COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1248 **Cir. Ct. No. 2009CV7538**

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

LEGACY BANK,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN PRESERVATION FUND, INC.,

DEFENDANT-APPELLANT,

TATIA P. JACKSON, JOHN DOE JACKSON,
UNKNOWN SPOUSE OF TATIA P. JACKSON,
T. P. JACKSON ENTERPRISES, LLC,
FINESSE, LLC,
HANNAH.AMISHA.TATIA.INVESTMENT, LLC
AND WELLS FARGO BANK, N.A.,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Wisconsin Preservation Fund, Inc. (WPF) appeals the order reopening and dismissing Legacy Bank's (Legacy) mortgage foreclosure action, without prejudice, so that Legacy can correct an error in the amount of money sought. WPF argues that the circuit court failed to account for the finality of judgments and failed to properly exercise its discretion. Because the record supports the circuit court's discretionary decision, we affirm.

BACKGROUND

¶2 Legacy filed a mortgage foreclosure action claiming that it was owed approximately $145,000 plus interest, costs, and fees. After the defendants defaulted, Legacy received a judgment in that amount, which was entered on December 10, 2009. WPF holds a second mortgage on one of the properties that was the subject of the foreclosure action.

¶3 It was later discovered that the $145,000 amount set forth in the complaint and default judgment was incorrect. Consequently, four months after the judgment was entered in its favor, Legacy moved the circuit court to amend the judgment by increasing the amount due to it on one of the notes at issue from approximately $145,000 to $500,000.[1] Legacy claimed that the lower amount was

[1] Legacy made two underlying loans in this matter, one with a principal balance of $500,000 and the other with a principal balance of $480,759. The loans were secured by mortgages. WPF's mortgage relates to only one of the properties involved. We note that Legacy attached, among other things, the following documents to the summons and complaint to substantiate its allegations: a Business Note in the amount of $500,000, a Real Estate Mortgage in the amount of $500,000, a second Real Estate Mortgage in the amount of $500,000; a U.S. Small Business Administration Note in the amount of $480,759; and a Real Estate Mortgage in the amount of $480,759. Despite submitting this documentation, Legacy incorrectly stated that the amount due and owing to it under each note was approximately $145,000. By requesting relief, Legacy sought to set forth the proper balances due and owing under both notes. The focus of this opinion, however, is on Legacy's requested relief as it relates to WPF.

included in its complaint and again in the judgment it submitted because of an inadvertent mistake. Legacy did not present affidavits or offer testimony to support its motions.[2]

¶4 WPF filed two separate responses opposing Legacy's motions. It argued that if Legacy's requested amendment to the amount of the judgment was granted, WPF's mortgage would be subordinate to a mortgage lien securing more than $500,000. As a result, WPF would not receive proceeds from the sale of the property. In contrast, if the original judgment remained in effect, WPF would likely recover the amounts it loaned. WPF further asserted that Legacy had not explained why it deserved to be relieved of the judgment.

¶5 Before the circuit court ruled on its motions, Legacy changed tactics and sought leave of the circuit court to file an amended complaint. Legacy's motion was governed by WIS. STAT. § 802.09 (2009-10), which provides that leave to file an amended pleading "shall be freely given at any stage of the action when justice so requires."[3] WPF opposed this motion arguing that Legacy failed to provide a sufficient reason to overcome the finality of the existing judgment.

¶6 At the motion hearing, the circuit court heard arguments and inquired whether it had occurred to Legacy to seek leave of the court to reopen the judgment and dismiss the case. Following additional discussion, the circuit court orally ordered that the judgment be vacated and the case dismissed. Legacy

[2] For reasons that are unclear, Legacy subsequently filed an amended motion on identical grounds to the motion it originally filed.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

submitted a proposed order and WPF objected arguing that Legacy had failed to show excusable neglect.

¶7 A second hearing was held to address WPF's objection. Legacy argued that relief from the judgment was available under WIS. STAT. § 806.07(1)(g) and (h). After ordering additional briefing, the circuit court entered an order reopening and dismissing the case, without prejudice.

DISCUSSION

¶8 "Granting, and granting relief from, a default judgment rests within the circuit court's discretion." ***Mared Indus., Inc. v. Mansfield***, 2005 WI 5, ¶9, 277 Wis. 2d 350, 690 N.W.2d 835. A circuit court properly exercises its discretion in granting relief from a judgment when it (1) considers the relevant facts; (2) applies the correct law; and (3) articulates a reasonable basis for its decision. ***Id.*** We generally look for reasons to sustain the circuit court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). "Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶9 At issue here is whether the circuit court properly relied on WIS. STAT. § 806.07 to relieve Legacy from the default judgment entered in its favor. Section 806.07(1)(g) allows relief from a judgment when "[i]t is no longer equitable that the judgment should have prospective application." ***Id.*** Courts invoke their equitable powers when they act under subsection (1)(g), which applies only to equitable actions. ***Bank One Wisconsin v. Kahl***, 2002 WI App

312, ¶17, 258 Wis. 2d 937, 655 N.W.2d 525. "A mortgage foreclosure is an equitable proceeding." ***Id.***; *see also* ***McFarland State Bank v. Sherry***, 2012 WI App 4, ¶32, 338 Wis. 2d 462, 809 N.W.2d 58 (WI App 2011) ("Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings. This discretion extends even after confirmation of sale, if necessary to provide 'that no injustice shall be done to any of the parties.'") (two sets of quotation marks and citations omitted).

¶10 WPF argues that relief is not warranted under WIS. STAT. § 806.07(1)(g) and relies on ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 363 N.W.2d 419 (1985), where our supreme court reviewed cases construing subsection (1)(g)'s counterpart under the Federal Rules of Civil Procedure, Rule 60(b)(5). The court explained:

> Commentators have concluded that Rule 60(b)(5) was intended to preserve for the courts the power to alter final judgments having an ongoing impact when the facts as determined in the original action have changed to a degree that the final judgment must also be changed to comport with the new conditions. The chief use of Rule 60(b)(5) apparently has been to obtain relief from a permanent injunction which has become unnecessary due to a change in conditions. Relief from the injunction does not challenge the propriety of the original judgment, but rather is a recognition that it would be inequitable for the original judgment to be enforced prospectively.
>
> In this case, [the party adversely affected by the original judgment] is seeking relief not only from the prospective operation of the support orders but also from the "original judgment," that is, from his agreement that he is the father. This case, unlike a permanent injunction case, does not involve a change of the conditions or the operative facts occurring after the "judgment." Rather, [the party] and the court are now aware of facts previously unknown to them. This is not a case where changes make prospective application of a previously proper judgment inequitable but rather a case where new information makes the original

> "judgment" inequitable. We therefore conclude that this case does not appear to fall within the usual circumstances warranting relief under subsection [(1)](g).

State ex rel. M.L.B., 122 Wis. 2d at 543-44 (citations omitted). Following ***State ex rel. M.L.B.***, WPF submits that Legacy is not entitled to relief because it does not assert a change in the conditions or operative facts occurring *after* the judgment that make future application of the judgment inequitable.

¶11 We acknowledge that this case does not fit the mold of a permanent injunction case. But, we are not convinced that it needs to. As noted, the court in ***State ex rel. M.L.B.*** said that the "chief use" of subsection (1)(g)'s federal counterpart was to obtain relief from a permanent injunction, *see* ***State ex rel. M.L.B.***, 122 Wis. 2d at 544—this statement, by its very wording, implies that other uses exist.

¶12 One such use is revealed in ***Bank One Wisconsin*** where the court faced a situation similar to the one before us. After the circuit court entered a default judgment in its favor, Bank One learned that the terms of a senior mortgage greatly reduced the believed amount of equity in the property that was foreclosed upon. ***Id.***, 258 Wis. 2d 937, ¶1. Bank One moved to vacate the judgment. ***Id.*** This court upheld the circuit court's determination that WIS. STAT. § 806.07 was applicable. ***Bank One Wisconsin***, 258 Wis. 2d 937, ¶13. In that case, however, we concluded that the circuit court reasonably exercised its discretion when it refused to grant Bank One relief under subsection (1)(g) primarily based on the eighteen-month delay between entry of judgment and the motion to vacate. ***Id.***, ¶18.

¶13 Implicit in this court's opinion is that if Bank One had promptly sought relief, the analysis under subsection (1)(g) would have been different.

Here, Legacy sought relief just over four months after the judgment was entered in its favor. Consequently, delay is not a relevant consideration.

¶14 Although Legacy attached to its summons and complaint relevant documentation supporting its allegations, *see supra* ¶3 n.1, it misstated the amount due and owing to it. During the first hearing, the circuit court inquired as to the difference between the amount sought and the amount for which judgment was rendered and learned that Legacy had misstated the amount it was owed by approximately ninety percent.

¶15 During the first hearing, the circuit court also accounted for the timing of events, noting that the matter was before it prior to a sheriff's sale, and asked about the specific security for the loans, including the physical address of the property at issue. The circuit court expressed concern that if the amount of the judgment was in question, it might be difficult for a purchaser to obtain clean, marketable title. The circuit court listened to WPF's objections. It then distinguished the circumstances presented from those instances where a party seeking to reopen a judgment is "trying to dump the property back on the back of the taxpayers[, or] … where they're trying to dump the home back on the homeowner because the property is environmentally contaminated or because the property taxes aren't paid…. I don't allow that. Okay. That's not what's going on here."

¶16 During the second hearing, the circuit court acknowledged that it had, on its own motion, reopened and dismissed the case. *See* ***Gittel v. Abram***, 2002 WI App 113, ¶24, 255 Wis. 2d 767, 649 N.W.2d 661 (concluding that the plain language of WIS. STAT. § 806.07 authorizes the court to act *sua sponte*). The circuit court then reviewed § 806.07 with the parties and, apparently relying on

subsection (1)(g), asked WPF why it was equitable that the original judgment should have prospective application. WPF responded citing, in part, the policy favoring finality of judgments. The circuit court, in turn, explained that despite the policy favoring finality, judgments are frequently reopened in other matters.

¶17 In short, having reviewed the record in this matter, we conclude that it supports the circuit court's discretionary decision to reopen and dismiss the case, without prejudice. As Legacy pointed out below, WPF's objection to the circuit court's order is based solely on its desire to retain a windfall if the default judgment were to stand. In this situation, "[i]t is no longer equitable that the judgment should have prospective application." *See* WIS. STAT. § 806.07(1)(g). To the extent WPF challenges the factual support for the new amounts asserted by Legacy, it will have the opportunity to make this argument when Legacy files a new action.[4] Accordingly, we affirm.[5]

By the Court.—Order affirmed.

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

[4] WPF posits: "[T]here is as much factual support in the record for the possibility that a $500,000 loan has been paid down to the $145,000 amount as there is for the claim that the $145,000 amount is a mistake."

[5] Because we conclude that a sufficient basis to affirm exists under WIS. STAT. § 806.07(1)(g), we do not address subsection (1)(h). *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).