COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1981 **Cir. Ct. No. 01SC27688**

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

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802 LLC AND CHRISTINE LORENZ,

PLAINTIFFS-RESPONDENTS,[1]

V.

DON KEMP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN BUCKLEY, Reserve Judge.[2] *Affirmed.*

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[1] The summons and complaint and numerous record items also refer to Christine Lorenz as a plaintiff. Therefore, we are amending the caption accordingly.

[2] Judge Kitty K. Brennan entered the default judgment and dismissal of Kemp's cause of action.

¶1 CURLEY, J.[3] Don Kemp appeals the order denying his motion to reopen a default judgment entered against him in an eviction action. This court affirms.

I. BACKGROUND.

¶2 Christine Lorenz, as manager of a rental property, started an eviction action against Kemp, a tenant, on behalf of 802 LLC, the owner. She sought to recover two months of rent which she claimed Kemp owed. Her complaint alleged that for the first month of unpaid rent Kemp did, in fact, give her a money order issued by Park Bank, but shortly thereafter it disappeared, and Kemp refused to replace it with another money order. Ultimately, Lorenz called the bank and discovered that Kemp had apparently purloined the money order from her address book where she had placed it and cashed the money order.

¶3 According to Lorenz, the second claim for unpaid rent involved a similar subterfuge by Kemp. In that instance, after she inquired about the rent, Kemp sent her a registered letter but it contained only a copy of a five-day notice sent by her to Kemp. When she persisted that Kemp had not paid the rent, Kemp's attorney provided her with a copy of the money order that Kemp claimed was enclosed in the registered letter. Again she investigated, contacted Western Union, and discovered that Kemp had a money order made payable to her but that Kemp cashed it himself.

¶4 After Lorenz began her small claims action, Kemp filed an answer and a counterclaim challenging Lorenz's assertions that he had not paid the rent

[3] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

for two separate months and asking for the return of his security deposit. The case was set for a hearing before a court commissioner. The court commissioner granted judgment to Lorenz of $470 and dismissed Kemp's counterclaim. Kemp then made a demand for a trial in front of a circuit court judge.

¶5 Complying with his request, the matter was scheduled for a trial in front of Judge Kitty Brennan and a trial date was given. Three days before the trial date, Kemp requested an adjournment, to which Lorenz objected. Because of a concern about the possible inability of Lorenz's witness to attend a later trial date, Judge Brennan removed the case for trial on the date set but required the parties to come to court on the originally scheduled trial date to check on the health status of Lorenz's witness. On this date, all the parties appeared, including Lorenz's witness. At this time, Kemp requested that the trial court recuse herself; a request that was denied. Kemp also sought to substitute against Judge Brennan and the judge ruled the request untimely. In order to secure a new trial date, the trial court set a status conference for the next day. Plaintiff appeared by phone and Kemp appeared in person. He sought to tape record the proceedings, claiming his medications interfered with his memory. This request was granted with the court cautioning Kemp that taping would only be allowed this one time. Due to Kemp's attorney not being present, the trial court adjourned the matter to June 5, 2002, for a telephone conference.

¶6 On June 5, 2002, the date for the telephone conference, according to the docket entry, Kemp both failed to appear and did not telephone. The plaintiff was present in court. Believing that Kemp had hired Attorney Antholine, as that was what Kemp had stated at a previous date, the court staff called the attorney. Someone purporting to be Antholine's secretary advised the court that Attorney Antholine had not been hired to represent Kemp. Consequently, due to Kemp's

failure to appear, pursuant to WIS. STAT. § 799.22(1) (2001-02), a default judgment was entered against Kemp and his counterclaim was dismissed.[4]

¶7 Following the entry of the default judgment, Kemp appeared in court several days later and filed a motion seeking to reopen the judgment. As is required under WIS. STAT. § 799.29(1), the trial court reviewed his motion and noted it appeared to be sufficient to require a hearing and gave Kemp a hearing date.[5] Prior to the date for the motion, Kemp filed his third motion seeking Judge Brennan's recusal. He also filed a motion seeking permission to tape the proceedings and he filed an amendment to his motion seeking Judge Brennan's recusal.

¶8 On the return date for Kemp's motion to reopen the default judgment, another case involving Kemp in which he was the plaintiff was also set for a motion to reopen. At this combined hearing, Reserve Judge John Buckley presided.[6] Kemp's request to tape record the proceedings was denied. Kemp then played what the docket entry calls an "inaudible tape." Kemp objected when the trial judge failed to listen to the entire tape. In response, the judge suggested that

[4] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[5] Specifically, the docket entry states "Application for motion to reopen reviewed. Court finds excusable neglect and that the applicant asserts a legal defense. Application for hearing on motion to reopen granted. Motion to Reopen scheduled for July 22, 2002, at 9:45 a.m. before the Hon. Kitty Brennan."

[6] Contrary to Kemp's assertion, there is no indication in the record that Judge Brennan recused herself. Inasmuch as Judge Buckley is a reserve judge, it is most likely that Judge Brennan was gone on that day, either because her official duties took her elsewhere or because she was on vacation.

Kemp should have had the tape transcribed. The trial judge then denied Kemp's motion to reopen and this appeal follows.

II. ANALYSIS.

¶9 This court notes that Kemp's notice of appeal states that he is appealing the alleged "illegal and injudicious decision" of the circuit court, but his brief objects to a great many actions and decisions. Moreover, the plaintiff-respondent's pro se brief addresses only the default judgment and makes no argument concerning the trial court's denial of the motion to reopen except to say that "Lorenz and Ferris support the decisions made by Court Commissioner Hill, and by Judges Brennan and Buckley. All court proceedings conducted by Commissioner Hill and by Judges Brennan and Buckley were conducted in a fair and non-biased manner."

¶10 Despite this confusion in the briefs, this appeal can only be from the denial of the motion to reopen. This is so because WIS. STAT. § 799.29 prohibits an appeal from a default judgment, and even if this court were to overlook this impediment, the appeal would be untimely under WIS. STAT. § 808.04(2), which mandates that an appeal in an eviction action must be initiated within fifteen days after entry of judgment or order appealed from. Kemp's notice of appeal was both signed by him and filed with the Milwaukee County Clerk of Court on July 26, 2002. It bears a timestamp from the Clerk of Court of Appeals of July 30, 2002. Both dates are well beyond the fifteen days allotted.

¶11 Thus, this court addresses only whether the trial court properly exercised its discretion in denying Kemp's notice to reopen the default judgment. A trial court determination to deny or grant a motion seeking to reopen a default

judgment is a discretionary act. ***Dugenske v. Dugenske***, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977).

¶12 Although voluminous pages have been submitted in this appeal, this court discerns that, distilled to its essence, Kemp appears to be arguing that the motion to reopen should have been granted because on the date the default judgment was entered, the trial court scheduled a telephonic conference, thereby relieving him of the obligation to appear. Further, he argues that he should have been excused from calling because there was a snafu in his attorney's office and his attorney was tardy in arriving in the office. Additionally, he argues that when someone from his attorney's office finally called the court, this person was told to instruct Kemp to go to the courtroom and when he arrived he was told the matter had been dismissed. While this series of events may, in fact, have occurred, nothing in the record presented to Judge Buckley substantiates these events. Thus, this court finds that Judge Buckley properly exercised his discretion when he refused to reopen the default judgment.

¶13 Before a party is entitled to relief from default judgment, he must show that the judgment was a product of mistake, inadvertence, surprise or excusable neglect on his part and he must show that a meritorious defense to the action exists. ***Hansher v. Kaishian***, 79 Wis. 2d 374, 389, 255 N.W.2d 564 (1977). The burden is on the movant to show that one of the requisite conditions of excusable neglect exists such that defendant is entitled to relief from default judgment. W.S.A. 806.07(1)(a). ***Carmain v. Affiliated Capital Corp.***, 2002 WI App 271, ¶23, ___ Wis. 2d ___, 654 N.W.2d 265.

¶14 No official transcripts or affidavits have been filed in this matter to support Kemp's rendition of the events of June 5, 2002.[7] In reviewing the file, this court found what purports to be a transcript. However it is untitled, undated and in print unlike that found in official transcripts More importantly, it bears no certification by the court reporter. Thus, in support of Kemp's motion to reopen the default judgment, there are only Kemp's bald assertions. There is no affidavit submitted by Kemp or Attorney Antholine, or anyone else for that matter, attesting to Kemp's assertions. Kemp has attached exhibits in which he "affirms" that Attorney Antholine told the court that, "I [Kemp] had been making arrangements with him to participate with me at a telephonic conference with [J]udge Brennan's court, and that the conference was scheduled for 10 AM on 5 June 2002." Clearly, Kemp's self serving "affirmations" of what others said instead of supplying a transcript of the event will not suffice. Moreover, even if the purported statement by Antholine to the court was true, this does not prove that Kemp was at Antholine's office at the time of the telephone conference. Nor is there anything in the record explaining the failure of Antholine's office to advise the court when court staff called that Kemp was there awaiting a phone call. Additionally, Kemp knew of the date and, had he been in Antholine's office at the time of the telephone conference, he could easily have called the court and explained that his attorney had not yet arrived.

¶15 Consequently, the trial court properly exercised its discretion when it implicitly decided Kemp had failed to meet his burden of proof. Other than the

[7] The only transcript in the record is for a proceeding held May 20, 2002, during which the trial court set two adjourned dates. This transcript sheds no light on the hearing of July 22, 2002, or Kemp's whereabouts at the time of the June 5, 2002 hearing.

"inaudible tape," Kemp put forth no evidence at the motion to reopen the default judgment that would rise to the level of excusable neglect. Accordingly, the denial of the motion to reopen the default judgment is affirmed. Additionally, Lorenz's motion for frivolous costs is denied.

By the Court.—Order affirmed.

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