

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 2008

David R. Schanker
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.

Appeal No. 2008AP1093-FT

Cir. Ct. No. 2006CV69

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHERYL MALEK,

PLAINTIFF-RESPONDENT,

V.

**HELEN VAN PROOYEN, ROBERT PRIPPS, LOUIS KOTORA, JR., A/K/A
LOUIS KOTORA, JULIE A. KOTORA, JACQUELINE I. KOTORA AND
LOUIS KOTORA, III,**

DEFENDANTS,

PATRICK T. MAHONEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Judgment reversed; order affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.¹ Patrick Mahoney appeals an order denying his motions to enlarge time to answer a complaint under WIS. STAT. § 801.15(2)(a) and for relief from a default judgment under WIS. STAT. § 806.07. He also appeals a judgment that “confirmed” the default judgment. He contends the circuit court erroneously exercised its discretion by failing to explain its reasoning for denying his § 806.07 motion. We agree and reverse the portion of the order denying his § 806.07 motion, as well as the judgment “confirming” the default judgment. On remand, we direct the court to demonstrate, on the record, its reasoning for granting or denying Mahoney’s § 806.07 motion.

BACKGROUND

¶2 In November 2006, Cheryl Malek filed a summons and complaint seeking an easement of necessity across part of Mahoney’s property. After Mahoney failed to file a timely answer, Malek moved for a default judgment, which the court granted on January 16, 2007.

¶3 On February 2, Mahoney filed a motion to enlarge time to answer, along with an answer. Mahoney averred that he was only served with the complaint, not the summons. Malek opposed Mahoney’s motion and sought to have Mahoney’s answer stricken. On February 12, the circuit court denied Mahoney’s motion to enlarge time and granted Malek’s motion to strike.

¶4 Mahoney filed a motion for relief from the default judgment under WIS. STAT. § 806.07. The court initially scheduled a hearing on the motion, but

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

then sent a one-line letter to the parties stating, “The Order of the Court dated 2-12-07 concerning the above referenced case, stands.” The court thereby effectively denied Mahoney’s motion for relief from the default judgment. The court cancelled the motion hearing.

¶5 Mahoney appealed the default judgment and the orders striking his answer, denying his motion to enlarge time, and denying his motion for relief from the default judgment. By order dated August 28, 2007, we reversed the default judgment and the orders. We concluded the court erroneously exercised its discretion by failing to demonstrate, on the record, the reasoning underlying its decisions. We remanded for the court to demonstrate its reasoning on the record. We also directed the court to hold an evidentiary hearing to determine whether service was proper.

¶6 On remand, the court held an evidentiary hearing and found that Mahoney was properly served. The court then ordered briefing on Mahoney’s motions to enlarge time to answer and for relief from the default judgment. In Mahoney’s brief, he argued the court should grant his motion to enlarge time because his failure to timely answer was due to excusable neglect and Malek would not be prejudiced by granting the motion. Mahoney also argued the court should vacate the default judgment under various provisions of WIS. STAT. § 806.07. He first relied on § 806.07(1)(b), contending “newly discovered evidence” conclusively demonstrated that Malek did not have a valid claim. He also relied on § 806.07(1)(c), based on an alleged misrepresentation by Malek in the complaint. Finally, Mahoney argued under §§ 806.07(1)(g)-(h) that equitable considerations weighed in favor of reopening the judgment.

¶7 In a written order, the court denied Mahoney's motions because Mahoney's failure to timely answer was not the result of excusable neglect. The order also stated that, even if there were excusable neglect, Malek was prejudiced by Mahoney's failure to timely answer because she dismissed another defendant from the suit. Based on these conclusions, the order also stated the court need not reach the issue of meritorious defenses.

DISCUSSION

¶8 Mahoney asserts the court erroneously exercised its discretion by failing to explain its rationale for denying his motion for relief from the default judgment under WIS. STAT. §§ 806.07(1)(c) and (1)(h).² Mahoney contends a court's determination whether to grant relief from a judgment under §§ 806.07(1)(c) or (1)(h) is discretionary, and Malek does not contest this assertion. Therefore, Malek concedes the standard of review. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments deemed conceded).

¶9 We will affirm a court's discretionary determinations if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). While this is a deferential standard of review, the record must demonstrate that

² While Mahoney's briefs to the circuit court also relied on WIS. STAT. §§ 806.07(1)(b) and (1)(g), his arguments on appeal focus on the circuit court's failure to address §§ 806.07(1)(c) and (1)(h).

discretion was, in fact, exercised. *Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987).

¶10 Under WIS. STAT. § 806.07(1)(c), a court may grant relief from a judgment due to “fraud, misrepresentation, or other misconduct of an adverse party.” Under § 806.07(1)(h), relief may be granted due to “any other reasons justifying relief from the operation of the judgment.” This has been interpreted to require “extraordinary circumstances” justifying relief. *See State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 549, 363 N.W.2d 419 (1985).

¶11 We conclude the court erroneously exercised its discretion because the record fails to demonstrate the court considered the merits of Mahoney’s WIS. STAT. § 806.07 motion.³ The court failed to explain why Mahoney was not entitled to relief because of a misrepresentation under § 806.07(1)(c) or extraordinary circumstances under § 806.07(1)(h). On remand, we direct the court to address the merits of Mahoney’s § 806.07 motion on the record.

By the Court.—Judgment reversed; order affirmed in part; reversed in part and cause remanded with directions.

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

³ The circuit court’s failure to address Mahoney’s WIS. STAT. § 806.07 motion appears to stem from Malek’s argument that, if the court found no excusable neglect, it need not address the § 806.07 motion. Mahoney’s § 806.07 motion for relief from the judgment was independent of his WIS. STAT. § 801.15(2)(a) motion to enlarge time to answer. While the absence of excusable neglect was fatal to Mahoney’s § 801.15(2)(a) motion, it had no bearing on the claims for relief under §§ 806.07(1)(c) and (1)(h).

