COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP509 **Cir. Ct. No. 2014SC1537**

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

WRIGHT WEBER MANAGEMENT, LLC,

PLAINTIFF-RESPONDENT,

V.

RYAN P. WALKER AND BOBBIE S. WALKER,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Ryan P. and Bobbie S. Walker, husband and wife, appeal the circuit court's denial of their motion to reopen and vacate a judgment of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

eviction entered against them following a court trial. The Walkers assert that the circuit court erred in denying, without a hearing, their motion to reopen and vacate the judgment. They contend the court should have afforded them a hearing on their motion because if the allegations contained in the motion and supporting documents are true, the judgment was procured by fraud and was void, pursuant to WIS. STAT. § 806.07(1)(c) and (d) respectively. They alternatively assert that it should be reopened and vacated because relief from operation of the judgment is otherwise justified, based upon § 806.07(1)(h). For the following reasons, we affirm.

Background

¶2 The following undisputed facts are taken from the record, including testimony at the October 13 and 30, 2014 hearings. The Walkers were tenants under a written one-year lease which had converted to a month-to-month tenancy. The Walkers failed to timely pay their rent for September 2014, and on September 25, 2014, Wright Weber Management, LLC, the company managing the Walkers' rental property, filed a complaint of eviction, seeking the Walkers' eviction for failure to pay September 2014 rent. Attached to the complaint was a "5-day notice to pay rent or vacate premises" addressed to the Walkers[2] with a notation that the notice was "hand-delivered" on "8-Sept-14 4:58 p.m."

¶3 At the October 13 hearing, the Walkers, appearing pro se, contested the allegation in the eviction complaint that they had been served with the five-day

[2] The five-day notice listed Bobbie's name as Bobbie Theusch. The complaint listed Bobbie as "Bobbie S. Theusch (n/k/a Bobbie S. Walker)." No one disputes that the name on the five-day notice refers to defendant-appellant Bobbie Walker.

notice, and the circuit court scheduled a trial to take place two weeks later to address this issue. The court informed the parties that on the date of the trial "everybody needs to be sure to be here; at least anybody who knows anything about this, whether the five-day was served or not."

¶4 The Walkers again appeared without counsel at the October 30 court trial. Wright Weber employee Daniel Mojica testified on direct examination that he had served Ryan with the five-day notice. Mojica stated he receives a list of late rents "usually between the 6th of the month and the 8th of the month, every month," for which he prepares five-day notices for "[his] tenants." Mojica testified he handed the five-day notice to Ryan as Ryan "was either coming back from the store, or something. I caught him when he was walking in and out." Mojica noted that Ryan's daughter was "running around somewhere." The Walkers specifically declined the opportunity to cross-examine Mojica, the court excused Mojica as a witness, and Wright Weber rested its case.

¶5 Ryan then testified on behalf of the Walkers. He testified in relevant part as follows:

> [Ryan] All right. My side of the situation, your Honor, is I was at work at the time that he [Mojica] said he delivered this.
>
> [Court] Where do you work?
>
> [Ryan] I work out in Salkville [sic]…. A place call[ed] Calibre. And my hours are second shift, and I leave the house at quarter after 2:00…. It's 3:00 to midnight, so there is no possible way I was home.
>
> [Court] Do you have any documentation that verifies you were at work? I don't know if you punch a clock or—
>
> [Ryan] I do punch a clock at work. If I need to get some evidence I could probably get that from work.

> ….
>
> [Court] … September 8th happens to be a Monday. So when do you normally work? In other words, what days of the week. Is it always the same, or is it different?
>
> [Ryan] It's always the same, it's Monday through Friday….
>
> [A]nd … Friday is differential, because I work nine-hour[] days during the week Monday through Thursday, and Fridays I go in like 10:00 in the morning until 2:00, unless we have overtime or something like that happens.

When Ryan stated he could bring paperwork to court to show that he worked that day, the court responded, "Well, today is the day…. [I]t would have to be here today because I got to figure this part of it out today." Ryan also testified that he recognized Mojica, Mojica is a "very nice gentleman" and he has "[n]ever had a problem with [Mojica], never had an issue." Ryan also testified that Mojica would recognize him. On cross-examination, Ryan acknowledged he had not paid September rent before receiving the summons and complaint of eviction.

¶6 The court expressed that its decision rested on "who is telling the truth." It noted that the plaintiff has

> the burden of proof … [t]hey got to convince me that what their side is saying is more likely true than what the other side is saying. And, of course, I have got the paperwork which seems to back up what Mr. Mojica is saying [on behalf of Wright Weber].

The court compared this with Ryan's testimony and the fact that the Walkers brought no documentation or someone from his workplace "to prove [Ryan] was at work that day." It concluded that based on Wright Weber's documentation, it "met its burden of proof" that the five-day notice was properly served, and the court granted the eviction. The court then noted that Wright Weber had twenty days in which to file an itemization of what it was owed and that the Walkers

could object by providing the court with a handwritten response within two weeks after receiving the document from Wright Weber.

¶7 Wright Weber then filed and mailed the itemization request to the Walkers on December 18, 2014. The Walkers never responded nor did they appear at the January 12, 2015 hearing the court held on the itemization request. The court entered judgment for back rents and damages on January 15, 2015. The Walkers did not timely appeal.

¶8 On February 12, 2015, the Walkers, now represented by counsel, filed a "motion to reopen and vacate the judgment and to dismiss for lack of jurisdiction," pursuant to WIS. STAT. §§ 799.28(2) and 806.07(1)(a), (b), (c), (d) and (h). They argued the judgment had been "procured by fraud on the part of plaintiff" because, as Ryan had argued at trial, it was impossible for Mojica to have personally served Ryan with the five-day notice as claimed. Relatedly, the Walkers also argued the judgment is void as the circuit court was without subject matter jurisdiction. Both of the Walkers filed affidavits in support of the motion, with Ryan attaching to his affidavit a document purported to be a time card record from his employer. There is no attorney affidavit or any affidavit from Ryan's employer.

¶9 In a February 24, 2015 written decision and order, the circuit court denied the Walkers' motion without a hearing, indicating that the Walkers should have provided the time records at the October 30 court trial and that they "are not entitled to a 'do over'" of that proceeding. The court found that the records were known and available at the time of the trial and therefore did not constitute newly discovered evidence, and further concluded that the purported time card record was cumulative of Ryan's trial testimony and would not have been admitted

without proper foundation and authentication. The Walkers appeal the February 24, 2015 decision and order. Additional facts are set forth as necessary.

Discussion

¶10 We will affirm a circuit court's denial of a motion to reopen a judgment under WIS. STAT. § 806.07 unless the court erroneously exercised its discretion. *See* ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. A court properly exercises its discretion so long as it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion a reasonable judge could reach. ***Franke v. Franke***, 2004 WI 8, ¶55 & n.38, 268 Wis. 2d 360, 674 N.W.2d 832. "[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations." ***Sukala***, 282 Wis. 2d 46, ¶8 (alteration in original; citation omitted).

¶11 The Walkers argue that the circuit court erroneously exercised its discretion by failing to address all the grounds they asserted in their motion. However, if the circuit court fails to record sufficient reasons to support its decision, this court may nevertheless examine the record to determine whether the facts support the court's decision. ***Franke***, 268 Wis. 2d 360, ¶55 & n.38; *see also* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶¶30, 47, 326 Wis. 2d 640, 785 N.W.2d 493.

¶12 The Walkers contend the circuit court erred in refusing to reopen and vacate the judgment against them, arguing that they are entitled to such relief pursuant to WIS. STAT. § 806.07(1)(c), (d) and (h). Specifically, the Walkers' appellate complaints are that (1) the circuit court did not address their allegations

that "the judgment against them was procured by fraud or misrepresentation," and, relatedly, that the circuit court "lacked jurisdiction to entertain Wright Weber's eviction action against them due to Wright Weber's lack of standing" and (2)

> it was in the interest of justice to grant the relief [the Walkers requested in their motion] because they were unrepresented by counsel at the October 30, 2014 trial and because, in light of the fact that the Walkers were not requesting to be allowed to re-occupy the premises, but were merely seeking to have the judgments of eviction and for rent and damages vacated, there were no intervening circumstances which would render it inequitable to grant them the relief they requested.

We disagree with the Walkers' complaints.

¶13 WISCONSIN STAT. § 806.07 provides in relevant part:

> [T]he court … may relieve a party … from a judgment … for the following reasons:
>
> ….
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;
>
> (d) The judgment is void;
>
> ….
>
> (h) Any other reasons justifying relief from the operation of the judgment.

The party seeking relief, here the Walkers, bears the burden of demonstrating the circuit court erroneously exercised its discretion in denying a § 806.07 motion. ***Richards v. First Union Sec. Inc.***, 2006 WI 55, ¶27, 290 Wis. 2d 620, 714 N.W.2d 913. The evidence necessary to allow this court "to set aside such a judgment is evidence sufficient to allow a court to determine that the circuit court's findings of fact were 'contrary to the great weight and clear preponderance

of the credible evidence.'" ***Id.*** (citation omitted). The Walkers have not met their burden.

¶14 To warrant relief under WIS. STAT. § 806.07(1)(c), a party must demonstrate a "plain case" of misrepresentation. ***Johnson v. Johnson***, 157 Wis. 2d 490, 498, 460 N.W.2d 166 (Ct. App. 1990). The Walkers' motion did not present such a case. Even if the court had granted the Walkers a hearing and the Walkers proved the time card to be authentic, this would not necessarily mean Wright Weber committed fraud, misrepresentation, or other misconduct at the court trial. Mojica, Wright Weber's resident manager, confirmed at the trial that he handed the five-day notice to Ryan as Ryan "was either coming back from the store, or something. I caught him when he was walking in and out." Mojica provided details of the event, including that Ryan's daughter was "running around somewhere." The court noted at the trial that its decision rested on "who is telling the truth" and that neither Mojica nor Ryan had "a huge motive … to fabricate testimony or make it up." In the end, the court believed Mojica.

¶15 As indicated, even if the time card is authentic, it would not necessarily demonstrate Mojica lied about serving Ryan with the notice. For example, some employers allow employees greater flexibility during the workday to address personal needs. It is possible Ryan did punch in to work at "14:45" and out at "23:45," as the time card indicates, yet was afforded an opportunity during that time to tend to a personal matter at home. Such a scenario would be consistent with Mojica's testimony that Ryan appeared to be "coming back from … something" and was "walking in and out" when Mojica handed him the notice. Or perhaps Mojica mistakenly wrote September "8th" on the notice and testified to the same when in fact he actually served Ryan the notice on Saturday, September 6 or Sunday, September 7. According to Ryan's testimony, Saturday and Sunday,

September 6 and 7, would not have been days he worked. If service had been made on September 6 or 7, instead of September 8, there would be no fraud, material misrepresentation, or misconduct, just a simple mistake as to the precise date. Such a scenario would be consistent with Mojica's undisputed testimony that he usually received between the sixth and eighth of every month a list of tenants who were late with paying their rent for that month. The point is, this one time card, even if authentic, does not present a *plain case* of fraud, misrepresentation or misconduct.

¶16 The Walkers' motion thus also fails with regard to WIS. STAT. § 806.07(1)(d). As discussed above, the time card document, even if proven to be authentic, would not by itself be sufficient additional evidence from which the circuit court would necessarily conclude it erred with its initial decision finding that Mojica in fact did serve Ryan with the five-day notice.

¶17 The Walkers also have failed to show they are entitled to relief under WIS. STAT. § 806.07(1)(h). In ***Miller***, our supreme court stated that when faced with a motion for relief from judgment pursuant to § 806.07(1)(h), "a circuit court is to consider the five interest-of-justice factors in determining whether extraordinary circumstances are present under [§] 806.07(1)(h) such that relief from a judgment … is appropriate." ***Miller***, 326 Wis. 2d 640, ¶41. Those factors are (1) "whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant"; (2) "whether the claimant received the effective assistance of counsel"; (3) "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"; (4) "whether there is a meritorious defense to the claim"; and (5) "whether there are intervening circumstances making it inequitable to grant relief." ***Id.***, ¶36; *see also*

Sukala, 282 Wis. 2d 46, ¶11 (affirming factors originally set forth in ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)). As the Walkers recognize in their reply brief, the circuit court would only have been required to hold a hearing on the Walkers' motion if "the facts set forth in the petition …, if true, … would constitute extraordinary circumstances justifying relief." This case does not present "extraordinary circumstances" that would justify reopening and vacating the judgment.

¶18 In evaluating the Walkers' motion and determining a hearing was not warranted, the court wrote:

> The Defendants have filed a Motion to Reopen and Vacate Judgment based on a claim of "newly discovered evidence" in the form of time card work records of Ryan Walker purporting to show that Walker was at work and could not have been served with a 5-Day Notice as claimed by Plaintiff Wright Weber Management, LLC.
>
> The time card records could have been obtained, either voluntarily or by subpoena, and could have been presented at the October 30, 2014 [court trial], but they were not. The Defendants are not entitled to a "do over" of the October 30, 2014 court trial simply because they were unrepresented and after-the-fact now claim they did not realize that the records might be important.
>
> Stated simply, existing time records that could have been obtained and presented at the time of a trial are not "newly discovered evidence." Moreover, such time records do not establish that the judgment was obtained against the Defendants by fraud or misrepresentation because the time records would not have been conclusive on the issue of service of the 5-Day Notice. Such time records are supportive of, but cumulative to Walker's testimony at trial. The records are hearsay and would not have been admitted into evidence without a proper foundation. The records could be authentic and valid, or they could be erroneous or fabricated. The court's decision would not necessarily have been different even if the records had been presented.

We agree the circuit court could have been more clear and specific in its denial of the motion. We further recognize the court failed to express specific consideration of the interest-of-justice factors enumerated in ***Miller***, and because it failed to do so we must "independently review the record to determine whether there is a basis for the proper exercise of discretion, including whether the record provides a reasonable basis for the court's decision." ***Miller***, 326 Wis. 2d 640, ¶47. We conclude that the court did not erroneously exercise its discretion in denying the Walkers' motion.

¶19 As to the first interest-of-justice factor, the Walkers had their "day in court" and were free to and did present the evidence they chose. There is no dispute the Walkers were aware on October 13 that the issue for trial on October 30 was their assertion that they in fact were not served with the five-day notice as indicated in the eviction complaint. The Walkers do not dispute that they could have produced, but did not produce, at trial the time card document to support Ryan's testimony that he could not have been served with the five-day notice because he was at work on the date and at the time which Mojica testified he had served the notice on Ryan. Even pro se litigants, as the Walkers were at trial, should understand they must bring to court their best evidence and that the time card might have been helpful in supporting Ryan's testimony. As previously noted, however, even if the Walkers had proved at the hearing that the time card record was authentic, as the circuit court noted, such proof would not necessarily have resulted in a finding in their favor.

¶20 On the second factor, the Walkers obviously did not have the assistance of counsel at trial; but again, even pro se litigants should know to bring to trial purported business records which would support their oral testimony. Also, we cannot entirely relieve the Walkers of their decision, for whatever

reason, to not involve an attorney to assist them at trial. They certainly knew how to enlist the assistance of an attorney after they lost at trial.

¶21 Related to the third factor, there was a judicial consideration of the merits in this case; the only thing that was not considered is *additional* evidence—the time card—that Mojica could not have served Ryan with the five-day notice as Mojica testified because Ryan was at work during that time. While the particular evidence of the time card was not considered in the trial to the court (although it could have been if the Walkers had chosen to present it), again there is no certainty that consideration of that evidence would have resulted in the conclusion that Ryan in fact was not served with the five-day notice on or around September 8, 2014. We do not see the possibility of this evidence having an impact as outweighing the importance of finality of the judgment. *See* ***Eau Claire Cnty. v. Employers Ins. of Wausau***, 146 Wis. 2d 101, 111, 430 N.W.2d 579 (Ct. App. 1988) (there is a strong policy in favor of the finality of judgments).

¶22 On the fourth factor, the Walkers' defense does have some merit, but, again, there is no certainty the evidence the Walkers wish they would have presented at the court trial would have affected the outcome.

¶23 Lastly, on the fifth factor, whether intervening circumstances make the judgment inequitable, we conclude that the Walkers have failed to demonstrate that their motion set forth such circumstances. Rather, we view, as the circuit court did, the Walkers' posttrial production of the time card as simply an effort by the Walkers to procure a "do over." They may wish they would have hired an attorney prior to the court trial or, at a minimum, wish they would have introduced the time card at the trial, but they did not. Regrets in how they handled the matter at trial do not warrant a "do over."

¶24 At the October 13, 2014 hearing, the circuit court made clear that the October 30, 2014 court trial would be on the sole issue of whether or not the Walkers were in fact served with the five-day notice prior to the filing of this action. The court told the parties to make sure they brought to the hearing "anybody who knows anything about this, whether the five-day was served or not." Despite that admonition, the Walkers brought no witness, other than Ryan himself, to testify as to whether Ryan was or could have been served with the notice. If indeed he was at work at the time Mojica claimed to have served him, presumably the Walkers could have subpoenaed someone from Ryan's work who could have testified to that effect at the trial. They did not. Nor did the Walkers present the time card record which months later they argue demonstrates Ryan could not have been served as Mojica testified. Yet, even with that time card record, it is entirely possible Ryan was served with the notice on or around the date indicated by Mojica. The Walkers failed to present the most persuasive case they could to the circuit court at trial, and having retained counsel after the appeal time ran on the November 13, 2014 eviction judgment, now wish to have a second chance. The circuit court correctly stated that the Walkers are not entitled to a "do over." Indeed, to allow the Walkers to come in after the court trial decided this determinative issue and claim they now have some additional evidence that might persuade the court would be in direct conflict with the important objective in our legal system of finality. *See* ***Eau Claire Cnty.***, 146 Wis. 2d at 111. As stated by our supreme court in ***Miller***:

> "We are mindful—and the circuit courts should be mindful—that finality is important and that [WIS. STAT. § 806.07(1)](h) should be used sparingly." "The court should not interpret extraordinary circumstances so broadly as to erode the concept of finality, nor should it interpret extraordinary circumstances so narrowly that subsection (h) does not provide a means for relief for truly deserving claimants." Under subsection (h), a party is entitled to

> relief "only when the circumstances are such that the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts."

Miller, 326 Wis.2d 640, ¶69 (citations omitted).

¶25 The circuit court's denial of the Walkers' motion to reopen and to vacate was a reasonable exercise of discretion.

By the Court.—Order affirmed.

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