COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1302-FT **Cir. Ct. No. 2012PR103**

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

IN RE THE ESTATE OF JOYCE ANN RAINEY:

ESTATE OF JOYCE ANN RAINEY, BY ITS PROPOSED PERSONAL REPRESENTATIVE, DEBRA L. BURKHALTER,

APPELLANT,

V.

CYNTHIA RAINEY-DARGITZ,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

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

¶1 PER CURIAM. The Estate of Joyce Ann Rainey appeals from a trial court order declining to provide relief from a default judgment granting Cynthia Dargitz's claim against the estate.[1] Pursuant to a presubmission conference and this court's order of July 8, 2014, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).[2] Upon review of those memoranda and the record, we affirm.

¶2 Rainey died testate and on November 16, 2012, Dargitz filed a claim against the estate concerning payments made on the decedent's behalf and Dargitz's asserted interest in a house she shared with Rainey, her mother. The attorney for the estate failed to file an objection to Dargitz's claim within sixty days as required by WIS. STAT. § 859.33. Dargitz eventually filed a motion for default judgment and seven days prior to the default hearing, the estate filed its objection to Dargitz's claim. The trial court granted Dargitz's motion for default, allowed her claim against estate, and ordered judgment for (1) money damages in the amount of $2,280 and (2) specific performance of an agreement to transfer the decedent's undivided interest in real estate to Dargitz.

¶3 In January 2014, the estate filed motions for reconsideration and to reopen the default judgment.[3] Following a status conference, the trial court stayed

[1] Contrary to the estate's assertion, the propriety of the default judgment is not at issue in this appeal. The estate did not timely appeal from the trial court's default judgment and we are without jurisdiction to review that judgment. As such, we will not address the estate's claims relating to the trial court's default judgment, namely, the significance and relevance of the estate's purported "standing answer," and whether the deadline for filing an objection is akin to a statute of limitations.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] Due to the retirement of the judge that entered the default, a new judge presided over the postjudgment proceedings.

the default judgment and set a briefing schedule. Dargitz filed a brief opposing both reconsideration and the estate's request for relief from the default judgment. Two days after the estate's response was due, rather than filing a brief, counsel for the estate wrote a letter confirming that it intended to rely on "its Motions, Affidavits and law cited in the filings of January 8, 2014." The letter made five assertions it characterized as beyond dispute and opined that Dargitz's brief was not "factually or legally [] sufficient to rebut the Estate's filings." Dargitz filed a reply brief as provided by the scheduling order.

¶4 The trial court entered a written decision denying the estate's motions to reconsider and reopen the default judgment. As to reconsideration, the trial court determined that this claim was contextually inappropriate and unsupported by reference to statute or other relevant authority.[4] The trial court also denied the estate's WIS. STAT. § 806.07 motion for relief from judgment, concluding that the estate failed to establish either "[m]istake, inadvertence, surprise, or excusable neglect" under § 806.07(1)(a), or the extraordinary circumstances required for relief under the "catchall" provision, § 806.07(1)(h). The estate appeals.

¶5 WISCONSIN STAT. § 806.07 provides the terms under which a court may relieve a party from a judgment, including a "catchall" provision, which allows a party to seek relief for "[a]ny other reasons justifying relief from the operation of the judgment." *See* § 806.07(1)(h). In seeking relief under § 806.07(1)(h), the movant carries the burden to establish the existence of

[4] The estate does not discuss the trial court's denial of its motion to reconsider, and we deem the issue abandoned. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed or argued on appeal are deemed abandoned).

"extraordinary circumstances" that "justify[] relief in the interest of justice." ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶¶34-35, 326 Wis. 2d 640, 785 N.W.2d 493. Extraordinary circumstances exist only in "extreme and limited cases." ***Connor v. Connor***, 2001 WI 49, ¶43, 243 Wis. 2d 279, 627 N.W.2d 182. Determining whether extraordinary circumstances have been established requires the trial court to consider a wide range of factors, most notably, the "five interest of justice factors." ***Miller***, 326 Wis. 2d 640, ¶¶36, 49. These five factors are:

> [W]hether 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.

Id. at ¶36 (citation omitted).

¶6 The trial court properly denied the estate's WIS. STAT. § 806.07(1)(h) claim for relief. After reviewing the pleadings and relevant law, the trial court concluded that the estate's motions, affidavits, and supporting briefs neglected to adequately discuss, let alone establish the existence of, any of the relevant interest of justice factors. The trial court's written decision dutifully analyzed each factor and, as to the first, whether the judgment was the result of a deliberate choice, the trial court noted that though the burden was on the estate, it failed to discuss this factor and "the record is devoid of any facts for this court to rely on." On the second factor, whether the estate had received the effective assistance of counsel, the trial court noted that the estate's attorney had provided representation throughout the proceedings and "there is no claim by the Estate that he was not effective." In considering the third factor, whether the interest of

deciding a case on the merits outweighs the interest in finality, the trial court stated that the case began in July 2012 and that any claims on the estate should have been but were not decided long ago owing to the estate's failure to object. The trial court determined that finality interests required the estate to move toward its closing.

¶7 The trial court acknowledged that the estate's submission made mention of the fourth factor, whether there existed a meritorious defense to the claim. Here, the trial court found that the estate's argument was wholly undeveloped:

> The fourth factor is a meritorious defense to the claim. Once again, [the estate's attorney] fails to meet his burden of proof with his conclusory pleadings. For example, he cites the Statute of Frauds as a "clearly meritorious defense" but does not elaborate. This court cannot and will not guess at whether that defense would ultimately prevail. [Dargitz's brief] strongly argues that reliance on the defense is "misplaced." While the court must assume the Estate's facts are true, it need not assume its legal conclusions are true. This court cannot say the defense offered is "meritorious" based on the record before it. Frankly, it is not clear from the pleadings of the Estate how their objection to the claim would be supported.

The trial court thus concluded that the estate failed to establish the existence of a meritorious defense to Dargitz's claim against the estate. Finally, as to the existence of intervening circumstances, the court stated that the estate's "pleadings again ignore this issue, forcing the court to speculate." Unwilling and unable to speculate, the trial court determined that the estate failed to establish the fifth factor.

¶8 Curiously, in this court the estate devotes nearly its entire brief to arguing the existence of a meritorious defense. There are at least two problems

with the estate's approach on appeal. First, as it did in the trial court, it neglects to discuss any of the other interest of justice factors. Once again, the estate has failed to meet its burden to establish the existence of extraordinary circumstances justifying relief in the interest of justice. Second, we review the trial court's order for an erroneous exercise of discretion. The estate failed to develop its meritorious defense argument in the trial court, and cannot remediate this shortcoming later, on appeal. We consider whether the trial court properly exercised its discretion based on the record it was presented. Here, the trial court addressed all five prongs in its written decision and, after rationally applying the law to the facts, made a discretionary determination that the estate did not meet its burden under WIS. STAT. § 806.07(1)(h). We will not interfere with the trial court's appropriate exercise of discretion. ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982).

¶9 Though not addressed by the estate on appeal, we also conclude that the trial court properly determined that relief was not warranted on the ground of excusable neglect under WIS. STAT. § 806.07(1)(a).[5] Excusable neglect is the neglect that "'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). "It is 'not synonymous with neglect, carelessness or

[5] We address this portion of the trial court's decision because the theme of excusable neglect is woven throughout this case. In both its predefault judgment objection and its motion to reopen the default judgment, the estate asserted that its failure to file a timely objection was due to excusable neglect, namely, the physical health of its attorney. Since the judgment, the estate has repeatedly complained that the original court's default was entered in error because the court strictly construed the objection-filing deadline as akin to a statute of limitations. However, the record reveals that the decision to enter a default judgment was made only after the court determined that the estate's untimely objection was not attributable to excusable neglect. This conceptual thread was neatly tied up by the postjudgment court's explicit decision that relief was not warranted on the ground of excusable neglect.

inattentiveness.'" ***Id.*** The burden of establishing excusable neglect is on the party seeking relief from a default judgment. ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265.

¶10 Noting that the default-granting court was presented with the estate's claim that the untimeliness of its objection should be forgiven, the postjudgment court carefully examined the record and the parties' submissions and determined that any neglect alleged to have contributed to the default judgment was not sufficiently excusable to justify relieving the estate from the judgment. In reaching this conclusion, the postjudgment court considered the serious health incidents suffered by the estate's attorney, but pointed to the distinct pattern of missed deadlines, observing that the record "is replete with the failure of [the estate's attorney] to comply with virtually every time deadline." The trial court also considered that the estate's attorney was actively involved in the case while the time for filing an objection was still running and "filed other pleadings in this case within that same time frame that the objection to claim was due." Even after the deadline expired, the estate failed to file an objection for another ten months, after Dargitz filed a motion for default judgment. Here again, the trial court applied the correct law to the facts of record and its decision constitutes an appropriate exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).