

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 99-1719

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES DARNELL GOLDEN,

PLAINTIFF-APPELLANT,

V.

**JOSEPH F. BLACK, ROY STRAIT, AND ROCK COUNTY
SHERIFF'S DEPARTMENT,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Pro se appellant James Darnell Golden appeals from an order dismissing his complaint for failure to diligently prosecute his case. Golden contends that the trial court erroneously exercised its discretion and violated his due process rights when it dismissed his action without prior actual or

constructive notice. We agree and conclude the trial court's dismissal order was void for lack of prior notice. Accordingly, we reverse.

¶2 Golden filed a complaint in the trial court in March 1997. After the State filed its answer in April 1997, Golden filed an interrogatory and request for production of documents. The last document of record, before the court's dismissal order, is Golden's August 4, 1997 letter to the court informing the court clerk of a change of address. The dismissal order is dated June 23, 1999. As grounds for dismissal, the order states, "Summons and complaint filed 3/6/97. August 4, 1997, plaintiff provided the Court with a change of address. To date—no further action." Golden now appeals that dismissal.

¶3 It is well established that a court has both inherent and statutory power to dismiss an action in the interest of the orderly administration of justice. *See Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 395, 497 N.W.2d 756 (Ct. App. 1993) (citing, in part, WIS. STAT. § 805.03 (1991-92)). Dismissal for failure to prosecute is a matter left largely to the trial court's discretion. *See id.* at 392. Because the decision to dismiss is discretionary, we will affirm if the trial court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. *See Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991).

¶4 Significantly a dismissal order based upon failure to prosecute is subject to due process concerns if there is no advance actual notice of dismissal that contains a clear standard as to what constitutes the default. *See Neylan v. Vorwald*, 124 Wis. 2d 85, 95, 368 N.W.2d 648 (1985). The fundamental requisite of due process is affording the party whose rights may be affected by government action the opportunity to be heard with such notice and proceeding as will

adequately safeguard the right for which constitutional protection is invoked. *See id.* at 90 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)). In *Neylan*, the Wisconsin Supreme Court noted the United States Supreme Court's discussion in *Link* that it may not be necessary to provide actual notice and a hearing where a party has constructive notice through other means, for example by orders or rules of the court, as to what may be the specific consequences of his conduct. *See id.* at 90. Consequently actual or constructive notice of the specific consequences for failing to prosecute an action will satisfy the due process concerns attending a dismissal for failure to prosecute. *See id.* at 92.

¶5 In this instance, there is no evidence of actual notice to Golden of the consequences for failure to prosecute this matter. The State never moved to dismiss the action for want of prosecution. Golden was not given notice that the court was contemplating dismissal of this matter at any time prior to the dismissal order. Instead, the court's dismissal order was entered sua sponte. Having concluded that no actual notice forewarned Golden of the consequences of failing to proceed on his action, we turn to whether Golden had constructive notice.

¶6 WISCONSIN STAT. § 805.03 (1997-98)¹ provides for dismissal as a sanction for want of prosecution,² but it does not provide constructive notice of

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² WISCONSIN STAT. § 805.03 provides:

For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the

(continued)

what timelines must be adhered to in order to avoid a dismissal. *See Neylan*, 124 Wis. 2d at 94. Furthermore respondent does not argue that Golden had constructive notice, for example, by virtue of local court rule or some other means. Because the record in this matter is devoid of either actual or constructive notice of the consequences for failing to prosecute, we conclude the trial court's dismissal order lacked the fundamental requisite of due process and is therefore, void. *See id.* (judgments entered contrary to due process are void). Accordingly, we reverse.

¶7 Respondent appears to contend that Golden suffered no harm because the application of WIS. STAT. § 806.07, governing relief from judgments or orders, provides an “escape hatch” or corrective remedy that renders the lack of prior notice of less consequence. *See Neylan* at 95-96 (citing *Link*, 370 U.S. at 632). However, we perceive nothing in case law or the language of § 806.07 that requires a plaintiff to move for relief from a dismissal order prior to appealing that dismissal where no actual or constructive notice is given. In *Link* the United States Supreme Court concluded that the specific circumstances present in that case warranted dispensing with the necessity for advance notice and a pre-dismissal hearing because the petitioner had constructive knowledge of the consequences for failing to attend a scheduled a pretrial hearing by virtue of the dilatory history of the proceedings. *See Link*, 370 U.S. at 632-33. The court then commented that the petitioner had also failed to avail himself of the opportunity to demonstrate he was entitled to relief despite the notice by moving for relief pursuant to the federal counterpart to § 806.07. *See id.*

order. A dismissal on the merits may be set aside by the court on the grounds specified in and in accordance with s. 806.07. A dismissal not on the merits may be set aside by the court for good cause shown and within a reasonable time.

¶8 Two Wisconsin cases have discussed the comment in *Link* concerning the availability of an “escape hatch.” Neither case addressed whether a plaintiff is required to file a motion for relief prior to appealing a dismissal order for failure to prosecute where no actual or constructive notice is given. In *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 317, 127 N.W.2d 225 (1964), the Wisconsin Supreme Court commented that if court rules provide for dismissal or if the notice for a pretrial conference gives fair warning of that possibility, and the complaint is dismissed without a hearing, an “escape hatch” is available under the statute governing relief from judgment. Although the appellant filed for relief from judgment and the motion was denied, the appeal in that matter arose from the judgment dismissing the complaint and the court declined to pass on the merits of the motion. *See id.* The question whether a plaintiff is required to file a motion for relief from judgment prior to appealing a dismissal order was not addressed.

¶9 In *Neylan*, after concluding that a dismissal order lacking either actual or constructive notice violates due process concerns and is void, the Wisconsin Supreme Court again commented that had there been actual notice given of the dismissal, plaintiff could have proceeded under the statute giving relief from judgments and orders. *See Neylan*, 124 Wis. 2d at 95. Although the plaintiff in *Neylan* appealed from an order denying her request for relief, the court was not presented with and did not discuss whether a plaintiff is required to seek relief from a judgment prior to appealing a dismissal for failure to prosecute. Because we perceive nothing in case law or WIS. STAT. § 806.07 that requires a plaintiff to move for relief from a dismissal order for failure to prosecute, where no notice is given, prior to an appeal of the dismissed order, we conclude that respondent’s argument fails.

¶10 We conclude the trial court's dismissal order was void for lack of prior notice. We note that WIS. STAT. § 806.07(2), requiring that motions to vacate an order or judgment be brought in a "reasonable time," does not apply to void judgments. *See Neylan*, 124 Wis. 2d at 94. Consequently the void dismissal order may be vacated by motion at any time.

By the Court.—Order reversed.

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

