

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 19, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1178

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

HAYES INDUSTRIAL BRAKE, INC.,

Plaintiff-Respondent,

v.

MECHANICAL & INDUSTRIAL
FASTENERS, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH D. MC CORMACK, Judge. *Affirmed.*

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

PER CURIAM. Mechanical & Industrial Fasteners, Inc. (MIFAST) appeals from a default judgment in favor of Hayes Industrial Brake, Inc. (Hayes). Because we conclude that the trial court properly exercised its discretion in granting a default judgment and determining damages, we affirm.

In 1991, a dispute arose between MIFAST and Hayes regarding parts which MIFAST was supposed to supply to Hayes. On February 24, 1992,

Hayes sued MIFAST for damages. On May 8, 1992, Hayes moved the trial court for default judgment because MIFAST's president, Alois Hartmann, had been personally served with a summons and complaint on March 30, and the time for answering had long since expired. MIFAST filed an answer on June 1. On June 2, Hayes moved to strike MIFAST's answer as untimely. At a June 3 hearing on Hayes's motion for default judgment, the court granted MIFAST a continuance to allow it to demonstrate the reason it did not file a timely answer.

At a June 15 hearing, Hartmann testified that he was served the summons and complaint on the date indicated on the affidavit of service (March 30), that he put the documents in a "Hayes" file and gave the file to a trainee administrative assistant in the expectation that the documents would be forwarded to counsel. The documents were never forwarded to counsel. In April, Hartmann became aware that legal proceedings involving Hayes were pending and learned in May that the summons and complaint had not reached counsel. Hartmann did not follow up on the status of the case after he gave the file to his assistant due to the large number of legal documents coming into the office involving another case. After oral argument, the trial court took Hayes's motion for default judgment under advisement.

On September 25, the trial court rendered its decision on Hayes's motion for default judgment. The trial court concluded that the facts adduced at the previous hearing did not establish excusable neglect for failing to timely answer the complaint. The court directed Hayes to submit an affidavit itemizing its damages arising from MIFAST's failure to deliver parts as required by the parties' contract. MIFAST filed a counteraffidavit.

At a September 27 hearing, MIFAST argued that Hayes's affidavit was defective because it contained hearsay. The court rejected MIFAST's argument on the grounds that it could take proof, in whatever form, of any fact necessary for the court to enter a judgment. *See* § 806.02(2), STATS. The trial court did not perceive itself to be limited in the form in which it could accept proof. However, the court was not satisfied that Hayes had submitted sufficient proof of damages, and it required Hayes to file another affidavit setting forth the efforts it made to mitigate its damages. On March 15, 1994, after reviewing the parties' submissions on damages, the court awarded Hayes \$96,710.93 in damages.

On appeal, MIFAST protests the entry of default judgment and claims that the trial court erred in awarding damages. Whether to grant a default judgment is within the trial court's discretion. *Martin v. Griffin*, 117 Wis.2d 438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984). In order to avoid the entry of a default judgment for failing to timely answer Hayes's complaint, MIFAST had the burden to show excusable neglect. See *id.* at 443, 344 N.W.2d at 209. Although the trial court concluded that MIFAST did not demonstrate excusable neglect, it did not explicitly state the facts upon which it based that conclusion. Therefore, we will independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *Town of Seymour v. City of Eau Claire*, 112 Wis.2d 313, 322, 332 N.W.2d 821, 825 (Ct. App. 1983). We are obliged to uphold a discretionary decision if we can conclude that there are facts of record which would support the trial court's decision. *Liddle v. Liddle*, 140 Wis.2d 132, 150-51, 410 N.W.2d 196, 204 (Ct. App. 1987).

The record supports the trial court's discretionary decision to grant Hayes a default judgment. MIFAST's president testified that he was served with a summons and complaint, handed it to a trainee administrative assistant and never followed up. Hartmann also testified that MIFAST was involved in other litigation during the period in which MIFAST should have answered Hayes's complaint.

"Excusable neglect is `that neglect which might have been the act of a reasonably prudent person under the same circumstances' and is not synonymous with neglect, carelessness or inattentiveness." *Martin*, 117 Wis.2d at 443, 344 N.W.2d at 209 (quoted source omitted). Hartmann's failure to follow up is not "the act of a reasonably prudent person under the circumstances." See *id.* at 443, 344 N.W.2d at 209. The trial court properly exercised its discretion in entering a default judgment in favor of Hayes. See *id.* at 442, 344 N.W.2d at 209.

In so holding, we distinguish this case from *Baird Contracting, Inc. v. Mid Wisconsin Bank*, 189 Wis.2d 321, 525 N.W.2d 276 (Ct. App. 1994). In *Baird*, we held that the trial court properly exercised its discretion when it vacated a default judgment after determining that the bank's failure to timely answer a complaint served upon a bookkeeping supervisor constituted excusable neglect. See *id.* at 326-27, 525 N.W.2d at 278. There the trial court

made the following findings: (1) the supervisor did not have training in legal matters; (2) the supervisor had been employed in her position for only six months; (3) the documents got "buried" on her desk; and (4) the bookkeeping department was "swamped" with work and short staffed at the time service was made. *Id.* at 325-26, 525 N.W.2d at 277-78.

In *Baird*, we observed that "[w]hile attorneys and insurance company claims employees are regularly involved with lawsuits and trained to recognize the importance of timely responding to legal documents, the same is not necessarily true of a bank." *Id.* at 326, 525 N.W.2d at 278. We stated that a case-by-case analysis would be used to determine whether the bank's conduct constituted excusable neglect. *Id.* We concluded that there were facts of record about the supervisor's workload and inexperience in legal matters from which the trial court could reasonably determine that the bank's failure to timely answer constituted excusable neglect. *Id.* at 326-27, 525 N.W.2d at 278.

Here, in contrast, Hartmann, the president of the defendant corporation, was involved in other litigation during the time for answering the complaint. Therefore, the trial court could have found that he has some experience in legal matters. Additionally, Hartmann was aware of a dispute with Hayes regarding MIFAST's production and delivery of parts. He was personally served with Hayes's summons and complaint which he turned over to a trainee administrative assistant. The facts of this case do not support a conclusion that MIFAST's conduct constitutes excusable neglect.

The balance of MIFAST's appellate issues relate to the trial court's damages award. MIFAST argues that the trial court should have held an evidentiary hearing and should not have relied upon the affidavits submitted by Hayes because they were not in evidentiary form¹ and did not comply with the requirements for summary judgment affidavits as set forth in § 802.08(3), STATS. (affidavits should be based on personal knowledge and set forth evidentiary facts which would be admissible in evidence).

¹ MIFAST does not elaborate upon its claim that Hayes's affidavits are not in evidentiary form. In the trial court, MIFAST objected to the first Hayes affidavit on the grounds that it contained hearsay and conclusions. Because this claim is inadequately briefed on appeal, we will not consider it. See *Fritz v. McGrath*, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

As MIFAST acknowledges, the trial court was not required to hold a hearing on damages after entering a default judgment. See *Martin*, 117 Wis.2d at 445, 344 N.W.2d at 210. Rather, the trial court "had the option of holding a hearing or receiving proof by affidavit of any facts necessary to render judgment." *Id.* MIFAST does not cite any authority for the proposition that affidavits in support of damages on default judgment must be in the same form as summary judgment affidavits. The trial court's goal was to satisfy itself that the amount claimed by Hayes was due. The manner in which it did so was within its discretion, and MIFAST has not convinced us that it erroneously exercised that discretion by relying upon Hayes's affidavits.

Next, MIFAST contends that the trial court did not make adequate findings of fact in its March 15, 1994, judgment, as required by § 805.17(2), STATS. This statute only applies to trials held to the court. Here, the court did not hold a trial or an evidentiary hearing.

Finally, MIFAST contends the trial court did not consider whether Hayes mitigated its damages. A court awarding damages on a default judgment must permit the defaulting party to introduce evidence regarding mitigation or be heard as to the diminution of damages. *Midwest Developers v. Goma Corp.*, 121 Wis.2d 632, 651, 360 N.W.2d 554, 564 (Ct. App. 1984).

The parties submitted evidence regarding mitigation. Hayes submitted two affidavits in support of its claim for damages made by James F. Sullivan, senior purchasing agent at Hayes. The affidavits describe Hayes's need for the part to be provided by MIFAST, the consequences of not receiving it and the costs incurred in replacing MIFAST as a source for the part. The affidavit of MIFAST's president also addresses the mitigation issue. That the trial court did not make specific findings regarding mitigation does not mean it did not consider the issue. The trial court permitted MIFAST to address this issue and was not required to do more with MIFAST's submissions.

Finally, MIFAST asks us to reverse in our discretion under § 752.35, STATS. We will not do so in the absence of reversible error.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.