COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2133 **Cir. Ct. No. 03CV000078**

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

MICHAEL KIELBLOCK,

PLAINTIFF-RESPONDENT,

V.

HYTEC MANUFACTURING, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 PER CURIAM. Hytec Manufacturing, Inc., appeals a default judgment entered against it when the circuit court denied a motion to extend the time for filing a proper answer, effectively striking Hytec's faulty answer from the record. Hytec argues that the circuit court erroneously exercised its discretion

when it declined to find excusable neglect, and that the court erred when it limited Hytec to cross-examination of Michael Kielblock during the hearing on damages. Because we conclude that the court properly exercised its discretion by concluding that there was no excusable neglect, the decision to deny the motion to extend time and the default judgment of Hytec's liability is affirmed. However, even when a default judgment is entered, a defendant must be allowed to present evidence as to mitigation or diminution of damages. Because the court did not allow Hytec to present such evidence, the judgment for damages is reversed and the cause remanded for a rehearing on damages only.

Background

¶2 Hytec agreed to replace a harvester head on Kielblock's logging equipment. Hytec took the equipment to its workshop. According to Kielblock, Hytec kept the equipment for nearly a year. He brought this action seeking return of his equipment plus damages relating to his inability to use the equipment while in Hytec's possession.

¶3 The summons and complaint were served on Hytec on March 27, 2003. Hytec president Dale Wieciech signed and filed an answer on May 6, 2003. In Wisconsin, however, a corporation's answer must normally be filed by an attorney licensed to practice in the state.[1] It may not be filed, pro se, by a corporate officer. *See* WIS. STAT. § 757.30(2). Also on May 6, Hytec's Michigan attorney, James Viau, allegedly called Kielblock's attorney, Konrad Tuchscherer.

[1] A corporation's employee may appear on the corporation's behalf in small claims cases. *See* WIS. STAT. § 799.06(2); ***Holz v. Busy Bees Contract.***, 223 Wis. 2d 598, 601, 589 N.W.2d 633 (Ct. App. 1998). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Viau stated he had drafted an answer, but because he was not a Wisconsin-licensed attorney, Wieciech would be signing it on Hytec's behalf. On May 8, Tuchscherer wrote to Viau, informing him Wieciech's answer would be insufficient because it had not been signed and filed by a Wisconsin lawyer. In addition, on June 9, Kielblock filed a motion to strike Hytec's answer.[2] There is no evidence that Hytec failed to receive a copy of the motion.

¶4 A hearing on Kielblock's motion was initially set for June 11. Kielblock sent a note informing Hytec of the date, but that notice was returned as undeliverable[3] despite the fact that the address was the same for all previous mailings and was used to serve the summons and complaint. The court clerk's office rescheduled the hearing for July 1. On June 26, Hytec's Wisconsin counsel sent a notice of retainer, a motion to enlarge time, and a proposed answer. On July 1, the court heard arguments on both Hytec's and Kielblock's motions.

¶5 The court concluded that Hytec had not shown excusable neglect and denied the motion to extend the time for filing an answer, effectively striking Hytec's faulty answer. Without an answer on file, the court granted Kielblock a

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[2] Hytec takes issue with Kielblock's assertions regarding contact with Viau, claiming that Tuchscherer's affidavit contains inadmissible hearsay, and that there is no evidence that Viau or Hytec ever received any warning of the faulty answer. Hytec points us to no place in the record to demonstrate it first made these objections in the circuit court. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (this court will generally not consider arguments raised for the first time on appeal); ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463 (we will not search the record to support counsel's contentions).

The circuit court ultimately found that Hytec "ignored the warning of the plaintiff's counsel …." The only warning would be the May 8 letter, and the court's conclusion is supported by Tuchscherer's affidavit and oral statements to the court. It is not clearly erroneous. *See* WIS. STAT. § 805.17(2). Even if Tuchscherer's affidavit were inadmissible or inappropriate, the June 9 motion put Hytec on notice that its answer was insufficient.

[3] This is the only item with a "NOT DELIVERABLE" returned mail notice in the record.

default judgment on the complaint. It proceeded to hear evidence on damages, but limited Hytec to cross-examining Kielblock. The court awarded Kielblock $314,660 plus costs. Hytec appeals.

Discussion

I. Excusable Neglect

¶6 A circuit court's decision regarding motions to enlarge time and granting default judgments are reviewed under an erroneous exercise of discretion standard. ***Rutan v. Miller***, 213 Wis. 2d 94, 101, 570 N.W.2d 54 (Ct. App. 1997). A discretionary decision will be affirmed if it is based on the facts of record and the appropriate law. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Findings of fact are not disturbed unless they are clearly erroneous. WIS. STAT. § 805.17(2).

¶7 The statute for enlarging time, WIS. STAT. § 801.15(2)(a), requires that the moving party demonstrate excusable neglect, which is conduct that "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) (citation omitted). The circuit court should also look beyond the causes for neglect to the interests of justice, which may include considering whether the dilatory party acted in good faith, whether the opposing party has been prejudiced, and whether prompt remedial action was taken. ***Rutan***, 213 Wis. 2d at 101-02.

¶8 Hytec concedes that the answer signed by Wieciech is inadequate. Nonetheless, it argues that the court should have found excusable neglect because of language in the summons that states "You may have an attorney help or represent you." This language, Hytec argues, implies that it could appear pro se

because the summons "does not indicate that the use of an attorney is mandatory for corporations." It also argues that a Michigan corporation "cannot be expected to be familiar with the intricacies of Wisconsin law."

¶9 The circuit court concluded:

> I believe that Hytec Manufacturing tried to – Tried to save some money here, and instead of getting local counsel and getting the matter taken care of, they dragged their feet and ignored the warning of the plaintiff's counsel and therefore failed to show … that there was any excusable neglect ….

¶10 We initially note that every person is presumed to know the law and cannot claim ignorance as an excuse. ***Putnam v. Time Warner Cable***, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626. Thus, Hytec's argument that it should not be expected to know the intricacies of Wisconsin law fails.

¶11 Moreover, the circuit court accepted that Viau drafted the answer for Wieciech to sign and that Tuchscherer informed Viau that the answer would be improper. Hytec offers no explanation as to why Viau failed to investigate Wisconsin law, particularly considering Hytec has Wisconsin contacts. It also offers no explanation why Viau failed to seek *pro hac vice* status or ask a Wisconsin attorney to file the answer.

¶12 Even if Hytec had not been put on notice on May 8, the June 9 motion fully alerted it of the answer's deficiency. However, it was not until June 26 that Hytec retained Wisconsin counsel and filed its motion to enlarge the time to file an answer. A "reasonably prudent person" in Hytec's position would not have waited to hire a Wisconsin attorney, particularly when, by either May 8 or June 9, the time limit for filing the initial answer had already expired.

¶13 There was no "prompt remedial action." At no point between May 8 or June 9 and June 30 did Hytec contact Kielblock to ask him to forgive the oversight or agree to an extension. In addition, while there is no evidence of bad faith, there is no evidence that Hytec acted in good faith once informed of its error. And, while Hytec argues that Kielblock has not been prejudiced by the delay, that factor is not dispositive. The circuit court did not erroneously exercise its discretion when it concluded that Hytec failed to demonstrate excusable neglect.

II. Damages

¶14 Because Kielblock fails to respond to the argument in his brief, he effectively concedes that the circuit court erred by refusing to allow Hytec to present its own evidence regarding damages. *See* ***Charolais Breeding Ranches, Ltd., v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). However, we will address why, indeed, the circuit court erred.

¶15 Kielblock did not allege a specific dollar amount of damages in his complaint, nor are we dealing with liquidated damages. Thus, it is necessary for the circuit court to hear evidence on damages beyond the complaint. *See* ***Apex Electronics Corp. v. Gee***, 217 Wis. 2d 378, 387, 577 N.W.2d 23 (1998).

¶16 But, "If the defendant contests the amount of damages, [it] may appear at the hearing to assess damages, cross-examine the plaintiff's witnesses, *and present evidence to mitigate or be heard as to the diminution of damages*." ***Smith v. Golde***, 224 Wis. 2d 518, 530, 592 N.W.2d 287 (Ct. App. 1999), (quoting ***Midwest Developers v. Goma Corp.***, 121 Wis. 2d 632, 651, 360 N.W.2d 554 (Ct. App. 1984) (emphasis added). Therefore, it was error for the circuit court to award Kielblock's damages without allowing Hytec to present its own witnesses

or evidence. For that reason, the judgment for damages is reversed, and the cause remanded for a new hearing.

¶17 Because we reverse the judgment for damages due to the procedural error, we need not address Hytec's third argument that the award was based on conjecture and speculation. *See* ***Gross v. Hoffman***, 224 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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