

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2007

David R. Schanker
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. 2007AP1920

Cir. Ct. No. 2004SC1777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PJL PROPERTIES, LLC,

PLAINTIFF-APPELLANT,

V.

LAWRENCE P. RECLA AND JUNE M. RECLA,

DEFENDANTS-RESPONDENTS,

JOYCE GOFFIN,

GARNISHEE.

APPEAL from an order of the circuit court for Winnebago County:
BRUCE SCHMIDT, Judge. *Affirmed.*

¶1 SNYDER, J.¹ PJI Properties, LLC (solely owned by Peter J. Long) appeals from an order denying a motion to reopen a small claims default judgment. Long contends that the circuit court erred when it denied his motion to reopen the judgment dismissing his claim and granting the counterclaim made by June M. Recla and her son Lawrence. Long presents several issues on appeal, challenging the circuit court's rulings on valid service of the Reclas' counterclaim, the merits of the Reclas' counterclaim, and the timeliness of Long's motion to vacate or reopen. We have reviewed the record supplied by Long, together with the briefs of both parties, and we ascertain no error. Accordingly, we affirm the order denying Long's motion to vacate or reopen the default judgment.

BACKGROUND

¶2 On May 7, 2004, Long filed a summons and complaint against the Reclas for moving out of their apartment without giving proper notice and for damaging the property. The Reclas filed a counterclaim against Long, asserting that they gave proper notice to vacate the apartment and that the property damage existed prior to their tenancy. The Reclas' counterclaim sought compensation for their security deposit plus interest, travel expenses to court, lost wages, time to prepare for court, and legal advice sought totaling \$850.

¶3 Long failed to appear at a court-ordered mediation orientation on June 24, 2004; therefore, the court commissioner entered a default judgment dismissing Long's complaint and granting the Reclas' counterclaim. The notice of entry of judgment, dated June 25, 2004, indicates that a copy was mailed to Long

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

at 320 E. Doty Ave, Neenah, WI 54956. Long filed his first motion to reopen on July 12, 2004, explaining that the matter should be reopened because he had many cases pending and had “mis-entered the mediation date in [his] calendar.” The court commissioner set a hearing date of August 5. Long again failed to appear and his motion was denied.

¶4 Long took no further action until January 26, 2007, when he filed a second motion to reopen. Long characterized his failure to appear at the August 5, 2004 hearing as “excusable neglect” and stated as follows: “Peter J. Long was incarcerated at the time he was supposed to appear. We (sic) were never served paperwork about garnishment.... [The Reclas] never gave 60 day notice. They gave verbal commitment, then moved out in the middle of the night.” The court commissioner summarily denied this motion on February 2, 2007, holding that Long failed to comply with WIS. STAT. § 799.29(1)(c), which requires a motion to reopen to be filed within one year of a small claims default judgment.

¶5 Shortly thereafter, on February 21, 2007, Long filed a third motion, this time moving the court “to vacate or reopen small claims judgment and order.” This was Long’s first attempt to vacate as an alternative to reopening the judgment and he now sought relief under WIS. STAT. § 806.07(1)(c) and (h). SECTION 806.07 states in relevant part:

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party ... from a judgment [or] order ... for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

....

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

....

(2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment [or order] was entered

At a hearing on April 20, 2007, the court commissioner denied Long's motion. The April 20 order is not in the record but appears on the small claims court record summary; therefore, we know the motion was denied but we do not know why.² It is the appellant's responsibility to provide this court with a complete record. When an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the ruling below. *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

¶6 Long followed with another letter on May 21, advising the court of his intent to appeal from the April 20 order and seeking review by a circuit court judge. He enclosed a motion to vacate or reopen that was identical to the motion he had filed in February. He requested that his motion be heard prior to an upcoming garnishment hearing. Long's motion was heard in conjunction with the garnishment hearing before a court commissioner and the motion was denied on June 18.

¶7 On June 21, Long filed a "motion to appeal" the June 18 order. In his motion, he invoked WIS. STAT. § 799.207, but did not explain the relevance. He further asserted that his motion to reopen should be granted "pursuant to WIS.

² The circuit court's June 28, 2007 order tracks the procedural history, but appears to tie the January 26 motion to the April 20 hearing. However, the small claims court record summary indicates that the hearing on April 20, 2007, was on Long's February 21 motion. The circuit court's June 28 order states that Long's motion to reopen was "not timely," but that a motion hearing was granted and held on April 20, 2007. The court goes on to say that "pursuant to testimony and evidence presented at said hearing, [Long's] motion to reopen was denied."

STAT. § 806.07(1)(h),” which allows a court to grant relief from judgments based upon “any other reason[] justifying relief from the operation of the judgment.” Long included a copy of his previous motion to vacate or reopen. The circuit court reviewed the file and summarily denied the motion on June 28, 2007. The court observed that Long had been granted three prior hearings on motions to reopen, which were all denied, and had presented nothing new in his current motion. It is from this order that Long now appeals.³

DISCUSSION

¶8 Long presents six issues for our review. Many of his issues would require us to review the underlying default judgment rather than the order denying his motion to reopen. For example, Long asks whether the Reclas’ counterclaim was timely and properly served, whether the counterclaim was otherwise defective, and whether the counterclaim was frivolous or fraudulent. We have jurisdiction to review only the order denying Long’s motion to reopen, not the default judgment itself. *See* WIS. STAT. § 799.29(1)(a).⁴ Accordingly, our review is limited to the court order on the motion to vacate or reopen from which he has appealed. The only issue before us is whether the circuit court properly exercised its discretion when it denied Long’s motion to reopen the default judgment.

³ Although the June 28, 2007 order misstates some of the dates in the procedural history, the error is harmless. It is clear that Long’s motion would have been denied even absent the error.

⁴ WISCONSIN STAT. § 799.29(1)(a) states that “[t]here shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.”

¶9 The granting of a default judgment is within the circuit court's discretion. *Oostburg State Bank v. United Sav. & Loan Ass'n*, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). Likewise, a court has wide discretion in determining whether to reopen a judgment, and the circuit court's decision will not be disturbed unless there has been an erroneous exercise of that discretion. *See Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). We will affirm a circuit court's exercise of discretion if it has applied the proper law to the established facts and if there is any reasonable basis for the circuit court's ruling. *See State v. Alsteen*, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). An appellate court will generally look for reasons to sustain a discretionary determination. *Steinbach v. Gustafson*, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993). Nonetheless, we are mindful that the law prefers to afford litigants their day in court and a trial on the issue. *See Dugenske*, 80 Wis. 2d at 68.

¶10 Long's trouble began when he failed to appear for a mediation orientation and, as a result, the default judgment against him was entered. The court's decision to dismiss Long's claim against the Reclas is directly supported by WIS. STAT. § 799.22(1). Furthermore, judgment on the Reclas' counterclaim against Long is supported by § 799.22(2). Because the default judgment was properly granted, Long has the burden to show that he is entitled to relief. *See Carmain v. Affiliated Capital Corp.*, 2002 WI App 271, ¶23, 258 Wis. 2d 378, 654 N.W.2d 265.

¶11 The order before us rests its reasoning on prior orders denying Long’s multiple motions to reopen the judgment.⁵ Long’s first motion to reopen, filed July 12, 2004 (less than a month after the default judgment was entered), was denied because Long failed to appear in support of his motion at the hearing on August 5. Had he appeared, he would have had to demonstrate “good cause” to reopen the default judgment. *See* WIS. STAT. § 799.29(1).

¶12 Long filed his next motion to reopen in January 2007. In a letter to the court, he explained that he had been incarcerated on the date of the August 5, 2004 hearing and sought another opportunity to make his case. The court commissioner summarily denied this motion on grounds that it did not comply with WIS. STAT. § 799.29(1)(c), which requires a notice of motion be made within twelve months after entry of judgment.

¶13 Long’s subsequent motions were denied because they were untimely. Long offers two arguments challenging the court’s use of the twelve month time limit for his motions. First he argues that he never received notice of the default judgment and therefore he is relieved of the statutory time constraint. We note, however, that at the bottom of the notice of entry of judgment is a section titled “Distribution” showing that the notice was mailed to PJI Properties LLC c/o Peter J Long at the address on Doty Street in Neenah. Long argues that the court should have known of his incarceration because he directed that all legal correspondence should be mailed to him at his new address. Nonetheless, the

⁵ We observe that Long never appealed from the first order denying his motion to reopen. Instead, he filed subsequent motions to reopen more than two years later. The circuit court’s tolerance for repeated motions on the same subject has contributed to the burden on the Reclas. We encourage the circuit court to be vigilant for procedural abuses that serve to avoid the finality of judgments and to harass other parties.

record shows that the first time Long contacted the court to update his address was in a letter dated January 25, 2007, over two-and-one-half years from the date the notice of the default judgment was mailed. The small claims court record summary confirms that Long first notified the court of his address change from Doty Street to the Stanley Correctional Institution in January 2007. Furthermore, as the Reclas point out, Long's motion to reopen filed on July 12, 2004, mentions the default judgment and therefore demonstrates that Long had knowledge of the judgment at that time. Long's "lack of notice" argument fails.

¶14 Long also asserts that his incarceration is a "disability" under WIS. STAT. § 893.16, which extends the time period in which a party may sue. This issue is new on appeal and therefore we do not address it. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980),⁶ *superseded by statute on other grounds*, *Wilson v. Waukesha County*, 157 Wis. 2d 790, 797, 460 N.W.2d 830 (Ct. App. 1990).

¶15 Finally, although Long does not make this distinction, we note that a motion to reopen and a motion to vacate are treated differently in the statutes. WISCONSIN STAT. § 799.29(1)(c) time requirements apply to motions to reopen a default judgment for good cause shown. Motions to vacate are controlled by WIS. STAT. § 806.07(1)(d), and a party may move to vacate a *void* judgment at any time. *See Neylan v. Vorwald*, 124 Wis. 2d 85, 97, 100, 368 N.W.2d 648 (1985) (void judgments may be expunged at any time, the "reasonable time" requirement

⁶ Furthermore, we reject Long's proposition that an incarcerated person, by reason of disability, may file repeated, redundant motions to reopen a case for five years under WIS. STAT. § 893.16. Such an interpretation would be absurd. It would, as we see here, turn the legal system into a tool for harassment.

of § 806.07 does not apply). Long never sought relief under § 806.07(1)(d) and never argued that the judgment was void.⁷

¶16 In summary, Long has not persuaded us that the circuit court erred in denying his motion. Long's failure to appear at his mediation orientation and his failure to appear or notify the court of his incarceration before his August 5 motion hearing provide adequate grounds for the default judgment and the refusal to reopen that judgment. Furthermore, his attempts to revisit the merits of the case two years after the entry of judgment were untimely. Long's challenges to the merits of the original small claims action are not relevant to this appeal. Therefore, to the extent that we have not addressed an argument made in Long's appeal, the argument is deemed rejected.

CONCLUSION

¶17 We conclude that the circuit court's order reflects a proper exercise of discretion. We therefore affirm.

By the Court.—Order affirmed.

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

⁷ Long did argue that the judgment should be "voided" as fraudulent, which is different than arguing that the judgment was void. Assertions of fraud are covered by WIS. STAT. § 806.07(1)(c).

