

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 23, 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 No. 2010AP1727

Cir. Ct. No. 2009CV7111

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BANK OF NEW YORK MELLON TRUST COMPANY,

PLAINTIFF-RESPONDENT,

v.

VIRGINIA F. PRATT,

DEFENDANT-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF REVENUE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Virginia F. Pratt appeals a default judgment of foreclosure. She contends that the circuit court erred when it expected her to

demonstrate excusable neglect—which would have allowed her to file a late answer—without first evaluating the sufficiency of the complaint against her. We conclude the circuit court did not err, and we affirm.

BACKGROUND

¶2 On May 8, 2009, a complaint was filed alleging that Pratt had failed to make payments on a mortgage. The complaint identifies the plaintiff as “The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RAMP 2006RP1 c/o GMAC Mortgage, LLC.” The complaint alleges that the “plaintiff” is the “current owner and holder of a certain note, recorded mortgage and loan modification agreement” signed by Pratt. Pratt did not answer the complaint.

¶3 On July 22, 2009, the plaintiff, which we will refer to as the Bank, moved for a default judgment. The default was granted, but the Bank had it reopened because Pratt was attempting to settle with the Bank. On January 4, 2010, the Bank requested that its action be dismissed without prejudice, evidently as part of ongoing negotiations with Pratt. However, those negotiations appear to have been unsuccessful because on January 26, the Bank asked to have the case reopened. The circuit court approved the request and vacated the dismissal order. On March 2, the Bank again moved for default judgment. On March 31, Pratt submitted some *pro se* documents, which the Bank moved to strike. On April 8, an attorney for Pratt submitted a brief opposing the default judgment and a motion for leave to file an untimely answer. Pratt also sought to have the complaint dismissed.

¶4 At the motion hearing, the circuit court asked Pratt whether she could show excusable neglect for her late answer. The circuit court explained that by its reading, WIS. STAT. § 801.15(2)(a) (2009-10)¹ required Pratt to show excusable neglect before it could extend the time for Pratt to submit a late answer. Pratt conceded she “doesn’t have any excuse other than the fact that she was proceeding *pro se* doing as best she could trying to save her home.” However, she also contended that the complaint, because it did not detail how the Bank came to hold the note and mortgage or allege that it was statutorily entitled to enforce the mortgage, failed to state a claim upon which relief could be granted, and that this prohibited the circuit court from entering a default judgment.

¶5 The circuit court rejected this argument. It concluded that the complaint was sufficient because it alleged that the Bank was the current holder and owner of the mortgage and note. It rejected Pratt’s arguments that the attachments, which appear to be copies of original papers signed by Pratt and which appear to show at least two transfers, were inconsistent with the complaint. It explained that the Bank was not required to show the entire chain of transfers in the complaint. In short, the circuit court concluded that Pratt’s complaints about the “sufficiency” of the complaint really went to the merits of the case, which the circuit court could not reach because Pratt had not answered the complaint, nor had she demonstrated excusable neglect to justify filing a late answer. The circuit court thus struck Pratt’s *pro se* documents and granted default judgment. Pratt appeals.

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

¶6 The decision to grant default judgment is committed to the circuit court's discretion. *Martin v. Griffin*, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984). Although defaults are disfavored, we should affirm unless it was impossible for the circuit court to grant the default in its exercise of discretion. *Id.*

¶7 On appeal, Pratt contends the default judgment was an erroneous exercise of discretion, renewing her argument that the complaint and its attachments are inconsistent regarding ownership of the note and the Bank's power to foreclose upon the mortgage. She also argues that the circuit court applied an erroneous legal standard in requiring her to show excusable neglect before determining the sufficiency of the complaint.

¶8 The complaint is not inherently inconsistent with the attachments. Pratt complains that the complaint alleges the Bank is the current owner and holder of the mortgage and note, but the attachments do not demonstrate how the Bank came to own or hold them. As the circuit court aptly noted, however, a plaintiff claiming to be the "current" owner of the note and mortgage implies that someone else previously held the note and mortgage, and documents showing those prior holders are not inherently contradictory with the assertion that the plaintiff is the current holder. A complaint "is not required to state all the ultimate facts constituting each cause of action[.]" and it "should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Ollerman v. O'Rourke Co., Inc.*, 94 Wis. 2d 17, 24, 288 N.W.2d 95 (1980) (citation omitted). If the Bank's complaint is true, it is entitled to recover on its claims.

¶9 Pratt also complains that the circuit court was required to first apply WIS. STAT. § 806.02(2) to the motion for default judgment, rather than making her demonstrate excusable neglect. Section 806.02(2) provides:

After filing the complaint and proof of service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue, the plaintiff may move for judgment according to the demand of the complaint. If the amount of money sought was excluded from the demand for judgment ... the court shall require the plaintiff to specify the amount of money claimed and provide that information to the court and to the other parties prior to the court rendering judgment. If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.

¶10 Pratt focuses on the last sentence: “If proof of any fact is necessary for the court to give judgment, the court shall receive the proof.” From this sentence, she extrapolates that “where the statute specifically mandates that a court hearing a motion for default judgment shall receive ‘proof of any fact ... necessary for the court to give judgment,’ the circuit court erecting a preliminary hurdle of excusable neglect for failure to file a responsive pleading applied an incorrect legal standard.”

¶11 Pratt misinterprets the statute. It says *if* proof is required, the court shall receive it. Pratt does not demonstrate that proof of the allegations in the complaint is necessary in this instance.² Additionally, the manner of proof is discretionary and can be accomplished by affidavit. See **Rao v. WMA Sec., Inc.**, 2008 WI 73, ¶¶40-41, 310 Wis. 2d 623, 752 N.W.2d 220. Here, the circuit court had an affidavit from plaintiff’s lawyer, averring that the complaint was true. We

² Indeed, under Pratt’s interpretation, any motion for default judgment would necessarily result in a mini-trial on the complaint in order to prove the pleadings.

therefore see no reason why, even if Pratt's interpretation were correct, the circuit court could not be satisfied with the affidavit as proof of the allegations.

¶12 Pratt has no valid challenge to the fundamental sufficiency of the complaint. What she really attempts to challenge is the Bank's ultimate proof of its allegations. The way to put a party to its proof, however, is with a timely answer to the complaint, and Pratt allowed the time for answering to expire. She therefore had to obtain permission to file her answer late, and the circuit court properly required her to demonstrate excusable neglect.

When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. ... If the motion is made after the expiration of the specified time, *it shall not be granted unless the court finds that the failure to act was the result of excusable neglect.*

WIS. STAT. § 801.15(2)(a) (emphasis added).

¶13 Pratt has conceded her only excuse is her *pro se* status, though that is no real excuse. See *Waushara County v. Graf*, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992). Pratt failed to timely answer a sufficient complaint. That entitled the Bank to seek default judgment. The circuit court, unable to find excusable neglect, did not erroneously exercise its discretion in refusing to allow a late answer and did not erroneously exercise its discretion in granting default judgment on an unanswered complaint.

By the Court.—Judgment affirmed.

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

