**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 7, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2006AP591** **Cir. Ct. No. 2005SC1126**

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

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**BARBER ENTERPRISES,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN C. WEICHMAN, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed and cause remanded*.

¶1 NETTESHEIM, J.[1] John C. Weichman, Jr., appeals pro se from two postjudgment orders entered in favor of Barber Enterprises (Barber) in a small claims eviction action. We affirm the orders and also hold that Weichman's appeal is frivolous. We remand to the trial court for a determination of Barber's costs and fees, including reasonable attorney fees, and for a determination of whether Weichman should be barred from prosecuting any further actions against Barber until such sanctions are paid.

¶2 We first summarize the history of this case. Barber leased a commercial premise to Weichman. According to Barber's amended small claims complaint, Weichman failed to pay the required rent. As a result, Barber commenced this action seeking eviction and the unpaid rent. Weichman did not appear in the action and a default judgment was docketed on June 30, 2005. On July 21, 2005, Weichman, represented by counsel, brought a motion to "remove judgment and reopen." The trial court denied the motion on November 17, 2005.

¶3 On December 19, 2005, Weichman filed a pro se motion for reconsideration, contending that after the default judgment, the parties had entered into a stipulation providing that the judgment would be vacated if Weichman made certain payments on a timely basis. Weichman argued that the trial court had misconstrued the stipulation when denying Weichman's earlier motion to reopen the judgment. The trial court denied this motion on January 9, 2006.

¶4 On January 13, 2006, Weichman filed multiple pro se motions asking for the following relief: (1)"to charge plaintiff with perjury"; (2) for a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

change of venue of this matter and "all pending matters," contending that he "has been unable to receive a fair and impartial hearing on any matters held within the confines of Fond du Lac county"; (3) to disqualify Judge Steven W. Weinke from further presiding in this matter because the judge "has demonstrated on numerous separate occasions his inability to treat John C. Weichman, Jr. in an impartial and unbiased manner"; and (4) for a "trial de novo." The trial court denied these motions on January 17, 2006.

¶5 Weichman next filed a pro se motion to set aside the judgment and for a new trial. In support, Weichman sought relief pursuant to a variety of statutes that we will later address. The trial court denied this motion on January 30, 2006.

¶6 Next, we address the scope of this appeal. Weichman has filed two notices of appeal in this case. The first notice, filed February 1, 2006, appealed from the original default judgment entered in favor of Barber on June 30, 2005, and from all of the subsequent trial court orders. Weichman's second notice, filed March 14, 2006, referenced only the last order of January 30, 2006.

¶7 Suspecting that we might not have jurisdiction over the original judgment and some of the ensuing orders, we directed the parties to submit memoranda on the question of which orders were properly before us. After reviewing those materials, we issued an order on October 9, 2006, holding that our review was limited to the January 17 and January 30, 2006 orders, which denied Weichman's motions seeking reconsideration of the November 17, 2005 order rejecting Weichman's motion to reopen the default judgment. We also cautioned Weichman that our review "is limited to any issues that could not have been

reviewed in an appeal from the November 17, 2005 order. *See* ***Silverton Enters. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988)."[2]

¶8 With this background in place, we turn to Weichman's appellate arguments. We first hold on a threshold basis that all of Weichman's issues are barred under our October 9, 2006 order. All of Weichman's arguments could have been raised in his original motion to reopen the judgment which resulted in the November 17, 2005 order denying his motion. We do not know if Weichman did so since he has not provided us a transcript of that proceeding. But we know this much—Weichman never took an appeal from the November 17 order denying the motion to reopen. And we warned Weichman in our order that our review in this case would be limited to any issues that could not have been reviewed in an appeal from the November 17 order. Consequently, under our order defining our jurisdiction in this appeal, Weichman is barred from raising his current arguments as to why the default judgment should be reopened.

¶9 That said, we nonetheless address each of Weichman's arguments on the merits in light of Barber's contention that Weichman's appeal is frivolous.

¶10 Weichman first contends that he is entitled to a new trial on the basis of newly discovered evidence pursuant to WIS. STAT. § 799.28(2). Into this discussion, Weichman weaves allegations of fraudulent conduct by Barber as well as a pitch for a new trial in the interests of justice.[3] However, other than making

[2] Our order also struck Weichman's original brief because it raised issues outside the scope of this appeal as defined by our order. We directed Weichman to file a new brief. He has done so, but as this opinion will demonstrate, all of his issues are beyond our jurisdiction as set out in the order.

[3] In support, Weichman cites to a number of Massachusetts appellate opinions.

conclusory statements that Barber's conduct was fraudulent, Weichman never links this argument to any specific facts. Although we were not obliged to do so, we looked to Weichman's statement of facts to see if anything therein supports his claim of fraudulent conduct by Barber or his request for a new trial in the interests of justice.[4] We found nothing. We summarily reject Weichman's argument that he is entitled to a new trial on the various grounds he asserts in this portion of his argument.

¶11 Next, Weichman argues that Barber's pleadings are deficient because they did not recite the notice provisions of WIS. STAT. § 704.21. This argument is a nonstarter. This statute is not a pleading statute, nor does it require that a copy of the notice be part of the pleadings. Instead, the statute prescribes how notice of eviction is given by a landlord to a tenant.

¶12 Next, Weichman contends that Barber's pleadings are defective under WIS. STAT. § 799.41, which requires, inter alia, that an eviction complaint identify the parties and the subject property. This argument is patently incorrect. Barber's amended complaint clearly complied with this statute.

¶13 Next, Weichman argues that Barber's complaint improperly joined a claim for eviction with a claim for pecuniary damages in violation of WIS. STAT. § 799.40. But this statute expressly authorizes joinder of claims for eviction and

[4] Weichman's recital of the facts registers the following complaints: (1) Barber's initial complaint failed to list the correct address of the leased premises, (2) Weichman did not receive notice of any default, (3) Barber improperly joined claims for eviction and damages in the same action, (4) the parties had agreed that Barber could lease the premises to a third party, (5) no writ of restitution had ever issued, (6) Weichman did not receive adequate notice that the November 17, 2005 hearing would address Weichman's motion to reopen the judgment, and (7) Barber had incorrectly stated to the trial court that Weichman was in default under the parties' stipulation.

"any other claim against the defendant arising out of the defendant's possession or occupancy of the premises." Sec. 799.40(2).

¶14 On a related theme, Weichman contends that Barber's complaint was improper because it sought back rent in excess of the small claims damage limit of $5000. *See* WIS. STAT. § 799.01(1)(d). But § 799.01(1)(a) provides that small claims procedure governs an eviction action "*regardless of the amount of rent claimed.*" (Emphasis added.)

¶15 Next, Weichman argues that Barber was not entitled to rent under WIS. STAT. § 704.29 because he was current in his payments. However, this is a conclusory argument unsupported by any evidentiary underpinning. Moreover, the argument is inadequately briefed, and we do not address it further. *See* ***Alswager v. Roundy's Inc***., 2005 WI App 3, ¶15, 278 Wis. 2d 598, 692 N.W.2d 333.

¶16 Next, Weichman complains that the trial court did not issue a writ of restitution pursuant to WIS. STAT. § 799.44.[5] But here again, the issue is inadequately briefed. *See* ***Alswager***, 278 Wis. 2d 598, ¶15. Moreover, Weichman fails to demonstrate any prejudice. He makes no claim that he was forcibly removed from the premises under circumstances calling for a writ of restitution. For all we know, Weichman abandoned the premises and a writ of restitution was not necessary.

[5] In conjunction with this argument, Weichman once again contends that the judgment improperly granted relief of both eviction and money damages, an argument we have already rejected.

¶17 Next, Weichman argues that Barber's complaint is "erroneous and untriable" under WIS. STAT. § 802.05(2)(c)[6] because "there are no factual contentions." We summarily reject this argument. Barber's complaint clearly states a factual basis for the claims for relief.

¶18 Finally, Weichman argues for relief under WIS. STAT. § 806.07(a), (b), (c), (d), (g) and (h). But his arguments in support are nothing more than a rehash of the arguments we have already rejected.

¶19 Barber asks that we declare Weichman's appeal frivolous. As we have demonstrated, all of Weichman's arguments are nonstarters. In most instances, Weichman's arguments are directly refuted by the very language of the statutes he cites in support. In other instances, the arguments are patently without merit and/or are inadequately briefed. As such, none of Weichman's arguments have any reasonable basis in law or equity; nor can they be supported by a good faith argument for an extension, modification or reversal of existing law. *See* WIS. STAT. § 809.25(3)(c)2. We declare Weichman's appeal frivolous. We remand for the trial court to determine Barber's costs, fees and reasonable attorney fees. As a further sanction, Barber also asks that we bar Weichman from pursuing any future claims against it until such sanctions are paid. *See* ***Minniecheske v. Griesbach***,

[6] WISCONSIN STAT. § 802.05 was repealed and recreated, effective July 1, 2005. S. Ct. Order No. 03-06, 2005 WI 38, 278 Wis. 2d xiii, xiv (eff. Mar. 31, 2005).

161 Wis. 2d 743, 468 N.W.2d 760 (Ct. App. 1991). We leave that determination for the trial court on remand.[7]

*By the Court.*—Orders affirmed and cause remanded.

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

[7] In support of its claim that Weichman's appeal is frivolous, Barber has supplied us with a cassette recording and transcriptions of two telephone calls to Barber's attorney in which Weichman purportedly threatens to sue Barber, his lawyer, and two Fond du Lac county circuit judges in federal court. We cannot consider this material because it is not part of the trial court record in this case. However, this material may be relevant to the proceedings on remand.