

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-3618

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SANDRA KUBE,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. PIETRUSZKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed.*

SNYDER, J. Thomas A. Pietruszka appeals from a default judgment evicting him from N6207 Hodunk Road, Elkhorn, Wisconsin (Hodunk Road property), and from an order denying his motion to reopen the matter pursuant to § 806.07(1)(a) and (h), STATS. He claims that the trial court erred in not finding excusable neglect and that he has a meritorious defense to the eviction

action. Because we conclude that the trial court properly exercised its discretion, we affirm.

This case arises from a dispute over Sandra L. Kube's Hodunk Road property. Kube and Pietruszka entered into written agreements on November 10, 1990, and September 16, 1993, for Pietruszka's purchase of the property. On April 1, 1997, Kube filed an eviction action seeking Pietruszka's vacation from the property. A pretrial conference date was then scheduled for October 29, 1998, and a trial date was set for November 11, 1998. In July 1998, Pietruszka's attorney passed away. Pietruszka subsequently failed to appear at both the pretrial conference and the trial. As a result, the court awarded Kube a default judgment and issued a writ of restitution ordering Pietruszka's removal from Kube's property.

Pietruszka was notified of the default judgment on November 12, 1998. He then filed a motion to reopen the case and to stay the writ of restitution. At a December 11, 1998 motion hearing, Pietruszka argued that grounds for excusable neglect existed under § 806.07(1)(a), STATS., because (1) he was not provided further notice of the pending court dates after his attorney's death in July 1998, (2) he mistakenly believed the trial was scheduled for November 23, 1998, and (3) despite numerous discussions with Kube prior to the pretrial conference and trial, she never mentioned the court dates. The trial court denied Pietruszka's motion and reinstated the November 11 writ of restitution. He appeals.

Pietruszka argues that this matter should be reopened because his failure to appear at trial was due to "[m]istake, inadvertence, surprise, or excusable neglect" pursuant to § 806.07(1)(a), STATS. Our review of a trial court's ruling on a motion for relief under § 806.07 is limited to whether the court erroneously

exercised its discretion. See *Department of Corrections v. Kliesmet*, 211 Wis.2d 254, 259, 564 N.W.2d 742, 744 (1997). We will not find an erroneous exercise of discretion if the record shows that the trial court exercised its discretion and that there is a reasonable basis for its decision. See *Nelson v. Taff*, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993).

A party seeking to vacate a default judgment under § 806.07, STATS., must show that it meets one of the criteria for relief from a default judgment and that it has a meritorious defense to the complaint. See *J.L. Phillips & Assocs. v. E & H Plastic Corp.*, 217 Wis.2d 348, 355, 577 N.W.2d 13, 16 (1998). Because we conclude that Pietruszka fails to demonstrate any of the criteria under § 806.07, we do not reach the issue of whether he has a meritorious defense.

At the December 11, 1998 motion hearing, Pietruszka's attorney offered his explanation of why the case should be reopened:

When Mr. Pietruszka came to my office the day after judgment was entered [he] came with the entire file from the [office of his previous attorney]. And before we even started looking through the file, he showed me his calendar and he had it written down on there as a November 23rd court appearance for this matter. And he said that's the date in his mind that was going to be the next court appearance; and, obviously, it wasn't.

When we looked through the file, I found a letter written in, I believe, in May from [his attorney] to Mr. Pietruszka telling him, you know, the trial date. And I asked him if he had seen this letter, and he said that he doesn't – he didn't recall seeing the letter and he never wrote down those dates.

....

And, Judge, during this time, you know, the parties were going back and forth trying to settle this matter In fact, on November 5th, which was a week after the pre-trial, the

Plaintiff called the Defendant trying to settle this matter. And as indicated in Mr. Pietruszka's affidavit, [Kube] indicated, you know, don't get lawyers involved. Let's try to settle this matter. And she knew at that time that he hadn't shown up for the pre-trial and the trial was only a few days away.

The trial court rejected Pietruszka's argument because he showed a lack of diligence in securing new counsel and because his former attorney had sent a letter to him providing the pretrial conference and trial dates. The court further explained that

[o]ne of the problems with evictions is they're supposed to be put on a fast track to get them resolved quickly. This thing has been sitting around since '97. We had a trial date set. Ms. Kube showed up here ready to go to trial. We had two days set aside for this thing and nothing. That two days is now gone. Mr. Pietruszka just didn't show up. He blew it off.

The court concluded that Pietruszka had failed to demonstrate excusable neglect.

We are not persuaded that the trial court erroneously exercised its discretion in declining to reopen this matter. Pietruszka's former attorney had sent him a letter listing the court dates. When his attorney died, the responsibility for pursuing the case was Pietruszka's, not the office of his former attorney or his opponent. Pietruszka chose not to seek new counsel until after the default judgment was entered against him. While he claims that he erred in marking the wrong date on his calendar, this was not excusable neglect. A calendaring error is not the sort of neglect "which might have been the act of a reasonably prudent person under the same circumstances." *Dugenske v. Dugenske*, 80 Wis.2d 64, 68, 257 N.W.2d 865, 867 (1977). We conclude that the trial court had a reasonable basis for not reopening this case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

