

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1831

Cir. Ct. No. 2009CV17432

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

FIDELIS OMEGBU,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Fidelis Omegbu appeals a judgment in favor of American Family Mutual Insurance Company in Omegbu's action against American Family. Omegbu contends that: (1) the circuit court failed to schedule a hearing on Omegbu's motion for judgment on the pleadings prior to a hearing on

American Family's motion for summary judgment; (2) American Family was not entitled to summary judgment because it did not properly respond to Omegbu's motion for judgment on the pleadings; (3) Omegbu is entitled to amend his pleadings; (4) the circuit court erroneously considered matters outside the record on Omegbu's motion for judgment on the pleadings; and (5) Omegbu is entitled to judgment on the pleadings. We reject each of these contentions, and affirm.¹

Background

¶2 On November 3, 2009, Omegbu sued American Family for reporting to the Wisconsin Department of Transportation that Omegbu had defaulted on a court order for installment payments on a money judgment, resulting in the suspension of Omegbu's driver's license. Omegbu contended that American Family acted maliciously and deprived him of due process. American Family answered, denying the allegations in Omegbu's complaint. On December 17, 2009, Omegbu filed a motion for judgment on the pleadings. On that same day, the circuit court held a scheduling conference in this case. The court set a briefing and hearing schedule as to Omegbu's motion for judgment on the pleadings and any dispositive motion to be filed by American Family. The court set the motions on the same briefing schedule, and set them both to be heard at a hearing on March 23, 2010.

¶3 American Family then filed a motion for summary judgment and responded to Omegbu's motion for judgment on the pleadings, according to the

¹ American Family argues that several of Omegbu's arguments were not properly preserved for appeal because Omegbu failed to raise them in the circuit court. Because each of Omegbu's arguments fails on the merits, we need not deem them forfeited.

court's motions schedule. American Family also moved for sanctions against Omegbu for filing a frivolous lawsuit. At the March 23, 2010 hearing, the court denied Omegbu's motion for judgment on the pleadings and granted American Family's motion for summary judgment, and set the sanctions motion for a hearing on April 15, 2010. After Omegbu did not appear for the April 15, 2010 hearing, the court granted American Family's motion for sanctions and set a hearing date for May 10, 2010, to determine American Family's attorney fees and litigation expenses. After Omegbu did not appear for the May 10, 2010 hearing, the court entered a money judgment in favor of American Family. Omegbu appeals.

Discussion

Scheduling Order

¶4 Omegbu contends that the circuit court erred by failing to set a briefing schedule and hold a hearing on the motion for judgment on the pleadings that he filed on December 17, 2009. *See* WIS. STAT. § 802.06(3) (2009-10).² He contends that the court's scheduling order omitted his motion for judgment on the pleadings. However, the court's scheduling order, which the court signed on December 17, 2009, specifically addressed Omegbu's motion for judgment on the pleadings filed that day. The order provides:

[Defendant] to file and serve its dispositive motion on [Plaintiff] by 1-31-2010. *The [Plaintiff's] motion that was received on 12-17-09 will be considered filed and served as of 1-31-2010 for scheduling purposes.* Each party has 20 days to respond to dispositive motions filed by the other (2-

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

20-2010). Each party to have 10 days to reply to the position of their opponent (March 2, 2010) and the motions will be heard by the Court on March 23, 2010 at 1:30 PM.

(Emphasis added.)

¶5 Thus, the scheduling order specifically states that Omegbu's December 17, 2009 motion for judgment on the pleadings was deemed filed and served on January 31, 2010, for scheduling purposes. The court stated that any dispositive motion by American Family also was to be served on Omegbu by January 31, 2010, and the briefing for both motions would then follow the same schedule. It also set a hearing as to both motions for March 23, 2010. Because Omegbu's argument that the court failed to set a briefing schedule or hearing on his motion for judgment on the pleadings is contrary to the record, his argument fails.

American Family's Motion For Summary Judgment

¶6 Omegbu also contends that American Family wrongfully filed its motion for summary judgment before a motion hearing on Omegbu's motion for judgment on the pleadings. He argues that American Family was required to file a response to his motion for judgment on the pleadings within twenty days of his filing the motion on December 17, 2009. However, as explained above, the court's scheduling order dictated the motions schedule in this case. American Family was to file any dispositive motion by January 31, 2010, and both motions would then follow the same briefing schedule and be heard at the same hearing. American Family followed the court's scheduling order by filing its motion for summary judgment on January 29, 2010, and filing its response to Omegbu's motion for judgment on the pleadings on February 18, 2010.

¶7 Omegbu then contends that the circuit court was required to hear and determine his motion for judgment on the pleadings before allowing American Family to file any motions. However, he cites no authority for this proposition, nor are we aware of any.³ We discern no error in the court's scheduling the parties' motions for simultaneous briefing and hearing, or with American Family's compliance with the court's order. *See* WIS. STAT. § 802.10(3) (circuit court may enter a scheduling order setting time for parties to file motions).

Amending The Pleadings

¶8 Omegbu contends that he is entitled to amend his pleadings based on factual disputes as to the default judgment against him raised at the March 23, 2010 hearing in this case. He asserts that leave to amend should be liberally granted, and that leave to amend should be granted where a plaintiff will be able to state a cause of action by amending the complaint. However, Omegbu does not

³ Omegbu quotes WIS. STAT. § 802.06(2)(a) in this part of his brief. That statute, however, provides that particular defenses may be made by motion rather than asserted in an answer, and does not address whether a plaintiff's motion for judgment on the pleadings must be resolved before a defendant may move for summary judgment. Omegbu also cites § 802.06(2)(b), which states that, if matters outside the record are considered by the court on motions raising specified defenses, the court shall treat the motion as one for summary judgment. Omegbu then contends that American Family did not raise those specified defenses and, therefore, the circuit court was not authorized to hear American Family's summary judgment motion or consider any matters outside of the pleadings. First, we agree with Omegbu's underlying contention that § 802.06(2)(b) is not relevant to the facts of this case; however, that does not lead to the conclusion that the circuit court was not allowed to consider American Family's summary judgment motion or to consider facts outside of the pleadings. Whether the circuit court properly addressed American Family's summary judgment motion and considered matters outside the pleadings is addressed elsewhere in this opinion.

explain how an amended complaint including additional facts as to the previous default judgment against him would state an additional cause of action.⁴

¶9 Omegbu also contends that the circuit court erred in holding hearings in this case on April 15, 2010, and May 10, 2010, in Omegbu's absence. He contends that he was absent due to the death of his father in Nigeria, and that he informed the court of his upcoming absence from the country at the March 23, 2010 hearing. However, the March 23, 2010 hearing transcript reveals the following: the court suggested April 21, 2010, as a possible hearing date on American Family's motion for sanctions; Omegbu stated he had to leave the country due to the recent death of his father; the court inquired when Omegbu would be leaving, and Omegbu stated he was scheduled to leave April 20, 2010; and the court then suggested a hearing date of April 15, 2010, and Omegbu said "Okay."

¶10 The court then issued an order setting April 15, 2010, as the hearing date on American Family's motion for sanctions. After Omegbu failed to appear at the April 15, 2010 hearing, the court entered an order granting American Family's motion for sanctions, and setting May 10, 2010, as the hearing date to determine American Family's total attorney fees and litigation expenses. Omegbu does not contend that he did not receive notice of those hearings; he contends only that he had informed the court that he would be leaving the country and that the court erred in holding the proceedings in his absence. We are not persuaded. The record reveals that Omegbu told the court he was available for the April 15, 2010

⁴ As the circuit court explained, the court did not have the authority to review the prior default judgment against Omegbu in the course of this action. Similarly, any arguments as to whether the prior default judgment was properly entered are not before us on this appeal.

hearing, and Omegbu does not explain why he was not present for that hearing or for the May 10, 2010 hearing or why he did not inform the court that he would be unavailable for either hearing.⁵ We have no basis to disturb the circuit court's decision on these grounds.

Matters Outside The Record

¶11 Omegbu contends that the circuit court erred in considering matters outside the record in denying his motion for judgment on the pleadings and granting American Family's motion for summary judgment at the March 23, 2010 hearing. He asserts the court erroneously relied on information that: (1) Omegbu had entered into an installment agreement and then failed to make the required payments; and (2) Omegbu's subsequent bankruptcy proceedings were dismissed, reinstating Omegbu's debt. Omegbu contends that the court could not rely on that information because it did not appear in the parties' pleadings. Omegbu acknowledges that this information was presented in American Family's summary judgment submissions by affidavits, but contends that the court should have excluded that information. He asserts that American Family did not move to treat the motion as one for summary judgment under WIS. STAT. § 802.06(2)(b).⁶ This argument is not persuasive.

⁵ We understand Omegbu's argument that he had to leave the country on April 20, 2010, due to his father's death, and that he did not have an anticipated return date. However, the record reveals that Omegbu informed the court that he would be available for the April 15, 2010 hearing, and then failed to appear. The record does not contain any other correspondence from Omegbu to the court as to when he would be available. While we sympathize with Omegbu's situation, it would not be reasonable to expect the court to suspend proceedings in this action indefinitely based on this record.

⁶ It is not clear in this part of Omegbu's argument which motion Omegbu refers to, but that does not affect our analysis.

¶12 American Family moved for summary judgment under WIS. STAT. § 802.08. American Family was not required to move to treat any motion as one for summary judgment under WIS. STAT. § 802.06(2)(b). Thus, while Omegbu contends that it was improper for the court to grant judgment on the pleadings on matters outside the record, that is not what happened. The court denied Omegbu’s motion for judgment on the pleadings, and granted American Family’s motion for summary judgment. On summary judgment, the court considers the facts asserted in the summary judgment submissions, not just the pleadings, to determine whether there is a genuine issue of material fact.⁷ See § 802.08. Again, we discern no error in the court’s actions.

Omegbu’s Motion For Judgment On The Pleadings

¶13 Lastly, Omegbu contends that he is entitled to judgment on the pleadings. He asserts again that the circuit court erred in considering American Family’s summary judgment submissions in denying his motion for judgment on the pleadings because American Family did not move to treat its motion as one for summary judgment under WIS. STAT. § 802.06(2)(b). However, even if we examine only the pleadings, it is plain that Omegbu was not entitled to judgment on the pleadings.

¶14 The issue of whether Omegbu was entitled to judgment on the pleadings requires that we “examine the complaint to determine whether a claim

⁷ Omegbu also disputes the court’s reliance on issue preclusion, contending that there was no prior motion raising issue preclusion, and thus Omegbu did not have a chance to respond to that argument. While the circuit court referenced issue preclusion as an additional problem with Omegbu’s arguments, the court did not rely on issue preclusion in reaching its decision. We therefore will not address this argument further.

has been stated. We then turn to the responsive pleadings to ascertain whether a material factual issue exists.” *Freedom from Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991) (citation omitted). It is only “[i]f the complaint is sufficient to state a claim and the responsive pleadings raise no material issues of fact” that “judgment on the pleadings is appropriate.” *Id.*

¶15 Here, Omegbu filed a complaint against American Family consisting of thirty-one paragraphs. American Family answered, denying the substance of thirty of the thirty-one paragraphs and raising ten affirmative defenses. Because the pleadings established a factual dispute as to the claims in Omegbu’s complaint, Omegbu was not entitled to judgment on the pleadings. *See id.* Accordingly, we affirm.⁸

By the Court.—Judgment affirmed.

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

⁸ Omegbu has not argued that the circuit court’s decision to award sanctions to American Family under WIS. STAT. § 802.05(3) was erroneous, beyond asserting that § 802.05 does not apply to motions under WIS. STAT. § 802.06, an argument that is not developed or supported by legal authority. We therefore will not address the issue of sanctions. We note that Omegbu indicates he will argue the sanctions issue after we resolve this appeal; however, it is unclear what mechanism Omegbu believes will allow him to raise that issue at a later time.

