COURT OF APPEALS
DECISION
DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0820-FT **Cir. Ct. No. 01-CV-84**

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

ROBERT PENCE,

PLAINTIFF-RESPONDENT,

V.

M&I CENTRAL STATE BANK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. M&I Central State Bank appeals from a default judgment entered in favor of Robert Pence. M&I argues that the circuit court erred by not enlarging the time to answer the complaint based on excusable

neglect and the interests of justice. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In September 1999, Pence contracted with Summit Builders, Inc., for construction of a barn and advanced Summit the purchase price of $22,347. Unknown to Pence, Summit had defaulted on two of its loan obligations to M&I. Pursuant to a security agreement between Summit and M&I, any funds received by Summit were submitted directly to M&I through a cash collateral account that had been established in August 1999. Summit failed to construct the barn and ultimately filed bankruptcy.

¶3 On September 14, 2001, Pence filed suit against M&I alleging "nondisclosure of dual agency and insolvency of debtor." M&I was served on October 4, but failed to timely file its answer by November 19. Pence then filed an Affidavit of No Answer and a Motion for Default Judgment. M&I filed a motion for change of venue on November 30 and ultimately filed its answer and motion for enlargement of time on December 6. M&I claimed that after being served, it forwarded the complaint to its attorneys. The lead attorney in charge of the file asked an associate attorney to draft an affidavit and motion for change of venue. Although the associate attorney assumed the lead attorney would be filing the answer to the complaint, the lead attorney assumed the associate would file both the motion for change of venue and answer to the complaint. M&I further claimed that an answer was filed immediately upon discovery of the misunderstanding.

¶4 Pence moved to strike the answer. The circuit court ultimately denied M&I's motion for enlargement of time, granted Pence's motion to strike the answer and granted default judgment against M&I. This appeal followed.

ANALYSIS

¶5 The circuit court's determination whether to grant a default judgment or a concomitant motion for enlargement of time within which to answer is reviewed under an erroneous exercise of discretion standard. ***Oostburg State Bank v. United S & L***, 125 Wis. 2d 224, 238, 372 N.W.2d 471 (Ct. App. 1985). A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We will sustain a court's default judgment if there is a reasonable basis for its determination. ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 276-77, 470 N.W.2d 859 (1991).

¶6 A defendant is required to respond to a complaint within forty-five days of receiving the summons. WIS. STAT. § 801.095(1). The court may grant a default judgment to the plaintiff if the defendant fails to meet that deadline. WIS. STAT. § 806.02;[1] ***Hollingsworth v. American Fin. Corp.***, 86 Wis. 2d 172, 181,

[1] Wisconsin Stat. § 806.07(1) reads as follows:

> On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect;
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> (c) Fraud, misrepresentation, or other misconduct of an adverse party;

(continued)

271 N.W.2d 872 (1978). The time for filing an answer may be enlarged after the deadline has already passed if the delinquency was the result of excusable neglect. WIS. STAT. § 801.15(2)(a). Excusable neglect is "neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). It is not synonymous with carelessness or inattentiveness. ***Id.***

¶7 In determining whether to grant the dilatory party relief, the court must also look beyond the causes for neglect to the interests of justice. ***Id.*** at 469, 326 N.W.2d at 731. The interests of justice require the court to consider the sometimes contradictory interests in affording litigants a day in court and in ensuring prompt adjudication. ***Id.*** In making this assessment, the court should look to such factors as "whether the dilatory party has been acting in good faith, and whether the opposing party has been prejudiced." ***Id.*** at 477. A court should also consider the existence of prompt remedial action as "a material factor" in assessing both the reasonableness of the delay and the interests of justice. ***Id.*** A dilatory party's prompt action is not, however, "a substitute for determining

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(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

All references to the Wisconsin Statutes are to the 1999-2000 version.

whether the party's initial failure to meet the statutory deadline was the result of excusable neglect." ***Id.***

¶8 The circuit court reasonably concluded that M&I's neglect was inexcusable. The court recounted the timeline of events from service of the summons and complaint to the answer's ultimate filing. The court emphasized that the law firm's failure to timely file the answer was simply due to poor communication between an associate and someone in charge of the file. The court emphasized the importance of procedures to ensure the timely filing of pleadings and further concluded that the law firm's failure to either implement such procedures or follow those already implemented did not excuse the firm's neglect. Because excusable neglect is not synonymous with carelessness or inattentiveness, it was reasonable for the court to find no excusable neglect. ***Id.*** at 468.

¶9 M&I nevertheless contends that the court failed to sufficiently address the interests of justice—specifically, the promptness of its remedial action—in granting default judgment. In ***Connor v. Connor***, 2001 WI 49, 243 Wis. 2d 279, 627 N.W.2d 182, the defendant argued that the circuit court erred by failing to consider policy reasons weighing against default judgment. Our supreme court held: "The fact that the court did not specifically articulate its consideration of these policy factors does not mean that it was not cognizant of these factors before granting the [motion for default judgment]." ***Id.*** at ¶25. Through oral argument and M&I's pre-hearing brief, the court was aware of its obligation to consider the interests of justice. On appeal, we will assume when a finding is not made on an issue which appears from the record to exist, that it was determined in favor of or in support of the judgment. ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). Because the record supports the circuit court's decision, the judgment is affirmed.

By the Court.—Judgment affirmed.

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