COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP557 **Cir. Ct. No. 2010CV2642**

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

HSBC BANK USA NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

STEVEN R. LISSE AND SONDRA LISSE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Steven and Sondra Lisse appeal an order of the circuit court granting confirmation of sale and denying their motion for relief from the judgment of foreclosure. The Lisses sought relief from the final judgment on the basis that they obtained an expert report, after the judgment was entered, opining that the promissory note that HSBC Bank presented to the circuit court was a forgery and, therefore, that HSBC obtained the judgment through fraud. The Lisses make two arguments. First, they contend that they were entitled to relief from the judgment under WIS. STAT. § 806.07(1)(g) (2017-18).[1] Second, the Lisses argue that they were entitled to an evidentiary hearing under § 806.07(1)(h), which would have given them an opportunity to prove that they were entitled to relief from the judgment. We affirm the circuit court.

Background

¶2 In May 2010, HSBC initiated this foreclosure action against the Lisses. In March 2014, the Lisses moved for production and inspection of the original note. HSBC produced a document that HSBC represented was the original note, endorsed in blank. HSBC then moved for summary judgment.

¶3 The Lisses filed a response to the motion for summary judgment and also filed a motion to extend the summary judgment deadlines to allow the Lisses to obtain additional discovery. The Lisses argued that they believed they could obtain evidence that HSBC did not own the note. There was no allegation that the note might be a forgery.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. We cite to the current version of the statutes because there have been no changes to the relevant language.

¶4 The circuit court denied the Losses' extension motion, granted summary judgment to HSBC, and entered the judgment of foreclosure. The Losses appealed, and we affirmed the circuit court in an opinion dated February 4, 2016. *See* ***HSBC Bank USA v. Lisse***, No. 2015AP273, unpublished slip op. (WI App Feb. 4, 2016).

¶5 The Losses then each filed for bankruptcy. Steven filed for bankruptcy in March 2016, and Sondra filed in July 2016. During the bankruptcy proceedings, the Losses obtained a report from an expert, dated September 15, 2016, opining that the note proffered by HSBC was a forgery.

¶6 On December 12, 2017, after the conclusion of the two bankruptcy proceedings, the Losses' property was sold at a sheriff's sale.

¶7 On January 4, 2018, the Losses filed three motions in this case containing five requests, which were to: (1) vacate the foreclosure judgment, pursuant to WIS. STAT. § 806.07(1)(c), (d), (g), and (h); (2) dismiss HSBC's foreclosure claim; (3) allow the Losses to amend their pleadings; (4) adjourn the confirmation of sale hearing; and (5) hold HSBC in contempt. The underlying supporting argument for each request was the same—the Losses contended that they were entitled to the relief requested because HSBC had obtained the judgment of foreclosure by presenting a forged "original note." On March 15, 2018, the circuit court denied the Losses' motions and entered an order confirming the sheriff's sale.

Discussion

¶8 On appeal, the Lisses implicitly acknowledge that the propriety of the circuit court's denial of all of their requests hinges on the answer to just two questions. First, whether, based on the existing record, the Lisses were entitled to relief from the judgment under WIS. STAT. § 806.07(1)(g). Second, whether the Lisses were entitled to an evidentiary hearing under § 806.07(1)(h). We conclude that the circuit court properly exercised its discretion in denying relief under both subsections of § 806.07(1).

A. Standard of Review

¶9 The Lisses assert that we should employ a de novo standard of review because the issues on appeal do not involve whether the circuit court erroneously exercised its discretion, but rather hinge on statutory interpretation. That assertion is meritless. The Lisses do not make a statutory interpretation argument. Accordingly, we apply well-settled law requiring deference to the circuit court.

¶10 In ***Sukala v. Heritage Mutual Insurance Co.***, 2005 WI 83, 282 Wis. 2d 46, 698 N.W.2d 610, the court explained the standard of review. We now quote that standard, italicizing a principle that is key here:

> Whether to grant relief from judgment under Wis. Stat. § 806.07(1)(h) is a decision within the discretion of the circuit court. A circuit court's discretionary decision will not be reversed unless the court erroneously exercised its discretion. A discretionary decision contemplates a process of reasoning that depends on facts that are in the record, or reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard. "*We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a*

> *reasonable basis for the court's decision.*" "'[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations.'"

Id., ¶8 (emphasis added; citations and quoted sources omitted); *see also* ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993) ("Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling."). In the discussion below, several points we make were also made by the circuit court. But to the extent our reasoning may deviate from the circuit court's, we are nonetheless fulfilling our proper reviewing role.

B. WIS. STAT. § 806.07(1)(g)

¶11 Under WIS. STAT. § 806.07(1)(g), a court may relieve a party from a judgment if "[i]t is no longer equitable that the judgment should have prospective application." The Lisses argue that they are entitled to relief under this subsection because it was inequitable to allow HSBC to sell the property given that HSBC obtained judgment through fraudulent means, that is, the forged "original note." This argument fails because, as explained below, § 806.07(1)(g) requires a "new condition" and that requirement is not met by new *evidence* of a pre-existing condition.

¶12 A quote the Lisses themselves point to from the supreme court's decision in ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 363 N.W.2d 419 (1985), provides apt guidance on the meaning of WIS. STAT. § 806.07(1)(g):

> Commentators have concluded that [the federal rule analogue to WIS. STAT. § 806.07(1)(g)] 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 [the federal rule analogue] 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.

M.L.B., 122 Wis. 2d at 543-44 (emphasis added). The language we have italicized in the quote above makes clear that the terms "new conditions" and "change in conditions" both refer to a change in "the facts." Indeed, the ***M.L.B.*** court went on to explain that the case before it did "not involve a change of the conditions or the operative facts occurring after the 'judgment,'" but instead involved a party's and the circuit court's "aware[ness] of facts previously unknown to them." ***Id.*** at 544.

¶13 Similarly, here, the Lisses do no more than point to a new awareness. The new situation the Lisses rely on is an allegation made by their expert about a condition that existed prior to entry of the judgment of foreclosure. More specifically, they allege that they learned for the first time after entry of the foreclosure judgment of an expert opinion that the note HSBC presented to the circuit court was a forgery. This is not evidence of a "new condition" within the meaning of ***M.L.B.*** and, thus, does not satisfy WIS. STAT. § 806.07(1)(g).

¶14 Further supporting our conclusion that there is no "new condition" within the meaning of ***M.L.B.*** is the fact that the Lisses are plainly challenging the validity of the original judgment. The Lisses assert that the judgment should be vacated because it was "fraudulently obtained." However, as the passage from ***M.L.B.*** explains, relief under WIS. STAT. § 806.07(1)(g) "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." ***M.L.B.***, 122 Wis. 2d at 544.

¶15 In sum, even if the Lisses could prove that the note was a forgery, the circuit court properly exercised its discretion in denying them relief under WIS. STAT. § 806.07(1)(g).

C. WIS. STAT. § 806.07(1)(h)

¶16 The Lisses argue that their submissions were sufficient to require an evidentiary hearing to determine whether, under WIS. STAT. § 806.07(1)(h), the judgment should be vacated. It is undisputed that the proper analysis was set forth in ***Sukala*** as follows:

> To determine whether a party is entitled to review under Wis. Stat. § 806.07(1)(h), the circuit court should examine the allegations accompanying the motion with the assumption that all assertions contained therein are true. If the facts alleged are extraordinary or unique such that relief may be warranted under paragraph (1)(h), a hearing will be held on the truth or falsity of the allegations. After determining the truth of the allegations and upon consideration of any other factors bearing upon the equities of the case, the circuit court exercises its discretion to decide what relief, if any, should be granted.
>
> In exercising its discretion by determining whether it should grant relief from the judgment or stipulation, the circuit court should consider whether unique or extraordinary facts exist that are relevant to the competing interests of finality of judgments and relief from unjust judgments. We have [in ***M.L.B.***] explained that examination to include:
>
> > whether 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.
>
> The list of factors in ***M.L.B.*** is not exclusive.

Sukala, 282 Wis. 2d 46, ¶¶10-11 (citations and quoted source omitted).

¶17 Looking to the principles above, the Lisses argue that the circuit court erred two ways. First, they contend that the court erred by failing to accept all of their allegations as true. Second, they contend that the court erroneously failed to recognize that the facts alleged were "extraordinary or unique" within the meaning of ***Sukala***. We reject each argument in turn.

1. Accepting Allegations As True

¶18 As to the first alleged error, the Lisses start with the correct legal premise. As indicated in the extended quote from ***Sukala*** above, when determining whether a party is entitled to an evidentiary hearing under WIS. STAT. § 806.07(1)(h), the circuit court should "examine the allegations accompanying the motion with the assumption that all assertions contained therein are true." *See* ***Sukala***, 282 Wis. 2d 46, ¶10. The Lisses, however, have not demonstrated that the circuit court failed to follow this requirement.

¶19 The Lisses point to the following statement made by the circuit court: "I think one has to infer that there were strategic and tactical choices made by the defendants and their counsel that were deliberate and informed and free, not to present that evidence." According to the Lisses, this statement shows that the circuit court did not accept as true their allegation that they did not obtain evidence of the forgery until after the judgment of foreclosure was entered. That is, the

Lisses interpret the circuit court's statement as saying that the Lisses *did* obtain evidence that the note was a forgery prior to the foreclosure judgment, but made the strategic choice not to pursue the topic.

¶20 The Lisses' interpretation of the circuit court's statement is unreasonable. Read in context, it is clear that the circuit court was commenting on the Lisses' decision not to have an expert examine the note during the discovery period. Specifically, the court observed that the Lisses did "not offer any expert opinion or evidence at the time the matter was originally litigated" although they had "ample opportunity." The court later revisited this topic, stating that the Lisses "did not have [the expert's] opinion, but certainly had any knowledge necessary to be able to at least raise the issue of the forgery in a proper way during the litigation." These statements demonstrate, consistent with the Lisses' factual assertion, that the circuit court assumed that the Lisses first got an expert opinion after the judgment.

¶21 The Lisses do not argue that the circuit court failed to accept as true any other alleged fact and, thus, we conclude that the circuit court properly assumed the truth of all of the Lisses' allegations.

2. Extraordinary or Unique Facts

¶22 The Lisses' second WIS. STAT. § 806.07(1)(h) argument is that the circuit court failed to recognize that the facts alleged in their motion were "extraordinary or unique" within the meaning of ***Sukala***. We will assume for purposes of this discussion, as do the Lisses, that the threshold determination of

whether "extraordinary or unique" facts are alleged includes consideration of the ***M.L.B.*** factors and any other relevant factors.[2] The ***M.L.B.*** factors are:

First, "whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant";

Second, "whether the claimant received the effective assistance of counsel";

Third, "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";

Fourth, "whether there is a meritorious defense to the claim"; and

Fifth, "whether there are intervening circumstances making it inequitable to grant relief."

See ***M.L.B.***, 122 Wis. 2d at 552-53.

¶23 The Lisses argue that the circuit court improperly applied the second, third, fourth, and fifth factors and also an additional non-listed factor. Before addressing the Lisses' specific arguments, we explain why, apart from the factors the Lisses rely on, the alleged facts were not "extraordinary or unique."

[2] ***Sukala v. Heritage Mutual Insurance Co.***, 2005 WI 83, 282 Wis. 2d 46, 698 N.W.2d 610, might be read as teaching that a court must first look to whether a WIS. STAT. § 806.07(1)(h) motion alleges "extraordinary or unique" facts to determine whether an evidentiary hearing is required and then, only if the alleged facts are proven at an evidentiary hearing, a court considers the factors set forth in ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 363 N.W.2d 419 (1985), when deciding whether to actually exercise its discretion to grant relief. *See* ***Sukala***, 282 Wis. 2d 46, ¶¶10-11. We do not weigh in on this topic. Rather, as indicated in the text, we assume, as argued by the Lisses, that the ***M.L.B.*** factors inform whether, in the first instance, a § 806.07(1)(h) motion alleges "extraordinary or unique" facts.

¶24 The Lisses contend that the judgment was unknowingly based on a forged note and that, for reasons unknown and after judgment was entered, they explored whether the note was authentic by locating an expert who then opined that the note was a forgery. Like the circuit court, we conclude that there is nothing extraordinary or unique about this circumstance. Nothing prevented the Lisses from obtaining this evidence during the normal course of litigation. The Lisses do not point to a new event after judgment was entered that caused them, for the first time, to suspect a forgery. All that happened here was that the Lisses pursued an inquiry they could have pursued prior to the judgment. If courts routinely reopened cases or held evidentiary hearings based on allegations of false proof that could have been discovered prior to the judgment, the policy favoring the finality of judgments would be seriously undercut. *See* ***Sukala***, 282 Wis. 2d 46, ¶11 (courts should consider "the competing interests of finality of judgments and relief from unjust judgments").

¶25 With this broader conclusion in mind, we turn our attention to the Lisses' discussion of particular factors.

¶26 Regarding the second ***M.L.B.*** factor, the Lisses complain that the circuit court did not consider whether the Lisses received the effective assistance of counsel. They do not contend that they have evidence or that they have alleged facts showing that prior counsel had reason to believe the note was a forgery. Rather, the Lisses baldly assert that ***Sukala*** and ***Shelly J. v. Leslie W.***, Nos. 2011AP753 through 2011AP756, unpublished slip op. (WI App July 28, 2011), "both presume evidence of ineffective assistance of counsel will be presented [at] an evidentiary hearing." This is nonsense. A circuit court is not required to hold an evidentiary hearing in this context so that a party can go on a fishing expedition.

¶27 Regarding the third ***M.L.B.*** factor, the Lisses argue that the matter was not "fully litigated" on the merits because "HSBC deprived the court [of] the opportunity to consider the matter on the merits when its attorneys made false statements to the court, it submitted a false affidavit, and it proffered a fraudulent note to the court." We are not persuaded. First, this factor does not say "fully" litigated. Rather, the third ***M.L.B.*** factor asks whether "there has been no judicial consideration of the merits." *See* ***M.L.B.***, 122 Wis. 2d at 552. Second, the Lisses' argument misapprehends the meaning of "judicial consideration of the merits." That phrase does not mean that every possible issue was litigated. Consideration of the merits stands in contrast to judgments entered either based on default or based substantially on stipulations. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶54, 326 Wis. 2d 640, 785 N.W.2d 493 (concluding there had been "no judicial consideration of the merits" because the judgment was entered based on default); ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶12, 305 Wis. 2d 400, 740 N.W.2d 888 ("judgment based upon the stipulation of the parties" was not a "determination on the merits").

¶28 Regarding the fourth ***M.L.B.*** factor, the Lisses argue that they had a meritorious defense that was not litigated. We agree that this factor weighs in favor of the Lisses. However, we do not agree that it outweighs other considerations.

¶29 Regarding the fifth ***M.L.B.*** factor, the Lisses argue that a new circumstance justifying relief is the fact that they retained an expert and obtained an opinion from the expert that the note was a forgery. We disagree. As we have discussed above, nothing prevented the Lisses from pursuing the potential forgery issue prior to the judgment.

¶30 Finally, the Lisses point to a non-***M.L.B.*** factor. They argue that it weighs in their favor that they pursued relief based on the potential forgery issue in their federal bankruptcy proceedings and were rebuffed because the federal court determined that the proper forum to challenge the propriety of the foreclosure judgment was in state court. However, looking at the Lisses' argument as a whole, their concern appears to be directed at the circuit court's decision to weigh against the Lisses their delay in pursuing relief from the judgment in state court. Whatever the Lisses mean to argue, the argument is undeveloped legally and is completely unsupported by the record. More specifically, the Lisses make assertions about what went on in the federal actions, but do not direct our attention to any place in the record that supports those factual assertions. Moreover, even assuming that the circuit court erroneously weighed delay against the Lisses, it is apparent that the circuit court's decision did not hinge on delay.

¶31 Accordingly, we conclude that the circuit court properly exercised its discretion in denying the Lisses' WIS. STAT. § 806.07(1)(h) motion.

Conclusion

¶32 For the reasons stated herein, we affirm the order of the circuit court granting confirmation of sale and denying the Lisses' motion for relief from the judgment.

By the Court.—Order affirmed.

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