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DISTRICT III/IV

January 24, 2017

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

2016AP1113 Xiulian Deng v. Shawlly Risberg, John Risberg and Fuji Sushi LLC (L.C. # 2014CV858)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Shawlly Risberg and John Risberg appeal from an order denying a motion for relief from a default judgment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.[2]

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Throughout their brief, the Risbergs refer to the parties as "defendants-appellants" and "plaintiff-respondent," rather than "the Risbergs" and "Deng," in violation of WIS. STAT. RULE 809.19(1)(i). (An appellate "brief must contain … [r]eference to the parties by name, rather than by party designation, throughout the argument section.") Appellate counsel should be more mindful of that requirement in the future.

While the Risbergs disagree with the inferences drawn by the circuit court, the salient facts are not in dispute. This appeal arises from the failed sale of a restaurant from the Risbergs to Xiulian Deng. After the sale fell through, Deng sued the Risbergs seeking return of her down payment and rent paid. The Risbergs and a corporate defendant, Fuji Sushi, LLC, filed an answer, affirmative defenses, and counterclaim.[3]

On July 29, 2015, about one year after the complaint was filed, Deng filed a motion for summary judgment. Deng mailed a copy to the Risbergs at 3129 N. Lawe Street, #8, Appleton, WI, their address in court records, and to Fuji Sushi, attn.: Ping Wang, at 216 S. Mason St., Appleton, WI. Ping Wang is the registered corporate agent for Fuji Sushi, LLC. The restaurant does business at 1003 W. Northland Ave. in Appleton.

On August 5, the court issued a briefing schedule that also scheduled a summary judgment hearing for September 16, 2015. That notice was mailed to all parties at their addresses in court records.

On August 10, the court received a letter from the Risbergs, dated August 3, stating:

> From July 29, 2015 all correspondence concerning this case should be mailed to: 1003B W. Northland Ave., Appleton, WI 54914.
>
> In response to plaintiffs request for summary judgment: Based on evidence we have provided and no proof from the plaintiff that we ousted her from the business, we request that the trial proceed as planned.

[3] Fuji Sushi, LLC is not involved in this appeal.

The Risbergs did not appear at the September 16 hearing and the court granted Deng's request for a default judgment. The Risbergs were not represented by counsel during this time period.

On April 8, 2016, the Risbergs, now represented by counsel, moved for relief from the judgment pursuant to WIS. STAT. § 806.07. The Risbergs argued they had not received notice of the motion for summary judgment and, therefore, the court should vacate the judgment due to "[m]istake, inadvertence, surprise, or excusable neglect" or "[a]ny other reasons justifying relief" from the judgment. *See* § 806.07(1)(a) and (1)(h).

At a hearing on the motion for relief, the Risbergs continued to claim they did not have notice of the summary judgment hearing. They also pointed to their pro se status and lack of litigation experience as mitigating factors. Deng countered by noting that her motion and the court's scheduling notice had been sent to the parties at their then-correct addresses.

The circuit court denied the motion to reopen. The court first defined "excusable neglect" and identified factors relevant to the determination whether excusable neglect exists. The court also recognized that a motion to reopen under WIS. STAT. § 806.07(1)(h) presented "a bit of a balancing test" between "the sanctity of the final judgment" and "the Court's conscience that justice be done in light of all the facts." The court then turned to the facts before it. The court acknowledged that the briefing schedule had been sent to the addresses in the court file before the Risbergs' change of address notice was filed. The court found that the briefing schedule was sent to the "old address" and was not returned to the court as undeliverable. The court noted that the summary judgment motion was mailed to the Risbergs using the same addresses as later used to send out the scheduling notice and it was undisputed that the Risbergs

had notice of the motion for summary judgment. The court noted that "a responsible business owner would have notified the Post Office of a change of address and the [court's] letter would have been forwarded." Citing the non-return of the schedule, the court found the Risbergs' claim that they did not get notice as "not credible." The court concluded "when the Court does not receive anything back from the Post Office, I have to assume that [the schedule] got there."

A motion to vacate a default judgment is addressed to the discretion of the circuit court. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶31, 326 Wis. 2d 640, 785 N.W.2d 493. The court "'does not erroneously exercise its discretion if its decision is based on the facts of record and on the application of a correct legal standard.'" ***Id.***, ¶29 (quoted source omitted). This court "'will not reverse a discretionary determination … if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.'" ***Id.***, ¶30 (quoted source omitted).

Paragraphs (a) through (g) of WIS. STAT. § 806.07(1) describe specific circumstances in which relief may be granted, and paragraph (h) is a "catch-all" provision giving the court broad discretionary authority to grant relief for other reasons in order to accomplish justice. ***Miller***, 326 Wis. 2d 640, ¶¶32-33. When deciding a motion under subsection (1)(h), a court must "'balance the competing values of finality and fairness.'" ***Id.***, ¶33 (quoted source omitted).

The Risbergs do not contend that the circuit court considered improper factors. Indeed, the factors identified in their brief are identical to those recited by the court in its decision. Essentially, the Risbergs argue that their failure to appear at the summary judgment hearing was excusable because they did not have notice of the hearing date.

The circuit court, however, rejected that factual premise as not credible—the court expressly found that the Risbergs had notice of the hearing date. They had received the summary judgment motion, despite it being mailed to an address they claim was no longer their home address. The briefing schedule was sent to that same address. The court's express factual finding defeats the Risbergs' argument.

The circuit court considered the controlling law and made factual findings that are supported by the record. The court found that the Risbergs' neglect was not excusable, thereby defeating their WIS. STAT. § 806.07(1)(a) claim. Given that factual finding, the court's discretionary determination that relief was not needed in order to accomplish justice under § 806.07(1)(h) is reasonable and must be upheld.

Deng argues that the Risbergs filed this appeal in bad faith and solely for the purpose of harassing or maliciously injuring her. *See* WIS. STAT. § 25(3)(c)1. In her motion, Deng points to an earlier appeal, other litigation between the parties, and the Risbergs' conduct in small claims court, as evidence of the Risbergs' bad faith in pursuing this appeal.

This court determines, as a matter of law, whether an appeal is frivolous. ***Tennyson v. School Dist. of Menomonie Area***, 2000 WI App 21, ¶33, 232 Wis. 2d 267, 606 N.W.2d 594. All doubts about whether an appeal is frivolous must be resolved in favor of the appellant. *See* ***Rabideau v. City of Racine***, 2001 WI 57, ¶46, 243 Wis. 2d 486, 627 N.W.2d 795.

We conclude this appeal is not frivolous. The earlier appeal, No. 2015AP2281, was begun by the Risbergs *pro se* and voluntarily dismissed after counsel was retained, no doubt in recognition that relief from a default judgment must first be sought in the circuit court. The other litigation cited by Deng is not part of this appeal and Deng has not shown a "'pattern of frivolous

litigation.'" ***Village of Tigerton v. Minniecheske***, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (1997) (court may restrict litigant's access to court if the litigant has engaged in a pattern of frivolous litigation) (quoted source omitted).

Upon the foregoing reasons,

IT IS ORDERED that the motion for costs and fees under WIS. STAT. RULE 809.25(3) is denied.

IT IS FURTHER ORDERED that the order is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals