

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2331

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JON A. HAAS,

PLAINTIFF-RESPONDENT,

V.

VANCE R. STARK,

DEFENDANT-APPELLANT,

**ASSOCIATED BANK, F/K/A FIRST FINANCIAL BANK FSB
AND WAUKESHA COUNTY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County:

KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Nettlesheim, Anderson and Lundsten, JJ.

¶1 PER CURIAM. Vance R. Stark appeals from a judgment granting Jon A. Haas a default judgment. Because the circuit court did not misuse its discretion by declining to extend the time for Stark to answer Haas's complaint and entering a default judgment, we affirm.

¶2 To reach his property, Haas traverses a gravel driveway located on Stark's property and a bridge over the Bark River. Although the driveway was supposed to be subject to an easement over Stark's property, the driveway's actual location falls outside of the easement's legal description. The parties, with the assistance of counsel, unsuccessfully attempted to negotiate a settlement of their disputes relating to Haas's use of the driveway and bridge.

¶3 On July 9, 1999, Haas filed a summons and complaint seeking a declaratory judgment that he owns the bridge and has adverse possession or, in the alternative, a prescriptive easement over the gravel driveway on Stark's property. Haas also sought damages for Stark's physical damage to the bridge.¹

¶4 Haas served Stark with the summons and complaint on August 10; Stark's answer was due on September 24. Because Stark did not file an answer, Haas moved for a default judgment on October 13. Haas filed various pleadings in support of his motion during November. On November 17, Stark's counsel filed a notice of retainer in the circuit court.

¶5 At the November 29 hearing on Haas's motion for default judgment, Stark appeared with counsel. Stark informed the court that he never told his counsel he had been served with a summons and complaint. Stark further

¹ The damage claim appears to have been abandoned.

contended that Haas's counsel never advised his counsel that he had commenced litigation. Haas's counsel countered that he had informed Stark's counsel that he intended to commence litigation and did not receive a response to his inquiry as to whether counsel would accept service for Stark. The court adjourned the proceedings to give Stark an opportunity to file a motion to extend the time to answer Haas's complaint. Stark filed an extension motion on December 7.

¶6 At the extension motion hearing, Stark reiterated that an extension was warranted because he did not inform his counsel that he had been served with process. Haas countered that the extension motion was filed over seventy days after the answer was due. Furthermore, Stark did not file an appearance in the case until over a month after Haas moved for default judgment. Haas noted that Stark had extensive experience with litigation, had been a defendant in six lawsuits in recent years, and could have taken steps to preserve his rights. Haas urged that Stark's failure to answer was not attributable to excusable neglect.

¶7 The court made the following findings. The Haas-Stark dispute had been ongoing for at least five years and the litigation "didn't necessarily come out of the blue." Stark wrongly assumed that his counsel had been served with process, he failed to contact his counsel regarding the pleadings served on him, and a substantial period of time passed between service of process and the extension motion. Stark is familiar with the legal system and he timely answered complaints in other cases brought against him. The court declined to find that Stark's failure to answer arose from excusable neglect, a prerequisite under WIS. STAT. § 801.15(2)(a) (1999-2000)² for extending the time to answer the complaint.

² All statutory references are to the 1999-2000 version unless otherwise noted.

¶8 After barring Stark from answering the complaint, the court entered a default judgment in favor of Haas. The court found sufficient proof of Haas's open, notorious and adverse use of the driveway for the requisite period of time and granted Haas adverse possession of the driveway. The court also granted Haas a prescriptive easement over other portions of Stark's property to the extent that such property is affected by Haas's use and maintenance of the driveway. The court granted Haas all ownership interests and maintenance rights in the bridge which is used solely by Haas to gain access to his property. Stark appeals.

¶9 Refusing to extend the time to answer a complaint and entering a default judgment are discretionary acts. *Rutan v. Miller*, 213 Wis. 2d 94, 101, 570 N.W.2d 54 (Ct. App. 1997). We will not disturb these discretionary decisions if the record shows that the court "logically interpreted the facts and applied the proper legal standard to them." *Lambert v. Hein*, 218 Wis. 2d 712, 721, 582 N.W.2d 84 (Ct. App. 1998).

¶10 Under WIS. STAT. § 801.15(2)(a), a party seeking to perform an act after the time for doing so has expired must demonstrate excusable neglect. Excusable neglect is conduct that "might have been the act of a reasonably prudent person under the same circumstances." *Rutan*, 213 Wis. 2d at 101 (citation omitted). "[T]he court must also look beyond the causes for neglect to the interests of justice," considering "the sometimes contradictory interests in affording litigants a day in court, and in ensuring prompt adjudication." *Id.* at 101-02 (citation omitted).

¶11 Stark does not contest the circuit court's findings regarding his conduct after service of the summons and complaint. The court found that a reasonably prudent person with experience as a defendant and knowledge of an

ongoing dispute would have responded to a summons and complaint in some fashion other than assuming that his counsel had also been served. The court also noted that a substantial period of time had passed since service of the default judgment motion and Stark's motion to extend the time to answer the complaint.

¶12 Although the circuit court did not explicitly address the interests of justice in declining to extend the time to answer the complaint, *id.*, we may search the record to support the court's discretionary decision, *Liddle v. Liddle*, 140 Wis. 2d 132, 150-51, 410 N.W.2d 196 (Ct. App. 1987). The record supports a determination that it was not in the interests of justice to extend the time for Stark to answer the complaint. Stark knew that the parties had a dispute and had experience as a defendant answering a complaint. Yet he did not forward the pleadings to his counsel. Stark's lack of diligence in responding to the pleadings was not excusable neglect and the interests of justice do not require that Stark be given an opportunity to answer the complaint.

¶13 In conclusion, the court examined the relevant facts surrounding Stark's failure to answer the complaint and properly denied his motion to extend the time to answer the complaint. In the absence of a timely answer, the court properly granted default judgment. *Martin v. Griffin*, 117 Wis. 2d 438, 441, 344 N.W.2d 206 (Ct. App. 1984).³

¶14 We turn to Stark's challenge to the circuit court's remedy on default judgment. Stark claims the court could not award adverse possession of property

³ We reject Stark's reliance in his reply brief upon the WIS. STAT. § 806.07 standards for relief from a judgment. The chronology of this case does not support Stark's analysis. The court denied Stark's motion to extend the time to answer the complaint and then entered a default judgment. Stark appealed; he never sought relief from the judgment in the circuit court under § 806.07.

governed by an easement. Haas sought adverse possession of a gravel driveway on Stark's property which Haas uses to reach his property. It is undisputed that the driveway falls outside of the recorded easement over Stark's property. Therefore, Haas's claim to the driveway properly sounded in adverse possession or prescriptive easement, not the law of recorded easements.

¶15 Stark also argues that the circuit court's remedy exceeded the relief requested by Haas. We disagree. Haas placed in dispute the use of the driveway and the bridge. Stark did not dispute these claims by filing an answer. We agree with the circuit court that Haas offered adequate proof to support the remedy awarded on default judgment.⁴

By the Court.—Judgment affirmed.

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

⁴ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

