COURT OF APPEALS DECISION DATED AND FILED

April 18, 2001

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. 00-1842

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

MARIA MARGARET COOK AND STEPHEN COOK,

PLAINTIFFS-RESPONDENTS,

V.

LENORA BROCKMAN, M.D.,

DEFENDANT-APPELLANT,

XYZ INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Lenora Brockman, M.D., appeals from a default judgment and from an order denying her motion to vacate a default judgment entered against her. Brockman argues that the trial court's grant of a default judgment constituted an erroneous exercise of discretion because the court did not consider the relevant facts and failed to properly interpret and apply the law. We agree and reverse the judgment and the order and remand this matter for proceedings consistent with this opinion.

FACTS

¶2 Plaintiffs Maria and Stephen Cook filed a medical malpractice action against Brockman on November 5, 1999, and obtained service on Brockman on November 10, 1999.

¶3 On December 7, 1999, in lieu of an answer, Brockman filed a motion to dismiss pursuant to WIS. STAT. § 806.02 (1999-2000),[1] arguing that the Cooks had not filed a timely request for mediation as required by WIS. STAT. § 655.445. On December 22, 1999, the Cooks filed their request for mediation.

¶4 A hearing on Brockman's motion to dismiss was held on January 7, 2000. Due to a scheduling error, Brockman's attorney failed to appear at this hearing. The trial court proceeded with the hearing with the acknowledgment of Brockman's counsel. The trial court adjourned the hearing without reaching a decision and the motion was continued "until [it is] otherwise scheduled." The trial court's clerk informed a staff member from Brockman's lawyer's office that the motion had been stayed until after mediation.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶5 On March 22, 2000, a scheduling conference was held before a court commissioner, and a scheduling order was issued. This scheduling order did not address Brockman's motion to dismiss. On March 30, 2000, mediation was completed.

¶6 On April 17, 2000, the Cooks filed a motion for default judgment, alleging that Brockman had failed to file an answer and that the time for filing an answer had expired. Brockman then filed a motion to extend the time to answer and a proposed answer. A hearing was held on the Cooks' motion for default judgment on May 15, 2000. The trial court did not rule from the bench, but instead informed the parties that it would review the transcript of the January 7, 2000 hearing before ruling.

¶7 On May 16, 2000, the trial court issued a written decision granting the Cooks' motion for default judgment and awarding them $75,000 in damages plus costs. The trial court stated that the scheduling order clearly contemplated that all pleadings were to be completed by April 17, 2000, and "clearly and specifically sets up the parties' pleading obligations notwithstanding the mediation which was to occur on 30 March."

¶8 On May 23, 2000, judgment was entered against Brockman. On June 14, 2000, Brockman filed a motion to vacate the default judgment, which was denied by the trial court. Brockman appeals from the default judgment and the trial court's order denying her motion to vacate the default judgment.

DISCUSSION

¶9 A motion to vacate a default judgment is addressed to the discretion of the trial court. ***Maier Constr., Inc. v. Ryan***, 81 Wis. 2d 463, 472, 260 N.W.2d 700 (1978), *overruled on other grounds by* ***J.L. Phillips & Assocs., Inc. v. E & H***

Plastic Corp., 217 Wis. 2d 348, 577 N.W.2d 13 (1998). We will not disturb a trial court's discretionary decision unless there is a misuse of this discretion. ***Id***. However, we will find a misuse of discretion if the record demonstrates that the trial court failed to exercise its discretion, if the trial court applied the wrong legal standard, or if the facts fail to support the trial court's decision. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11-12, 386 N.W.2d 53 (1986). Courts look with disfavor upon default judgments, preferring to give litigants their day in court with an opportunity to try the issues. ***Maier Constr.***, 81 Wis. 2d at 472.

¶10 Brockman argues that the trial court erroneously exercised its discretion when it granted the Cooks' motion for default judgment. We agree. The facts in the record do not support the trial court's decision.

¶11 The Cooks filed this medical malpractice action on November 5, 1999. Medical malpractice actions are subject to the provisions of WIS. STAT. ch. 655. WIS. STAT. §§ 655.006, 655.004. WISCONSIN STAT. § 655.445(1) addresses the commencement of a medical malpractice action and states:

> Beginning September 1, 1986, any person listed in s. 655.007 having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered or that should have been rendered by a health care provider shall, within 15 days after the date of filing an action in court, file a request for mediation. The request shall be prepared and delivered in person or sent by registered mail to the director of state courts, in the form and manner required under s. 655.44(2) and (3), together with a notice that a court action has been commenced and the fee under s. 655.54 shall be paid.

Thus, under § 655.445(1), the Cooks were directed to file a request for mediation within fifteen days of filing their action.

¶12 On December 7, 1999, thirty days after being served, Brockman filed a motion to dismiss the complaint, arguing that the Cooks had not filed a timely request for mediation as required by WIS. STAT. § 655.445(1). A motion to dismiss is acceptable in lieu of an answer and alters the time period for answering a complaint. WIS. STAT. § 802.06(1). Specifically,

> [t]he service of a motion permitted under sub. (2) alters these periods of time as follows, unless a different time is fixed by order of the court: if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action ….

Id. Here, Brockman timely filed a response to the complaint—her motion to dismiss. Thus, she was no longer required to file an answer within forty-five days of service of the complaint. Instead, Brockman was required to file an answer within ten days after notice that her motion to dismiss had been denied or notice that the trial court had postponed a decision on the motion until a trial on the merits.

¶13 On January 7, 2000, the trial court held a hearing on Brockman's motion to dismiss. Brockman's attorney did not appear, which admittedly was the result of his office's own scheduling mistake. At this hearing, the court stated:

> The Court will adjourn this matter for proceedings that may be necessary. In fact, what I'll just do is put it back on the normal sequence so you get a pretrial date for appearance before the Commissioner for scheduling and you can handle it that way rather than doing anything else. The motion will just be continued until it's otherwise scheduled.

The trial court did not deny Brockman's motion, nor did the court postpone its decision until a trial on the merits. The court's decision was not a denial of the motion but a deferral of the ruling. Thus, the motion to dismiss remained outstanding.

¶14 On March 22, 2000, a scheduling conference was held before a court commissioner, and a scheduling order was issued. The relevant portions of the scheduling order, for purposes of the trial court's default judgment decision, read as follows:

> 4. All actions, including motions and amendment of pleadings, relating to adding additional parties, third party practice, interpleader, misjoinder and nonjoinder shall be served, filed and completed by April 17. Plaintiff shall join as parties all persons with subrogated, derivative or assigned rights by April 17 pursuant to sec 803.03(2), Wis. stats.
>
> 5. Except as provided in paragraph 4, all amendments to pleadings and supplemental pleadings shall be served and filed by April 17.
>
> 6. All motions including motions under sec. 802.06 and 802.08, Wis. stats. shall be filed, served and heard by ________.

The trial court, in granting the default judgment, relied primarily upon this scheduling order. The trial court stated in a written decision granting the default judgment:

> Absent the scheduling order in this matter, the Court would be inclined to agree with the Defendant; however, the scheduling order dated 22 March clearly and specifically sets up the parties' pleading obligations notwithstanding the mediation which was to occur on 30 March.
>
> The Defendant's position that since the Court had not ruled on its motion to dismiss, it stands as an Answer would be more persuasive if the additional time subsequent to the mediation had not occurred before an Answer was filed; if the Defendant had filed an Answer before the motion and application for default judgment had been filed; and if the scheduling order had not been issued which established 17 April as a last date for all pleadings to be submitted.…
>
> Subsequent to 7 January the scheduling order was issued and the mediation occurred. Both the mediation event and the scheduling order effectively answered and mitigated the Defendant's motion to dismiss.

The trial court essentially ruled that the provisions of the scheduling order and ensuing mediation resolved the motion to dismiss and set deadlines for filing all pleadings. This constitutes an erroneous exercise of discretion.

¶15 Nowhere in this scheduling order did the court commissioner establish a deadline for Brockman to file an answer after the resolution of the motion to dismiss. Paragraph four established a deadline for adding parties and amending the pleadings; it did not address the filing of an answer while a motion to dismiss is pending. Paragraph five addressed amended and supplemental pleadings. Most significantly, paragraph six specifically addressed motions to dismiss, but failed to establish deadlines for hearing such motions; the space for this deadline was left completely blank.

¶16 The scheduling order did not resolve the motion to dismiss and, in fact, failed to even address it. Consequently, we are hard pressed to see exactly how this scheduling order settled the motion to dismiss. WISCONSIN STAT. § 802.06 specifically states that an answer only needs to be filed within ten days of the court's denial of the motion or a postponement of the disposition of the motion until a trial on the merits. The trial court never denied the motion, nor did it postpone disposition until a trial on the merits. Thus, an answer was never required. Even if dismissal of the complaint was an inappropriate sanction for a tardy request for mediation, *see* ***Eby v. Kozarek***, 153 Wis. 2d 75, 77, 450 N.W.2d 249 (1980), Brockman was still entitled to a ruling on the motion, even if said ruling was a denial.

¶17 In addition, even if it can be said that Brockman failed to file a timely answer, such failure can be attributed to excusable neglect. A defendant may obtain relief from a default judgment by showing excusable neglect and a

meritorious defense to the action. ***Maier Constr.***, 81 Wis. 2d at 472. Excusable neglect is neglect that might have been the act of a reasonably prudent person under the circumstances. ***Id***. at 473.[2]

¶18 The transcript from the January 7, 2000 hearing gave no indication that the trial court had disposed of Brockman's motion and, in fact, indicated that the motion was continued pending further proceedings. After the January 7, 2000 hearing, Brockman's attorney had his secretary call the trial court to ascertain the result of the hearing. The trial court's clerk informed the secretary, who in turn informed Brockman's counsel, that the motion to dismiss had been stayed until the completion of mediation. Brockman reasonably relied upon the word of the trial court's staff. The scheduling order gave no clear indication of a change in this arrangement. Once the Cooks filed their motion for default judgment, Brockman immediately filed a motion to extend the time to file an answer and a proposed answer. Under the circumstances, Brockman's counsel acted reasonably and any failure to file a timely answer can be attributed to excusable neglect.

CONCLUSION

¶19 The trial court's grant of a default judgment constituted an erroneous exercise of discretion because the record fails to support the trial court's decision. We reverse the judgment and the order of the trial court and remand this matter for proceedings consistent with this opinion.

[2] The Cooks implicitly acknowledge that Brockman has a meritorious defense when they admit that "filing an answer does constitute a meritorious defense" but argue that a meritorious defense "is insufficient by itself to entitle the defaulting party to relief."

By the Court.—Judgment and order reversed and cause remanded.

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