

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 2011

A. John Voelker
Acting 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 Nos. 2010AP14
2010AP493**

Cir. Ct. No. 2009CV474

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THOMAS K. ZANDER,

PLAINTIFF-RESPONDENT,

V.

KAREN A. BIDARD AND OLIVIER J. BIDARD,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In these consolidated appeals, Karen and Olivier Bidard appeal from an order granting a default judgment against them and a judgment denying their motion to vacate the default judgment. The circuit court properly exercised its discretion when it declined to vacate the default judgment

because the Bidards did not establish either excusable neglect for their failure to timely answer the amended complaint or extraordinary circumstances. We affirm.

¶2 Thomas Zander filed a summons and complaint on June 10, 2009, claiming ownership of a strip of land the Bidards believed they owned as part of their residential real estate. Zander sought temporary and permanent injunctions to restrain the Bidards from interfering with his alleged right to this land. Karen and Olivier Bidard were served with the original summons and complaint on June 10 and June 11 respectively. The Bidards' counsel filed a notice of retainer on June 15. Zander filed an amended complaint on June 26; he served the amended complaint by mail upon the Bidards' counsel. The Bidards answered the amended complaint on July 24.

¶3 On August 12, Zander moved to strike the Bidards' answer and to enter default judgment because the July 24 answer was not timely filed. Zander claimed that although the Bidards' counsel was served with the amended complaint, she repeatedly asked him for an authenticated copy of the amended complaint and asserted that the twenty-day answer period under WIS. STAT. § 802.09(1) (2009-10)¹ did not commence until she received an authenticated copy. Zander told Bidards' counsel that an authenticated copy of the amended complaint was not required to commence the answer period. The Bidards' counsel agreed in an e-mail exchange that the answer to the amended complaint was due on or before July 15, but she continued to request an authenticated copy of the complaint. It is undisputed that the Bidards' July 24 answer was not filed within twenty days after service of the amended complaint.

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

¶4 In response to Zander’s motion for default judgment, the Bidards moved the circuit court to extend the time to answer Zander’s amended complaint. They also opposed the entry of default judgment because the parties had a courtesy agreement to extend the time to answer the amended complaint to July 26 because the Bidards’ counsel was out of the office for a portion of the twenty-day answer period, and the parties had met to discuss settlement. In the alternative, the Bidards argued that the answer was only four days late when calculated from service of the amended complaint under the service by mail rules. The Bidards also argued excusable neglect and the interest of justice as a basis to deny the motion to strike their answer and enter default judgment.

¶5 At the hearing on Zander’s default judgment motion, the court determined that there was no excusable neglect and that counsel should not have waited for an authenticated copy of the amended complaint before filing an answer. The court did not find that the contours of the alleged courtesy agreement to extend the time to answer the amended complaint were properly defined. The court struck the Bidards’ untimely answer and granted default judgment to Zander.

¶6 The Bidards, by new counsel, moved the court to vacate the default judgment pursuant to WIS. STAT. § 806.07(1)(a) (excusable neglect) and § 806.07(1)(h) (any other reason justifying relief from the judgment).² They argued that Zander did not serve an authenticated copy of the amended complaint

² Although the Bidards’ motion to vacate the default judgment cited WIS. STAT. § 806.07(1)(d) (judgment is void), their arguments in the circuit court and this court focus on excusable neglect under § 806.07(1)(a). We treat the motion as seeking relief under § 806.07(1)(a), not § 806.07(1)(d).

and vacating the default judgment would serve the interests of justice given the harm caused by the default judgment.

¶7 At the hearing on the Bidards’ motion to vacate, the Bidards argued that the amended complaint voided the previously filed and served original complaint. Therefore, Zander had to serve an authenticated amended complaint. In response, Zander relied upon WIS. STAT. § 801.14(4), which states that all papers after the summons may be served before filing with the court.

¶8 The court denied the Bidards’ motion to vacate the default judgment because WIS. STAT. § 801.14(4) does not require service of an authenticated amended complaint. The court found that the Bidards’ counsel erroneously insisted upon an authenticated amended complaint before answering, but the error did not constitute excusable neglect warranting relief from the default judgment.

¶9 Whether to vacate a default judgment was within the circuit court’s discretion. *Holman v. Family Health Plan*, 227 Wis. 2d 478, 483, 596 N.W.2d 358 (1999). The party seeking to vacate the default judgment must prove a right to relief under WIS. STAT. § 806.07. *Connor v. Connor*, 2001 WI 49, ¶28, 243 Wis. 2d 279, 627 N.W.2d 182.

¶10 We agree with the circuit court that the Bidards’ counsel incorrectly demanded service of an authenticated amended complaint before filing an answer. The amended complaint was subject to the service and filing requirements of WIS. STAT. § 801.14. *Schuett v. Hanson*, 2007 WI App 226, ¶7, 305 Wis. 2d 729, 741 N.W.2d 292. The statute “assumes that an amended pleading will be served before it is filed [within a reasonable time after service].” *Id.* The amended complaint superseded the original complaint, *Holman*, 227 Wis. 2d at 484, and there is no dispute that the amended complaint was properly served.

¶11 The question becomes whether the Bidards' counsel's erroneous view of the law constitutes WIS. STAT. § 806.07(1)(a) excusable neglect that justifies vacating the default judgment. The answer is "no." "Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the same circumstances." *Schuett*, 305 Wis. 2d 729, ¶14. Misapprehension of the law is not excusable neglect. *See Gerth v. American Star Ins. Co.*, 166 Wis. 2d 1000, 1008, 480 N.W.2d 836 (Ct. App. 1992). Counsel's reliance upon nonexistent service requirements was not a reasonable or prudent basis for failing to timely answer the amended complaint. *See Connor*, 243 Wis. 2d 279, ¶16.

¶12 The Bidards next argue that their counsel had a courtesy agreement extending the time to answer the amended complaint or that it was excusable neglect for counsel to believe that such an agreement existed. Zander and the Bidards' counsel disagreed over whether they entered into a courtesy agreement. As a result, the circuit court had to determine whether such an agreement existed. *See id.*, ¶21. The Bidards cite e-mail exchanged by counsel as the source of the courtesy agreement. Our review of the e-mail indicates that there was no courtesy agreement, only an agreement to meet to discuss settlement.³ The e-mail further establishes the Bidards' counsel's acknowledged that the answer to the amended complaint was due several days before it was actually filed. The circuit court properly found that there was no courtesy agreement.

³ The Bidards' counsel's July 14 e-mail to Zander requested an authenticated copy of the amended complaint and calculated the answer deadline from the date she received an authenticated copy. Zander did not acknowledge the alleged extension in subsequent e-mails. There was no agreement to extend the time to answer in relation to the July 22 settlement meeting. The terms of the alleged courtesy agreement were in dispute, and the parties' e-mail does not bear out an agreement. *See Rutan v. Miller*, 213 Wis. 2d 94, 102, 570 N.W.2d 54 (Ct. App. 1997). Therefore, it was not reasonable or prudent for the Bidards' counsel to believe a courtesy agreement existed.

¶13 The Bidards argue that their counsel’s error should not be attributed to them. “A court is not bound to impute to a client everything his lawyer does or omits to do.” *Connor*, 243 Wis. 2d 279, ¶36 (citation omitted). “[M]istakes ... of a lawyer may constitute excusable neglect on the part of the client, when the client has acted as a reasonable and prudent person in engaging a lawyer of good reputation, has relied upon him [or her] to protect his rights, and has made reasonable inquiry concerning the proceedings.” *Id.* (citations omitted). “In deciding whether to impute the negligence of the lawyer to the client, the trial court must exercise its ‘equitable powers to secure substantial justice between the parties.’” *Id.* (citations omitted).

¶14 The circuit court touched on the question of whether counsel’s error should be imputed to the Bidards:

And finally, is there something here that shocks the conscience. And this always makes everybody uncomfortable when a lawyer that somebody has retained—They were diligent about it, they went and got a lawyer, and unfortunately the lawyer made a mistake. And that’s not excusable neglect any more than failing to pay a jury tender or failing to file an answer because you’re moving your office, things like that.

¶15 In their affidavits in support of their motion to vacate the default judgment, the Bidards averred that they relied upon their counsel to handle their case. The Bidards did not aver that they inquired about the proceedings after they were served with the original complaint. Therefore, it was reasonable for the circuit court to impute their counsel’s error to them. *See id.*

¶16 The Bidards argue that extraordinary circumstances under WIS. STAT. § 806.07(1)(h) warrant relief from the default judgment. Their arguments are merely a variation of their earlier arguments that Zander should have provided

an authenticated copy of the amended complaint, there was a courtesy agreement, and counsel's error should not be attributed to them. We have already addressed these issues.

¶17 Finally, the Bidards claim that they had a meritorious defense to Zander's claims. They cite the general standards for adverse possession, but do not develop an argument supporting their claim of a meritorious defense.

¶18 We conclude that the circuit court properly exercised its discretion when it rejected the extraordinary circumstances grounds for vacating the default judgment. *See Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493.

By the Court.—Judgment and order affirmed.

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

