COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2270 **Cir. Ct. No. 2004CV9728**

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

DESMOND JONES,

PLAINTIFF-APPELLANT,

V.

ROGER CARLTON, BRENDA CARLTON, WAYNE HUEHNS, AND JANET HUEHNS, D/B/A COURTYARD APARTMENTS, LLP, EAGLE MOVERS, INC., GENERAL CASUALTY COMPANY OF WISCONSIN, AEGIS CORPORATION, MILWAUKEE COUNTY SHERIFF, DEPUTY BRIAN ANDERSON AND DEPUTY JON NILSEN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD and JOHN J. DiMOTTO, Judges.[1] *Affirmed in part, reversed in part, and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Desmond Jones appeals the circuit court's order granting summary judgment to Courtyard Apartments, LLP, and dismissing his wrongful-eviction claims against: Roger and Brenda Carlton and Wayne and Janet Huehns, doing business as Courtyard Apartments; Eagle Movers, Inc., and its insurer, General Casualty Company of Wisconsin; and the Milwaukee County Sheriff, its insurer, the Aegis Corporation, and Deputies Brian Anderson and Jon Nilsen.

¶2 Jones claims that the circuit court erred when it granted Courtyard Apartments's motion for summary judgment because: (1) the writ of restitution Courtyard Apartments used to evict him was facially invalid, and (2) Courtyard Apartments did not have the legal capacity to seek his eviction. We affirm on these issues.

¶3 Jones also claims that the circuit court erred when it granted Courtyard Apartments's motion for summary judgment because: (1) Deputies Anderson and Nilsen knew or should have known that the writ was executed untimely, and (2) an issue of fact exists whether Courtyard Apartments had notice of a hearing at which Jones sought to reopen a judgment for restitution. We agree, reverse on these issues, and remand for an evidentiary hearing.

[1] The Honorable M. Joseph Donald granted Courtyard Apartments, LLP's motions for a protective order and summary judgment. The Honorable John J. DiMotto signed the final order.

¶4 Finally, Jones contends that the circuit court erroneously exercised its discretion when it granted Courtyard Apartments's motion for a protective order in connection with Jones's second set of interrogatories and requests for admission. We affirm on this issue.

I.

¶5 Jones leased an apartment at the Courtyard Apartments building in Milwaukee. In September of 2003, Courtyard Apartments filed a small-claims action to evict Jones. The parties settled the eviction action, and on September 26, 2003, a court commissioner dismissed the eviction action on the parties' stipulation:

> Case dismissed upon defendant['s] agreement to pay rent in full (550) by the 5th of each month beginning 10/5/03 thru 3/5/03 [*sic* – should be 04]. Defendant also agrees to remove all LP gas from his unit within 24 hrs of receiving a basement key. Failure to comply with foregoing entitles plaintiff to an immediate writ of restitution without notice.

See WIS. STAT. § 799.24(3) (stipulated dismissal).

¶6 On January 27, 2004, Courtyard Apartments, as permitted by the stipulation, sought an immediate writ of restitution without notice. A court commissioner vacated the September 26, 2003, stipulation, entered a judgment granting Courtyard Apartments "restitution of premises," and did not stay issuance of the writ. The writ of restitution was issued and delivered to the Milwaukee County Sheriff's Office on February 9, 2004.

¶7 On February 11, 2004, Jones sought to reopen the January 27, 2004, judgment, claiming that he had followed the terms of the September 26, 2003, stipulation. On February 12, 2004, the circuit court considered Jones's application

to reopen the January 27 judgment, and the judgment roll for February 12 records the following: "[Courtyard Apartments] NOT in court. [Jones] in court pro se. Writ of restitution issued and stayed to 2-23-04. Application for motion to reopen reviewed. Court finds excusable neglect and that [Jones] asserts a legal defense. [Jones's a]pplication for hearing on motion to reopen granted." (Emphasis in original.) The hearing on Jones's motion was set for February 23, 2004. Courtyard Apartments did not appear on February 23, and the circuit court granted Jones's motion to reopen, and reinstated the September 26, 2003, stipulation.

¶8 On February 25, 2004, Courtyard Apartments, acting on the February 9, 2004, writ of restitution, had Jones evicted. In his second amended complaint, Jones sued, as material, Courtyard Apartments and all of its general partners, Roger Carlton, the Huehns, Eagle Movers, and its insurer, General Casualty, for wrongful eviction. Jones also sued the Milwaukee County Sheriff, its insurer, the Aegis Corporation, and Deputies Anderson and Nilsen for "negligently execut[ing] an invalid writ of restitution … that had been in possession of defendant, Sheriff, in excess of 10 days." *See* WIS. STAT. § 799.45(5)(a) ("Within 10 days of the receipt of the writ, the sheriff shall execute the writ.").

¶9 The parties filed cross-motions for summary judgment. The Milwaukee County Sheriff, the Aegis Corporation, and the deputies claimed that the Sheriff and Deputies Anderson and Nilsen were entitled to absolute immunity. They also pointed to Deputy Nilsen's deposition testimony that he called the circuit court's bailiff who told him, erroneously, that the stay was until February 23 and that he could "continue with the move." The Sheriff and the deputies also argued that the ten-day execution-requirement in WIS. STAT. § 799.45(5)(a) was tolled by the stay of the writ.

¶10 Jones contended, as relevant, that there was no dispute that the writ was invalid and thus the deputies were not entitled to immunity.

¶11 The circuit court denied both motions in a written decision, concluding that a question of fact existed whether the deputies negligently performed a ministerial duty:

> Whether to execute a Writ of Restitution does not require the exercise of discretion on the part of the Sheriff. The Legislature has clearly laid out what is required of the Sheriff in Chapter 799. Deputies Anderson and Nilson [*sic*] were given a Writ on February 9, 2004, and did not execute it until February 25, 2004. According to [WIS. STAT.] § 799.45(5), the Sheriff has ten (10) days after receipt of the writ in which to execute. Deputies Anderson and Nilson [*sic*] did not have the authority to decide that the Writ could be executed after the ten-days had elapsed.
>
> However, the Court recognizes that the Deputies did not look at the Writ and simply decide to execute and ignore the rule of [WIS. STAT.] § 799.45(5). They phoned the Small Claims Bailiff to check on the status of the Writ. They were incorrectly informed that the Writ should be executed.

¶12 Jones also sought partial summary judgment against Courtyard Apartments, arguing, as material, that the writ of restitution was invalid because the Courtyard Apartments limited liability partnership was terminated on September 30, 2001. *See* WIS. STAT. § 799.40(1) (eviction must be commenced by person entitled to possession of property).

¶13 Courtyard Apartments filed its own motion for partial summary judgment, contending that there was no dispute that Jones had failed to comply with the September 26, 2003, stipulation. In support, Courtyard Apartments attached a copy of a money order for Jones's February of 2004 rent dated February 7, 2004, and a summary of Jones's rent payments from April of 1998 through

February of 2004 showing that Jones was one month behind as of June of 2002. Courtyard Apartments also claimed that it was not at the February 23, 2004, hearing on Jones's motion to reopen because "no one from Courtyard Apartments, LLP ever received or reviewed the Motion to Reopen and had no knowledge that the February 23, 2004 hearing was going to take place."

¶14 The circuit court granted summary judgment to Courtyard Apartments and dismissed Jones's claims against all of the defendants, concluding that what it determined were Jones's misrepresentations made the stay of the writ of restitution void:

> I'm confronted now with the unusual situation of having a tenant who obtains a stay of a writ by … false[ly] represent[ing] … to the Court that he had paid the rent on time, and somehow felt that there may have been either a misapplication of the payment or the payment somehow was -- had failed to be credited against his account … and then turn[s] around and, in essence, bring[s] suit for violation of that stay when in reality it never would have been issued. So it's clear to me at this time, and although there's, as I indicated, a long history in this case, that the Sheriff's failure to sort of confirm those dates or even to execute on a writ that was stayed, was in fact an error, but I find that it was, in essence, a harmless error because it was only acting on, in essence, a writ or at least acting during a stay that never should have been issued.[2]

(Footnote added.)

[2] Jones's lawyer again claimed at the hearing on Jones's and Courtyard Apartments's motions for partial summary judgment that the writ of restitution was facially invalid and executed untimely. The circuit court did not address the issue:

> There's still one question about this case that somehow I'm not sure what the status of the law is and what affect [*sic*] a stay has on the Court in staying a writ, and does it, in essence, toll any of the time limits with respect to that writ of when it is to be executed upon.

II.

A. *Summary Judgment.*

¶15 We review *de novo* a trial court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

¶16 As we have seen, Jones claims that the trial court erred when it granted summary judgment to Courtyard Apartments because: (1) he contends that the writ of restitution was facially invalid and executed untimely; (2) he argues that there is evidence that Courtyard Apartments had notice of the February 23, 2004, hearing despite its denial; and (3) he also claims that Courtyard Apartments did not have the legal capacity to seek his eviction. We address each contention in turn.

1. Writ of Restitution.

¶17 Jones argues that Courtyard Apartments unlawfully evicted him because the writ of restitution was facially invalid under WIS. STAT. § 799.44.[3] Section 799.44 provides, as relevant:

[3] Jones also claims that the stipulation is "arguably … not the actual stipulation between the parties" because there is a line drawn through it. There is nothing in the Record, however, indicating who put the line there or when, and, thus, insofar as this Record is concerned, the matter is not before us. Jones further contends that the stipulation does not meet the requirements of WIS. STAT. RULE 807.05 (stipulations must be in writing and subscribed by the parties), but, other than pointing out that there is a line through the document, does not explain why it was not a valid agreement between him and Courtyard Apartments. Accordingly, we do not discuss this matter either. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 (continued)

> **(1)** ORDER FOR JUDGMENT. In an eviction action, if the court finds that the plaintiff is entitled to possession, the order for judgment shall be for the restitution of the premises to the plaintiff….
>
> **(2)** WRIT OF RESTITUTION. At the time of ordering judgment for the restitution of premises, the court shall order that a writ of restitution be issued, and the writ may be delivered to the sheriff for execution in accordance with s. 799.45. *No writ shall be executed if received by the sheriff more than 30 days after its issuance.*
>
> **(3)** STAY OF WRIT OF RESTITUTION. At the time of ordering judgment, upon application of the defendant *with notice to the plaintiff*, the court may, in cases where it determines hardship to exist, stay the issuance of the writ by a period not to exceed 30 days from the date of the order for judgment…. *Upon the failure of the defendant to perform any of the conditions of the stay, the plaintiff may file an affidavit executed by the plaintiff or attorney, stating the facts of such default, and the writ of restitution may forthwith be issued.*

(Emphasis added.)

¶18 Jones contends that the writ was facially invalid because: (1) the writ says that a judgment for restitution was entered on September 26, 2003, when, in fact, as we have seen, the small-claims court dismissed the eviction action on that day based on the parties' stipulation; (2) the February 9, 2004, writ was issued and executed more than thirty days after the September date; and (3) Courtyard Apartments did not file an affidavit "stating the facts" of Jones's default. We disagree.

¶19 First, as we have seen, a judgment for restitution was entered on January 27, 2004; thus that the writ erroneously referred to the September 26,

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N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

2003, date is without consequence. *See* WIS. STAT. RULE 805.18 (harmless errors). Second, Jones does not point to anything in the Record beyond his contention that vitiates the circuit court's entry of judgment on January 27, 2004. *See* ***Barakat v. Department of Health & Soc. Servs.***, 191 Wis. 2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (we will not review arguments that are "amorphous and insufficiently developed").

¶20 Jones also argues that the Sheriff unlawfully evicted him because the deputies knew or should have known that the writ became facially invalid when they did not execute it within ten days of receiving it. *See* WIS. STAT. § 799.45(5)(a) ("Within 10 days of the receipt of the writ, the sheriff shall execute the writ."). The circuit court did not decide this issue. As explained below, we are remanding this matter to the circuit court for a fact-finding hearing to determine whether Courtyard Apartments had notice of the February 23, 2004, hearing. The circuit court should also assess Jones's contention that the writ of restitution was stale and that the Sheriff and the deputies should have known that. In making that assessment, the circuit court should hold whatever evidentiary hearing it deems appropriate. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (appellate courts may not find facts).

2. Notice of February 23, 2004, Hearing.

¶21 The trial court did not expressly rule on whether Courtyard Apartments had notice of the February 23, 2004, hearing. Its decision to grant Courtyard Apartments's motion for summary judgment, however, implicitly includes the conclusion that Courtyard Apartments did not have notice. *See* ***State v. Echols***, 175 Wis. 2d 653, 673, 499 N.W.2d 631, 636 (1993) (when a trial court does not expressly make a finding necessary to support its legal conclusion, we

may assume that the trial court made the finding in a way that supports its decision). As we show below, there is an issue of fact whether Courtyard Apartments was given notice of the February 23, 2004, hearing.

¶22 At his deposition, Jones testified under oath that he served Courtyard Apartments by certified mail and took the return receipt to the small-claims court. *See* WIS. STAT. RULE 801.14(2) (service of motions may be made by mail).[4] His testimony that he mailed the notice of the February 23, 2004, hearing to Courtyard Apartments creates a presumption that Courtyard Apartments received it. WIS. STAT. RULE 903.01 (presumptions); ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 612, 516 N.W.2d 362, 370 (1994) ("It is well established that the mailing of a letter creates a presumption that the letter was delivered and received."). This shifted the burden of disproof to Courtyard Apartments. *See* RULE 903.01. In an affidavit submitted to the circuit court, a Courtyard Apartments employee claimed that "[a]lthough the court file shows a 'motion to reopen' was mailed to Courtyard Apartments, neither I nor anyone from Courtyard Apartments ever received or reviewed the motion to reopen, and therefore we had no knowledge that a hearing was going to take place on 02/23/04." This raises an issue of fact of whether Jones mailed the notice, as he claims. Accordingly, we reverse and remand to the circuit court for a fact-finding hearing, and for its determination of the proper remedy should it find both that Jones mailed the notice and that Courtyard Apartments never received it.

[4] What Jones contends is the return receipt is not part of the Record on appeal. His description of it may not properly be considered on summary judgment because of the best evidence rule, WIS. STAT. RULE 910.02.

3. Courtyard Apartments's Capacity to Evict Jones.

¶23 As noted, Jones contends that the small-claims court lacked jurisdiction over the eviction action because the Courtyard Apartments partnership was terminated on September 30, 2001. *See* WIS. STAT. RULE 803.01(1) (real party in interest). Jones waived this claim.

¶24 WISCONSIN STAT. RULE 802.06(2) requires that the defense of "[l]ack of capacity to sue" be "asserted in the responsive pleading" or "be made by motion … before pleading." *See also* WIS. STAT. RULE 802.03(1) (pleading lack of capacity); WIS. STAT. § 799.04 (general rules of civil procedure apply to small-claims cases unless otherwise provided). Jones does not point to anything in the Record that shows he did either of these things before he agreed to the September 26, 2003, stipulation. Accordingly, the defense was waived. *See also* ***Great Lakes Trucking Co. v. Black***, 165 Wis. 2d 162, 168–169, 447 N.W.2d 65, 67 (Ct. App. 1991) (stipulation bars later claims).

B. *Discovery.*

¶25 Courtyard Apartments sought a protective order in connection with Jones's second set of interrogatories and requests for admission. In support, Courtyard Apartments submitted an affidavit from one of its lawyers averring that:

- Courtyard Apartments had already answered forty-five interrogatories and one-hundred-and-two requests for admission.

- Jones was requesting an additional eighteen interrogatories and two-hundred-and-four requests for admission.

- Jones's first set of one-hundred-and-two requests for admission caused "an undue burden, expense, and annoyance."

- In a letter dated February 24, 2006, Courtyard Apartments's lawyer asked Jones to "either rescind or significantly curtail the number of requests in the Second Request For Admissions."

- In a letter dated February 28, 2006, Jones refused to do so.

- Jones's "discovery tactics" were "excessive [and] unduly burdensome."

Jones claimed that the second set of interrogatories and requests for admission were necessary to address "the allegations that Courtyard Apartments no longer exists."

¶26 The circuit court granted Courtyard Apartments's motion in a written decision, finding that Courtyard Apartments would "suffer undue burden, expense and annoyance if forced to respond." Jones argues that the circuit court erroneously exercised its discretion because it did not explain why "the additional discovery should not be had." We disagree.

¶27 Under WIS. STAT. RULE 804.01(3)(a), a circuit court may issue a protective order for "good cause shown" to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The determination of whether to issue a protective order is a discretionary determination for the circuit court. ***State v. Beloit Concrete Stone Co.***, 103 Wis. 2d 506, 511, 309 N.W.2d 28, 30 (Ct. App. 1981). A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper legal standard, and, using a demonstrated rational process, reaches a reasonable conclusion. ***Ibid.***

¶28 The circuit court in its written decision stated that it had reviewed the interrogatories and requests for admission and found them to be "excessive," "repetitive," and "not necessary to elicit the information sought":

> The Court has reviewed Jones' Second Set of Interrogatories and Request for Admissions, and finds them to be excessive. Many of the questions are repetitive. The number of interrogatories and admissions requested are not necessary to elicit the information sought. Given the number of discovery requests already addressed, the Court agrees that Courtyard would suffer undue burden, expense and annoyance if forced to respond.

In the initial set of interrogatories, Courtyard Apartments told Jones that: (1) Courtyard Apartments owned the apartments from January 1, 1997, to September 30, 2001; (2) Courtyard Apartments was terminated on September 30, 2001; (3) Wayne and Janet Huehns owned the apartments from October 1, 2001, to January 1, 2005; and (4) Roger and Brenda Carlton bought the apartments on January 1, 2005. Many of the questions in Jones's second set of interrogatories and requests for admission sought the same information. The circuit court properly exercised its discretion.

By the Court.—Order affirmed in part, reversed in part, and cause remanded with directions.

Publication in the official reports is not recommended.