

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2005

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. 2005AP996-FT

Cir. Ct. No. 2004CV1061

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DARLYNE ESSER,

PLAINTIFF-APPELLANT,

V.

HUDEC LAW OFFICES, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Darlyne Esser appeals from the order granting the motion to dismiss her complaint against Hudec Law Offices, S.C. She argues on appeal that the circuit court erred when it entered an order dismissing her complaint because the court should have treated it as a motion for summary

judgment, and that the court erred when it determined she had not stated a claim for equitable relief from judgment. Because we conclude that the court did not err, we affirm the order.

¶2 The underlying action involved Esser's attempt to obtain relief from a judgment under WIS. STAT. § 806.07(2) (2003-04).¹ In 1993-95, Hudec represented Esser in a lawsuit. The suit was unsuccessful. In 1998, Hudec sued Esser for the attorney's fees. Esser filed a counterclaim, apparently for malpractice. Esser gave up the counterclaim and she stipulated to arbitration. Eventually this action went to arbitration. During the arbitration, Esser again attempted to raise a counterclaim and withdraw her stipulation. An award to Hudec was confirmed by the circuit court. This is the judgment from which Esser sought relief in the circuit court.

¶3 Esser first argues that the circuit court improperly converted the motion to dismiss to summary judgment or, in the alternative, improperly relied on evidence outside of the pleadings when granting the motion to dismiss. First, we reject the argument that the circuit court converted the action to one for summary judgment either explicitly or implicitly. Esser argues that the court said it was construing the motion to be one for summary judgment. At the motion hearing, the court at one point said, "I guess it is a motion for summary judgment because I'm referring more than just to the pleadings." Later, however, the court concluded by saying that it granted the motion to dismiss. The court subsequently

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

entered an order dismissing the complaint. We conclude that the court did not convert the motion to a summary judgment motion.

¶4 Further, we conclude that the circuit court properly dismissed the complaint. Esser argues that the circuit court considered evidence other than the pleadings when granting the motion, and consequently that action converted the motion to one for summary judgment. We disagree.

¶5 In this action, Esser was challenging a previous judgment. Hudec moved to dismiss the complaint on the grounds of statute of limitations, failure to state a claim, claim preclusion, collateral estoppel, and equitable principles. In dismissing the complaint, the circuit court looked to the historical record of the case. This was both appropriate and necessary for determining whether a cause of action was precluded on these grounds.

¶6 The next issue is whether the circuit court erred when it concluded that there was no basis for an action for equitable relief from judgment, which Esser argued constituted a fraud upon the court. Esser argues that she stated a claim for relief under WIS. STAT. § 806.07(2). “Equitable relief against a judgment, although not regarded with favor by the courts, may nevertheless be had where sufficient grounds appear.” *Walker v. Tobin*, 209 Wis. 2d 72, 77, 568 N.W.2d 303 (Ct. App. 1997). Under § 806.07(2), a party may seek relief from judgment under an independent action for equitable relief. *Walker*, 209 Wis. 2d at 78. “A bill attacking a judgment is not regarded with favor by the courts and will lie only in exceptional cases. Such relief may be had, not as of right, but in the exercise of sound legal discretion, and each case must stand on its own peculiar merits.” *Id.* The elements of an independent action are:

(1) a judgment which ought not, in equity and good conscience, to be enforced;

(2) a good defense to the alleged cause of action on which the judgment is founded;

(3) fraud, accident, or mistake which prevented the [plaintiff] in the judgment from obtaining the benefit of his [claim];

(4) the absence of fault or negligence on the part of [plaintiff]; and

(5) the absence of any remedy at law.

Id. at 79 (alterations in original). We review whether the trial court misused its discretion when it denied relief under that statute. *Id.* at 76.

¶7 Esser argued before the circuit court that she was entitled to relief from judgment because her counterclaim in the underlying action was never heard by any tribunal. The circuit court reviewed the historical record and found that Esser gave up the counterclaim when she agreed to the stipulation. The circuit court concluded that the current action was, in essence, an attempt by Esser to reopen the agreement to which she had voluntarily stipulated. We agree with the circuit court that she did not establish that she was entitled to equitable relief, and conclude that the circuit court did not erroneously exercise its discretion when it denied relief. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

