

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2015

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. 2014AP2846-FT

Cir. Ct. No. 2013CV463

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARCO ARAUJO, M.D.,

PLAINTIFF-RESPONDENT,

V.

RONALD H. VAN DEN HEUVEL AND GREEN BOX, N.A. GREEN BAY, LLC,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed and cause remanded with directions.*

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Green Box, N.A. Green Bay, LLC, and its founder and chairman, Ronald Van Den Heuvel (collectively “Green Box”) appeal a judgment awarding Marco Araujo \$813,735.34, consisting of \$600,000 for

damages relating to a breach of contract plus prejudgment interest and costs. The circuit court entered the default judgment after striking Green Box's answer as a penalty for its noncompliance with a discovery order. Green Box argues: (1) the court erroneously exercised its discretion by imputing Green Box's former counsel's conduct to the blameless defendants; and (2) the court erroneously exercised its discretion by not requiring proof of damages and by failing to respond to Green Box's motion for reconsideration, in which it requested that the judgment be amended to require Araujo to transfer his membership units back to Green Box upon full payment of the judgment. We affirm the decision to strike the answer and grant a default judgment for the liquidated damages identified in the complaint plus interest and costs. We remand the cause with directions to amend the judgment to require Araujo to transfer his membership units back to Green Box upon full payment of the judgment.

BACKGROUND

¶2 Araujo's complaint alleged Van Den Heuvel used misrepresentations and false promises to induce Araujo to invest \$600,000 in Green Box. The complaint alleged breach of contract, numerous torts, and a violation of WIS. STAT. § 100.18 (2013-14),¹ and requested compensatory and punitive damages, double damages under § 100.18(11)(d), costs and attorney fees. Green Box, through Attorney Ty Willihnganz, answered the complaint.

¶3 On May 15, 2013, Araujo served interrogatories and requests for production of documents on Green Box. On June 5, 2013, Willihnganz sent what

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

purported to be the interrogatory answers and indicated responses to the requests for production of documents would be forthcoming. Because Araujo deemed the interrogatory answers deficient, he filed a motion to compel production of documents and answers to the interrogatories on August 6, 2013. On August 13, Willihnganz filed a motion to withdraw as counsel because he had been administratively suspended from practicing law.² At his deposition, Willihnganz testified that, around the time of his motion, he strongly advised Van Den Heuvel and Green Box to obtain new counsel. Nonetheless, because he expected to be reinstated, he participated in a scheduling conference on September 20, 2013. After the scheduling conference, Willihnganz failed to open his mail, did not respond to telephone calls, and did not provide any additional discovery to Araujo.

¶4 On October 4, 2013, the circuit court entered an order granting the motion to compel, requiring Green Box to produce the requested documents and to serve responsive answers to Araujo's interrogatories on or before November 1, 2013. When Green Box failed to provide any additional discovery responses, on November 5 Araujo moved to strike the answers and for default judgment. On November 25, Van Den Heuvel sent a letter to the court in which he professed ignorance of the proceedings beginning with Willihnganz's attempt to withdraw from representation on August 13. On December 30, 2013, new counsel appeared for Green Box and, three weeks later, appeared for Van Den Heuvel.

¶5 The circuit court did not rule on the motion to strike until October 7, 2014. The court concluded Green Box's conduct was egregious and the

² Attorney Willihnganz's suspension was, according to his motion to withdraw as counsel, apparently based on "a complication involving the untimely filing of his Mandatory CLE Reporting Form and Fees."

defendants were not blameless in their failure to participate in the litigation. Therefore, on October 23, 2014, the court entered a default judgment for the principal amount requested in the complaint, along with prejudgment interest and costs.

DISCUSSION

¶6 Although the law disfavors default judgment and prefers to afford litigants their day in court, *see Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶31, 326 Wis. 2d 640, 785 N.W.2d 493, WIS. STAT. § 804.12(2)(a)3. allows the court in which an action is pending to strike a party's pleading and enter a default judgment for failure to comply with discovery orders. The court may enter a default judgment if it determines the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse. *Smith v. Golde*, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999). While the court has discretion to enter a default judgment, imputing the attorney's conduct to a blameless client may constitute an improper exercise of discretion. *See Industrial Roofing Servs. Inc. v. Marquardt*, 2007 WI 19, ¶61, 229 Wis. 2d 81, 726 N.W.2d 898. When considering whether a client was blameless, the court may consider whether the client was at fault for failing to act in a reasonable and prudent manner when the client knew or had reason to know that its attorney was failing to properly manage the case. *Id.*, ¶64.

¶7 The circuit court properly exercised its discretion when it struck the answer and granted default judgment. The record reflects that while Willihnganz was not Green Box's "in-house counsel," his office was located in Green Box's building, his files relating to Green Box were located on Green Box's computer server, and he kept all of the paper files in a file cabinet accessible to Green Box.

Green Box employees would retrieve Willihnganz's mail from the mailbox and deliver it to his office. The record shows a close relationship between Willihnganz and Green Box.

¶8 In June 2013, Willihnganz told Van Den Heuvel he had been suspended and could not represent Green Box. He advised Van Den Heuvel to and Green Box to obtain counsel. Willihnganz was aware from many previous lawsuits that Van Den Heuvel knew a nonattorney was not allowed to represent a corporation. Green Box did not retain replacement counsel for over six months. After retaining replacement counsel, Green Box did not attempt to rectify the discovery violation for almost eleven months. The record shows Green Box was not blameless because it willfully failed to follow its attorney's advice to obtain replacement counsel and then made no effort to rectify the discovery violations while the motion to strike the answer was pending. Green Box argues it needed to wait until the circuit court made a ruling on the motion to strike and for default judgment before incurring the cost of complying with discovery. That is not a reasonable and prudent course of action for a defendant under the circumstances of this case. Green Box was subject to a court order to produce the discovery. A party is not permitted to weigh the cost of compliance in deciding whether to follow a court order. In addition, had it complied, albeit belatedly, it may have resulted in the denial of the motion to strike and for default judgment.

¶9 Green Box contends the circuit court erroneously relied on the number of cases in which Van Den Heuvel had been a party to support its statement that the defendants were "not unexperienced litigants." Green Box also contends the court should have considered the nature of Van Den Heuvel's participation in the seventy-nine other cases. However, in his deposition, Willihnganz also testified Van Den Heuvel had been involved in litigation for

years, understood a nonattorney could not appear on behalf of the corporation, and was “very familiar with civil procedure and litigation.”

¶10 Green Box contends the circuit court’s finding that its conduct was “arguably unintentional” required the court to impose a less severe sanction. Conduct may be found egregious even though it is unintentional when it is, as in this case, extreme, substantial and persistent. *Selmer Co. v. Rinn*, 2010 WI App 106, ¶36, 328 Wis. 2d 263, 789 N.W.2d 621. Furthermore, Green Box does not suggest an alternative appropriate remedy other than simply allowing the case to continue without consequences for Green Box’s conduct.

¶11 The circuit court properly awarded Araujo \$600,000 in liquidated damages arising from his breach-of-contract claim, plus interest and costs. No hearing was required under WIS. STAT. § 806.02(5) because Araujo opted to seek only the liquidated damages for the breach-of-contract claim, forgoing double damages under WIS. STAT. § 100.18(11)(b)2. as well as tort damages, including punitive damages. There was no genuine factual dispute for the court to resolve at a hearing.

¶12 Green Box requests a modification to the judgment to require Araujo to surrender his membership units in Green Box upon full payment of the judgment. Araujo agrees. Therefore, upon remittitur, the circuit court shall amend the judgment to require Araujo to return his membership units to Green Box upon satisfaction of the judgment.

By the Court.—Judgment affirmed and cause remanded with directions.

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

