

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2003

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.

Appeal No. 02-1999

Cir. Ct. No. 02-CV-48

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ACCU-TECH PLASTICS, INC.,

PLAINTIFF-RESPONDENT,

V.

**MIDWEST MICROFORM INDUSTRIES, INC., D/B/A
ACCU-PAC,**

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

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

¶1 PETERSON, J. Midwest Microform Industries, Inc., (MMI) appeals an order denying its motion to vacate a default judgment. It argues the trial court erroneously exercised its discretion when it entered judgment without allowing MMI to be heard on damages. We disagree and affirm.

BACKGROUND

¶2 In 2001, MMI ordered polystyrene products from Accu-Tech for use in its manufacturing process. When Accu-Tech did not receive payment, it commenced this action, alleging that MMI owed \$23,148.45 plus interest for the purchase.

¶3 Accu-Tech granted MMI an extension of time to answer the complaint. On April 4, 2002, the court issued a Notice of Scheduling Conference that set a conference for May 1, 2002, and provided:

Defendant shall file a legally sufficient answer or other responsive pleading to plaintiff's complaint on or before April 30, 2002. Failure of defendant to file a legally sufficient answer or other responsive pleading by April 30, 2002, shall constitute a default.

MMI did not file an answer or other responsive pleading.

¶4 MMI's attorney arranged to attend the conference by telephone. However, on the day of the conference, he called late and was unable to reach the conference. The court ordered a default judgment in the amount demanded in the complaint.

¶5 MMI moved to vacate the default judgment and for an extension of time to answer. The court denied the motion, finding that there was no excusable neglect, nor were there any extraordinary circumstances justifying vacating the default or extending MMI's time to answer.

¶6 In its brief, MMI also requested a hearing on damages. The court concluded that, although a hearing on damages would be required in a tort claim, this was a contract claim for liquidated damages for which a hearing was not

required. MMI appeals on the sole issue whether it is entitled to be heard on damages.

STANDARD OF REVIEW

¶7 MMI recognizes that whether to require proof of damages in this case is within the court's discretion. "A court properly exercises its discretion if it examines relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." *Kerans v. Manion Outdoors Co.*, 167 Wis. 2d 122, 130, 482 N.W.2d 110 (Ct. App. 1992).

DISCUSSION

¶8 Proof of damages after default judgment varies depending on whether a claim is based in tort or in contract. In tort cases, additional proof is necessary beyond what is alleged in the complaint to determine the amount of damages. *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 387, 577 N.W.2d 23 (1998). The trial court has discretion as to whether this proof will be in the form of a hearing or by affidavit. *Id.* at 387-88.

¶9 In contract cases, however, whether additional proof is necessary depends on whether the claim is liquidated or unliquidated. WISCONSIN STAT. § 806.02(4) provides:

In an action on express contract for recovery of a liquidated amount of money only, the plaintiff may file with the clerk proof of personal service of the summons on one or more of the defendants and an affidavit that the defendant is in default for failure to join issue. The clerk shall render and enter judgment against the defendants who are in default for the amount demanded in the complaint.

Thus, in the event of liquidated damages, the clerk alone may render a default judgment. The judge does not even have to be involved. Proof of damages is not required.

¶10 Here, the judge, rather than the clerk, granted the default judgment. In all other respects, however, the statute was followed. The complaint alleged a contract for the recovery of a liquidated amount of money. The court rendered judgment in that amount.

¶11 We discussed this issue in *Midwest Developers v. Goma*, 121 Wis. 2d 632, 360 N.W.2d 554 (Ct. App. 1984), when we determined that no hearing is required in non-tort cases, a defendant has notice of the amount claimed as damages and does not contest that amount. *Id.* at 651-53. No proof is necessary in order for the court to determine the amount of damages. *Id.* When determining damages for an unliquidated claim, however, a circuit court requires additional proof beyond the complaint. *Apex*, 217 Wis. 2d at 387.

¶12 Relying on *Smith v. Golde*, 224 Wis. 2d 518, 530-32, 592 N.W.2d 287 (Ct. App. 1999), MMI asserts that a defendant has a fundamental right to contest damages. In that case, we held that the defaulted defendant was entitled to a hearing on damages because “having a voice in a controversy is such a substantial and fundamental right” *Id.* at 530-31. However, that holding is not applicable here because *Golde* was a tort case involving battery, intentional infliction of emotional distress, and conversion. It was consistent with the *Apex* rule that tort cases require proof in order to determine the amount of damages.

¶13 WISCONSIN STAT. § 806.02(4) compels a different result in contract cases. As we noted in *Goma*, when a defendant is aware of the damages claimed and does not contest them there need not be a hearing.

¶14 MMI attempts to avoid WIS. STAT. § 806.02(4) by claiming that the damages here are unliquidated. Despite the allegation in the complaint, MMI argues the damages became unliquidated once it moved to reopen, asserted a defense and contested damages.

¶15 MMI is correct that proof of damages is required when contract damages are unliquidated. However, the time for determining whether the damages are liquidated or unliquidated is when the default judgment is granted. MMI's argument would turn default judgment procedure on its head. A court would be required to do one of two things: (1) at the time the judgment is granted, require proof that damages are liquidated, or (2) vacate a damage award every time a defaulting defendant later asserts damages are unliquidated. That is not the law. The first alternative is contrary to WIS. STAT. § 806.02(4). The second is contrary to WIS. STAT. § 806.07, which deals with relief from judgments. Here, MMI tried to reopen the judgment alleging grounds in § 806.07 and the court found that those grounds did not exist. On appeal, MMI does not contest that finding.

¶16 Finally, MMI argues there are no Wisconsin cases holding that a defaulting defendant who contests damages is not entitled to do so simply because it did not timely answer. It cites federal cases and the Federal Rules of Civil Procedure for the proposition that statements related to the amount of damages in a complaint are not taken as true. However, WIS. STAT. § 806.02(4) controls so there is no need to resort to federal law.

¶17 MMI failed to file a timely answer or other responsive pleading. That was the time to contest damages. Instead, MMI did not contest damages until it attempted to have the default judgment vacated. That was too late. At that

point, the circuit court was not required to consider proof of damages. When it declined to do so, the court properly exercised its discretion.

By the Court.—Judgment and order affirmed.

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