



Ditech served its foreclosure summons and complaint on October 2, 2017. It is undisputed that the twenty-day deadline for the Estate to serve its answer was Monday, October 23, 2017. The Estate electronically filed and served its responsive pleading—a counterclaim and motion to dismiss—on October 24, 2017. *See* WIS. STAT. § 801.18(4)(c) and (6)(a) (for documents not requiring personal service, the e-filing system will generate a confirmation or notice that constitutes effective service).<sup>2</sup>

In November 2017, Ditech filed a motion to strike the Estate’s responsive pleading, for default judgment, and to dismiss the Estate’s counterclaims, primarily on grounds that the responsive pleading was untimely because it was served after the twenty-day answer period. The Estate filed a response but did not address Ditech’s assertion that its responsive pleading was untimely.

In April 2018, Ditech filed an amended motion to strike, for default judgment, and to dismiss the Estate’s counterclaims. Once again, Ditech cited the untimeliness of the Estate’s responsive pleading as the basis for the requested relief. As before, the Estate filed a response that failed to address the untimeliness of its motion to dismiss and counterclaims.

On June 26, 2018, more than seven months after Ditech’s motion to strike, the Estate addressed, for the first time, its untimely answer by filing a motion to retroactively extend the time to submit its responsive pleading by one day, to October 24, 2017. The motion asserted that

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<sup>2</sup> The twenty-day time limit at issue applies to the *service* of an answer or substitute responsive pleading, not to its filing. *See* WIS. STAT. § 802.06(1)(a). The answer or responsive pleading must be filed “within a reasonable time after service.” WIS. STAT. § 801.14(4). The parties use the terms “filing” and “service” interchangeably, presumably because the Estate used the e-filing system to simultaneously effectuate both.

counsel attempted but was unable to file the responsive pleading on October 23 because “the electronic filing system does not permit any filings other than a Notice of Retainer until the clerk accepts that filing.” The motion continued: “My Notice of Retainer was not accepted as filed until October 24, 2017. Therefore, the system would not accept my responsive pleading until that day.” Ditech filed a response opposing the motion, and the Estate filed a reply to Ditech’s response.

The matter came on for a hearing before the circuit court, and counsel for the Estate reiterated that the delay in service was due to e-filing problems. When the court stated that counsel’s explanation did not comport with e-filing practice in Walworth County and that documents submitted with a notice of retainer were filed on the date of submission, counsel said his information was based on “[a] conversation with a clerk not of this court. It would be either the Dane or Rock County clerk or IT department.” Counsel acknowledged that he might have been “misinformed” and assured the court he would file all documents together “from now on.”

The circuit court denied the retroactive extension motion, finding that the untimely service was not the result of excusable neglect. The court considered that the Estate was “put on notice in November that this was an issue and then again in April,” and found “that the motion to enlarge the time was not filed within a reasonable time after the expiration of the time period.” The court also determined that no “reasonable basis” for the one-day delay in service was “submitted to the Court,” finding that the e-filing information provided by the Estate “is not in accord with the policy or procedures of e-filing here in Walworth County.” After denying the extension, the court struck the Estate’s responsive pleading, found that the Estate was in default, and granted the foreclosure judgment. The Estate appeals, challenging the denial of its retroactive extension motion.

After the time to perform an act has expired, a circuit court may not grant a motion enlarging the time to perform that act “unless the court finds that the failure to act was the result of excusable neglect.” WIS. STAT. § 801.15(2)(a). We will not disturb the circuit court’s decision absent an erroneous exercise of discretion. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 470, 326 N.W.2d 727 (1982).

The circuit court reasonably determined that there was no basis for a finding of excusable neglect. The Estate’s suggestion that the e-filing system was somehow to blame is unpersuasive. To the extent it might have encountered difficulty in e-filing documents on October 23, 2017, the Estate did not consult the Walworth County clerk’s office, and its proffered explanation did not comport with Walworth County’s e-filing practice. Further, the notice of retainer on which the Estate pins its argument was not filed until October 24. The circuit court was not presented with any proof that the Estate tried to e-file any paper on October 23. Additionally, and as the Estate acknowledged in the circuit court, it *could* have timely served its responsive pleading by email or facsimile, regardless of any e-filing problems. Of greatest concern, however, is that the Estate did not respond to Ditech’s motion to strike in November, did not respond to the amended motion to strike in April, 2018, and did not address its untimely answer at all until June 2018, when it filed a motion to extend the long-expired deadline. This lengthy delay occurred despite the notice provided by Ditech’s original and amended motions, both of which were expressly premised on the Estate’s delinquency, and neither of which were responded to.

We reject the Estate’s argument that “Ditech forfeited or waived the alleged tardiness of the Estate’s response by proceeding to summary judgment.” As the circuit court explained, “[t]here was no conversion to summary judgment” and any possible earlier confusion was

dispelled by the court's subsequent statements. Additionally, the Estate's argument lacks factual and legal support.

Ditech argues that the Estate's entire appeal is frivolous and requests attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3). The Estate's arguments, while unpersuasive, are accompanied by legal citation and we decline to find that they are made in bad faith or without any basis in law. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the respondent's motion for costs and attorney fees under WIS. STAT. RULE 809.25(3), is denied.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*