COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0521 **Cir. Ct. No. 00-CV-182**

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

PARTNERS IN DESIGN ARCHITECTS, INC.,

PLAINTIFF-RESPONDENT,

V.

PHOENIX INTERNET TECHNOLOGIES, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Phoenix Internet Technologies, Inc. appeals from a circuit court order denying reconsideration or modification of an order granting default judgment in favor of Partners In Design Architects, Inc. We affirm.

¶2 Partners sued Phoenix, its internet service provider, claiming that in the course of setting up Partners' internet service, Phoenix provided Partners with a long distance dial-up access number when Partners had specifically contracted for a local dial-up access number. Partners used its internet connection, unaware that its access number was long distance, and incurred long distances charges of $13,443.18 before discovering and terminating the long distance connection. Partners alleged that Phoenix owed it a duty to exercise reasonable care in obtaining a local access number, breached this duty by negligently providing a long distance access number, and directly and proximately caused Partners financial injury.

¶3 Phoenix did not timely answer the complaint, and Partners moved for a default judgment. The circuit court granted Partners default judgment and awarded damages in the amount of $13,443.18 plus costs. Thereafter, Phoenix moved the court to vacate the default judgment on the grounds of excusable neglect. At a November 5, 2000 hearing, the circuit court ruled from the bench that Phoenix had not satisfied the requirements of WIS. STAT. § 806.07 (1999-2000) [1] for relief from the default judgment. On December 1, 2000, Phoenix filed a motion to reconsider or modify the order granting default judgment. The circuit court declined to do so. Phoenix appeals from the May 29, 2001 order denying reconsideration.

¶4 As a preliminary matter, we must address the scope of this appeal. Partners argues that Phoenix may not challenge the circuit court's November 5,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

2000 ruling declining to vacate the default judgment. Partners contends that the November 5 ruling was appealable and since Phoenix did not appeal, it may not have review of this ruling. We disagree with Partners.

¶5 The November 5 ruling declining to vacate the default judgment was not reduced to a written order. A party may only appeal from a written order or judgment. WIS. STAT. § 808.03(1)(a). In the absence of an order memorializing the circuit court's November 5 ruling, the November 5 ruling may be challenged as part of Phoenix's appeal from the May 29, 2001 order denying reconsideration. *See* WIS. STAT. RULE 809.10(4).

¶6 We turn to Phoenix's argument that it demonstrated excusable neglect for its failure to timely answer Partners' complaint. A motion to vacate a default judgment is addressed to the sound discretion of the circuit court. ***Baird Contracting, Inc. v. Mid Wis. Bank***, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). We will not disturb the circuit court's determination unless the court erroneously exercised its discretion. ***Id.*** A proper exercise of discretion requires an examination of the relevant facts, application of the proper legal standard, and use of a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Id.***

¶7 We are unable to review the circuit court's exercise of discretion. First, the record does not contain a transcript of the November 5 hearing on Phoenix's motion to vacate the default judgment. Therefore, we do not have the circuit court's findings and its reasons for refusing to vacate the default judgment. Second, during the hearing on Phoenix's December motion to reconsider, the circuit court did not restate its reasons for declining to vacate the default judgment in November. Rather, the court noted that Phoenix had not offered any new

factors for it to consider. Third, neither party's brief offers us the circuit court's findings in November.

¶8 The appellant must provide us with the record necessary to review the issues raised. ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). When an appeal is brought upon an incomplete record, we will assume that every fact essential to sustain the circuit court's decision is supported by the record. ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988). We affirm the circuit court's refusal to vacate the default judgment and its refusal to reconsider that decision.

¶9 We turn to the remaining appellate issues. Phoenix argues that the circuit court should have held a hearing on damages for what it claims was Partners' tort claim against it. The circuit court construed Partners' complaint as alleging a breach of contract claim and awarded damages based on counsel's affidavit.

¶10 Proof of damages on default judgment varies depending on whether the claim sounds in tort or contract. In tort cases, additional proof beyond the complaint is needed to award damages on default judgment. ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 387, 577 N.W.2d 23 (1998). Such proof may be by affidavit or hearing at the circuit court's discretion. ***Id.*** at 387-88. Phoenix contends a hearing was necessary.

¶11 In order to determine what type of proof of damages was necessary, we must construe Partners' complaint, bearing in mind that Wisconsin is a notice pleading state. ***Norwest Bank Wis. Eau Claire v. Plourde***, 185 Wis. 2d 377, 388, 518 N.W.2d 265 (Ct. App. 1994) (the pleading need only notify the opposing party of the pleader's position in the case and need not include "magic words").

¶12 The complaint alleges that Partners and Phoenix had a contract for the provision of internet services that required a local dial-up number for internet access. Partners alleges that "[h]aving agreed to obtain a local access number for [Partners], [Phoenix] owed a duty to [Partners] to exercise reasonable care in doing so." Partners alleges that Phoenix breached this duty "by negligently providing [Partners] with a long distance number rather than a local access number." Partners further alleges that "[a]s a direct and proximate result of [Phoenix's] actions, [Partners] has incurred damages in the form of long distance charges, business interruption and various other costs, fees and disbursements." Partners demanded judgment against Phoenix in the amount of the long distance charges, $13,443.18, and damages relating to business interruption.

¶13 We note that in its proposed answer to the complaint, Phoenix admitted that the parties entered into a service agreement and that Phoenix told Partners that a local access number existed for the internet connection. More importantly, in its affirmative defenses, Phoenix alleged that "[t]his action lies in contract." At the hearing on Phoenix's motion for reconsideration, Phoenix's counsel argued that there was a contract between the parties which governed their conduct, including the issue of long distance charges.

¶14 The nature of an action is determined by considering all of the allegations in the pleading. ***Durkin v. Bd. of Police and Fire Comm'rs***, 48 Wis. 2d 112, 118, 180 N.W.2d 1 (1970). Here, Partners alleges the existence of a contract. Phoenix concedes that the claim sounds in contract. We conclude that the contract claim controls. *Cf.* ***Hause v. Schesel***, 42 Wis. 2d 628, 635, 167 N.W.2d 421 (1969) ("If the cause of action based on contract stands, there is no reason to take up the cause of action based on tort."). In light of the mixed bag of allegations in the complaint, the circuit court did not err in construing the complaint as one for breach

of contract because the parties' relationship was founded on a contract and there is no duty to perform other than within the contractual relationship. Our holding is consistent with the recognized distinction between contract and tort claims. *See* ***State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.***, 225 Wis. 2d 305, 316-17, 592 N.W.2d 201 (1999).

¶15 Because we conclude that the complaint sounds in contract, the circuit court did not err in the procedure it used to determine the damages to be awarded on default judgment. Proof of damages on default judgment is governed by WIS. STAT. § 806.02(2). That statute requires the demand of the complaint to set forth the amount of damages claimed. The complaint in this case specifies the amount of long distance charges incurred. Partners also submitted an affidavit of counsel with supporting documentation of that amount and judgment was entered in that amount plus statutory costs. This procedure was approved in ***Martin v. Griffin***, 117 Wis. 2d 438, 445, 344 N.W.2d 206 (Ct. App. 1984).

¶16 Phoenix argues that it was premature to award Partners damages because at the time default judgment was entered, Partners had not paid the $13,443.18 in long distance charges. We do not see the damages as hypothetical or premature.

¶17 Phoenix also argues that the damages award is a windfall to Partners because the long distance provider may be willing to accept less than $13,443.18 to satisfy Partners' debt. The circuit court acknowledged the possibility that Partners would have to pay less than $13,443.18 to settle with the long distance provider. On reconsideration, the circuit court referred back to its prior ruling that Partners had not

failed to mitigate damages.[2] The windfall claim is premature because at the time of the reconsideration hearing, Partners had not yet reached a compromise with the long distance provider.

¶18 Finally, Partners argues that Phoenix's appeal is frivolous. We disagree. The appellate issues in this case, particularly those relating to proof of damages, arise, in large part, due to the confusing allegations in the complaint drafted by Partners.

By the Court.—Order affirmed.

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

[2] As stated earlier in this opinion, we do not have a record of the prior ruling. Therefore, we accept the circuit court's recitation as true.