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July 29, 2020

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

2019AP1471 Rocky Point Lending, LLC v. Rocky Point International, LLC (L.C. #2017CV1558)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dag O. Dvergsten appeals from a judgment entered by the circuit court in favor of Seah Chee Wei, as Liquidator of Traxiar Drilling Partners II, PTE, Ltd. (the Liquidator), in the amount of $22,520,810. The circuit court entered the default judgment on the remaining cross claims in the case after striking Dvergsten's pleadings as a sanction for his failure to appear at the final

pretrial conference and failure to comply with the scheduling order. Dvergsten argues that the circuit court erroneously exercised its discretion in granting a default judgment as he was unaware of the requirement that he attend the pretrial conference and the provisions of the scheduling order, which provides a clear and justifiable excuse for his conduct. 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 (2017-18).[1] We affirm the circuit court's exercise of discretion.

This proceeding commenced on September 6, 2017. It began as a lawsuit and foreclosure action filed by Rocky Point Lending, LLC, against Rocky Point International, LLC; Dvergsten; and Edgewood International, LLC.[2] Rocky Point Lending made a loan to Rocky Point International secured by a mortgage on Rocky Point International's lake house (the Rocky Point property). Rocky Point International defaulted on the loan, and Rocky Point Lending commenced this action to foreclose on the mortgage. The suit sought a judgment against Rocky Point International as a borrower and Dvergsten and Edgewood as guarantors. The Liquidator,

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

[2] The background of this case has a global history. Dvergsten is a resident of Norway. Dvergsten formed Traxiar in Singapore in 2013 to purchase an oil drilling rig. Traxiar contracted with Symphony Ventures, PTE, LTD., to provide $6 million in financing for the purpose of purchasing the rig. Allegedly, Dvergsten did not use the Symphony funds for the rig; instead, a portion of the funds were transferred to Rocky Point International, LLC, which was formed to purchase a lake home on Pewaukee Lake and used for construction of the property. The purchase of the rig never occurred. Symphony demanded an accounting for the loaned funds, the parties entered into a settlement agreement, Traxiar defaulted on that agreement, Symphony commenced litigation to wind up Traxiar in Singapore, and, as a result, the Liquidator was appointed under Singapore law. The Liquidator obtained a multi-million dollar judgment against Dvergsten in Singapore. In an attempt to follow the money, the Liquidator subsequently filed actions in the U.S. District Court for the Southern District of Texas and the U.S. District Court for the Eastern District of Wisconsin for fraudulent transfers and other claims. Both of those actions were dismissed.

Seah Chee Wei, was included in the suit because the liquidation estate held an interest against the Rocky Point property through a lis pendens due to the liquidation estate's claim of a constructive trust over the Rocky Point property in ongoing litigation. The Liquidator filed counterclaims against Rocky Point Lending and cross claims against Dvergsten and Rocky Point International, seeking a judgment in the amount of its actual damages as well as punitive damages. Rocky Point Lending was granted a judgment of foreclosure, and a sheriff's sale of the property was held in November 2018.[3] The circuit court eventually entered an order resolving the case in all respects, except for the Liquidator's remaining claims against Rocky Point International and Dvergsten.

The court entered the original scheduling order in this case on November 10, 2017. On October 5, 2018, the circuit court held a status conference and entered an order specifically requiring Dvergsten to appear at the final pretrial conference scheduled for February 25, 2019, and modifying the existing scheduling order to remove the requirement that the parties participate in mediation, but otherwise leaving the previous order intact. The scheduling order required that the parties file final pretrial reports ten days prior to the pretrial conference and warned that "FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER SHALL BE CONSIDERED CAUSE FOR IMPOSING SANCTIONS THAT MAY INCLUDE THE DISMISSAL OF CLAIMS AND DEFENSES, OR EXCLUSION OF WITNESSES."

Dvergsten did not file a pretrial report. On February 20, 2019, Dvergsten submitted a letter to the circuit court unprompted, arguing that the actions of the Liquidator were improper.

[3] Neither the judgment of foreclosure nor the sheriff's sale are at issue in this appeal.

The next day, Dvergsten submitted another letter to the circuit court stating that Dvergsten "learned this morning that I have not received any call for a meetings or hearing from you of which supposedly shall take place over the next week or two weeks." Dvergsten then failed to appear at the pretrial conference on February 25, 2019. The circuit court entered an Order to Show Cause, ordering "that Rocky Point International, LLC and Dag Dvergsten shall appear in person at the hearing set for April 1, 2019 in this Court and shall show just cause why their answer to the cross-complaint of the Liquidator should not be stricken for failure to abide by Orders of this Court, resulting in judgment against them."[4] At the hearing, Dvergsten failed to appear, despite the court's order that he do so, and the hearing was adjourned to allow Dvergsten's newly-retained counsel time to respond.[5] Dvergsten also did not appear personally at the adjourned hearing on April 23, 2019, and, after hearing arguments of counsel, the circuit court found that Dvergsten violated the scheduling order in the case and that his conduct was "egregious" due to his "almost total failure to participate in the case in a manner that would allow the Court and the opposing side to move forward to prepare" for trial.

As a sanction, the circuit court struck Dvergsten's pleadings and entered judgment on the cross claims remaining in the case in the amount of $7,500,000, plus actual attorney fees of

[4] The Honorable Ralph M. Ramirez entered the Order to Show Cause. Previous orders of the court were entered by the Honorable Jennifer R. Dorow and the Honorable Sarah B. O'Brien, reserve judge.

[5] Former counsel for Dvergsten withdrew in March 2018 due to lack of payment of fees, and Dvergsten was "directed to retain replacement counsel as soon as possible." Current counsel was retained on March 31, 2019.

$20,810, punitive damages of $15,000,000, and statutory costs and attorney fees, for a total of $22,520,810.[6] Dvergsten appeals.

Dvergsten argues that the circuit court erroneously exercised its discretion by striking his answer and entering a default judgment[7] pursuant to WIS. STAT. §§ 805.03 and 804.12(2)(a)3.[8] We review the court's decision under an erroneous exercise of discretion standard, and we will uphold the decision if the court "examines relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Smith v. Golde***, 224 Wis. 2d 518, 525, 592 N.W.2d 287 (Ct. App. 1999) (citation omitted). A default judgment is an appropriate sanction where the court determines that the "noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse." ***Id.*** at 526 (citation omitted). "We will sustain the court's default judgment sanction if there is a reasonable basis for its determination." ***Id.***

[6] The circuit court also entered judgment against Rocky Point International in the total amount of $8,850,000, which is not at issue in this appeal.

[7] "A successful motion to strike an answer will normally lead to a default judgment. Therefore, a motion to strike an answer to facilitate a default judgment should satisfy the same criteria as the motion for default judgment." ***Split Rock Hardwoods v. Lumber Liquidators***, 2002 WI 66, ¶38, 253 Wis. 2d 238, 646 N.W.2d 19.

[8] WISCONSIN STAT. § 805.03 provides, in pertinent part: "For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under [WIS. STAT. §] 804.12(2)(a)." Section 804.12(2)(a)3. provides that if a party "fails to obey an order to provide or permit discovery" the court "may make such orders in regard to the failure as are just," including "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

In this case, the circuit court found Dvergsten's conduct to be egregious and it properly set forth a factual and legal basis to justify its decision on the record. The circuit court found that Dvergsten violated the scheduling order by failing to appear at the pretrial conference on February 25, 2019, and failing "to comply with very elemental and important parts of this scheduling order. No pretrial report. No witness list. No participation in discovery." Further, Dvergsten's excuse for his failure to abide by the scheduling order was that he did not know about the pretrial requirements as he did not receive the order by e-mail and was without an attorney for a period of time. Evidence in the record suggests that Dvergsten was properly provided notice by e-mail, as ordered by the court; that Dvergsten was responding to the parties from that same e-mail address before and after the scheduling order was sent; that Dvergsten's former counsel represented that Dvergsten was aware of the dates in the scheduling order; and that counsel for the Litigator followed up with Dvergsten by e-mail regarding the scheduling order. The circuit court determined that Dvergsten's version of events was not credible. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998) ("[W]e will accept the circuit court's determination as to weight and credibility."). According to the court, Dvergsten's "almost total failure to participate in the case" prevented the court and the opposing party from having the matter brought to trial:

> The Scheduling Order is an order. It is not a suggestion of this Court. Mr. Dvergsten's failure to participate in these proceedings has wasted the time and resources of the Liquidator and this Court. This case cannot proceed to trial because the Liquidator does not know Mr. Dvergsten's theories of defense, his witnesses or the evidence he will submit. Proceeding to trial without Mr. Dvergsten having any witnesses or other evidence would be a complete waste of time and expense for the Court, a jury and the Liquidator. Since Mr. Dvergsten will have no witnesses or evidence, a trial would likely have the same result: judgment against Mr. Dvergsten.
>
> Further, Mr. Dvergsten has presented no clear or justifiable excuse for its failure to abide by the Scheduling Order. He is a

> sophisticated businessman and litigant as shown from his involvement in multiple court cases around the world. His blatant lack of compliance is egregious behavior with no justifiable excuse offered.

Based on the record in this case, we cannot find that the circuit court lacked a reasonable basis for its determination. Accordingly, we conclude that the circuit court properly exercised its discretion in finding Dvergsten's conduct to be egregious without justifiable excuse, striking Dvergsten's answer, and entering a default judgment against him.[9]

Upon the foregoing reasons,

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

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[9] Dvergsten also challenges the circuit court's choice of sanction in this case, arguing that it "could have levied any number of sanctions, which would have been more equitable." Specifically, he argues in his reply brief that the court's imposition of $15,000,000 in punitive damages was "without any basis in the record" and "should be related to proof of the wealth of the party against whom judgment is levied," citing ***Trinity Evangelical Lutheran Church v. Tower Ins. Co.***, 2003 WI 46, ¶¶52-53, 261 Wis. 2d 333, 661 N.W.2d 789. As to the type of sanction levied by the circuit court, it is within the circuit court's discretion to determine which sanctions to impose for violation of a court order. ***Schultz v. Sykes***, 2001 WI App 255, ¶¶8-10, 248 Wis. 2d 746, 638 N.W.2d 604. A circuit court may sanction a party by striking pleadings and entering a default judgment. *See* ***id.***, ¶9. Dvergsten fails to argue how the circuit court's choice of sanction was an erroneous exercise of discretion, except to disagree with its conclusion.

As to the imposition of punitive damages, the circuit court held two order to show cause hearings, and Dvergsten did not appear personally at either hearing to submit the evidence he now argues should have been considered. Dvergsten also never requested an evidentiary hearing or objected to the manner in which the order to show cause hearing was conducted. At the first order to show cause hearing, the court directed counsel for the Liquidator to "submit" documentation of appropriate facts "that support the request for punitive damages and state with specificity the amount of punitive damages. I will review it and consider that before I sign them." The court reviewed the proposed Findings of Fact, Conclusions of Law, and Order for Judgment Against Dag O. Dvergsten, which contained appropriate support for the award of punitive damages; reviewed the history of the case; heard arguments from counsel; and determined that the award for punitive damages was appropriate. *See* WIS. STAT. § 806.02; ***Rao v. WMA Sec., Inc.***, 2008 WI 73, ¶¶30-44 & nn.26-27, 31, 310 Wis. 2d 623, 752 N.W.2d 220; ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 385-91, 577 N.W.2d 23 (1998). Our independent review of the record confirms that the circuit court did not err.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals