COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1658

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

GORO TSUCHIYA, M.D., S.C.,

PLAINTIFF-RESPONDENT,

v.

JAMES P. BRENNAN, D/B/A BRENNAN & COLLINS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

BROWN, J. James P. Brennan appeals from a default judgment entered against him in a small claims action in favor of Dr. Goro Tsuchiya. Brennan claims that even though he failed to appear, the trial court erred when it denied his motion to reopen the judgment. Because the trial court did not erroneously exercise its discretion in denying Brennan's motion to reopen, we affirm.

In 1995, Brennan hired Tsuchiya to give expert medical testimony in a lawsuit. However, when Tsuchiya sent Brennan a bill in the amount of $750 for his services, Brennan refused to pay, claiming the amount was excessive. In October 1996, Tsuchiya filed a claim against Brennan in small claims court in order to collect his fee.

The trial was scheduled for February 13, 1997. However, approximately three days before the trial, the trial court received a letter from Brennan requesting an adjournment and rescheduling of the proceeding. Apparently, Brennan was involved in another trial and would be unable to attend the proceedings.

On February 13, the date of the trial, Brennan sent an associate, Attorney Meghan O'Callaghan, to ensure that the action had in fact been adjourned. O'Callaghan again requested that the trial be adjourned due to the scheduling conflict. The trial court denied this motion and granted Tsuchiya default judgment in the amount of $750. Brennan subsequently moved to reopen the default judgment; however, this motion was also denied. Brennan then filed this appeal.

It is the trial court's discretionary decision whether to reopen a default judgment. *See* ***Gaertner v. 880 Corp.***, 131 Wis.2d 492, 500, 389 N.W.2d 59, 62 (Ct. App. 1986). Discretionary decisions will not be disturbed on appeal if the record reflects that the trial court made a reasoned application of the appropriate legal standard to the relevant facts. *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 471, 326 N.W.2d 727, 732 (1982). If necessary, an appeals court will search the record for facts supporting the trial court's decision. *See* ***Kolpin v. Pioneer Power & Light Co.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 607 (1991).

In a small claims action, a trial court may reopen a default judgment when good cause is shown. *See* § 799.29(1)(a), STATS. Good cause includes the "excusable neglect" of a party. *See* § 806.07(1)(a), STATS. Excusable neglect is not, however, synonymous with carelessness or inattentiveness. *See* ***Price v. Hart***, 166 Wis.2d 182, 194-95, 480 N.W.2d 249, 254 (Ct. App. 1991).

Here, the record provides ample support for the court's discretionary decision not to reopen the default judgment. First, it was not the practice of the court to adjourn a trial merely upon a letter of request. In the absence of an agreement between the parties, a motion for adjournment and a hearing on that motion were required. Second, the trial court offered Brennan a choice between an adjournment with costs and a default judgment. O'Callaghan, representing Brennan, expressed no preference. This, in the view of the court, "tip[ped] the scale … in favor of default." Third, and most significantly, Brennan's request for adjournment was not timely. The date for Brennan's small claims trial was set on November 12, 1996, a full three months in advance. The record indicates that, early on, Brennan had good reason to consider how other commitments would conflict with the trial date.[1] However, he took no action and waited until three days before trial to notify the court of his unavailability. A trial court would well

[1] In his letter requesting adjournment, Brennan wrote:

> I am presently representing a defendant in a jury case before Judge Jackie Schellinger in Milwaukee. This is the case of Betty Blue v. Ford Motor Company, et al. The trial started February 3, 1997, *and the original estimate of a three week trial is beginning to look pretty legitimate*.
>
> ….
>
> For the above reasons I am writing to you with a request for an adjournment of the small claims trial which is set for February 13, 1997 at 9:30 a.m. before you. [Emphasis added.]

be within the bounds of discretion to determine that this was not excusable neglect establishing good cause to reopen a default judgment under § 799.29(1)(a), STATS.; rather, it was consistent with inattentiveness or carelessness. Therefore, we uphold the trial court's decision not to reopen the default judgment.

Brennan also argues that the court erred when it failed to reopen the default judgment without first striking his answer as required by § 806.02, STATS., and related cases. However, this argument is easily dismissed because Brennan relies on the wrong section of the statutes. The general rules of civil trial practice are set forth in ch. 806, STATS., and apply to small claims actions *unless* supplanted by a provision of ch. 799, STATS., the small claims chapter. *See* § 799.04(1), STATS.; ***King v. Moore***, 95 Wis.2d 686, 690, 291 N.W.2d 304, 306-07 (Ct. App. 1980). Here, a specific small claims provision exists. Section 799.22(2), STATS., governs entry of a default judgment upon a defendant's failure to appear. It provides that:

> If the defendant fails to appear on the return date or on the date set for trial, the court may enter a judgment upon due proof of facts which show the plaintiff entitled thereto.

The trial court properly applied this statute when it entered default judgment after Brennan failed to appear for trial.[2]

Brennan argues that the court erred when it entered default judgment because it violated SCR 62.02, which states in part:

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[2] Moreover, Brennan is wrong when he claims that under ch. 806, STATS., the trial court was required to strike his answer before entering default judgment. Under ch. 806, default judgment may be entered against a defendant who fails to appear regardless of whether an answer has been filed. *See* § 806.02(5), STATS.

> (1) Judges, court commissioners, lawyers, clerks and court personnel shall at all times do all of the following:
>
> ….
>
> (g) In scheduling all hearings, meetings and conferences, be considerate of the time schedules of the participants and grant reasonable extensions of time when they will not adversely affect the court calendar or clients' interests.

Brennan appears to argue that under SCR 62.02(1), a trial court should always honor a party's request to adjourn the proceedings; therefore, the court should have reopened the default judgment. He is incorrect. Supreme Court Rule 62.02(1) does not mandate adjournments on request; it merely favors them under proper circumstances. In other words, it is still within the trial court's discretion to determine if under the circumstances an adjournment is reasonable and proper. As we have already stated, the trial court did not erroneously exercise its discretion when it denied Brennan's motion to reopen the default judgment. Therefore, we reject Brennan's argument.

Finally, Tsuchiya claims that Brennan's appeal is frivolous and asks this court to award him costs, fees and attorney's fees under § 809.25(3), STATS. An appeal is frivolous if it is without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *See* § 809.25(3)(c)2. We do not find Brennan's appeal to be without basis in law or fact, and we deny this motion.

By the Court.—Order affirmed.

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