COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

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. 96-1484-FT

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

SAGLER MASONRY & CONCRETE,

Plaintiff-Respondent,

v.

JEFF NETZER,

Defendant-Appellant.

APPEAL from an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

VERGERONT, J.[1] Jeff Netzer appeals from the trial court order denying his motion to reopen a default judgment entered in favor of Sagler Masonry & Concrete. We conclude that the trial court did not erroneously

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. This appeal has been expedited. RULE 809.17, STATS.

exercise its discretion in entering the default judgment or in denying the motion to vacate the default judgment and we therefore affirm. [2]

Sagler filed a verified summons and complaint against Netzer in a small claims action averring that Sagler put in a new basement wall; that he tried to contact Netzer several times with no luck; that he put a lien on the property but it was not valid because Netzer's house is in his parents' name; that Sagler billed Netzer on November 8, 1994, and demanded $1,659.18. The summons and complaint advised Netzer that he must appear at the time and place stated on the form, which was January 19, 1996, at 9:00 a.m. at the La Crosse County Courthouse, Room 308. The summons and complaint also stated: "if you do not appear, judgment may be granted to the plaintiff. You may file an answer and counterclaim, but this does not relieve you of your duty to appear." Netzer appeared on the return date and the parties were unable to resolve their dispute before a mediator. A notice dated January 19, 1996, entitled "Notice of Hearing" was sent to Netzer's counsel. The notice scheduled a court trial for February 14, 1996, at 9:00 a.m. and also stated that: "failure to serve and file the answer will result in a default judgment. Answer due by January 31, 1996."

By agreement of the parties, a new trial date was set--March 22, 1996, at 1:50 p.m. The court later changed the time of the trial to 10:30 a.m. on March 22, 1996. Neither Netzer nor his counsel appeared at 10:30 on March 22,

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[2] In response to Netzer's statement that no transcript was necessary, Sagler filed and served a designation of transcript, designating transcripts of the court hearing granting default judgment and a hearing on the motion to vacate the default judgment. When Netzer failed to file the transcripts as requested, Sagler filed a motion with the trial court and the court ordered Netzer to furnish the transcript as requested within twenty days if a statement could not be agreed upon between the parties within ten days. This order is not part of the record but Sagler makes this assertion in his brief and Netzer did not file a reply brief. We may take assertions as true that are made in respondent's brief and not disputed in a reply brief. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). The circuit court approved transmittal of the record without the transcript from the two hearings. Netzer, proceeding pro se, has attached copies of the transcripts from the two hearings to his brief. We agree with Sagler that Netzer has failed to comply with the requirement that any decision appealed above be part of the record on appeal. Section 809.15(1)5, 6 and 7, STATS. Nevertheless, since Netzer has filed the transcripts and since Sagler has addressed the merits of the appeal, we choose to decide this appeal on the merits.

1996. Apparently neither defendant nor his counsel was advised that the trial was changed to an earlier time on March 22. Sagler did appear at 10:30 a.m. on March 22 and his attorney stated he was ready to proceed with the trial. Because an answer had not yet been filed, the court entered a default judgment based on the complaint. Netzer filed an answer shortly before 1:50 p.m. on March 22.

Netzer subsequently moved to reopen the default judgment on the ground that his counsel believed that the answer was timely filed[3] and that he had a meritorious defense to the cause of action and the amount of recovery being sought.

At the hearing on the motion, Netzer's counsel explained that he had relied on § 799.20(1), STATS., which provides that, "[o]n the return date of the summons or any adjourned date thereof the defendant may answer, move to dismiss under s. 802.06(2) or otherwise respond to the complaint." He understood that the proceeding on March 22, 1996, was the return date and that he had until 1:50 on that date to file an answer.

Netzer's counsel also explained at the hearing and in his affidavit accompanying the motion that he did not receive the notice of hearing setting the trial for February 14 and an answer date on January 31 until February 7 because that notice was first sent to his former office address, not his current one.[4]

The trial court denied the motion. The reasons for denial had nothing to do with the misunderstanding concerning whether the trial was set for 10:30 or 1:50 on March 22. The trial court stated that the default judgment had been granted because no answer was filed by January 31. Although the trial court apparently was under the impression that Netzer acknowledged in his affidavit that he received the notice dated January 19, 1996, we do not find

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[3] The answer denied that he owed Sagler "the money claimed in the--complaint" and "generally denie[s] and denied all other facts and inferences made by [Sagler] in the ... complaint and holds [Sagler] to his proof."

[4] It appears that Netzer's counsel was not present on the January 19, 1996 return date.

support for that finding in the record. Netzer's affidavits filed with the motion do not indicate he received the notice. In his comments to the court at the hearing on the motion to reopen, Netzer denied that he had received it. The name of Netzer's counsel is Randy Netzer and that may account for the court's mistake. As noted above, counsel stated that he received the January 19, 1996 notice from the court in the mail on February 7, 1996. The court went on to state that even if there were some delay in Netzer's attorney receiving the notice, a motion to extend the time limits for filing the answer should have been filed. The court also concluded that there had been no showing of injustice or legitimate defense. The court considered that Netzer's answer--alleging simply that Netzer did not owe the money or owe all the money Sagler was asking for--did not demonstrate a meritorious defense sufficient to relieve him from the default judgment.

Netzer first argues that the trial court erred in entering a default judgment because the answer was timely served. There is no merit to this contention. A personal appearance on the return date is required in order to avoid a default judgment unless a circuit court rule provides for answer by mail or telephone. Section 799.22(1), (2) and (4), STATS. Section 799.06(2), STATS., permits a court to require that a written answer be filed in a particular case. In this case, Netzer was advised that a personal appearance was required at the return date but an answer was not required by that date. However, the notice issued on the return date, after mediation failed, clearly stated that an answer had to be filed and served by January 31, 1996, or it would result in a default judgment. The return date was January 19, 1996. There was no adjournment of the return date. The January 19, 1996 notice does not refer to an adjourned return date but only to the court trial, set for February 14, 1996, and to the due date for filing the answer, January 31, 1996. Section 799.20(1), STATS., relied on by Netzer, does not authorize the filing of a written answer on the date of the court trial. Section 799.06(2) plainly permits the court to require a written answer after the return date and before the trial, as the court did here. Netzer was therefore in default when the court entered the default judgment on March 22. The court was authorized to do so under § 799.22(3).

Netzer argues that even if his counsel erred in interpreting § 799.20(1), STATS., and the answer was not timely filed, the default judgment should be set aside. The trial court may reopen a default judgment for good cause. Section 799.29(1), STATS. A decision to vacate a default judgment is within the sound discretion of the trial court. *See* ***Martin v. Griffin***, 117 Wis.2d

438, 442, 344 N.W.2d 206, 209 (Ct. App. 1984). If the trial court considered the facts of record and applied the correct law and reached a decision that a reasonable judge could reach, we will not reverse a trial court's denial of a motion to vacate a default judgment. *See* ***id.***

As we have noted above, the trial court appears to have been mistaken that Netzer received a notice of the answer date. However, his counsel did receive the notice on February 7, 1996, but a timely answer was not filed until March 22, 1996, and no extension was sought. Although the court did not use the words "good cause," it is evident from its decision that it decided there was not good cause for failing to file a motion for an extension and promptly answer once counsel received the notice. In ***Martin v. Griffin***, we held that as a matter of law, it is not excusable neglect to fail to file a timely answer even though there is a good faith view that an answer was not required. ***Id.*** at 442-44, 344 N.W.2d at 209-10. The trial court here could reasonably decide that trial counsel's misinterpretation of the statute and ignoring the plain language of the notice do not constitute good cause.

Because we conclude that the trial court correctly determined that there was no good cause for defaulting, we need not reach the issue of whether the trial court correctly determined that there was an insufficient showing of a meritorious defense. *See* ***id.*** at 444, 344 N.W.2d at 210.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.