COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2828 **Cir. Ct. No. 01-CV-830**

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

LEGEND DIAMONDS, INC.,

PLAINTIFF-RESPONDENT,

V.

DIAMOND CUTTERS OF MILWAUKEE,

DEFENDANT,

ARMOND MESSNICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Armond Messnick appeals from a judgment awarding Legend Diamonds, Inc. summary judgment against him and Diamond

Cutters of Milwaukee jointly and severally after Messnick and Diamond Cutters failed to respond to Legend Diamonds' discovery requests. We conclude that the circuit court properly exercised its discretion in declining to permit Messnick and Diamond Cutters to file late responses to Legend Diamonds' discovery. The admissions resulting from the failure to respond to the discovery removed all genuine issues of material fact from the case, making summary judgment appropriate. We also hold that Messnick waived his appellate claim that the circuit court should have granted only partial summary judgment against him. We affirm.[1]

¶2 In its complaint, Legend Diamonds alleged that it supplied goods and services for which Diamond Cutters and Messnick did not pay. Diamond Cutters and Messnick answered the complaint and denied liability on behalf of Messnick because the invoices appended to the complaint all referred to Diamond Cutters. Diamond Cutters also denied liability.

¶3 On April 19, 2001, Legend Diamonds served opposing counsel with a First Set of Interrogatories, Requests for Admission and Request for Production of Documents. On June 11, Legend Diamonds filed a summary judgment motion because the discovery had not been responded to and dispositive facts were admitted by the failure to respond to the requests for admission. *See* WIS. STAT. § 804.11(1)(b) (1999-2000) ("[t]he matter is admitted unless, within 30 days after service of the request [to admit] … the party to whom the request is directed serves upon the party requesting the admission a written answer or objection

[1] We originally issued an opinion in this appeal on July 3, 2002. Messnick moved for reconsideration, and we withdrew the July 3 opinion.

addressed to the matter …").[2] Based on the facts admitted in the discovery, Legend Diamonds sought summary judgment.

¶4 On June 22, Diamond Cutters and Messnick moved the circuit court to allow a late response to Legend Diamonds' discovery and filed its opposition to the summary judgment motion. In an affidavit, Messnick stated that he was out-of-state on business at various times during April, May and June and was unable to respond to the requests for admission. He further averred "[t]hat as a result of his own inadvertence and excusable neglect, your affiant unintentionally failed to submit timely answers to certain requests to admit …." Messnick asserted that Diamond Cutters is a corporation, and he has no personal liability for corporate debts. He also claimed that Diamond Cutters was not the entity with whom Legend Diamonds dealt. Messnick contended that Legend Diamonds would not be prejudiced by allowing a late response to discovery because the discovery deadline had not expired. Messnick and Diamond Cutters also argued that summary judgment should not be granted based upon a simple failure to respond to discovery when there are genuine factual disputes.

¶5 At the motion hearing, Legend Diamonds argued that Messnick's "press of business" excuse was insufficient to avoid the consequences under WIS. STAT. § 804.11(1)(b) for failing to respond to the requests for admission. Specifically, Legend Diamonds noted that Messnick was represented by counsel and has experience in prior litigation, Messnick and Diamond Cutters did not address the discovery requests until after Legend Diamonds filed its summary

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

judgment motion, and Messnick never sought an extension of time to respond to the discovery.

¶6 Messnick and Diamond Cutters responded that counsel made many efforts to contact Messnick to prepare responses to the discovery and reiterated the lack of prejudice to Legend Diamonds if late discovery responses were allowed. Counsel stated that she left Messnick telephone messages regarding the importance of timely responding to the discovery, particularly the requests for admission.

¶7 The court found that being out-of-state and occupied with other business were insufficient reasons to have missed the discovery deadline. Messnick was not out-of-state during the entire period the discovery was outstanding, but counsel was unable to meet with Messnick until early June. The court also found that there was no excusable neglect for failing to timely answer the requests for admission, that Messnick did not seek relief or an extension at or near the deadline for responding to the discovery, and the discovery went unanswered for another month after the response deadline. Because dispositive facts were admitted, the court granted summary judgment to Legend Diamonds.[3]

¶8 On appeal, Messnick argues that the circuit court misused its discretion in declining to extend the time for discovery responses or to give Messnick relief from the admissions. We agree that this is the standard of review,

[3] The requests for admission stated that Messnick ordered $28,844 in goods on behalf of Diamond Cutters, which was not incorporated at the time. The requests also stated the balances due on the goods, that the goods were received by Messnick and Diamond Cutters, and that Messnick and Diamond Cutters do not have a defense to the allegations in Legend Diamonds' complaint.

see ***Mucek v. Nationwide Communications, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98, but disagree that the court misused its discretion. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and, demonstrating a rational process, reached a conclusion that a reasonable judge could reach. ***Phone Partners Ltd. P'ship v. C.F. Communications Corp.***, 196 Wis. 2d 702, 710, 542 N.W.2d 159 (Ct. App. 1995).

¶9 The circuit court found that Messnick did not get around to discussing the discovery with his counsel, effectively neglecting his own business even though counsel told Messnick that action had to be taken on the discovery. These findings are supported in the record and are inferences the circuit court was allowed to make and by which we are bound. ***Estate of Wolff v. Town Bd. of Weston***, 156 Wis. 2d 588, 597-98, 457 N.W.2d 510 (Ct. App. 1990). The court found facts, applied the proper law and explained its reasons for its ruling.

¶10 By failing to respond to the discovery, Messnick admitted that he had no defense to the action, ordered and received the goods on behalf of unincorporated Diamond Cutters, and balances were due. Therefore, there were no material facts in dispute as to receipt or value of the goods and services. Summary judgment can be based on a party's failure to respond to requests for admission, ***Bank of Two Rivers v. Zimmer***, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1983), and the circuit court did not err in granting summary judgment.[4]

[4] The circuit court did not impose a sanction for violating a discovery order. Rather, the court exercised its discretion to decline to extend the time to respond to discovery or grant relief from the consequences under WIS. STAT. § 804.11(1)(b) of not timely responding to discovery. This is a crucial distinction. Therefore, the analysis in ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 470 N.W.2d 859 (1991), a sanction case, does not control.

¶11 Messnick relies on ***Bank of Two Rivers*** to support his contention that a summary judgment motion based solely on requests for admission can be refuted if genuine issues of material fact are shown. Messnick puts the cart before the horse. ***Bank of Two Rivers*** makes clear that a litigant must first demonstrate that the party "should be relieved from the effect of failing to answer the request for admission." ***Id.*** at 633. Here, Messnick did not meet his burden. Therefore, the admissions were an appropriate basis for summary judgment.

¶12 Messnick further argues that even if the requests for admission were properly admitted and used as a basis for summary judgment, the admissions support only partial summary judgment. Specifically, Messnick argues that summary judgment was inappropriate as to a November 15, 1999 purchase in the amount of $8937.40 because that purchase was made after Diamond Cutters was incorporated on November 8, 1999. Therefore, Messnick argues, this debt cannot be attributed to him in his personal capacity.

¶13 We do not reach the significance of the inconsistencies in the requests for admission relating to the $8937.40 debt because Messnick failed to raise this issue with sufficient prominence in the circuit court such that the court understood that it was being called upon to address the issue. ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). At both the summary judgment hearing and on reconsideration in the circuit court, Messnick failed to alert the circuit court to his contention that the November 15, 1999 transaction was distinguishable from the other transactions. Rather, Messnick argued that he could not be held personally liable for any of the transactions because the invoices were sent to the corporation. Messnick distinguishes the November 15, 1999 transaction with clarity for the first time on appeal. We do not consider issues

raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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