

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2001

Cornelia G. Clark
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.

No. 01-1124-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NORTHERN VISIONS, INC.,

PLAINTIFF-RESPONDENT,

V.

**JAMES R. HISHMEH AND CATHY B. HISHMEH,
HUSBAND AND WIFE,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. James Hishmeh and his wife, Cathy Hishmeh, appeal a default judgment entered in favor of Northern Visions, Inc., and an order

denying their motion to vacate the default judgment.¹ They argue that the circuit court failed to obtain personal jurisdiction over James. They further argue that the circuit court erroneously exercised its discretion when it denied their motion to vacate the default judgment. Because the record supports the trial court's rulings, we affirm the judgment and order.

BACKGROUND

¶2 On November 13, 2000, Northern Visions, Inc., a residential construction general contractor, filed a collection action against the Hishmehs based upon breach of express or implied contract. The complaint alleged that the Hishmehs owed an unpaid balance of \$79,910.94 in connection with labor and materials for the construction of their home.

¶3 On November 17, 2000, a Waukesha County deputy sheriff personally served an authenticated copy of the summons and complaint on Cathy Hishmeh at her home in Brookfield, Wisconsin. Her husband, James, however, was not at home. The officer attested that he served James:

By leaving a true copy thereof at his usual place of abode, in the presence of Cathy B. Hishmeh his wife a competent person ... who resides at this address and who was informed of the contents thereof, that the said James [R.] Hishmeh could not be found by me after diligent search and inquiry, as follows: He is gone for rest of month hunting.

¶4 After the forty-five-day statutory period for the Hishmehs to file an answer lapsed on January 2, 2001, Northern Visions filed an affidavit of default.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 1999-2000 version unless otherwise noted.

On January 3, the circuit court granted Northern Visions a default judgment against the Hishmehs for \$82,402.78.

¶5 On February 14, 2001, the Hishmehs filed a motion to vacate the default judgment. Cathy's affidavit stated she advised the officer that her husband had gone deer hunting and may not be home for the balance of the month of November, and that the officer did not inquire further. She stated that she did not read the papers, but noticed that they concerned Northern Visions, the contractor for their northern Wisconsin home. She set the papers aside on a desk in the kitchen for her husband to read when he returned. When James returned home after Thanksgiving, she was unable to locate the papers. She suspected they were inadvertently thrown away. James erroneously assumed they merely concerned a construction lien.

¶6 At the end of January, James learned from his attorney that the papers were a summons and complaint and that he was in default. The Hishmehs submitted an untimely answer that disputed the contentions of the complaint and raised several affirmative defenses, including a breach of contract and misrepresentation. They objected to personal jurisdiction over James and sought relief from the judgment on the grounds of excusable neglect.

¶7 The trial court rejected James's objection to personal jurisdiction. It found that Cathy advised the process server that her husband was gone hunting and would be gone for the rest of the month. The court found that the officer exercised reasonable diligence, stating that under the circumstances presented, substituted service was reasonable.

¶8 It also denied relief from the judgment on grounds of excusable neglect, finding:

[W]e are dealing with neglect, we are dealing with carelessness, and we are dealing with inattentiveness. However, I do not find that neglect, carelessness or [inattentiveness] is excusable. That is to say, I don't find the actions of the defendants to be those of a reasonably prudent person under those circumstances.

¶9 The court also found:

[W]hen you have a reasonable person who knows that the building contractor claims 80 thousand dollars, they were advised that a lawsuit would be filed, they expected a lawsuit to be filed, were served with papers, and then did nothing with those papers, this court just cannot find that to be excusable neglect. ... I don't think a reasonable person under those circumstances would have just left the matter go knowing that information and not doing anything about it.

The Hishmehs' appeal followed.

DISCUSSION

1. Personal jurisdiction

¶10 The Hishmehs argue that Northern Visions failed to exercise reasonable diligence in attempting to obtain personal service on James. They complain that a single attempt, as a matter of law, cannot constitute reasonable service. We disagree.

¶11 WISCONSIN STAT. § 801.11 governs the service of process. It provides in relevant part:

A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:

(1) NATURAL PERSON. Except as provided in sub. (2) upon a natural person:

(a) By personally serving the summons upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode:

1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;

1m. In the presence of a competent adult, currently residing in the abode of the defendant, who shall be informed of the contents of the summons

¶12 The plain meaning of WIS. STAT. § 801.11(1) requires service under para. (a) to be attempted with “reasonable diligence” before an alternative method of service is employed. Reasonable diligence, or due diligence, is treated as a finding of fact to be affirmed unless clearly erroneous. *Welty v. Heggy*, 124 Wis.2d 318, 324, 369 N.W.2d 763 (Ct. App. 1985). Where, as here, the underlying facts are undisputed, however, the trial court's determination is considered a conclusion of law to be addressed independently by the reviewing court. *Id.*

¶13 “Although case law defining reasonable diligence is sparse, sec. 801.11, Stats., does require pursuit of ‘leads or information reasonably calculated to make personal service possible.’” *Id.* at 325 (citation omitted). The meaning of reasonable diligence has been described as follows:

The diligence to be pursued and shown by the affidavit is that which is reasonable under the circumstances and not all possible diligence which may be conceived. Nor is it that diligence which stops just short of the place where if it were continued might reasonably be expected to uncover an address ... of the person on whom service is sought.

Haselow v. Gauthier, 212 Wis. 2d 580, 589, 569 N.W.2d 97 (Ct. App. 1997) (citation omitted). There is no bright line rule. Whether reasonable diligence was exercised depends on the facts of each case. *Id.*

¶14 Here, the trial court correctly concluded that the officer's diligence was reasonable under the circumstances. The officer went to James's home and spoke to his wife. The officer served James's wife, a co-defendant, and explained the contents of the papers to her. He inquired as to James's whereabouts and was informed that James was hunting for a couple of weeks or the rest of the month.

¶15 The officer was not required to exercise "all possible" diligence. *Id.* Under the circumstances here, reasonable diligence did not require the officer to track James down on his hunting trip. Also, because his wife was vague about the specific date James would be home, it would have exceeded the demands of reasonable diligence to expect the officer to return on a hunch or to guess as to the date James would arrive. We conclude as a matter of law the officer was reasonably diligent in his attempt to personally serve James.

¶16 The cases upon which the Hishmehs rely can be distinguished on their facts. In *Haselow*, the process server attempted to serve the defendant at his father's residence, when the server had been advised that the defendant was living and working in Hawaii. *Id.* at 585. In *Beneficial Fin. Co. v. Lee*, 37 Wis. 2d 263, 155 N.W.2d 153 (1967), and *Heaston v. Austin*, 47 Wis. 2d 67, 176 N.W.2d 309 (1970), the process server failed to make reasonable inquiry. In these cases, the process server exercised considerably less diligence than the officer here.

2. Motion to Vacate

¶17 Next, the Hishmehs argue that the trial court erroneously exercised its discretion when it refused to re-open the default judgment on the grounds of excusable neglect. We disagree. Under WIS. STAT. § 806.07, the trial court may relieve a party from judgment on various specified grounds, including excusable neglect.² However, not every act of neglect is sufficient to entitle a moving party to relief. Post-judgment courts may reopen judgments for mistakes that are justifiable and excusable. *Hansher v. Kaishian*, 79 Wis. 2d 374, 390-91, 255 N.W.2d 564 (1977). The primary question is whether the conduct of the moving party was excusable under the circumstances. *Id.* “Excusable neglect is that neglect which might have been the act of a reasonably prudent person under the circumstances.” *Id.*

¶18 Under this standard, we consider whether James’s neglect is of a kind that a reasonably prudent person might have exhibited under the circumstances. Whether to grant relief under WIS. STAT. § 806.07 is committed to the trial court’s discretion, and we will not reverse unless the trial court erroneously exercised its discretion. *State v. Schultz*, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). A court erroneously exercises its discretion if it does not properly apply the law. *Id.* at 502-03.

¶19 The court found that the Hishmehs “were aware that a check they had written to [Northern Visions] covering amounts owed exceeding \$70,000 was

² WISCONSIN STAT. § 806.07 provides relief from judgment or order: “On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect”

dishonored and came back nonsufficient funds several months prior to the time this action was filed.” There is no dispute that in October the Hishmehs received a letter from Northern Visions’ attorney informing that a lawsuit was going to be filed. It is undisputed that the Hishmehs were expecting a lawsuit.

¶20 The process server attested that he advised Cathy of the contents of the papers served. It is undisputed that she placed them on a desk, but later they were apparently lost or thrown out. Finally, the trial court found, and James does not dispute, that when James returned from his hunting trip, Cathy informed him that papers had been delivered with Northern Visions’ name on them. Nonetheless, James failed to make any inquiry until more than two months later when he was notified by his attorney of the default judgment.

¶21 We are satisfied from these facts that the trial court was entitled to find that the Hishmehs’ failure to follow up is not the act of a reasonably prudent person under the circumstances. Accordingly, the trial court properly exercised its discretion in refusing to vacate the default judgment.

¶22 The Hishmehs argue that the trial court failed to properly apply the law by failing to recognize that this case parallels *Baird Contracting, Inc. v. Mid Wisconsin Bank*, 189 Wis. 2d 321, 525 N.W.2d 276 (Ct. App. 1994). We disagree. 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 325-26. 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.* We stated that a case-by-case analysis would be used to determine whether the bank's conduct constituted excusable neglect. *Id.* at 326. 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.

¶23 Here, in contrast, the trial court found that James was expecting a lawsuit. Cathy, a co-defendant in the case, was personally served and advised of the nature of the documents. She advised James of that fact. She stated that her husband handled all business and legal matters, permitting an inference that he had experience in that regard. The fact that Cathy misplaced the papers does not excuse the Hishmehs of doing nothing for over two months.

¶24 The Hishmehs complain, nonetheless, that by virtue of the default judgment, Northern Visions will receive a windfall. This argument is unaccompanied by record citation. WIS. STAT. § 809.19(1)(e). There is no way this court can evaluate an unsupported argument and, therefore, we decline to address it further. *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

By the Court.—Judgment and order affirmed.

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

