COURT OF APPEALS
DECISION
DATED AND RELEASED

May 7, 1996

No. 95-3093

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JENNIFER L. LYON,

Plaintiff-Respondent,

v.

MICHAEL R. MAX AND
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,

Defendants-Appellants,

AND

MCS CONTRACTING COMPANY, INC.,

Defendant.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Modified and, as modified, affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Michael R. Max and Fidelity & Deposit Company of Maryland appeal a default judgment entered on behalf of Jennifer L. Lyon in the

amount of $970,738.34. Max contends that the trial court had not obtained personal jurisdiction over him because the substitute service of the summons and complaint made at his home in Illinois failed to reflect the exercise of due diligence to personally serve Max prior to effecting substitute service. Fidelity contends that the court erroneously exercised its discretion by granting the default judgment and by refusing to vacate the default judgment where the complaint failed to state a claim against Fidelity. Because we conclude that the complaint properly stated a claim against Fidelity and that Lyon concedes to dismissal of Max if the judgment against Fidelity is upheld, we modify the judgment by dismissing Max and affirm the judgment as modified.

Lyon was a passenger on a motorcycle that collided with a vehicle driven by Max. As a result of this accident, Lyon suffered numerous injuries including partial loss of her right leg. Max is an Illinois resident and the vehicle was owned by MCS Contracting Company, Inc., an Illinois corporation. Fidelity was an insurer of the vehicle. Lyon filed a complaint against Max, MCS and Fidelity alleging that Max was negligent and that such negligence was the proximate cause of her injuries. None of the defendants filed a timely answer to the complaint.

Lyon moved for default judgment based on her attorney's affidavit and affidavits of service on file. Counsel for Fidelity appeared on behalf of Fidelity, Max and MCS at the hearing for default judgment and objected to the court's exercise of personal jurisdiction over Max and MCS, but did not move to extend the time for answering or allege that the failure to timely respond to the complaint was due to excusable neglect. The trial court determined it had jurisdiction, entered default judgment in favor of Lyon as to liability and set the matter for trial on the issue of damages only.

The defendants subsequently filed a motion to vacate the default judgment pursuant to §§ 806.07(1)(d) and (h), STATS. Max again contended that the court lacked personal jurisdiction over him because substitute service rather than personal service was used to effect service at his Illinois residence. Fidelity contended that its failure to timely answer the complaint was due to excusable

neglect based on a misunderstanding between itself and its attorneys. The trial court denied the motions.[1]

After a jury trial on damages, the jury returned a verdict of $900,000 compensatory damages. A judgment in the amount of $970,738.34 was entered in favor of Lyon after including costs and disbursements. MCS and Fidelity subsequently filed motions to vacate the default judgment because Lyon failed to allege sufficient facts in her complaint to state a claim and support the default judgment against them. The trial court granted MCS's motion concluding that the allegations of ownership of the vehicle were insufficient to state a claim against MCS to support the judgment. However, the trial court denied Fidelity's motion concluding that the complaint was sufficient to state a claim against it. Judgment was then entered on the verdict as to Max and Fidelity.

Fidelity contends that the complaint failed to state a claim against it and therefore the trial court erroneously exercised its discretion by granting the default judgment and by refusing to vacate the default judgment.[2] The failure to timely answer the complaint absent excusable neglect does not automatically entitle the plaintiff to default judgment. ***Davis v. Elkhorn***, 132 Wis.2d 394, 397, 393 N.W.2d 95, 97 (Ct. App. 1986). To secure a default judgment, the plaintiff must first make two preliminary showings. ***Id.*** at 398-99, 393 N.W.2d at 97. The moving party must show that the complaint was served in the manner and within the time prescribed by statute. ***Id.*** In addition, the complaint must contain allegations sufficient in law to state a claim for relief against the defendant. ***Id.***

Because Fidelity does not challenge the trial court's finding that Fidelity's failure to timely answer was not the result of excusable neglect or that the complaint was properly served on it, we need only address whether the

[1] On appeal Fidelity does not challenge the trial court's determination that Fidelity's failure to timely answer was not due to excusable neglect.

[2] Fidelity cites no authority for its position that the default judgment must be reopened under § 806.07, STATS., if the complaint fails to state a claim against it. Because we conclude that the complaint states a claim against Fidelity, we need not address whether this is sufficient to reopen a default judgment.

complaint was sufficient to state a claim against Fidelity. This issue raises a question of law that we review de novo. ***Prudential Ins. Co. v. Spencer's Kenosha Bowl***, 137 Wis.2d 313, 317, 404 N.W.2d 109, 111 (Ct. App. 1987). Although the granting of a default judgment is submitted to the trial court's exercise of discretion, ***Martin v. Griffin***, 117 Wis.2d 438, 443, 344 N.W.2d 206, 209 (Ct. App. 1984), an error of law is an erroneous exercise of discretion. ***United Fire & Cas. Co. v. Kleppe***, 174 Wis.2d 637, 641, 498 N.W.2d 226, 227 (1993). Therefore, if the complaint fails to state a claim, the trial court's erroneous conclusion of law would be a basis for reversal.

Wisconsin is a notice pleading state. Under notice pleading, "[t]he purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover." ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). Complaints are to be liberally construed in favor of stating a cause of action. ***Id.*** Accordingly, a complaint must be construed to state a claim "unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." ***Id.*** at 731-32, 275 N.W.2d at 664.

Sections 803.04, STATS., and 632.24, STATS., provide the basis to bring a direct action against an insurer and to hold the insurer liable. Under § 803.04(2)(a), STATS., a plaintiff may join an insurer as a proper party defendant in an action against the insured for damages resulting from the negligence of the insured. If the insurance policy was issued or delivered outside Wisconsin, the insurer is made a proper party defendant only if the accident, injury or negligence occurred in Wisconsin. ***Id.*** Further, § 632.24 provides:

> Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

Lyon alleged in her complaint that an automobile accident occurred in Barron County, Wisconsin, that Max's negligence in driving his car proximately caused the accident and that as a proximate result of Max's negligence, she suffered personal injuries resulting in damage. Lyon also alleged in her complaint as follows:

> On May 22, 1994, [date of accident] Fidelity & Deposit Company of Maryland had in effect a liability insurance policy covering Michael R. Max and MCS Contracting Co., Inc., under the terms of which it insured them against liability imposed upon them by law for damages caused by their negligent acts. Fidelity & Deposit Company of Maryland is a proper party to this action pursuant to Wis. Stat. § 803.04(2).

We conclude that the complaint sufficiently states a claim against Fidelity. The complaint alleges that Max was negligent, his negligence proximately caused Lyon's injuries, Fidelity had in effect an insurance policy covering Max on the date of the accident, and Fidelity was a proper party pursuant to § 803.04(2), STATS. The complaint is sufficient to give adequate notice of the nature of the claim against Fidelity.

Fidelity contends that the complaint must allege facts under § 631.01(1), STATS., before a cause of action is stated for direct liability on an insurer. Section 631.01(1) provides that chs. 631 and 632, STATS., "apply to all insurance policies ... delivered or issued ... in this state, on property ordinarily located in this state, on persons residing in this state when the policy ... is issued, or on business operations in this state, except; .... (c) As otherwise provided in the statutes." Fidelity argues that Lyon's complaint fails to allege any § 631.01(1) facts and none of these facts were present in this case.

We conclude that the complaint need not recite such facts to state a cause of action. A claim that Fidelity is not susceptible to a direct action claim because of restrictions of the statute is an affirmative defense that must be alleged in an answer or by motion. The seventh circuit's decision in ***Utz v. Nationwide Mut. Ins. Co.***, 619 F.2d 7 (7th Cir. 1980) (interpreting Wisconsin law), supports this position. *See also* ***Scribbins v. State Farm Mut. Auto. Ins. Co.***, 304 F.Supp. 1268 (E.D.Wis. 1969). In ***Utz***, the court dealt with a situation

where the accident did not occur in Wisconsin and the plaintiff did not allege that the insurance policy was issued or delivered in Wisconsin. ***Id.*** at 9. Under § 803.04(2)(a), STATS., the insurer is made a proper party defendant only if the policy was issued or delivered in Wisconsin or the accident, injury or negligence occurred in Wisconsin. The court held that the plaintiffs were not required to plead facts relating to the place of issuance or delivery of the policy. ***Id.*** "The burden is not on plaintiff to make allegations or present evidence about the place of issuance or delivery of the policy when defendant has not raised the issue ...." ***Id.*** We conclude that, similarly, the plaintiff is not required to plead facts relating to the place of issuance or delivery of the policy or any other facts under § 631.01(1), STATS. The insurer has the burden to allege an affirmative defense and introduce evidence relating to the limitations of the direct action statutes. *See* ***id.*** Accordingly, we conclude that the plaintiff need not plead facts under § 631.01(1) and Fidelity's claim is an affirmative defense that must be alleged in an answer or by motion.

Fidelity also contends that ***State v. Citizens' Ins. Co.***, 71 Wis. 411, 37 N.W. 348 (1888), compels the result it urges. In ***Citizens Ins.***, the insurance company was sued by the state for failing to file various reports with the insurance commissioner. The complaint failed to allege that Citizens was licensed to do business in the state. Because doing business in the state was a prerequisite for the filing of the required reports, our supreme court concluded that an essential element of the complaint had been omitted and that the complaint did not state a claim against Citizens. The state's complaint was therefore dismissed.

We conclude that ***Citizens Ins.*** is inapposite to our analysis. First, Wisconsin has adopted notice pleading since that decision. Even so, ***Citizens Ins***. stands only for the proposition that the necessary elements to impose liability must be contained within the complaint. Because we conclude that Fidelity's claim that it is not susceptible to direct action because of the limitations of the statute is an affirmative defense and not a necessary element of the claim, ***Citizens Ins.*** does not apply. Lyon's complaint contains sufficient allegations to impose liability upon Fidelity. Fidelity's recourse was to file an answer to the complaint and raise the affirmative defenses it now wishes to assert.

Finally, Fidelity argues that even if the complaint states a claim, proof of one of the facts of § 631.01, STATS., is necessary to support the

judgment. We disagree. A plaintiff need not offer proof to rebut an affirmative defense not asserted by the defendant. The complaint and affidavits were sufficient to support the default judgment against Fidelity. Accordingly, we conclude the trial court did not erroneously exercise its discretion when it granted default judgment against Fidelity.

Lyon contends that the resolution of this issue against Fidelity is dispositive because Fidelity will be the party called upon to satisfy the judgment based on its considerable assets. We construe this as a concession to dismiss Max as a party defendant based on our affirmance of the default judgment against Fidelity. A plaintiff can bring an action directly against the insurer without naming the insured as a defendant. ***Biggart v. Barstad***, 182 Wis.2d 421, 428, 513 N.W.2d 681, 683 (Ct. App. 1994). We therefore conclude that resolution of Fidelity's liability is dispositive of the entire case and will not further consider Max's liability. Accordingly, we modify the judgment by dismissing Max, and as modified affirm the judgment against Fidelity only.

By the Court.—Judgment modified and, as modified, affirmed.

Not recommended for publication in the official reports.