COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2491 **Cir. Ct. No. 02-SC-2150**

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

WILLIAM MCCRACKEN,

PLAINTIFF-RESPONDENT,

V.

ZORKA ROMANOVIC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] In this small claims action, a circuit court commissioner issued an eviction order against Zorka Romanovic in favor of William McCracken. Romanovic then asked the small claims court to vacate the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

commissioner's eviction order because a large claims action for specific performance was then pending between the parties in which Romanovic was seeking to compel McCracken to convey the property in question to her pursuant to a land contract between the parties. In her small claims motion, Romanovic contended that her action for specific performance, if successful, would constitute a valid defense to McCracken's eviction action.

¶2 The small claims court ruled that it did not have jurisdiction to review the court commissioner's order. Instead, the court held that its only authority was to conduct a full hearing de novo. Since Romanovic had not sought such a hearing, the small claims court denied Romanovic's motion. Romanovic appeals. We affirm.

¶3 McCracken appears pro se in this appeal.[2] His respondent's brief does not respond to the arguments raised by Romanovic. Instead, McCracken makes but one undeveloped argument—that Romanovic's appeal is untimely. We summarily reject this argument. The written order of the small claims court was entered on September 17, 2002. Romanovic filed this appeal the very next day. The appeal is timely.

¶4 Romanovic contends that we should reverse the small claims court's ruling as a sanction against McCracken because his respondent's brief fails to respond to her arguments. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec., Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). While we certainly could invoke this sanction against McCracken, we disagree with the tone of

[2] McCracken also appeared pro se in all of the trial court proceedings.

Romanovic's brief which suggests that we are obliged to do so. Rather, we see the matter as a matter addressed to our discretion. *See, e.g.,* ***State ex rel. Sahagian v. Young***, 141 Wis. 2d 495, 500, 415 N.W.2d 568 (Ct. App. 1987).

¶5 Moreover, we note that the small claims court decided this case on the basis of a lack of jurisdiction, not on the merits of Romanovic's contention that her large claims action for specific performance, if successful, would constitute a valid defense to McCracken's eviction action. If the court had addressed and rejected the merits of Romanovic's claim, we might agree that McCracken's failure to address that question on appeal constitutes a concession that the court's ruling was wrong. But, as noted, the court never got that far. We should not issue a sanction-based reversal on a question of jurisdiction, *particularly where, as our ensuing discussion will reveal, we are convinced that the court correctly decided the issue*. If we did reverse and remand as a sanction, we would create the incongruity of requiring the trial court to conduct proceedings on a motion over which we have concluded the court has no jurisdiction. Therefore, we address the merits of the trial court's jurisdictional ruling.

¶6 The issue before us concerns the scope of judicial authority and jurisdiction as well as statutory construction, all of which present questions of law that we review de novo. ***Dane County v. C.M.B.***, 165 Wis. 2d 703, 707, 478 N.W.2d 385 (1992). Despite our de novo standard of review, we nonetheless value the trial court's decision on the matter. *See* ***Scheunemann v. City of West Bend,*** 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993).

¶7 WISCONSIN STAT. § 799.207 governs small claims proceedings before a circuit court commissioner and the ensuing proceedings, if any, before the small claims court. Section 799.207(2) provides that a circuit court

commissioner's decision becomes final within certain prescribed time limits following the issuance of the commissioner's decision. However, § 799.207(3)(a) guarantees "an absolute right to have the matter heard before the [small claims] court if the requirements of this section are complied with." To obtain such a hearing, the party must file a demand for a "trial" before the small claims court within ten days from the date of a commissioner's oral decision or within fifteen days after mailing of the commissioner's written decision. Sec. 799.207(2)(b) and (3)(c). Section 799.207(5) provides, "A timely filing of a demand for *trial* shall result in a *new trial* before the court *on all issues between the parties*." (Emphasis added.)

¶8 We take particular note of the legislature's repeated use of the term "trial" in WIS. STAT. § 799.207 when referring to further proceedings in the small claims court following the court commissioner's decision. *See, e.g.,* § 799.207(2)(b), (3)(c), (3)(d), (4) and (5). We also take note that § 799.207(5) refers to a "new trial" when describing the proceedings before the small claims court. As the small claims court aptly observed, these terms envision more than a review, akin to appellate review, of the court commissioner's decision. Instead, these terms clearly and unambiguously connote a wholly new and fresh proceeding in the small claims court, separate and apart from the proceedings before the court commissioner.

¶9 But that is not what Romanovic sought in her motion to the small claims court following the court commissioner's decision. Instead of simply demanding a "new trial" on McCracken's eviction complaint, Romanovic's motion sought to vacate the court commissioner's decision and listed the various grounds upon which she sought that relief. Moreover, at the hearing on her

motion, Romanovic did not seek a "new trial," even after the small claims court indicated its belief that its only authority was to conduct such a hearing.

¶10 Our reading of WIS. STAT. § 799.207 is supported by the supreme court's opinion in ***C.M.B.*** where the court discussed the nature of the proceedings in the circuit court following a court commissioner's decision.[3] The court first rejected the argument that the circuit court's role was limited to a mere pro forma adoption of the court commissioner's decision. ***C.M.B.***, 165 Wis. 2d at 709-10. The court stated that such an approach would functionally allow for direct review by the court of appeals of a court commissioner's decision without any meaningful circuit court involvement. *See* ***id***. at 713.

¶11 Having determined that a more meaningful involvement by the circuit court was necessary, the supreme court next addressed the kind of proceeding required at the circuit court level. The supreme court rejected the argument that the circuit court's role was to conduct a de novo review, akin to appellate review, of the proceedings before the court commissioner. ***Id***. Instead, the supreme court held that the circuit court must conduct "a new hearing (i.e., a hearing *de novo*)." ***Id***. In support of its holding, the supreme court alluded to the possible problems associated with a review of the proceedings before a court commissioner. The court noted that such proceedings are informal and sometimes are not memorialized by an official record. *See* ***id***. at 714-15. As a result, the court concluded "[t]hat a hearing *de novo* is more appropriate than a *de novo*

[3] On a threshold basis, the supreme court held that a court commissioner's ruling could not be directly appealed to the court of appeals. ***Dane County v. C.M.B.***, 165 Wis. 2d 703, 707-09, 478 N.W.2d 385 (1992).

review of the record because of the possible problems associated with establishing a record before a court commissioner." ***Id***. at 714.

¶12 Based upon the language of WIS. STAT. § 799.207 and the supreme court's opinion in ***C.M.B.***, we conclude that the small claims court correctly ruled that its only authority was to conduct a new trial, not a review of the court commissioner's decision. Since Romanovic asked for the latter rather than the former, the court properly denied Romanovic's motion to vacate the commissioner's decision.

By the Court.—Order affirmed.

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