COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0465 **Cir. Ct. No. 01-SC-5131**

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

JOSE L. SERATE,

PLAINTIFF-RESPONDENT,

V.

MIDWEST HEATING & COOLING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Midwest Heating & Cooling appeals the order denying its motion for relief from the default judgment in favor of Jose Serate for

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

$5,093.80. Midwest contends the circuit court erroneously exercised its discretion in denying relief from the default judgment entered at a trial de novo that Midwest's owner Godofredo Macapugay did not attend. Midwest asserts that Macapugay's reason for not attending—a calendaring error—constituted excusable neglect under WIS. STAT. § 806.07(1)(a) and that extraordinary circumstances exist justifying relief under § 806.07(1)(h). We conclude the circuit court properly exercised its discretion and therefore affirm.

BACKGROUND

¶2 Serate filed a small claims complaint against Midwest Heating & Cooling alleging Midwest had defectively installed his furnace and demanding $5,000. The court commissioner awarded Serate $1,000. Serate subsequently demanded a trial de novo because he considered the amount awarded was inadequate.

¶3 The trial de novo was scheduled for January 2, 2002, and the court sent notices to Serate and Macapugay, Midwest's owner, who had been appearing on behalf of his company without legal counsel. Macapugay did not appear on January 2. The circuit court took testimony from Serate at trial in Macapugay's absence and entered judgment in favor of Serate in the amount of $5,093.80.

¶4 Upon receiving notice of the judgment against his company on January 4, 2002, Macapugay, on behalf of Midwest, obtained counsel and filed a motion seeking relief from the default judgment on the grounds that Macapugay's failure to appear at the trial de novo was excusable neglect. Midwest contended that it had several meritorious defenses to Serate's claim, and allowing Serate to recover the full price of the furnace was unjust. Accompanying the motion was an affidavit averring Macapugay did not attend the trial de novo because he

accidentally calendared the trial date for January 9, 2002, one week after the actual date of January 2. The circuit court denied Midwest's motion. It concluded that under ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865, 867 (1977), a calendaring error was not excusable neglect. It also decided not to allow relief under WIS. STAT. § 806.07(1)(h) because it concluded that the majority of the factors listed in ***State ex rel M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 549, 363 N.W.2d 419, 425 (1985), favored not disturbing the final judgment.

DISCUSSION

¶5 WISCONSIN STAT. § 806.07 provides that a circuit court may relieve a party from a default judgment on certain specified grounds, including "mistake, inadvertence, surprise, or excusable neglect," § 806.07(1)(a), and "any other reasons justifying relief." Section 806.07(1)(h). In addition to satisfying the standards of the statute, a litigant must show a meritorious defense. ***J.L. Phillips & Assoc., Inc. v. E & H Plastic Corp***., 217 Wis. 2d 348, 355, 577 N.W.2d 13, 17 (1998). Whether to grant relief is a decision committed to the circuit court's discretion. ***J.L. Phillips & Assoc.***, 217 Wis. 2d at 364, 577 N.W.2d at 20. A circuit court properly exercises its discretion when it examines the relevant facts, applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Gerth v. American Star Ins. Co.,*** 166 Wis. 2d 1000, 1006-07, 480 N.W.2d 836, 839 (Ct. App. 1992).

¶6 Midwest contends that the circuit court erroneously exercised its discretion because the facts establish excusable neglect. "Excusable neglect" is "… 'that neglect which might have been the act of a reasonably prudent person under the same circumstances.'" ***Dugenske***, 80 Wis. 2d at 68. The supreme court has upheld circuit court decisions that a lawyer's failure to answer due to the

pressure of work, without some additional persuasive information, is not excusable neglect. ***Wagner v. Springaire Corp.,*** 50 Wis. 2d 212, 217, 184 N.W.2d 88, 91 (1971); ***Giese v. Giese***, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969). The supreme court has also upheld a circuit court's decision that a lawyer's failure to answer due to mislaid files in an office move is not excusable neglect. ***Dugenske***, 80 Wis. 2d at 71, 257 N.W.2d at 868. In this case it was the client, not the lawyer, who made the error resulting in the failure to answer. As the circuit court observed, Macapugay chose not to retain counsel. It was therefore incumbent on him to exercise care in calendaring the trial date of which he was notified, and to make sure he was present in court at that time. However, as the court also observed, he provided no explanation for relying solely on his "working calendar" and not subsequently referring to the notice from the court. The court found this to be careless and inattentive. The circuit court could reasonably conclude that Macapugay's conduct was not neglect "which might have been the act of a reasonably prudent person under the same circumstances." ***Dugenske***, 180 Wis. 2d at 68.

¶7 Midwest also contends that it is entitled to relief from the judgment under WIS. STATS. § 806.07(1)(h). We disagree. This subsection is intended to forgive parties only in "extraordinary circumstances," ***State ex rel. M.L.B.***, 122 Wis. 2d 536, 549, and it is appropriate "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' (citations omitted)" (emphasis in original). Factors relevant "to the competing interests of finality of judgments and relief from unjust judgments, including the following: 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." ***Id.*** at 552-53.

¶8 The circuit court applied this standard to the relevant facts. It reasoned that Macapugay had made a deliberate decision not to retain counsel, and therefore the lack of counsel did not favor granting relief. The court also took into account that there had been a judicial consideration of the proper amount of damage. The court noted that Midwest contended that it had meritorious defenses, but concluded that the circumstances in this case were not extraordinary and did not merit disturbing the finality of the judgment. This is a reasonable conclusion and, accordingly, we affirm.

By the Court.—Order affirmed.

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