



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

January 19, 2022

To:

Hon. David M. Reddy
Circuit Court Judge
Electronic Notice

Joseph W. Barber
Electronic Notice

Hon. Daniel S. Johnson
Circuit Court Judge
Electronic Notice

Stephen M. Compton
Electronic Notice

Charles A. Semmelhack
Electronic Notice

Kristina Secord
Clerk of Circuit Court
Walworth County
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP106

Karen Mae Pearce v. Mortgage Center, LC (L.C. #2020CV457)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mortgage Center, LC, appeals from orders of the circuit court granting Karen Mae Pearce's motion for default judgment and denying Mortgage Center's motion to vacate the default judgment.¹ Based upon our review of the briefs and record, we conclude at

¹ The Honorable Daniel S. Johnson entered the order granting Pearce's motion for default judgment. The Honorable David M. Reddy entered the order denying Mortgage Center's motion to vacate the default judgment.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).² Mortgage Center contends that the court erred in granting Pearce's motion for default judgment and in denying Mortgage Center's motion to vacate the judgment because its failure to timely file an answer was the result of excusable neglect. We disagree and, thus, affirm.

As alleged in her complaint, in 2001, Pearce entered into a note with Peoples Bank of Elkhorn, Wisconsin, secured by a mortgage. In 2005, she entered into another note with Peoples Bank, secured by a second mortgage on the same property. Pearce later consolidated the notes, which Peoples Bank subsequently assigned to Mortgage Center along with the mortgages.

In 2019, Pearce and Mortgage Center entered into a loan modification agreement stating that the unpaid principal that Pearce owed Mortgage Center was \$94,027.10. Mortgage Center claimed that the unpaid principal amount stated in the loan modification agreement was entered in error and that Pearce actually owed \$143,083.15 in unpaid principal. As such, Mortgage Center sent monthly repayment requests to Pearce using the higher loan amount for its amortization.

Pearce's counsel had several discussions with Mortgage Center representatives, including Donald Braspenninckx, Mortgage Center's Chief Compliance Officer and Vice President, regarding the discrepancy between the amount in the loan modification agreement and the amount Mortgage Center was asserting Pearce owed. Pearce then filed a complaint in the Walworth County Circuit Court seeking enforcement of the agreement as it was written.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Pearce's counsel served the summons and complaint on Mortgage Center's Wisconsin registered agent, CT Corporation System (CT Corp.).³

Mortgage Center failed to timely file an answer to Pearce's complaint and Pearce filed a motion for default judgment, a copy of which was sent to Mortgage Center in care of CT Corp. On the day of the default hearing, Pearce's counsel emailed Braspenninckx to inform him directly about the upcoming hearing. After receiving word about the action from Pearce's counsel, Braspenninckx learned from CT Corp. that it had apparently forwarded the summons and complaint to an incorrect mailing address and contact person for Mortgage Center. An attorney for Mortgage Center left Pearce's counsel a message shortly before the hearing requesting that Pearce stop the default proceedings, but counsel did not receive the message before the hearing. Mortgage Center did not appear at the hearing and the circuit court granted the default judgment on the motion.

Close to two weeks after the default hearing, Mortgage Center filed a motion to vacate the default judgment, arguing excusable neglect because Mortgage Center failed to timely answer due to a mistake. Mortgage Center argued that its failure to timely answer was not through its own fault but rather a mistake of its agent, CT Corp. Mortgage Center also argued that it acted within a reasonable amount of time after learning of Pearce's complaint and that it had meritorious defenses to the complaint. After a hearing, which included arguments from counsel, the circuit court denied the motion to vacate. The court explained that "there would [not] be a miscarriage of justice to deny [Mortgage Center's] motion" because it was the result of

³ Mortgage Center is a Michigan company doing business in Wisconsin.

“a mistake of [its] agent, which is attributable then to the principal, and, therefore, excusable neglect has not been shown.” Mortgage Center appeals.

We will overturn a circuit court’s decision on a motion to vacate only if it erroneously exercises its discretion by failing to: (1) examine the relevant facts; (2) apply the proper standard of law; and (3) rely on a rational process to reach a conclusion that a reasonable judge could reach. *Baird Contracting, Inc. v. Mid Wis. Bank of Medford*, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). A court has wide discretion in determining whether to vacate a judgment based on excusable neglect. *Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977). In fact, “[e]ven if the evidence favoring a default judgment is slight ... an appellate court should affirm unless it was impossible for the [circuit] court to grant the judgment in the exercise of its discretion.” *Martin v. Griffin*, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1994).

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) (citation omitted). “It is not synonymous with carelessness or inattentiveness, and it is not sufficient that the failure to answer in a timely manner be unintentional and in that sense a mistake or inadvertent,” because “nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect.” *Mohns, Inc. v. TCF Nat’l Bank*, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 714 N.W.2d 245 (citation omitted). The burden of demonstrating excusable neglect falls on the party seeking to vacate the judgment. *Id.*, ¶10.

In denying Mortgage Center’s motion to vacate the default judgment, the circuit court relied on *Mohns*, citing to the standards provided above and determining that, here, “to cast it other than just a mistake I think is improper.” Because it concluded that what happened was a mistake and “that’s the only way we can look at it[,]” the court determined that Mortgage Center’s evidence offered to explain its failure to timely answer Pearce’s complaint “is not sufficient to show excusable neglect.” We agree.

Mortgage Center’s argument for excusable neglect essentially rests on its bare assertion, set forth in an affidavit from a CT Corp. representative, that it failed to timely file an answer due to “a clerical error.” The affidavit states that CT Corp. “did not upload the [s]ummons and [c]omplaint to Mortgage Center, LC’s online account according to the proper protocol by mistake.” Instead, CT Corp. “forwarded the summons and complaint to an out-of-date mailing address and contact person for Mortgage Center.” Mortgage Center offers no further explanation as to why the protocol was not followed or why the information was out-of-date. It provides no facts to show whose fault that was or how this happened: in effect, it offers nothing to show that this was the result of excusable acts of a reasonably prudent person under the same circumstances. Absent more, particularly given that CT Corp. is in the business of accepting service and, presumably, setting in place a system to forward the documents, this bare assertion fails to show the error was anything more than carelessness and inattentiveness on the part of the parties involved and thus, the result of a mistake, which does not constitute excusable neglect. See *Mohns*, 292 Wis. 2d 243, ¶9.

We have upheld a circuit court’s determination that a party’s failure to timely answer did not constitute excusable neglect when it was due to the failure of the client to forward the service on to the person or persons responsible for answering, *Martin*, 117 Wis. 2d at 443-44, and where

a lawyer claimed that he was preoccupied by other legal business without stating specific incidents and a persuasive explanation, *Hedtcke*, 109 Wis. 2d at 473. With this precedent in mind, we conclude that the circuit court properly exercised its discretion in finding that Mortgage Center failed to meet its burden of proof to show excusable neglect.

Mortgage Center responds that it took action to vacate the default judgment within less than two weeks of learning of CT Corp.'s error. It observes that the law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues and that it had asserted several meritorious defenses warranting a trial. Mortgage Center further argues that vacating the judgment would not prejudice Pearce. While the interests of justice require the court to be aware that a failure to find excusable neglect could result in default judgment and that the law generally disfavors default judgments and prefers a trial on the merits, standards which the court appropriately noted and considered here, a circuit court has great discretion in granting relief based on excusable neglect. *See id.* at 468-69. Given the nominal facts provided by Mortgage Center, we affirm because it is not "impossible" for the circuit court to have granted judgment in the exercise of its discretion. *See Martin*, 117 Wis. 2d at 442.

As it does on appeal, Mortgage Center attempted to argue before the circuit court that default judgment was not appropriate because Mortgage Center itself did not make the mistake that led to its failure to timely answer. Mortgage Center asserted that CT Corp. made the mistake and, although it conceded that CT Corp. is its registered agent for service, Mortgage Center argued that CT Corp. is not its agent such that its conduct should bind Mortgage Center. The circuit court squarely rejected this argument, concluding that "[b]y its very name, [CT Corp. is] an agent for service, and agency princip[les] ... apply." We agree with the court, as the applicable statute fully supports this determination. As the registered agent, CT Corp. was

authorized by law to accept service on behalf of Mortgage Center, pursuant to WIS. STAT. § 180.0504, which states: “A corporation’s registered agent *is the corporation’s agent for service of process*, notice or demand required or permitted by law to be served on the corporation.” (Emphasis added.) The language of the statute could not be clearer, and we therefore reject any attempt by Mortgage Center to argue that CT Corp. was not its agent as is relevant to this appeal.

In sum, it was not “impossible” for the circuit court to have concluded that default judgment was appropriate here and that Mortgage Center failed to demonstrate excusable neglect. *See Martin*, 117 Wis. 2d at 442. It is evident that the court properly took into consideration Mortgage Center’s interests of justice arguments when it made its determination that excusable neglect was not present, identifying that Mortgage Center “would not be without remedy,” meaning that it could likely take action against CT Corp. for the purported clerical error. Further, the court examined the parties’ arguments and, applying the proper legal standards from *Mohns* to the facts before it, determined that Mortgage Center failed to present facts sufficient to demonstrate excusable neglect under those standards and simply was not entitled to relief from the default judgment. We therefore affirm the default judgment and denial of the motion to vacate the judgment.

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals