STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DODGE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 06-CX-01

WATERTOWN TIRE RECYCLERS, LLC,

Defendant.

STATE OF WISCONSIN'S BRIEF IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

The State of Wisconsin, by its counsel Attorney General J.B. Van Hollen and Assistant Attorney General JoAnne F. Kloppenburg, submits this brief in opposition to Watertown Tire's motion for relief from judgment, and asks the Court to deny that motion because it is untimely and lacks any basis in law or fact.

STATEMENT OF THE CASE

On June 7, 2006, the State filed a summons and complaint charging Watertown Tire with violations of state solid waste management laws and regulations at its tire processing facility in Watertown, and seeking both forfeitures for those violations and reimbursement of state costs incurred in responding to the July 2005 fire at the facility.

Also on June 7, 2006, the State filed a stipulation signed by counsel for the State, Watertown Tire, Thomas M. Springer, Dodge County and Citizens for a Safe

Environment UA, which provided for payments to the City of Watertown, Town of Shields, and 94 other local entities in partial reimbursement of their costs incurred in responding to the tire fire, payments to the Department of Natural Resources in partial reimbursement of its costs incurred in responding to the tire fire, and forfeitures for the violations described in the complaint. The payments were to be made pursuant to a schedule starting on July 7, 2006 and extending to May 15, 2010. The stipulation also provided for Thomas Springer's personal guaranty of these payments; cessation of tire shredding and all other nonconforming activities except for tire collection and transportation activities, cessation of tire collection and transportation activities on May 15, 2010, and if before then immediate payment of all amounts due; dismissal of the citizen suit against Watertown Tire in which Dodge County was also a party; and dismissal of Watertown Tire's suit against the Town of Shields. Finally, the stipulation provided that failure to make any of the scheduled payments places Watertown Tire in default, makes the entire judgment due, and requires that all nonconforming uses cease on the property; it makes Thomas Springer liable for the entire judgment; and allows Citizens for a Safe Environment to revive their lawsuit.

Also on June 7, 2006, the Court signed an order and entered a judgment incorporating all of the terms of the stipulation.

On November 14, 2006, Watertown Tire's insurer denied coverage for USEPA's claim for reimbursement of USEPA's response costs. Springer Affidavit, Ex. B.

On May 22, 2007, five months after the insurance denial letter was sent and one week after the second payment was due, Watertown Tire filed a motion seeking relief

from the judgment under Wis. Stat. § 806.07(1)(a), because its insurance company will not cover a claim submitted by USEPA in October 2006 for its response costs.

The State asks that the Court deny the motion because it is untimely and lacks both legal and factual merit.

ARGUMENT

Under Wis. Stat. § 806.07(1)(a), "[o]n motion and upon such terms as are just, the court . . . may relieve a party or legal representative from a judgment, order or stipulation for . . . [m]istake, inadvertence, surprise, or excusable neglect." Granting relief under Wis. Stat. § 806.07 is a matter of discretion for the circuit court. *Edland v. Wisconsin Physicians Service Ins. Corp.*, 210 Wis. 2d 638, 643, 563 N.W.2d 519 (1997).

The State asks that the Court exercise its discretion and deny the relief requested because Watertown Tire has not made the showing required by the statute. First, the motion is untimely as it was not made a reasonable amount of time after the judgment was entered. Second, as a matter of law, Mr. Springer's proceeding under the misimpression that Watertown Tire's insurance company would cover USEPA's response cost claim is neither a mistake nor excusable neglect as those terms have been interpreted by the courts. Third, as a matter of fact, Watertown Tire presents no competent evidence supporting the misimpression and even if true it has no bearing on the judgment committing Watertown Tire funds subject to Mr. Springer's personal guaranty, to state and local entities but not to USEPA.

I. THE MOTION WAS NOT MADE IN A REASONABLE TIME AFTER JUDGMENT.

> Section 806.07 attempts to achieve a balance between fairness in the resolution of disputes and the policy favoring the finality of judgment. The statute enhances fairness in the administration of justice by authorizing a circuit court to vacate judgments on various equitable grounds. Section 806.07(1)(a) furthers the policy favoring finality by limiting the time period for motions under that section to the shorter of one year or a reasonable amount of time after a judgment or order is entered.

Edland, 210 Wis. 2d at 644 (citations omitted; emphasis added).

Here, the reasonable time to seek relief from the judgment entered in June 2006 based on an insurance denial letter received in November 2006 was shortly after the November 2006 denial letter. It was not reasonable for Watertown Tire to wait until when its next payment under the judgment was due, almost one year after judgment, to seek relief from making that (and all future) payments. The May 15, 2007, payment was due the City of Watertown, and it was not reasonable to spring on the City the prospect of nonpayment in a May 22, 2007, motion filed after the payment was due.

Because Watertown Tire did not file its motion within a reasonable time after judgment was entered, its motion should be denied.

II. THE STATUTE AUTHORIZES VACATING A JUDGMENT DUE TO A MISTAKE OF THE COURT, BUT WATERTOWN TIRE'S MISIMPRESSION IS NOT A MISTAKE OF THE COURT.

One of the equitable grounds "providing a basis for vacating a judgment under § 806.07(1)(a) is mistake on the part of the trial court." *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶70, 281 Wis. 2d 173, 696 N.W.2d 194. Here, the purported mistake was Mr. Springer's misimpression of insurance coverage for a future claim from someone

other than the parties to the stipulation and judgment, not any action or inaction by the court. Because Watertown alleges no mistake by the court, its motion should be denied.

III. THE STATUTE AUTHORIZES VACATING A JUDGMENT DUE TO EXCUSABLE NEGLECT, BUT WATERTOWN TIRE'S MISIMPRESSION IS NOT EXCUSABLE.

When a party seeks relief from a judgment based on its own mistake, it must show that the mistake "is of a kind that a reasonably prudent person might have made under the circumstances." *State v. Schultz*, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). In *Schultz*, the court found that the defendant acted based on a "reasonable but mistaken view of the applicable law." 224 Wis. 2d at 505. Here, in contrast, Watertown Tire acted based on an unreasonable reliance on an alleged oral communication with its insurer, which directly contradicted an earlier written communication from the insurer.

All that Watertown Tire offers in support of its motion is Mr. Springer's averment that "I believed, based on representations made to me, that WTR's liability insurer, Ace Property and Casualty Insurance Company ("ACE"), would pay the EPA's claim when the same was filed." Springer Affidavit ¶11. Assuming there were such representations, it was not reasonable for him to rely on them for several reasons.

First, it was unreasonable to rely on an oral representation. There was a written denial of coverage in response to earlier claims for reimbursement for response costs dated August 17, 2005. Springer Affidavit Ex. B at 1. Regardless of the scope of that letter (without it, Watertown Tire's representation of it at page 3 of their Memorandum cannot be confirmed), it was not reasonable to rely on only an oral statement.

Second, it was unreasonable to rely on an oral representation that contradicted the earlier written denial. The USEPA claim, which was for reimbursement of costs incurred in responding to the tire fire, are just like the claims of the County and for cleanup, which Watertown Tire asserts were the claims to which the August 2005 denial letter applied (Memorandum at 3). Absent any obvious or apparent distinction between USEPA's claim for costs and the earlier claims for costs, all of which were incurred in responding to the same tire fire, it was unreasonable for Watertown Tire to rely on an oral statement of position directly opposite to that taken in the 2005 letter.

Finally, if Watertown Tire understood that its insurer's policy was not to allow or deny a claim in writing, it was unreasonable to settle with the State and local entities before obtaining such an allowance or denial.

Finally, it is not now reasonable to expect that the settling parties will agree to release to USEPA some of the money committed to them.

In sum, no prudent person would under similar circumstances have made the mistake claimed to have been made here. Accordingly, the motion should be denied.

IV. WATERTOWN TIRE DOES NOT SUPPORT ITS ASSERTED MISTAKE WITH COMPETENT EVIDENCE.

It is doubtful that Watertown Tire and Mr. Springer made the mistake as claimed. Notably, there is no assertion that the reliance was communicated to any of the settling parties during settlement discussions, or that the reliance was part of the settlement. Nor is there any evidence proffered to support the mistake as claimed.

There is no evidence that the August 2005 letter is as Watertown Tire represents it (Memorandum at 3), because the letter is not produced. Nor is there any evidence that the USEPA claim is different from the claims for which coverage was denied in that letter.

There is no evidence that Mr. Springer received the oral approval before judgment was entered (Memorandum at 3), because he gives no dates for any such conversations. Moreover, all of the communications referenced on page one of the insurer's letter attached as Exhibit B to his affidavit are dated after the judgment.

There is no evidence of the insurer's purported policy of not providing written positions before claims are presented (Memorandum at 3).

There is no evidence that Watertown Tire committed "all of its financial resources" (Memorandum at 3). Rather, the stipulation shows that Watertown Tire committed certain income streams and property, but notably not any income from the ongoing business, nor any resources belonging to Mr. Springer (except in the event of default). Even if there are "no other remaining funds to pay the EPA claim" (Memorandum at 4), no legal or factual argument is made why the settling parties should divert to EPA some of the funds committed by the judgment to them.

V. REOPENING THE JUDGMENT WOULD GRAVELY PREJUDICE THE STATE AND LOCAL ENTITIES AND THE CITIZENS AND DESTROY THE BALANCE OF INTERESTS STRUCK IN THE STIPULATION AND JUDGMENT.

"Section 806.07 attempts to achieve a balance between fairness in the resolution of disputes and the policy favoring finality of judgments." *Edland*, 210 Wis. 2d at 644. To

grant Watertown's motion here would affirmatively disserve both fairness and finality. It would deprive the State and local entities of a carefully constructed division of partial payments, on which they relied in giving up their rights to seek complete reimbursement for the costs they incurred in responding to the tire fire, and it would undo the finality of the complex balance of interests in compensation and continued business that was struck by the stipulation and judgment.

In *In re Paternity of M.T.H. v. A.G.R.*, 140 Wis. 2d 843, 849, 412 N.W.2d 164 (Ct. App. 1987), the court found that a reopened judgment to correctly formalize the decision left the defendant "in no worse a position." Here, reopening the judgment would leave the State and local entities and citizens in much worse a position by making available to non-party creditor financial resources committed by the judgment to them.

Watertown Tire and Mr. Springer committed certain resources to the State and local entities, and all parties accepted certain conditions of operation balanced against that commitment of resources. To take those resources back so that they can be accessed by a non-party creditor pursuant to a post-judgment claim would highly prejudice the settling parties, be greatly inequitable, and compromise the finality of a highly complex and carefully orchestrated settlement.

In addition, Watertown Tire and Mr. Springer avoided considerable forfeitures, in addition to response costs, by compromising the State's claims through the stipulation and order and judgment. Undoing that compromise as Watertown Tire requests would also subvert the underlying enforcement action.

Because the relief that Watertown Tire seeks would promote neither fairness nor finality, its motion should be denied.

CONCLUSION

For all the reasons stated above, the State asks the Court to deny the motion for relief from judgment.

Respectfully submitted this 6th day of July, 2007.

J.B. VAN HOLLEN
Attorney General

JOANNE F. KLOPPENBURG
Assistant Attorney General
State Bar #1012239

Attorneys for Plaintiff State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227