

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FORD CONSUMER FINANCE COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

ERIC K. GRAF A/K/A E K GRAF,

DEFENDANT-APPELLANT,

MADISON GAS & ELECTRIC COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Erik Graf appeals from a judgment in favor of Ford Consumer Finance Company, Inc. The court granted summary judgment to Ford on its foreclosure claim and dismissed Graf's counterclaim, after Graf failed to submit a timely response to Ford's summary judgment motion. The issues are whether material facts were in dispute and whether the trial court properly refused to consider Graf's untimely submission. We affirm.

¶2 Ford's complaint alleged that Graf defaulted on a loan secured by a mortgage on his home by failing to make a scheduled loan payment and pay his 1997 real estate taxes. Graf counterclaimed, alleging that Ford made material misrepresentations to him through its agent in the transaction, Endicott Financial Group, Inc., and that its collection efforts violated provisions of federal consumer credit statutes.

¶3 The trial court's pretrial order required the parties to file summary judgment motions by September 27, 1999, with responses due by October 18, 1999.

¶4 On August 25, 1999, Ford moved for summary judgment. Its affidavit and accompanying documents undisputedly presented a prima facie case that Graf had breached the loan contract. The submissions also provided prima facie documentary evidence that Endicott was Graf's agent in the transaction, not Ford's. The brief filed in support of summary judgment contended that Graf failed to state a claim based on federal consumer protection legislation because none existed to regulate a creditor's attempt to collect on its own loan.

¶5 On September 26 and again on October 4, 1999, Graf asked Ford's counsel for a copy of the summary judgment materials. Counsel provided them to Graf on October 16. On November 3 Graf requested an extension of the

October 18 deadline for responding to the summary judgment motion and on November 5 submitted a brief and affidavit in opposition to Ford's motion.

¶6 The trial court subsequently refused to consider Graf's untimely submissions, and granted summary judgment to Ford based on the unchallenged facts and law it presented in the summary judgment submissions. On appeal Graf contends that summary judgment was improperly granted because material facts remain in dispute, and the trial court erroneously exercised its discretion by refusing to consider his submissions.

¶7 We review summary judgment motions independently, using the same methodology as the trial court. *See State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). If, as here, the moving party has established a prima facie case for summary judgment, the burden shifts to the opposing party to put material facts in dispute through its affidavits and other submissions. *See id.* In this case, the trial court's exclusion of Graf's submissions leaves only Ford's supporting materials to consider. They establish Ford's right to summary judgment under any reasonable view. They show that Graf defaulted on material terms of the loan, and that the loan contract entitled Ford to pursue the foreclosure remedy. They also show that Endicott was Graf's agent, not Ford's, making summary judgment on Graf's misrepresentation claim proper. Finally, Ford's position that the counterclaim did not state a claim for relief under federal legislation is correct as a matter of law.

¶8 The trial court properly excluded Graf's untimely submissions. WISCONSIN STAT. § 801.15(2)(a) provides that when an act must be done within a specified time, and a motion to extend the deadline is made after expiration of that deadline, "it shall not be granted unless the court finds that the failure to act was

the result of excusable neglect.” Here, Graf presented no evidence that Ford failed to serve its motion when it was filed on August 25. Even if he did not receive timely service, he undisputedly received a copy of it before the October 18 deadline. He failed to present any explanation to the court why he then waited until November 3 before requesting any relief. Excusable neglect is the conduct of a reasonably prudent person under the circumstances. *See Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). Because Graf presented the court with no information from which it could reasonably conclude that the neglect was excusable, denying Graf’s motion and excluding his submissions was the only alternative the court had. *See id.* (if no excusable neglect found motion must be denied).

¶9 Additionally, Graf’s submissions, even if considered, provide no grounds to deny Ford its summary judgment. They do not refute Ford’s proof that Graf defaulted on the loan or that Endicott was his agent in the transaction rather than Ford’s. They also do not alter our conclusion that the counterclaim does not state a claim for relief under federal law.

By the Court.—Judgment affirmed.

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

