

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2001

Cornelia G. Clark
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.

No. 01-0402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CELEBRATION EXCURSIONS, INC.,

PLAINTIFF-RESPONDENT,

V.

MARSHA AZAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Marsha Azar appeals from a judgment and an order entered after the trial court granted Celebration Excursions, Inc.'s motion for default judgment. Azar contends the trial court erred because: (1) the complaint was insufficient to support the default judgment; and (2) Azar's failure to timely file an answer was a result of excusable neglect. Because the complaint was

sufficient to support the default judgment and because the trial court did not erroneously exercise its discretion when it found Azar's actions did not constitute excusable neglect, we affirm.

I. BACKGROUND

¶2 This case involves a vessel known as The Celebration yacht. An agreement was reached in December 1998, which provided that Azar would purchase the yacht from Celebration Excursions for the sum of \$340,000. After making a substantial upfront payment, the agreement permitted Azar to make monthly payments. On July 20, 1999, Celebration Excursions sent Azar written notice that she was in default. Although Azar had sent checks dated May 12, 1999, and June 11, 1999, both checks were returned for insufficient funds. In addition, the July monthly payment was late. The notice indicated that if Azar did not make up the payments within thirty days, the agreement to purchase the yacht would be terminated. On August 19, 1999, Celebration Excursions received a \$26,800 check, purportedly representing payment for May, June, July and August.

¶3 Celebration Excursions notified Azar that if the check did not clear, it would terminate the agreement. On August 20, 1999, David Kadinger, a representative of Celebration Excursions, received confirmation from Azar's bank that there were insufficient funds to cover the \$26,800 check.

¶4 In May 2000, Celebration Excursions filed a summons and complaint against Azar seeking declaratory judgment that the agreement could be terminated. Azar was served on July 9, 2000. Because Azar denied her identity at the time of service, she was also served by publication. As a result, Azar's answer was due on August 23, 2000. No answer was filed by that date. Kathryn Keppel,

one of Celebration Excursions's attorneys, indicated that it would extend the time to file an answer to August 28, 2000. No answer was filed by that date.

¶5 However, on August 25, 2000, Azar's ex-husband, Saul, left a voice mail message for Celebration Excursions's counsel Thomas E. Brown, requesting an extension to answer the complaint. Saul also faxed a letter requesting an extension. Brown refused to grant an extension.

¶6 On September 15, 2000, Celebration Excursions filed a motion seeking default. The hearing was scheduled for October 23, 2000. On October 18, 2000, Azar filed a motion to extend the time to file an answer, and a brief arguing that her failure to file was the result of excusable neglect. After the hearing, the trial court granted Celebration Excursions's motion for default, finding that Azar failed to establish excusable neglect. Azar filed a motion seeking reconsideration. The trial court denied that motion, ruling that the complaint was legally sufficient, and that Azar had failed to establish excusable neglect. Azar now appeals.

II. DISCUSSION

A. *Complaint.*

¶7 Azar contends that the trial court could not grant default judgment on the complaint filed here because the complaint was legally insufficient. Namely, the complaint failed to allege that Celebration Excursions had fulfilled all conditions precedent to receiving payments due under the agreement. The trial court concluded that the complaint was to be liberally construed and was therefore legally sufficient. We agree.

¶8 Although the granting of a default judgment is submitted to the trial court's exercise of discretion, *Martin v. Griffin*, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984), the legal sufficiency of the complaint is a question of law that this court reviews independently. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

¶9 In a default motion, the complainant must show that the complaint was timely served and filed and that the complaint contains allegations sufficient in law to state a claim for relief against the defendant. *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 398-99, 393 N.W.2d 95 (Ct. App. 1986). Here, there is no dispute that the complaint was timely served. Rather, Azar contends the complaint did not contain sufficient facts for a meritorious claim. Specifically, Azar argues that the complaint failed to allege that conditions precedent were satisfied, and failed to allege that notice of termination provisions were fulfilled. We reject Azar's arguments.

¶10 The trial court ruled:

Pleadings should be liberally construed to secure a just and speedy resolution of every action. In my opinion, the plaintiff has met both the spirit and the letter of the [sic] s.802.03(3). It alleged: 1) an agreement between the parties; 2) that the defendant breached the agreement by presenting plaintiff checks returned for insufficient funds; 3) plaintiff's notice to defendant that she must cure the default or plaintiff would terminate the agreement; and that 4) a conversation with the defendant's bank disclosed she had failed to cure the default. The complaint alleges the only conditions precedent to recovery needed; namely, that there was a demand to cure the default and that the cure was not done within the required time. The complaint is sufficient.

We have reviewed the complaint and agree with the trial court's analysis. Celebration Excursions's complaint sets forth the elements for recovery under the declaratory judgment statute and the facts supporting that claim.

¶11 In rejecting Azar's argument, we note that the two cases she relies on for support are not controlling here. Azar cites *Chetek State Bank v. Barberg*, 170 Wis. 2d 516, 489 N.W.2d 385 (Ct. App. 1992) and *Johnson v. Grzadzielewski*, 159 Wis. 2d 601, 465 N.W.2d 503 (Ct. App. 1990). In *Chetek* and *Johnson*, default judgments could not be granted because those complaints alleged theories of recovery which could never succeed as a matter of law. *Chetek*, 170 Wis. 2d at 520-21 (allegation of non-payment of real estate taxes was insufficient to state claim for tortious waste); *Johnson*, 159 Wis. 2d at 608-09 (where plaintiff was at least 51% contributorily negligent, public policy barred recovery as a matter of law). In the instant case, however, the complaint alleges a valid theory upon which Celebration Excursions would succeed: declaratory judgment as to whether or not it was entitled to terminate the agreement between Celebration Excursions and Azar.

B. Excusable Neglect.

¶12 Azar contends that the trial court erroneously exercised its discretion when it found she failed to establish excusable neglect. Azar sets forth a list of things her former husband did, which she argues constitutes excusable neglect. For example, he was trying to find a lawyer to represent her, and he phoned and faxed Brown asking for an extension. The trial court found this was insufficient to satisfy the excusable neglect standard. We cannot conclude that the trial court's decision constituted an erroneous exercise of discretion.

¶13 We review the trial court’s granting of a default judgment under the erroneous exercise of discretion standard. *Baird Contracting, Inc. v. Mid Wisconsin Bank*, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). “[B]ecause the exercise of discretion is so essential to the trial court’s functioning, we generally look for reasons to sustain discretionary decisions.” *Id.* at 591 (citation omitted).

¶14 As the parties have discussed, one of the grounds for vacating a default judgment is if the party against whom judgment has been rendered can establish excusable neglect. WIS. STAT. § 806.07(1)(a). Excusable neglect is “neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citations omitted). Excusable neglect is not just “neglect, carelessness or inattentiveness.” *Id.* There is an additional requirement for a party seeking the denial of a default judgment motion based on the preemptive use of § 806.07(1)(a). The party must also establish that it has a meritorious defense to the underlying action. *J.L. Phillips & Assoc., Inc. v. E & H Plastic Corp.*, 217 Wis. 2d 348, 351, 577 N.W.2d 13 (1998). A meritorious defense is any defense that is “good at law.” *Id.* at 360.

¶15 The trial court found that under the circumstances here, and given the history of protracted litigation between the parties, Azar should have answered the complaint in a timely fashion. A reasonable person in her position would have realized that the complaint needed to be answered. The trial court also found that the excuse of not being able to find a lawyer was unreasonable. Why was Azar able to hire a lawyer in October, when she could not in August? The trial court

also found that waiting over one and one-half months to file an answer to a short and simple complaint was inexcusable. The trial court's decision was not unreasonable. Moreover, Celebration Excursions points out that any action of searching for a lawyer or seeking an extension was not actually done by Azar, but by Azar's ex-husband, Saul. Thus, Azar did not demonstrate that her failure to timely answer the complaint constituted excusable neglect.

¶16 Azar argues that the trial court should have denied the motion for default on issues relating to fairness and justice. These matters, however, need only be considered after a party has established excusable neglect. ***Gerth v. American Star Ins. Co.***, 166 Wis. 2d 1000, 1008-09, 480 N.W.2d 836 (Ct. App. 1992). Because Azar failed to establish excusable neglect, the trial court was not required to address the additional fairness and justice issue.

By the Court.—Judgment and order affirmed.

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

