

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2009

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. 2009AP1554-FT

Cir. Ct. No. 2009CV258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COMMUNITY BANK & TRUST,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. FOGLE, JILL M. FOGLE AND HOME LOAN CENTER, INC.,

DEFENDANTS,

INDYMAC FEDERAL BANK, FSB,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Indymac Federal Bank, FSB, appeals from the order of the circuit court that struck its answer and entered a default judgment in

favor of Community Bank & Trust, and the order that denied its motion for reconsideration. Indymac argues that it established excusable neglect for failing to timely file its answer. This appeal was expedited under WIS. STAT. RULE 809.17 (2007-08).¹ We conclude that the circuit court properly exercised its discretion when it struck Indymac's answer and denied the motion for reconsideration. We affirm.

¶2 This was a foreclosure action in which Community Bank alleged that Indymac's interest in a property was inferior to its interest. Indymac was served with the summons and complaint on March 13, 2009. The documents have a stamp from the process server that says March 13, 2009, although the date is handwritten. Indymac's legal department stamped the summons and complaint as received on March 18, 2009. Indymac relied on the 18th as the date of service, and calculated that the answer was due on April 7, 2009. Local counsel apparently reviewed the file on April 2, the day the answer was actually due. Local counsel then determined that service occurred on March 13, 2009. Indymac's counsel asked Community Bank for an extension of time to file the answer the day after the answer was due. Community Bank would not agree, and moved for a default judgment. Indymac filed an answer on April 7. Community Bank moved to strike the answer, and Indymac moved to enlarge the time to file its answer.

¶3 Indymac argued that it was confused over the correct service date because the handwritten process server's date was difficult to decipher. Indymac argued that the process server's date stamp appeared to be "March 18, 2009," and

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that confirmed the date put on there by its own legal department. Community Bank, on the other hand, argued that the stamp was at best illegible, and that Indymac had the responsibility to investigate if it was unsure of the actual date of service. The circuit court agreed with Community Bank, and granted its motion. Indymac moved for reconsideration. Indymac again argued that it had not been uncertain about the date, but rather it mistakenly thought it said “March 18.” The circuit court determined that Indymac was not making any new arguments, found that the process server’s date was not actually illegible, and denied the motion for reconsideration.

¶4 Indymac argues on appeal that the circuit court erred when it determined that Indymac had not shown excusable neglect because the circuit court made two errors in its factual rulings. First, Indymac asserts that the circuit court erred when it determined that Indymac had been uncertain about the date on the process server’s stamp, and argues that it was “mistaken” about the date. Second, Indymac argues that the circuit court erred when it found that Indymac had not referred the matter to outside counsel until after the deadline for filing an answer had passed.

¶5 We review the decision to grant a default judgment for an erroneous exercise of discretion. *Binsfeld v. Conrad*, 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851. The record must reflect the circuit court’s “reasoned application of the appropriate legal standards to the relevant facts.” *Id.* (citation omitted). A party seeking to file a late answer must demonstrate excusable neglect. *Id.*, ¶23. “Excusable neglect is conduct that ‘might have been the act of a reasonably prudent person under the same circumstances.’” *Id.* (citation omitted). “It is not the same as neglect, carelessness, or inattentiveness.” *Keene v. Sippel*, 2007 WI App 261, ¶8, 306 Wis. 2d 643, 743 N.W.2d 838.

¶6 The circuit court concluded that the mistake was a clerical error completely within Indymac's control. The court did not accept that the date stamp was illegible, but found that even if it was, a reasonably prudent person would have done what was needed to be done to determine the correct date. Indymac's legal office did not do that. Further, the court found that Indymac's attempt at prompt remediation, by filing an answer on April 7, was not an acceptable cure.

¶7 We conclude that the circuit court properly exercised its discretion. We agree with Indymac that its calculation of the deadline was a mistake. The question then is, was the mistake excusable. It was not. The dates in this case speak for themselves. Indymac did not behave as a reasonably prudent person would under these circumstances.

¶8 Further, Indymac's attempt to remediate by filing an answer on April 7 does not negate the mistake. While promptness is a material factor, it does not, of itself, require an affirmative result. See *Hansher v. Kaishian*, 79 Wis. 2d 374, 392, 255 N.W.2d 564 (1977). The matter remains within the trial court's discretion. *Id.* We conclude that the circuit court did not erroneously exercise its discretion. Because we have found that Indymac did not demonstrate excusable neglect, we need not address its argument that the interests of justice require that it be relieved from the default judgment.

¶9 Further, because we concluded that the circuit court's initial ruling was proper, we also conclude that the circuit court properly denied the motion for reconsideration. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

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

