

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2010

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. 2009AP2441

Cir. Ct. No. 2003CV1842

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

C & W ASSET ACQUISITION,

PLAINTIFF-RESPONDENT,

V.

KEVIN W. O'CONNOR,

DEFENDANT,

LINDA C. O'CONNOR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Linda O'Connor appeals from an order denying her motion for relief from a 2003 default judgment in favor of C & W Asset

Acquisition for collection on a charge account. She argues that because the complaint failed to comply with WIS. STAT. § 425.109(1) (2007-08),¹ the circuit court lacked competency to proceed and the judgment, not merely voidable but void, can be attacked at any time under WIS. STAT. § 806.07(1)(d). She also argues that the defective judgment should forever be subject to attack under § 806.07(1)(h), because of the extraordinary consequence § 425.109(3) imposes when defective pleadings are utilized. We must follow the holding in *Mercado v. GE Money Bank*, 2009 WI App 73, ¶24, 318 Wis. 2d 216, 768 N.W.2d 53, that the default judgment is not void. The circuit court did not erroneously exercise its discretion in denying relief from the default judgment under § 806.07, and we affirm the order of the circuit court.

¹ WISCONSIN STAT. § 425.109, provides in relevant parts:

(1) A complaint by a creditor to enforce any cause of action arising from a consumer credit transaction shall include all of the following:

(a) An identification of the consumer credit transaction.

...

(d) The actual or estimated amount of U.S. dollars or of a named foreign currency that the creditor alleges he or she is entitled to recover and the figures necessary for computation of the amount, including any amount received from the sale of any collateral.

...

(3) A judgment may not be entered upon a complaint which fails to comply with this section.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶2 A default judgment for \$6,327.77 was entered in October 2003 against O'Connor and her now deceased husband, Kevin O'Connor. Collection efforts were made by garnishments in 2004, 2006, 2007 and 2008. A foreclosure action was commenced in 2008 to collect on the judgment. On May 4, 2009, O'Connor filed her motion for relief from the default judgment. She claimed that the complaint failed to comply with WIS. STAT. § 425.109(1)(a) and (d), because it only identified the account by number and no name and because it did not include the figures necessary to compute the amount due. She characterized the provision in § 425.109(3) as self-executing and voiding the default judgment. The circuit court determined that the default judgment was not void and it denied equitable relief from the judgment because so much time had passed and O'Connor did not present a meritorious defense to the amount owed.²

¶3 Curiously O'Connor does not cite to *Mercado*, 318 Wis. 2d 216, which was cited by the circuit court and is controlling here on the question of whether the default judgment is void or merely voidable. Not until her reply brief does O'Connor assert that *Mercado* is distinguishable and probably wrongly decided. Although *Mercado* involved a collateral attack on a default judgment in a consumer credit transaction and not a motion under WIS. STAT. § 806.07, its holding that the failure to comply with the pleading requirements of WIS. STAT. § 425.109, cannot deprive a court of subject matter jurisdiction and cannot render the default judgment void is not limited in its application to collateral attacks. *See Mercado*, 318 Wis. 2d 216, ¶24. We will not entertain the suggestion that *Mercado* is wrongly decided because this court may not overrule, modify or

² The circuit court did not decide, and it is not necessary to decide, whether or not C & W's complaint complied with WIS. STAT. § 425.109.

withdraw language from a published opinion of the court of appeals. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

¶4 Here, as in *Mercado*, 318 Wis. 2d 216, ¶24, because the circuit court had subject matter and personal jurisdiction and notice was adequate to the O’Connors, the default judgment is valid until set aside. There is no basis for relief from the judgment under WIS. STAT. § 806.07(1)(d), which permits relief from a void judgment. We turn to consider the circuit court’s refusal to grant relief under § 806.07(1)(h), allowing relief for “[a]ny other reasons justifying relief from the operation of the judgment.”

¶5 We review the circuit court’s decision to grant or deny relief under WIS. STAT. § 806.07(1)(h), for an erroneous exercise of discretion. *Miller v. The Hanover Insurance Company*, 2010 WI 75, ¶29, __ Wis. 2d __, __N.W.2d __ (July 13, 2010, 2008AP1494). An exercise of discretion will be upheld if it is based on the facts of record, the correct legal standard, and we can perceive a reasonable basis for the court’s decision. *Id.*, ¶¶29, 30. Under § 806.07(1)(h), the “extraordinary circumstances” test applies and the court must determine whether, in view of all the facts, “extraordinary circumstances” exist which justify relief in the interest of justice. *State ex rel. Cynthia M.S. v. Michael F.C.*, 181 Wis. 2d 618, 625-26, 511 N.W.2d 868, 871 (1994). The circuit court considers the following factors in determining whether extraordinary circumstances exist:

whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Connor v. Connor, 2001 WI 49, ¶41, 243 Wis. 2d 279, 627 N.W.2d 182. A circuit court, in determining whether extraordinary circumstances exist for purposes of subsection (h), has sufficient equitable latitude to consider only those of the five factors it considers relevant. See *Sprayer Supply, Inc. v. Feider*, 133 Wis. 2d 397, 407-09, 395 N.W.2d 624 (Ct. App. 1986).

¶6 Here the circuit court determined that the motion for relief from the judgment had not been brought within a reasonable time. The six-year delay is significant, particularly in light of the collection efforts reflected in the record. At no time when C & W was expending money to collect did the O’Connors cry foul. The circuit court also determined that O’Connor had no meritorious defense to the collection judgment. Granting relief from the judgment would be a windfall for charges not disputed by the O’Connors. The circuit court found nothing extraordinary in the entry of the default judgment. It refused to consider the massive amount of accumulated debt O’Connor now faces as a justification for relief in this case. The circuit court applied appropriate factors and properly exercised its discretion in refusing to grant equitable relief from the judgment under WIS. STAT. § 806.07(1)(h).

By the Court.—Order affirmed.

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

