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DISTRICT III

January 18, 2024

To:

Hon. Melissia R. Mogen
Circuit Court Judge
Electronic Notice

Jacqueline Baasch
Clerk of Circuit Court
Burnett County Courthouse
Electronic Notice

Ryan M. Benson
Electronic Notice

Kyle H. Torvinen
Electronic Notice

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

2023AP280 Clam Lake Protection & Rehabilitation District v. Evergreen Equipment, LLC (L. C. No. 2022CV105)

Before Stark, P.J., Hruz and Gill, 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).

Evergreen Equipment, LLC, appeals from a default judgment on a contract claim brought against it by Clam Lake Protection & Rehabilitation District and from an order denying Evergreen's motion to vacate the default judgment.[1] Based upon our review of the briefs and

[1] Although the notice of appeal identifies only the default judgment, Evergreen's brief also challenges the subsequently entered order denying the motion to vacate the judgment. As long as a notice of appeal was timely filed, we may look to an appellant's intent when determining what has been appealed. *See* ***Evans v. Luebke***, 2003 WI App 207, ¶31 n.16, 267 Wis. 2d 596, 671 N.W.2d 304. We therefore treat the notice of appeal as encompassing the order denying the motion to vacate the default judgment.

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[2] We affirm.

The facts relevant to the appeal are undisputed. The District sought on multiple occasions to obtain a refund or specific performance from Evergreen for custom-made equipment that the District claimed did not satisfy the agreed-upon specifications.

After Evergreen failed to fix the equipment to the District's satisfaction and refused to provide the requested refund, the District filed a summons and complaint on September 7, 2022, seeking contract damages from Evergreen. In accordance with WIS. STAT. § 801.095(1), the summons notified Evergreen that it must respond to the complaint by sending a written answer to the circuit court and to Ryan Benson, the District's attorney, within twenty days; that if Evergreen failed to respond, the court could enter judgment against it; and that Evergreen "may have an attorney help or represent" it.

Delvin Weaver, Evergreen's owner, responded to what he referred to as the District's "letter demanding refund" in a letter to Benson dated September 27, 2022. Weaver asserted that the equipment Evergreen had provided met the original specifications and that the District's requests for alterations to the equipment required additional payment. Weaver proposed a "[c]ompromise offer" to assist the District in reselling the equipment. Evergreen did not, however, file the September 27 letter or any other answer to the complaint in the circuit court at that time.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

On October 19, 2022, the District moved for default judgment and provided Evergreen with notice of its motion. The circuit court held a hearing on the default judgment motion on November 18, 2022. According to the court minutes,[3] Weaver appeared at the hearing and informed the court that he "did respond to Mr. Benson prior to the due date," but he claimed that he had misplaced the summons and did not realize that he also needed to respond to the court. Benson acknowledged receiving a letter from Weaver but asserted that the letter did not constitute an answer to the complaint.

The circuit court informed Weaver that he could not properly appear on behalf of Evergreen because a corporation must be represented by an attorney. *See* ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 202, 562 N.W.2d 401 (1997). The court therefore refused to allow Weaver to file his September 27, 2022 letter during the default judgment hearing. The court then found that Evergreen had failed to file a timely answer to the complaint, and it granted default judgment to the District.

On January 18, 2023, having retained counsel, Evergreen moved to vacate the default judgment "based upon the laws of the State of Wisconsin," with a reference in an accompanying affidavit from counsel to a "forthcoming Memorandum" that would address "each of the factors the [c]ourt is required to consider." In an additional accompanying affidavit, Weaver averred that he believed his September 27, 2022 letter to Benson, which addressed issues raised in Benson's July 7, 2022 letter, also "was responsive to all of the issues that were raised in the

[3] We note that the appellate record does not include the transcript from the hearing on the default judgment motion. It is the appellant's responsibility to provide this court with an adequate record. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). We therefore assume that any missing transcripts would support the circuit court's decision. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶6 n.4, 256 Wis. 2d 848, 650 N.W.2d 75.

[c]omplaint," and the affidavit stated that he did not know that he "was required to file the exact same arguments again" in the circuit court. That same day, Evergreen also filed a proposed answer to the complaint.

On January 19, 2022, the circuit court denied the motion to vacate the default judgment. It did so without a hearing and without waiting for Evergreen's counsel to file a memorandum in support of the motion. The court stated that it did "not find a reasonable basis to re-open this matter." Evergreen moved for reconsideration but it filed this appeal before the court decided the reconsideration motion.

Evergreen contends that it is entitled to relief under WIS. STAT. § 806.07(1)(a) because its failure to timely file an answer was the result of excusable neglect. We review a circuit court's discretionary decision to reopen a judgment under § 806.07 with great deference and we will uphold it as long as it was supported by a reasonable basis. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610. If the circuit court has failed to make any necessary findings, we may search the record for reasons to sustain the court's exercise of discretion. ***State v. LaCount***, 2008 WI 59, ¶15, 310 Wis. 2d 85, 750 N.W.2d 780.

A party seeking to vacate a default judgment pursuant to WIS. STAT. § 806.07(1)(a) must demonstrate that: (1) the judgment was obtained as a result of mistake, inadvertence, surprise or excusable neglect; and (2) there is a meritorious defense to the action. ***J.L. Phillips & Assocs., Inc. v. E&H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13 (1998). Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Mohns, Inc. v. TCF Nat'l Bank***, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 714 N.W.2d 245 (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, "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Id.*** (citation omitted).

Evergreen argues that it is entitled to relief under ***Maier Construction, Inc. v. Ryan***, 81 Wis. 2d 463, 260 N.W.2d 700 (1978), *overruled on other grounds by* ***J.L. Phillips & Associates***, 217 Wis. 2d 348, ¶26. In that case—and in response to a summons that directed the defendant to provide "an answer to the complaint … within 20 days"—a pro se defendant sent the plaintiff's attorney a letter which stated that it was an answer to the complaint, addressed the merits of the complaint, and explained why the defendant believed he was not liable. ***Maier Constr., Inc.***, 81 Wis. 2d at 468. The court concluded that the defendant's mistaken belief that an answer in letter form could serve as a proper responsive pleading constituted excusable neglect. ***Id.*** at 474.

The facts of this case are distinguishable from ***Maier Construction*** in several material ways. First and foremost, the summons here explicitly informed Evergreen that it needed to file its answer in the circuit court, whose address was provided.[4] Therefore, Weaver's asserted belief that Evergreen needed to send an answer only to the District's attorney does not arise from the language of the summons itself and it is not a mistake that a reasonably prudent person would make. Rather, Weaver's assertion that he had "misplaced" the summons that directed him to file an answer in court is precisely the type of carelessness that falls short of excusable neglect.

[4] WISCONSIN STAT. § 801.095, which requires a summons to direct a defendant to file an answer in the circuit court and to provide the court's address, was enacted by 1983 Wis. Act 323, several years after our supreme court's decision in ***Maier Construction, Inc. v. Ryan***, 81 Wis. 2d 463, 260 N.W.2d 700 (1978)), *overruled by* ***J.L. Phillips & Assocs., Inc. v. E&H Plastic Corp.***, 217 Wis. 2d 348, 577 N.W.2d 13 (1998).

Second, Evergreen did not promptly act to rectify its failure to file an answer in the circuit court. The month between the filing and service of the motion for default judgment and the date of the hearing was longer than the original twenty-day period for filing an answer. Evergreen's assertion that Weaver was "surprised" that sending a letter to Benson was insufficient and that Evergreen needed to be represented by counsel does not adequately explain why Weaver did not attempt to file either the September 27, 2022 letter or a more formal answer in court after being provided with notice of the default judgment.

Third, not only did Weaver's September 27, 2022 letter to Benson fail to state that it was intended to be an answer to the complaint, it explicitly stated that it was a response to Benson's prior letter. Therefore, even if Weaver had been allowed to file the letter at the default judgment hearing, the letter does not adequately join issue by responding to all of the allegations in the complaint.

In sum, the record supports the circuit court's determination that Evergreen failed to provide adequate grounds to vacate the default judgment. We therefore affirm.

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals