pursuant to a presubmission conference and this court's order of February 4, 2014, the parties submitted memorandum briefs. *See* WIS. STAT.

RULE 809.17(1) (2011-12).¹ Upon review of those memoranda and the record, we affirm the orders of the circuit court.

In June 2010, BAC Home Loans commenced an action against Janovski to foreclose on real property in Walworth, Wisconsin. Janovski was personally served with a summons and complaint. After he failed to answer or otherwise respond to the complaint, BAC filed a motion for default judgment. The circuit court granted the motion and entered a default judgment in favor of BAC in May 2011.

Janovski subsequently filed multiple bankruptcy petitions, which delayed the foreclosure action. The first was filed in June 2011 and was dismissed in March 2012. The second was filed in July 2012 and was dismissed in October 2012. The third was filed in March 2013 and was dismissed in April 2013. The fourth was filed in August 2013 and was dismissed in September 2013. Eventually, in October 2013, a sheriff's sale was conducted at which BAC purchased the property at issue.

In November 2013, over two and one-half years after the default judgment was entered, Janovski appeared for the first time in the case. He moved to vacate the default judgment pursuant to WIS. STAT. § 806.07(1)(h)² and deny the confirmation of sale.³ The circuit

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

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 Janovski also filed a document entitled “Complaint and Demand for Jury Trial.” BAC orally moved to strike the document as untimely and Janovski did not oppose the motion. Accordingly, we deem the issue waived and do not address it further.

court denied the motions. This appeal follows.

We review the circuit court's decision to grant or deny relief under WIS. STAT. § 806.07(1)(h) for an erroneous exercise of discretion. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. An exercise of discretion will be upheld if it is based on the facts of record and the correct legal standard, and if we can perceive a reasonable basis for the court's decision. *Id.*, ¶¶29, 30.

Under WIS. STAT. § 806.07(1)(h), 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. *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 625-26, 511 N.W.2d 868 (1994). The circuit court considers the following factors in determining whether extraordinary circumstances exist:

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.

Miller, 326 Wis. 2d 640, ¶36 (citation omitted).

As noted, the circuit court denied Janovski's motions to vacate the default judgment and deny the confirmation of sale. It did so because of (1) Janovski's significant delays in acting in the case; (2) his failure to raise any meritorious issue; and (3) the prejudice such relief would cause BAC.

Reviewing the circuit court's decision, we acknowledge that it did not explicitly consider the five factors outlined in *Miller* in determining whether extraordinary circumstances exist. Nonetheless, because the court's decision is discretionary, we look for reasons to sustain it and will independently review the record to determine whether it properly exercised its discretion and whether the facts provide support for its decision. *Id.*, ¶30.

Our independent review of the record persuades us that the facts asserted by Janovski do not warrant relief under WIS. STAT. § 806.07(1)(h). First, Janovski failed to present any evidence that the default judgment was the result of anything other than his own conscientious, deliberate, and well-informed choice not to contest the foreclosure action after being served process, but instead to seek to delay its implementation by filing multiple bankruptcy petitions. Second, by his own admission, Janovski's default was the result of his own decision not to seek assistance of legal counsel rather than any bad advice or ineffective assistance he received. Third, Janovski failed to show why the interest of deciding the merits of the case outweighed the finality of a two-and-one-half-year-old judgment that had induced substantial reliance. Fourth, Janovski failed to identify any meritorious defense to BAC's action.⁴ Fifth, the passage of time from Janovski's failure to act and the prejudice such relief would cause BAC are intervening circumstances making it inequitable to reopen the judgment now. For these reasons, along with the reasons cited by the circuit court, we conclude that the circuit court properly exercised its

⁴ Janovski does not dispute that his property was subject to a valid mortgage and that he had long been in default on his payments. Indeed, on the schedules to his bankruptcy petitions, he identified BAC and its successor in interest Bank of America, N.A. as the creditors holding the mortgage on the property.

discretion by denying Janovski's motions to vacate the default judgment and deny the confirmation of sale.⁵

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

⁵ Janovski offers no independent argument that the circuit court erred by confirming the sale. To the extent that he argues the sale should not be confirmed for the same reasons the judgment should be vacated, that argument fails for the reasons stated above.