

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2146-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ALBERT L. OTTO,

PLAINTIFF-APPELLANT,

V.

NANCY KREMER AND STEVEN H. KREMER,

DEFENDANTS,

**NORWEST BANK WISCONSIN, N.A., F/K/A MIDAMERICA
BANK,**

**GARNISHEE-DEFENDANT-
RESPONDENT.**

APPEAL from orders of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Albert Otto appeals from an order vacating a default order to pay over against Norwest Bank Wisconsin.¹ Otto also appeals from an order denying his motion to strike Norwest's second answer and re-enter the vacated default order. Otto argues that the circuit court erroneously exercised its discretion by vacating the default order because the untimeliness of Norwest's answers was not due to excusable neglect. Although the court expressly based its determination on excusable neglect, we conclude that its order is also supported under WIS. STAT. § 806.07(1)(h), by its recognition of the unfairness and inequity that would otherwise result under the facts of this case. Therefore, we affirm the orders.

BACKGROUND

¶2 The following facts are undisputed. Otto was awarded a money judgment of approximately \$30,000 against Steven Kremer. On March 15, 1999, Otto filed a garnishee summons and complaint naming Norwest Bank as the garnishee defendant. Norwest's Ladysmith branch was served on March 17. The Ladysmith branch, formerly known as MidAmerica Bank, had recently been acquired by Norwest and consequently, its employees were unfamiliar with Norwest's procedures for addressing garnishment actions.

¶3 At the time Otto's garnishment action was filed, Norwest itself was in the midst of a merger with Wells Fargo & Company Holding Corporation. Scott Martin, a legal process specialist with Wells Fargo, testified at the hearing on Norwest's motion to vacate regarding Norwest's general procedure for

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1997-98 version unless otherwise noted.

garnishment actions. Martin stated that when a summons and complaint are served on a local branch, as here, the branch fills out a “legal document record” and faxes it, along with the summons and complaint, to the Wells Fargo legal department. After faxing the documents, the originals are to be sent, via internal mail, directly to the legal department. Upon receipt of the faxed copies, the legal department searches Norwest’s mainframe computer to see if the bank has an account in the name of the principal defendant—here, Steven Kremer. If the search reveals an account in which the individual has ownership interest, Norwest attaches any available funds up to the amount sought in the garnishment claim and, within forty-eight hours, notifies the account holder of the action taken. If no account is found, the legal department places the faxed copies in a holding bin and awaits the originals before filing its answer. Martin explained that the legal department waits for the originals in order to insure that the documentation is complete, that there has been proper service and that there is a proper fee.

¶4 Martin testified that he received the faxed copies on March 17 and executed a search for an account matching Kremer’s name. Martin did not find an account in which Kremer had ownership interest, but rather, found an estate account over which Kremer was serving only as a personal representative. Martin, pursuant to Norwest procedure, placed the faxed copies in a holding bin and awaited the originals. In the meantime, the originals were mistakenly routed to Norwest’s South Dakota “hub,” rerouted back to the Ladysmith branch and eventually arrived in the legal department on April 19, after the statutory deadline for filing an answer had passed.²

² Pursuant to WIS. STAT. § 812.11, a garnishee must, within 20 days from the service of a garnishee summons and complaint, file its answer with the clerk of court.

¶5 On April 19, Norwest having failed to file an answer, the circuit court entered a default order to pay over.³ Martin, a non-attorney, mailed Norwest's answer on April 21 and it was filed in the circuit court on April 23. After receiving notice of the default order, Norwest moved the court, pursuant to WIS. STAT. § 806.07(1)(a) to vacate the order. Norwest argued that: (1) because Kremer did not have an account with Norwest, it had a meritorious defense; and (2) its failure to timely answer was due to mistake, inadvertence and excusable neglect.

¶6 On May 24, the circuit court granted the motion to vacate the default order and allowed Norwest to respond and file its answer. An attorney for Norwest filed a second answer the next day. Otto thereafter filed a motion to strike Norwest's answers and re-enter the default order to pay over. The circuit court struck Norwest's first answer,⁴ but otherwise denied Otto's motion and dismissed the action. This appeal followed.

ANALYSIS

¶7 Otto argues that the circuit court erred by vacating the default order to pay over. A motion to vacate a default judgment is addressed to the sound discretion of the circuit court. *See Baird Contracting, Inc. v. Mid Wisconsin Bank*, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). On review, "this court will not disturb the trial court's determination absent an erroneous exercise

³ Although dated April 19, the default order was filed with the circuit court on April 20.

⁴ In *Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 202, 562 N.W.2d 401 (1997), our supreme court determined that "only lawyers can appear on behalf of, or perform legal service for, corporations in legal proceedings before Wisconsin courts." Although the *Jadair* court recognized an exception for actions filed in small claims court, *see id.*, the present case involves a large claim.

of that discretion.” *Id.* A circuit court properly exercises its discretion when “it examines the relevant facts, applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach.” *Id.*

¶8 When determining whether to grant or deny a motion to vacate a default judgment, the trial court must consider the following factors:

(1) that the statute relating to the vacation of default judgments is remedial in nature and should be liberally construed; (2) that the general policy of the law favors giving litigants their day in court with an opportunity to try the issues; and (3) that default judgments are regarded with disfavor in the eyes of the law.

Id. at 325.

¶9 WISCONSIN STAT. § 806.07(1) governs relief from a judgment or an order and provides, in relevant part:

On motion and upon such terms as are just, the court ... may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released or discharged;
- (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
- (g) It is no longer equitable that the judgment should have prospective application; or
- (h) Any other reasons justifying relief from the operation of the judgment.

¶10 Here, the circuit court found excusable neglect on the part of Norwest. We need not address the circuit court's application of excusable neglect, however, because the facts support the court's granting of relief under subpara. (h) of the statute. *See Stan's Lumber v. Fleming*, 196 Wis. 2d 554, 573, 538 N.W.2d 849 (Ct. App. 1995) (we may independently review the record to determine whether additional reasons exist to support the court's exercise of discretion).

¶11 Our supreme court has held that "even if a claim sounds in sec. 806.07(1)(a), (b), or (c), it can be granted under sub[para.] (h), if the circuit court concludes that extraordinary circumstances exist which justify relief from a prior judgment, order or stipulation." *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 554, 363 N.W.2d 419 (1985). Although there is a "strong policy in favor of the finality of judgments and settlements ... [i]t is also recognized ... that [subpara. (h)] must be liberally construed to allow relief ... whenever such action is appropriate to accomplish justice." *Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 151-52, 519 N.W.2d 723 (Ct. App. 1994). Further, subpara. (h) should be used "only when the circumstances are such that the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts." *M.L.B.*, 122 Wis. 2d at 550 (citation omitted).

¶12 Here, it is undisputed that Norwest has a meritorious defense to the garnishment action, as Kremer did not hold an account with Norwest. The circuit court stated: "And in this particular case the court does find that *I don't think it would be fair* to award ... Mr. Otto \$30,000 because of an oversight that was precipitated by a new procedure for the bank in Ladysmith." (Emphasis added.) The court reasoned that it would be unfair to hold Norwest liable under the garnishment action for the \$30,000 owed by Kremer, an individual that did not

even hold an account with its bank. Although the court expressly based its determination on excusable neglect, we conclude that its order is nevertheless supported under WIS. STAT. § 806.07(1)(h), by its recognition of the unfairness and inequity that would otherwise result under the facts of this case. *See Stan's Lumber*, 196 Wis. 2d at 573. Accordingly, we affirm the order granting Norwest's motion to vacate the default order to pay over.

¶13 Regarding Otto's appeal of the circuit court's denial of his subsequent motion to strike both of Norwest's answers and re-enter the default order, we note that Otto conceded at hearing that he presented no new evidence in support of re-entering the default order, but rather, sought only to preserve the issue for appeal. Further, at the first motion hearing, the circuit court, after vacating the default order, permitted Norwest to respond and file its answer. Therefore, we conclude that the circuit court properly denied Otto's motion to strike Norwest's second answer and reconsider its order vacating the default order to pay over.

By the Court.—Orders affirmed.

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