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DISTRICT III

March 2, 2021

To:

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

2020AP178-FT LNV Corporation v. Tammy S. Stueber (L. C. No. 2018CV1089)

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Tammy Stueber appeals from an order denying her motion to reopen a residential mortgage foreclosure. 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.

As we discussed in a companion appeal, the circuit court entered a summary judgment of foreclosure against Stueber based upon the uncontested facts that she failed to make timely payments on a refinanced promissory note and mortgage held by LNV Corporation and failed to cure the default. *See* ***LNV Corp. v. Stueber***, No. 2019AP1658, unpublished slip op. (WI App Feb. 23, 2021). While Stueber's appeal of the judgment of foreclosure was pending, she moved to reopen the foreclosure judgment pursuant to WIS. STAT. § 806.07, seeking to raise counterclaims and an affirmative defense for an offset based on alleged violations of the Truth in Lending Act (TILA) during the loan origination process.

As grounds to reopen, Stueber alleged she had "relied on the advice of her prior attorneys who were not familiar with actions under the TILA." Stueber asserted that, given the complexity of this area of law, the failure of her prior attorneys to raise a TILA claim as an affirmative defense constituted "excusable neglect" within the meaning of WIS. STAT. § 806.07(1)(a). Alternatively, Stueber argued that her attorneys' failure to raise a TILA claim warranted "equitable" relief pursuant to the catchall provision of § 806.07(1)(h).

The circuit court denied the motion to reopen, reasoning that a litigant using the subsequent hiring of an attorney with better expertise or different legal theories as a reason to reopen a judgment after losing a case would "open[] up a new door" for obtaining relief from a

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

judgment.[2] We review a circuit court's discretionary decision whether to reopen a judgment under WIS. STAT. § 806.07 with great deference, and we will uphold it so long as it was supported by a reasonable basis. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

Excusable neglect is not synonymous with neglect, carelessness or inattentiveness; rather, it is that neglect which might have been the act of a reasonably prudent person under the same circumstances. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). Stueber does not cite a single case wherein a court has held that an attorney's failure to recognize or advance a particular legal theory based upon facts within the attorney's possession constituted excusable neglect. Moreover, Stueber did not present any allegations or affidavit describing the interactions she had with her prior attorneys regarding what defenses to raise in this case. In fact, Stueber's previously filed memorandum in opposition to summary judgment advanced a different defense—namely, that Stueber had never agreed to or executed the refinancing note and mortgage upon which the foreclosure action was based, and that a preceding note and mortgage were still in effect. The assertion of this different defense could indicate either that counsel had not considered a TILA defense or that counsel had not viewed a TILA defense as viable. We conclude it was reasonable for the circuit court to refuse to find excusable neglect on these facts.

The catchall provision under WIS. STAT. § 806.07(1)(h) should be employed only when extraordinary circumstances are present, taking into account: (1) whether the judgment was the

[2] The record does not contain the transcript from the hearing on the motion to reopen, despite the indication on the appellant's statement on transcript that the transcript had been ordered, and a notice by the court reporter that the transcript was filed. However, the parties both quote from the transcript. Because those quotations are uncontested, we will accept them as accurate for the purposes of this appeal.

result of the conscientious, deliberate and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether there had been any judicial consideration of the merits and the interest of deciding the case on the merits outweighs the interest in finality of judgments; (4) whether there was 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. Stueber does not explicitly address any of these factors in the section of her brief arguing that the circuit court should have granted her relief under § 806.07(1)(h). Instead, she merely asserts that the court's decision not to reopen the foreclosure judgment disregards the goal of fairness in favor of finality. However, balancing various factors is the essence of discretion. Stueber has not shown that it was unreasonable for the court to conclude, on balance, that the equities here did not support reopening the judgment to give Stueber a second chance to advance additional legal theories.

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals