

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2008

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. 2007AP504

Cir. Ct. No. 2006CV3412

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARLA BAKER F/K/A LOCKRIDGE,

PLAINTIFF-RESPONDENT,

V.

FAHMI ABDALLAH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed in part and cause remanded for further proceedings.*

Before Wedemeyer,¹ Fine and Kessler, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 PER CURIAM. Fahmi Abdallah appeals from a default judgment against him, awarding damages, costs and attorney's fees to Marla Baker, formerly known as Lockridge, on her claims against him for statutory fraudulent representation on a commercial lease agreement. We conclude that the trial court properly exercised its discretion in denying Abdallah's motions to extend the time to answer Baker's complaint and to reopen the default judgment entered against him, and that there was sufficient evidence to support the trial court's damage award. However, the trial court failed to find whether the attorney's fee award was reasonable. Therefore, we affirm the judgment with the exception of the award for attorney's fees and remand the matter for a determination of the reasonableness of the award for attorney's fees, and for an award of appellate attorney's fees pursuant to WIS. STAT. § 100.18(11)(b)2. (2005-06).²

¶2 Baker is a hair stylist and owns the Before and After Beauty Salon. She decided not to renew her lease because of structural problems in the building she was then occupying, and looked at a vacant storefront Abdallah owned as a potential location. When she viewed the property, she noticed what appeared to be water damage on the ceiling and specifically asked Abdallah whether he had problems with the roof. Reassured by Abdallah that there were no problems with the roof, Baker signed a two-year lease commencing July 1, 2004 for the monthly rent of \$550. At the beginning of the lease term, Baker discovered that the roof leaked, and asked Abdallah to fix it. Abdallah attempted to fix the roof, while Baker incurred expense to open her salon. Baker vacated her previous location on October 24, 2004, and because of Abdallah's failure to repair the roof, she was

² All references to the Wisconsin Statutes are to the 2005-06 version.

unable to open her salon at the property she had leased from him, on September 1, 2004 as she had intended. Instead, Baker was compelled to close her salon, lay off her employees and eventually lease a different location, commencing February 1, 2005 for a monthly rent of \$1200.

¶3 Baker sued Abdallah and had him personally served on June 26, 2006. It was later discovered that Abdallah had forwarded the pleadings to his attorney in late June or early July of 2006, although no answer was timely filed. After the deadline for filing an answer had expired, Baker moved for a default judgment on August 24, 2006. Abdallah's attorney finally discovered Abdallah's pleadings on October 6, 2006, and on October 30, 2006, moved to extend his time to file an answer. The trial court denied Abdallah's motion and entered a default judgment against him on December 13, 2006. The trial court then held an evidentiary hearing to determine damages, and awarded judgment in the total amount of \$31,623.78, comprised of \$23,561.87 in damages, \$7775.41 in attorney's fees, and \$286.50 in costs. Abdallah appeals, and in her respondent's brief, Baker also seeks a remand to determine appellate attorney's fees pursuant to WIS. STAT. § 100.18(11)(b)2.

¶4 Abdallah moved to extend the time for filing his answer after Baker had moved for a default judgment. Although the trial court had not yet decided Baker's motion for a default judgment, it considered Abdallah's extension motion in the context of his proposed motion to reopen the not-yet-entered default judgment. As Abdallah acknowledges, a decision on one necessarily decides the other.

¶5 Reviewing the trial court’s denial of Abdallah’s extension motion in the context of the standard of review for an order denying a motion to reopen a default judgment, we are mindful that:

Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances. It is not synonymous with carelessness or inattentiveness, and it is not sufficient that the failure to answer in a timely manner be unintentional and in that sense a mistake or inadvertent, since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.

Mohns, Inc. v. TCF Nat’l Bank, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 714 N.W.2d 245 (quotation marks, citations and quoted sources omitted). The burden of proving excusable neglect is on Abdallah as he is the moving party seeking to reopen the judgment. See *id.*, ¶10 (citing *Hansher v. Kaishian*, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977)).

In determining whether the party seeking relief from a default judgment has proven excusable neglect, the [trial] court should consider whether the moving party has acted promptly to remedy the default judgment, whether the default judgment imposes excessive damages, and whether vacatur of the judgment is necessary to prevent a miscarriage of justice. The [trial] court must also consider that the law favors the finality of judgments, and the reluctance to excuse neglect when too easy a standard for the vacatur of default judgments would reduce deterrence to litigation-delay.

Id., ¶10 (citations omitted).

¶6 The trial court, not this court, finds facts. See *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). Incident to the trial court’s fact-finding function, it is also the trial court’s obligation to determine the credibility of witnesses

because of ... the superior opportunity of the trial court to observe the demeanor of witnesses and to g[au]ge the persuasiveness of their testimony. Thus, the trial judge, when acting as the factfinder, is considered the ultimate arbiter of the credibility of a witness, and h[er] finding in that respect will not be questioned unless based upon caprice, an abuse of discretion, or an error of law.

Johnson v. Merta, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980) (citations and quotation marks omitted).

¶7 The facts were essentially undisputed. Abdallah was personally served with a summons and complaint on June 26, 2004. Abdallah left those pleadings with the law firm representing him in late June or early July. His lawyer discovered the papers on October 6, 2006, but did not move for an extension of time to file an answer until October 30, 2006.

¶8 The disputes were not truly factual, but more credibility-oriented. Abdallah initially testified that he was never personally served; he was out of the country during the relevant time. After Baker was prepared to produce the process server with proof of personal service, Abdallah filed an affidavit apologizing to the court that he had testified falsely because he was nervous, and misunderstood his lawyer's questions regarding personal service. Abdallah's lawyer also filed an affidavit admitting that the pleadings had been in his office for about three months before he discovered them. He also averred "[t]hat he has no explanation as to why he would not have seen the Summons and Complaint prior to October 6, 2006," and "[t]hat he has not in the past had a problem with losing documents." The remainder of the affidavit is conclusory, as opposed to factual, containing averments that the failure to answer "was due to inadvertence or excusable neglect," and that "Abdallah has a valid defense to this action," although he did not elaborate on what that valid defense was.

¶9 The trial court denied Abdallah's motion, providing its reasons for the denial.

[The trial court] think[s] there [are] substantial credibility problems here. I[t] think[s] the defendant's testimony in court was very clear he was out of the country, therefore [he] could not have been served with the Summons and Complaint; and the testimony, [the trial court] think[s] it is remarkable that it only changed after it was clear the process server would be appearing.

[The trial court] also find[s] it going to credibility as to the affidavit that says that Defense Attorney saw the Summons and Complaint in his file on October 6, yet no question was asked of the defendant how it got to his file, how it is that it's in his file if he is saying he never got it.

And [the trial court] guess[es it's] very puzzled why that wouldn't be the first question Counsel would ask of his client, ['How did this get here,'] before the person is put on the stand. The attorney says it's excusable neglect and that it just got lost in the office.

....

Admittedly, that time period has long passed. The Answer was not even filed until October 30th. Excusable neglect is not synonymous with neglect, carelessness or inadvertence.

By his own statement, Counsel had the Complaint; but in his own admission, he had it on October 6. But no motion was filed until October 30th. And the question is accepting the defense attorney's statement at face value, that is not excusable neglect. The defendant has a duty to do more.

First, the delay in response. There is no reason given for not filing an Answer on October 7th a[s] opposed to October 30th or any date in between those two dates because it's undisputed Counsel had it during that period of time.

Counsel says he lost it on the desk. That in itself is not sufficient. No action was taken until weeks later after the Complaint was found.

There is no evidence of reasonable procedures in place to prevent such a loss of a document. It's not sufficient to say that you will adopt such procedures to prevent this in the [future]. The question is what were the procedures in place at the time to ensure documents aren't lost; because then if those procedures are reasonable and this is the act of a reasonable attorney and something happened to them, then the analysis shifts somewhat.

But here, there is admittedly no effort of any procedures in place to prevent this. When one runs an office, they should have procedures and not just say [']'Oh, well, we'll do it now that we have lost something.'['] There is no evidence here for [the trial court] to decide that there was reasonableness in the handling of this document.

And [the trial court is] also concerned because no steps were taken until after October 30th apparently to find the facts that are now presented. There is no indication that there was any preventing of the attorney talking with his client to follow up and find out why was the Complaint in the file, how did it get there, what steps were taken, and no effort to learn from the client apparently until this new date.

So [the trial court] think[s] we look at the conduct and whether or not it is reasonable under all the circumstances.

.... merely losing something is not sufficient. You have to have some evidence of a process that is reasonable to prevent such action from occurring.

Here we have nothing, no explanation other than one statement which [the trial court] question[s] significantly because [it] question[s] the credibility of a person who testified one thing on the stand offers an affidavit which is to be considered a sham affidavit on the other hand; so [the trial court] think[s] that credibility is very low.

So [the trial court is] satisfied that there is no excusable neglect here, and [the trial court is] satisfied that ... the defendant has not set forth any basis for which the Court [should] either grant a motion to extend time to provide an Answer or grant a motion to set aside the judgment[.]

¶10 The trial court found the facts, and determined the credibility of the witnesses. It provided specific reasons for its findings and its credibility determinations. Its findings are not clearly erroneous; its credibility determinations are not capricious. *See* WIS. STAT. § 805.17(2); ***Johnson***, 95 Wis. 2d at 152. It provided ample reasons after “examin[ing] the relevant facts, appl[ying] the proper standard of law and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach.” ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994) (citation omitted). The trial court properly exercised its discretion in denying Abdallah’s motion to extend the deadline for filing his answer, and his prospective motion to reopen the not-yet-entered default judgment.

¶11 Abdallah also contends that the evidence supporting the damage award was insufficient and speculative. Abdallah contends that Baker only presented evidence of lost income for four months, but was awarded damages for five. Baker testified that her salon was closed for one week in October, and the entire months of November, December, January and February. Her Damages Computation, Exhibit 8, calculates that she lost business profits because the salon was “[o]ut of commission for five months.”

¶12 The trial court calculated its damage award, reasoning that:

[t]here is some indication she was there in the premises conducting business in the Silver Spring location through October 24th of 2004; but there is no dispute that for November, December, January and February, she was out of business and so a reasonable amount of \$1200 a month, [the trial court] think[s] that calculation, and [the trial court is] satisfied it should be for the full five months because you have a person who is trying on one hand to renovate a property to move into, trying to get out of a property that she has an obligation to get out of. She testified she lost the employees.

[The trial court] think[s] that five months is not unreasonable under all the circumstances, especially given the fact that the amount is reduced to 1200. It really is not a stretch here to say that is the amount that she would have been able to earn had she been able to be in business for those months.

¶13 The disputed amount of damage is for the month of October, as Abdallah does not challenge the sufficiency of Baker's evidence for the loss of business during the four months of November through February. Baker also testified that she "had to close down" the salon on October 24, 2004. Consequently, three weeks in October are in dispute. The trial court recognized that Baker was still working and the salon was operational through October 24, 2004, but awarded a full rather than a partial month of damage because Baker was compelled to renovate a property that she reasonably relied upon to be operational when she moved out of her existing location. We conclude that the trial court's inference from Baker's evidence regarding lost profits was reasonable. *See Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 570-71, 360 N.W.2d 65 (Ct. App. 1984). We therefore reject Abdallah's challenge to that damage award.

¶14 Abdallah's remaining challenge is to the award of attorney's fees pursuant to WIS. STAT. § 100.18. Abdallah contends that the trial court failed to find that the attorney's fees were reasonable, and that Baker was not entitled to a statutory award of fees because she mistakenly alleged in her complaint that Abdallah's fraudulent representations induced her to purchase as opposed to lease the property, which was contrary to the evidence. We reject Abdallah's contentions.

¶15 Abdallah contends that the trial court did not find that the award of attorney's fees was reasonable. Baker testified that initially, she could not afford counsel; consequently, she agreed to the greater of counsel's reduced hourly rate

of \$100, or one-third of her gross recovery. The trial court “accept[ed] Exhibit 8 [which included the \$7775.41 calculated as one-third of the damages sought by Baker pursuant to WIS. STAT. § 100.18(11)(b)2.] ... as the total award and total judgment amount that should be entered.” The trial court did not, however, expressly determine that the amount of the attorney’s fees was reasonable. The trial court must do so on remand and explain its reasoning.

¶16 Abdallah’s final challenge to the attorney’s fee award is that Baker alleged that Abdallah’s fraudulent representations induced her to purchase the property when she never purchased or even contemplated a purchase of the property. In the paragraph of her complaint previous to the “purchase” allegation, Baker alleged that Abdallah’s “fraudulent representations were made with the intent to rent the Property.” The evidence indicates that this dispute involved the rental of property, not its purchase. Although Abdallah contends that Baker did not move to conform (one part of) the pleadings (reference to purchase) to the proof at the conclusion of trial, this hypertechnical contention of error lacks merit. WISCONSIN STAT. § 805.18 allows the trial court to disregard an error in the pleadings that does “not affect the substantial rights of the adverse party.” Baker’s theories against Abdallah were straightforward and clear; this was not a trial by ambush. In fact, Baker’s theories became somewhat inconsequential once Abdallah failed to timely answer Baker’s complaint because the trial court granted a default judgment on the liability portion of Baker’s claims. We reject Abdallah’s hypertechnical contention.

¶17 Baker seeks reasonable appellate attorney’s fees if she prevails on appeal. See WIS. STAT. § 100.18(11)(b)2.; *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991).

[A] party who prevails on appeal in an intentional misrepresentation case brought under sec. 100.18 is likewise entitled to reasonable appellate attorney's fees.... [T]he purposes and policy interests of [the] statutory sections are [to] ... encourag[e] plaintiffs to enforce their rights, despite the high costs of litigation, and thus deter intentional misrepresentations or unfair practices in business and trade.

Radford, 163 Wis. 2d at 551. Baker has prevailed on appeal and is entitled to reasonable appellate attorney's fees. *See id.*

¶18 We therefore remand the cause for the trial court: (1) to determine and explain whether the attorney's fees for trial proceedings were reasonable; and (2) to find and award Baker reasonable appellate attorney's fees from Abdallah. We affirm the remainder of the judgment.

By the Court.—Judgment affirmed in part and cause remanded for further proceedings.

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

