COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2249

Cir. Ct. Nos. 02-SC-443
02-SC-956

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

SCOTT MULLEN AND CASSANDRA MULLEN,

PLAINTIFFS-RESPONDENTS,

V.

GERALD VANDEVOORT, D/B/A JERRY VAN'S HEATING AND COOLING,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

¶1 CANE, C.J.[1] Gerald VandeVoort, d/b/a Jerry Van's Heating and Cooling, appeals a summary judgment in favor of Scott and Cassandra Mullen and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

an order denying his request for relief from a prior judgment. The Mullens hired VandeVoort to install heating and air conditioning at their home and shop. A dispute developed regarding the price of VandeVoort's services and the Mullens sued him after he stopped working on the installation. The parties settled before trial with VandeVoort agreeing to complete the installation for what the Mullens had already paid him. VandeVoort then sued the Mullens, alleging they owed him more money.

¶2 The Mullens moved for summary judgment, arguing VandeVoort's suit was precluded because of the settlement. The court commissioner granted this motion, and VandeVoort appealed to the circuit court. The court reaffirmed the summary judgment and considered, but ultimately denied, VandeVoort's motion for relief from the judgment entered on the settlement.

¶3 On appeal, VandeVoort argues the court erred when it granted the Mullens' summary judgment because there were material facts in dispute. VandeVoort also contends he was denied his right to a trial de novo under WIS. STAT. § 799.207(3), and he asks that we remand the matter for a trial to determine the actual amount the parties agreed upon for the work. In addition, the Mullens claim VandeVoort's appeal is frivolous. We conclude that the trial court correctly granted summary judgment and reasonably exercised its discretion when it refused to grant VandeVoort relief from the settlement. Therefore, we affirm the trial court's judgment and order. We cannot conclude, however, that VandeVoort's appeal is frivolous and therefore deny the Mullens' request for attorney fees and costs.

BACKGROUND

¶4 In the summer of 2001, the Mullens began construction on a new home and shop in Seymour and hired VandeVoort to install the heating and air conditioning. The parties dispute the terms of their oral agreement. The Mullens contend they and VandeVoort agreed on a price of $6,300. VandeVoort argues they agreed upon $200 less than the lowest bid that the Mullens received, which he claims was $10,750 and was divided $4,250 for the shop and $6,500 for the house.

¶5 The Mullens gave VandeVoort a $4,000 down payment. After completing work on the house, he billed the Mullens $2,300. This, along with the down payment, would be $200 less than the $6,500 for the lowest bid on the house. The Mullens paid the $2,300, believing they had paid the balance of the bill for the entire project. VandeVoort demanded payment for the shop prior to starting and refused to finish the project when the Mullens did not pay. The Mullens then filed a small claims action, Case No. 02-SC-443, against VandeVoort.

¶6 On March 25, 2002, the parties settled prior to the scheduled hearing before the court commissioner. They agreed that VandeVoort would finish the shop before June 1, and would also warranty his labor for one year. The settlement did not require the Mullens to pay VandeVoort any additional money. The court commissioner approved the agreement and entered it as stipulated judgment of dismissal under WIS. STAT. § 799.24(3).

¶7 Two days later, VandeVoort filed his own small claims action, Case No. 02-SC-956, against the Mullens, seeking $4,250. The Mullens moved for summary judgment, arguing VandeVoort's claim was barred by res judicata

because of the stipulation. The court commissioner agreed, and VandeVoort moved for a trial de novo in the circuit court pursuant to WIS. STAT. § 799.207(3). The court affirmed the commissioner's summary judgment determination but, on its own motion, allowed VandeVoort to request relief from the stipulated dismissal under WIS. STAT. § 806.07. After hearing testimony from VandeVoort and Cassandra Mullen, the court determined any mistake VandeVoort made in entering the stipulation was not excusable and denied VandeVoort's motion. On VandeVoort's motion, the court consolidated the cases, and VandeVoort appeals.

DISCUSSION

¶8 VandeVoort frames the issues for review as whether the court improperly granted summary judgment because there were disputed material facts and whether he is entitled to a trial de novo. He does not directly challenge the trial court's denial of relief under WIS. STAT. § 806.07.[2] Nonetheless, we will address this issue because it is central to the court's resolution of the consolidated cases. *See* ***State v. Waste Management***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (an appellate court is not bound by the appellant's approach to the issues).

¶9 We first address VandeVoort's claim that the court erred by granting summary judgment in No. 02-SC-956. We review a summary judgment de novo and apply the same standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary

[2] VandeVoort also argues there were "material factual issues which neither the Court Commissioner nor the Circuit Court heard." The factual issues VandeVoort points to are the negotiations surrounding the execution of the parties' initial agreement and the settlement of No. 02-SC-443. To the extent these claims are susceptible to appellate review, we will address them in our resolution of the court's denial of VandeVoort's request for relief from judgment under WIS. STAT. § 806.07.

judgment if there are no disputed issues of fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 The circuit court granted summary judgment because it determined VandeVoort's claim in No. 02-SC-956 had been resolved by the parties' settlement in No. 02-SC-443. The parties contend the court's decision was based on the concept of res judicata. We have replaced this term, however, with claim preclusion. ***NSP Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties or their privies involving all matters litigated, and all matters that could have been litigated, in the proceeding leading to the judgment. ***Id.***

¶11 The circuit court correctly concluded No. 02-SC-956 was barred by the settlement in No. 02-SC-443. In filing No. 02-SC-956, VandeVoort sought to recover payment for his work on the Mullens' shop. This issue should have been raised and could have been litigated in No. 02-SC-443. Instead, the parties settled and the court commissioner entered a stipulated dismissal. This dismissal constitutes a judgment, and VandeVoort is barred from raising the issue in a subsequent lawsuit.

¶12 VandeVoort next argues he has an absolute right to a trial de novo on the court commissioner's decision and the court's grant of summary judgment denied him that right. The right to de novo review of a court commissioner's small claims judgment is found in WIS. STAT. § 799.207(3). Under the statute, there is an absolute right to have the circuit court review the commissioner's decision if the demand is timely made. WIS. STAT. § 799.207(3)(c).

¶13 We cannot conclude VandeVoort was denied his right to a trial de novo. Our review of the record reveals that he was granted a de novo trial in No. 02-SC-956, in which the court affirmed the commissioner's grant of summary judgment based on claim preclusion. Further, the record does not reveal that VandeVoort ever requested a trial de novo in No. 02-SC-443. Instead, he filed his own small claims action against the Mullens. VandeVoort's failure to request a trial de novo prevents us from determining whether he was denied his right to one.

¶14 VandeVoort's only avenue of relief, then, was WIS. STAT. § 806.07. This statute allows a court to grant relief from a judgment in the case of mistake, inadvertence, surprise, or excusable neglect. WIS. STAT. § 806.07(1)(a). Here, VandeVoort settled based on a mistake regarding the agreement's terms. Not every mistake is sufficient to entitle a moving party to relief. ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). Courts may grant relief from a judgment for excusable and justifiable mistakes. ***Id.*** A mistake is excusable when the mistake would have been reasonable under the circumstances. *See* ***id.*** The fact that a settlement appears by hindsight to have been a bad bargain is not sufficient by itself to warrant relief. ***Burmeister v. Vondrachek***, 86 Wis. 2d 650, 665, 273 N.W.2d 242 (1979). A trial court's decision to grant relief under WIS. STAT. § 806.07 is committed to the court's discretion and we will not reverse unless the court erroneously exercised its discretion. ***Id.*** at 664. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶15 The court determined VandeVoort's mistake in settling the case was not reasonable because the agreement was clear in its requirement that VandeVoort complete the work for the amount he had already been paid. It noted

there was no mathematical error regarding the amount, no confusing language or any confusion by VandeVoort as to what was at issue. Finally, the court noted that although VandeVoort's mistake may have been costly, that alone did not make it reasonable. We conclude this reflects a proper exercise of the court's discretion.

¶16 Finally, we consider the Mullens' claim that VandeVoort's appeal is frivolous. Under WIS. STAT. RULE 809.25(3)(c), an appeal is frivolous when either:

> 1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶17 The Mullens contend VandeVoort's appeal is frivolous because No. 02-SC-956 was barred by claim preclusion, No. 02-SC-443 had been settled and VandeVoort could offer no evidence of a reasonable mistake. Our review of the record, however, reveals there is a reasonable basis to suggest VandeVoort could have been reasonably mistaken when he settled No. 02-SC-443. Although VandeVoort does not directly argue the court erroneously exercised its discretion when it refused to grant him relief from the judgment, we construe his argument regarding "material factual issues which neither the Court Commissioner nor the Circuit Court heard" to be, in part, an argument the trial court should have determined there was a reasonable mistake by VandeVoort. This provides a reasonable basis for VandeVoort's appeal, and we deny the Mullens' motion for costs and attorney fees.

By the Court.—Judgment and order affirmed.

This decision will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.