COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2743 **Cir. Ct. No. 2006CV206**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

EAGLE MORTGAGE & LOAN, LLC,

PLAINTIFF-APPELLANT,

V.

ALYSHA K. RODRIGUEZ AND JONATHAN C. RODRIGUEZ,

DEFENDANTS,

MERCHANTS NATIONAL BANK,

GARNISHEE-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 BRIDGE, J. Eagle Mortgage & Loan, LLC, appeals from an order relieving Merchants Bank, N.A., Onalaska Charter, from a default judgment in a garnishment action. The circuit court determined that the Bank's failure to timely answer was not due to excusable neglect. We agree. However, the court determined that a misnomer in the pleadings constituted a fundamental defect in service, depriving the court of personal jurisdiction over the Bank. Accordingly, the court vacated the judgment against the Bank. Whether a defect is fundamental or simply technical turns on an inquiry into whether service was made on the party that Eagle intended to sue. We conclude that the record on appeal is insufficient to make this determination and therefore remand the case for additional fact-finding.

STATEMENT OF FACTS

¶2 Eagle Mortgage & Loan, LLC, obtained a default judgment against Alysha and Jonathan Rodriguez for past due balances owed on a loan. In an attempt to collect the judgment, Eagle commenced garnishment proceedings naming as garnishee *Merchants National Bank*, 3140 Market Place, Onalaska, Wisconsin. Garnishment pleadings were served on an assistant vice president of the bank at that address. The correct name of the bank doing business at that address, however, was *Merchants Bank, N.A., Onalaska Charter*. Mr. and Mrs. Rodriguez held no deposit accounts at Merchants Bank, Onalaska Charter, and the bank was not indebted to them when the garnishment was served.

¶3 The Bank did not timely answer, and a default judgment was entered against it. The Bank moved for relief from the judgment pursuant to WIS. STAT.

§ 806.07 (2005-06),[1] arguing that the judgment should be vacated because the court lacked personal jurisdiction over it. In the alternative, it argued that its failure to timely answer was due to excusable neglect.

¶4 The circuit court declined to find that the Bank's conduct constituted excusable neglect. However, the court determined that Eagle's failure to correctly name the Bank was a fundamental defect in service which deprived the court of personal jurisdiction over the Bank. Accordingly, the court vacated the default judgment. Eagle Mortgage appeals. We reference additional facts as needed in the discussion below.

DISCUSSION

¶5 We first address whether the circuit court erred when it declined to relieve the Bank from judgment due to excusable neglect as provided for in WIS. STAT. § 806.07(1)(a). We review a circuit court's decision whether to grant a default judgment under an erroneous exercise of discretion standard. ***Binsfeld v. Conrad***, 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851. A discretionary decision will be affirmed if it is based on the facts of record, the appropriate law, and the court's reasoned application of the correct law to the relevant facts. ***Id.*** The interpretation and application of statutes present questions of law that we review de novo. ***State ex rel. Steldt v. McCaughtry***, 2000 WI App 176, ¶11, 238 Wis. 2d 393, 617 N.W.2d 201.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 Excusable neglect "is conduct that 'might have been the act of a reasonably prudent person under the same circumstances.'" ***Binsfeld***, 272 Wis. 2d 341, ¶23. It is not synonymous with mere neglect, carelessness, or inattentiveness. ***Connor v. Connor***, 2001 WI 49, ¶16, 243 Wis. 2d 279, 627 N.W.2d 182. The basic question is whether the conduct was excusable under the circumstances "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984) (citation omitted).

¶7 The Bank argues that its conduct was excusable because it had a specific process in place to handle garnishments and that it forwarded the pleadings to the Bank's holding company, Merchants Financial Group, for processing. It states that the person at Merchants Financial Group who was in charge of responding to garnishments was familiar with the process for responding to garnishments originating in Minnesota, but was not familiar with the process for those originating in Wisconsin. The Bank indicates that this was the first Wisconsin garnishment that the employee had been given to process. It asserts that the employee's failure to respond to the summons and complaint was the result of her mistaken belief that she would receive additional documentation before she was required to respond, as was the case with Minnesota garnishments. In addition, it asserts that since the time the Bank was chartered in Wisconsin in 2003, Merchants Financial Group had been looking for educational opportunities in Wisconsin levies and garnishments, and had found none. The Bank also points out that once it learned of the default judgment, it quickly moved to have it vacated. The circuit court determined that the Bank's conduct was the type of inadvertence that clearly does not fall within the scope of excusable neglect.

¶8 The Bank argues that the facts in the present case are analogous to those in ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 525 N.W.2d 276 (Ct. App. 1994). In ***Baird***, a bookkeeping supervisor in a bank neglected to timely respond to a garnishee summons and complaint, and the bank offered several reasons for its actions. First, the employee had held her supervisory position for just six months and had been given no formal training in responding to summonses and complaints. ***Id.*** at 325. Second, the bookkeeping department was "swamped with work" at the time service was made and was short staffed because of office turnover. ***Id.*** Third, construction was ongoing in the building at the time the summons and complaint were served, interrupting activities in the bookkeeping department. ***Id.***

¶9 In upholding a finding of excusable neglect, we noted that, while attorneys and insurance company claims employees are regularly involved with lawsuits and are trained to recognize the importance of a timely response to legal pleadings, the same is not necessarily true of a bank. ***Id.*** at 326. We noted that "[e]valuation of a bank's conduct requires a case-by-case determination." ***Id.***

¶10 Unlike ***Baird***, the employee here was not a member of a bookkeeping department for an individual bank, but was instead the person in charge of handling garnishments for all of the separate federally chartered National Banks owned by Merchants Financial Group.[2] The summons stated that an answer was required within twenty days; it also stated in bold type that

[2] In addition to Merchants Bank, N.A., Onalaska Charter, Merchants Financial Group also owned Merchants Bank, N.A., Hampton, Minnesota; Merchants Bank, N.A., La Crescent, Minnesota; Merchants Bank, N.A., Caledonia, Minnesota; and Merchants Bank, N.A., Winona, Minnesota.

judgment would be entered for failure to answer. The employee's failure to process the pleadings because she mistakenly viewed Wisconsin procedure as the same as Minnesota procedure may have been attributable to carelessness or inattentiveness, but it does not constitute excusable neglect. We conclude that the circuit court acted within its discretion when it determined that the Bank's conduct was not excusable neglect and denied the Bank's motion for relief from the default judgment.

¶11 We next address whether the circuit court erred when it relieved the Bank from judgment due to the absence of personal jurisdiction. WISCONSIN STAT. § 806.07(1)(d) allows relief from judgment if "[t]he judgment is void." A judgment is void for purposes of this provision when the court rendering it lacked subject matter or personal jurisdiction. *See* ***Wengerd v. Rinehart***, 114 Wis. 2d 575, 578-79, 338 N.W.2d 861 (Ct. App. 1983). Where the question of proper service is involved, the burden of proof is on the person seeking to reopen and set aside or vacate the default judgment. ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶2, 290 Wis. 2d 620, 714 N.W.2d 913. Whether service of a summons and complaint is sufficient to confer jurisdiction over a defendant is reviewed as a question of law. ***Useni v. Boudron***, 2003 WI App 98, ¶8, 264 Wis. 2d 783, 662 N.W.2d 672.

¶12 Unless otherwise provided, the general rules of civil practice and procedure apply to garnishment proceedings. *See* WIS. STAT. § 812.01(2). A civil action is commenced as to any defendant when a summons and complaint "naming the person as [a] defendant" are filed with the court. WIS. STAT. § 801.02(1). A garnishee summons and complaint are to be served on the garnishee as required for the exercise of personal jurisdiction. *See* WIS. STAT. § 812.07(1).

¶13 A summons has two purposes. First, it gives notice to the defendant that an action has been commenced against him or her. ***Bulik v. Arrow Realty, Inc.***, 148 Wis. 2d 441, 444, 434 N.W.2d 853 (Ct. App. 1988). If it clearly informs the person that it is intended for him or her and requires an answer to the complaint, then notice is sufficient. ***Id.*** Second, a summons confers jurisdiction by the court over the person served. ***Id.*** "If a person is not named in a lawsuit, that person is a stranger to the court and cannot be bound by it." ***Id.***

¶14 To establish whether a pleading is adequate to confer jurisdiction, this court uses a two-part test. ***American Family Mut. Ins. Co. v. Royal Ins. Co.***, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). First, we must determine whether there is, in fact, a defect in the pleading. ***Id.*** Second, we must determine if the defect is technical or fundamental in nature. ***Id.*** If the defect is technical, the court has jurisdiction only if the non-pleading party has not been prejudiced by the defect. ***Id.*** When a pleading that contains a defect comports with the purpose and nature of a statute, the defect is generally technical. ***Schaefer v. Riegelman***, 2002 WI 18, ¶29, 250 Wis. 2d 494, 639 N.W.2d 715.

¶15 Eagle acknowledges the defect in the pleadings but relies on ***Hoesley v. La Crosse VFW Chapter***, 46 Wis. 2d 501, 175 N.W.2d 214 (1970), in support of its position that the defect is technical in nature. In ***Hoesley***, the summons referred to the defendant as an association and listed the defendant's name as "La Crosse VFW Chapter, Thomas Rooney Post." The defendant was instead a corporation and its correct name was "Thomas Rooney Post No. 1530, Veterans of Foreign Wars of the United States." The supreme court stated the general rule for correcting misnomers in pleadings as follows:

> [I]f the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or, even where

> there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit, or even after judgment, and a judgment taken by default is enforceable.

Id. at 502. The court determined that the misdescription of the defendant was not misleading and that an amendment would not have the effect of bringing in additional parties.[3] ***Id.*** at 503-04. It determined that the plaintiff in fact served the party it intended to serve and that the service of process was therefore valid. ***Id.***

¶16 Here, Eagle contends that the misnomer was likewise not misleading and the Bank was the entity it intended to serve. In support, it refers to an affidavit by David Hammers, Eagle's manager, in which Hammers asserts that he made the loan to the Rodriguezes which was the underlying subject matter of the present action. He states that at the time of the loan application, Alysha Rodriguez informed him that she had a certificate of deposit at the Merchants Bank in Onalaska. Further, he states that after judgment was entered against the Rodriguezes, he instructed his attorney to commence a garnishment action against the Merchants Bank in Onalaska. He states that "Merchants Bank N.A. – Onalaska Branch" was the intended garnishee in this action. In addition, Eagle points out that the summons and complaint contained the Bank's correct address in Onalaska, and service was made on an officer of the Bank at that address.

¶17 The Bank argues that Eagle intended to serve the Merchants National Bank of Winona. It bases this assertion on the fact that during briefing to

[3] The Bank seeks to distinguish ***Hoesley v. La Crosse VFW Chapter***, 46 Wis. 2d 501, 175 N.W.2d 214 (1970), on the basis that, unlike the present case, it involved a motion to dismiss rather than a motion for relief from a default judgment. However, ***Hoesley*** sets out the test for determining whether a misnomer in the pleadings deprives a court of personal jurisdiction, and the procedural posture of the case has no bearing on application of the test.

the circuit court, Eagle submitted two mortgage satisfactions unrelated to the present case, which identify the lender in both transactions as "Merchants National Bank." These documents were offered in furtherance of Eagle's position that, regardless of its correct name, the Bank held itself out as "Merchants National Bank." The Bank points out that the two mortgage satisfactions were drafted before the Bank came into existence under its present name, and the reference to "Merchants National Bank" instead referred to Merchants National Bank of Winona, which had been active in the local mortgage market for several years. It asserts that in 2001, the Merchants National Bank of Winona converted its name to "Merchants Bank, N.A., Winona Charter." Eagle responds that after it provided these mortgage documents in support of its opening brief, it then submitted the Hammers affidavit to clarify its intention.

¶18 Under ***Hoesley,*** if there is doubt as to the identity of the party intended to be sued, a misnomer may be corrected *if service is made upon the party intended to be sued.* ***Hoesley,*** 46 Wis. 2d at 502-03. Here, the circuit court noted that there were multiple entities that contained the name Merchants Bank, and stated that "it's not clear to me even today whether or not the plaintiff in this case was attempting to claim that Merchants National Bank in Minona [sic] or a branch of Merchants National Bank in Onalaska was the party that had control or access over the $38,000 allegedly belonging to the Rodriguez[e]s." However, the court did not specifically ascertain whether Eagle served the pleadings on the party it intended to sue. Because that determination is central to the inquiry whether the misnomer is correctable, and is therefore a technical defect, or is not correctable and is therefore a fundamental defect, we conclude that the record is insufficient to determine whether the defect in service deprived the court of personal jurisdiction

over the Bank. Accordingly, the matter is remanded to permit the circuit court to conduct an evidentiary hearing to make this determination.[4]

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

[4] The circuit court also observed that the burden of proof was on Eagle. The burden of proof would be on Eagle if Eagle was moving to dismiss the action. *See, e.g.,* ***American Family Mut. Ins. Co. v. Royal Ins. Co.,*** 167 Wis. 2d 524, 529, 481 N.W. 2d 629 (1992). However, when a party is moving for relief from a default judgment, the burden of proof is on the party seeking relief from the judgment. ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶2, 290 Wis. 2d 620, 714 N.W.2d 913. Thus, in this instance the burden is on the Bank.