COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1109 **Cir. Ct. No. 2009CV4336**

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

RED STAR YEAST COMPANY, LLC,

PLAINTIFF-RESPONDENT,

V.

CLIFF BASS AND MRI NETWORK SALES CONSULTANTS OF PLANTATION,

DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. This appeal arises out of a default judgment entered against Cliff Bass and MRI Network Sales Consultants of Plantation. The defendants appeal the circuit court's denial of their motion to vacate the default judgment entered against MRI Network Sales Consultants of Plantation and the

denial of their motion for reconsideration. They contend that the default judgment is void because the summons does not name Rabrob Corp.—the entity allegedly liable in the action—and there is therefore no personal jurisdiction over Rabrob. We conclude that there is no dispute that Rabrob is the correct defendant and the record shows that MRI Network Sales Consultants of Plantation is a name that Rabrob uses in doing business. Therefore, under ***Hoesley v. La Crosse VFW Chapter***, 46 Wis. 2d 501, 175 N.W.2d 214 (1970), we conclude that this is a mislabeling of the correct defendant, not a naming of the wrong defendant, and the judgment is not void for lack of personal jurisdiction over Rabrob.

BACKGROUND

¶2 Red Star Yeast Company, LLC, and Rabrob Corp. entered into a contract under which Rabrob referred candidates for employment at Red Star Yeast. Cliff Bass is the managing director of Rabrob Corp. A dispute arose between the parties and, in March 2009, Red Star Yeast initiated this action. The caption of both the summons and the complaint states that the defendants are Cliff Bass and MRI Network Sales Consultants of Plantation.[1] Red Star Yeast served a summons and complaint on Cliff Bass in his individual capacity and also served a summons and complaint on him as "Managing Director" of "MRI Network Sales Consultants of Plantation." Neither defendant answered the complaint.

[1] Management Recruiters International is also listed as a defendant in the summons and complaint. However, because Management Recruiters International was never served and no default judgment was entered against it, it is not involved in this appeal.

¶3 In June 2009, Red Star Yeast moved for a default judgment against Cliff Bass and MRI Network Sales Consultants of Plantation. The circuit court granted the motion and entered a default judgment against both defendants.

¶4 The defendants filed a motion to vacate the default judgment and to dismiss Red Star Yeast's complaint. The motion asserted that the circuit court did not have personal jurisdiction over the defendants. In support of their contention on lack of personal jurisdiction, the defendants raised two grounds that applied to both: (1) the parties' contract contains a forum selection clause vesting exclusive jurisdiction in Florida courts; and (2) the defendants lacked sufficient minimum contacts with Wisconsin to support personal jurisdiction in Wisconsin. In addition, they argued that MRI Network Sales Consultants of Plantation is a nonexistent entity and that the correct entity is Rabrob, which does business as MRI Sales Consultants of Plantation (not MRI *Network* Sales Consultants of Plantation). They asserted that, because the summons did not name Rabrob as a defendant, the court did not have personal jurisdiction over Rabrob.

¶5 The circuit court denied the defendants' motion, concluding that the defendants waived the defense of lack of personal jurisdiction by failing to timely file any responsive pleadings. The defendants moved for reconsideration on the ground that failure to raise the defense of lack of personal jurisdiction in a timely responsive pleading does not waive the defense. The circuit court did not address that issue but instead denied the motion on the ground that the defendants had sufficient minimum contacts with Wisconsin to support personal jurisdiction over them. The court did not address the issues of the forum selection clause or the summons' failure to name Rabrob.

DISCUSSION

¶6 On appeal, the only argument the defendants pursue is based on the failure of the summons to name Rabrob. They assert that this is a fundamental defect and therefore the circuit court does not have personal jurisdiction over Rabrob and the default judgment is void as to Rabrob. The judgment is also void as to MRI Network Sales Consultants of Plantation, the defendants assert, because that is a nonexistent entity. The defendants do not dispute that Bass was served the summons for MRI Network Sales Consultants of Plantation, nor do they dispute that Bass is the proper party to receive service for Rabrob. As to the court's waiver ruling, the defendants assert they did not waive the right to raise this defense of lack of personal jurisdiction by their failure to timely file a responsive pleading.

¶7 The defendants do not present any argument challenging the circuit court's determination that it had personal jurisdiction over Bass. Therefore, the propriety of the default judgment against Bass is not an issue.[2]

¶8 In response to the defendants' challenge to personal jurisdiction over Rabrob, Red Star Yeast does not dispute that this issue may be raised even though it was not raised in a timely answer. On the merits, Red Star Yeast responds that it used Rabrob's d/b/a name and not its corporate name in the summons. According to Red Star Yeast, this does not defeat personal jurisdiction over Rabrob because

[2] Although the default judgment against Bass is not at issue on this appeal, the briefs on appeal are identified as the briefs of "Defendants-Appellants." (Emphasis added.) In keeping with this, we use the term "defendants."

the correct party was served. Therefore, Red Star Yeast contends, the court's order denying the motion to set aside the default judgment should be affirmed.[3]

¶9 Pursuant to WIS. STAT. § 806.07(1)(d) (2009-10),[4] a court may allow relief from judgment if "[t]he judgment is void." A judgment is void within the meaning of this statute if the court rendering it lacked personal jurisdiction. ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶15, 290 Wis. 2d 620, 714 N.W.2d 913. Whether the contents of a summons are sufficient to confer personal jurisdiction over a defendant requires the application of § 801.09 to the undisputed facts. ***Johnson v. Cintas Corp. No. 2***, 2011 WI App 5, ¶8, 331 Wis. 2d 51, 794 N.W.2d 475. This presents a question of law, which we review de novo. ***Id.***

¶10 Wisconsin courts obtain personal jurisdiction over a defendant if the defendant is served in the manner required by WIS. STAT. § 801.11. § 801.05. Section 801.11 requires that service of a summons must be made in a prescribed

[3] In their supplemental reply brief, in response to our order for supplemental briefing from both parties, the defendants assert for the first time that Red Star Yeast has waived the right to respond to their argument on the summons because Red Star Yeast did not do so in the circuit court in its brief responding to the defendants' motion to vacate the default judgment. Our review of the record shows that, although Red Star Yeast did not present specific arguments in the circuit court in response to the defendants' assertion of a defect in the summons, it did contend that there was proper service. Thus, the issue of the asserted deficiency in the summons as to Rabrob was before the circuit court, and the record does not show a concession by Red Star Yeast on this issue. In any event, the waiver rule is a rule of judicial administration and does not restrict our authority to address an issue even if it is raised for the first time on appeal. ***Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc.***, 2009 WI App 142, 321 Wis. 2d 671, 775 N.W.2d 283. In this case the defendants addressed this issue in their main appellate brief—indeed, it is the only issue they raise on appeal themselves. Red Star Yeast responded to it and the defendants replied; in addition, each party filed a supplemental brief on this issue in response to our order. We address the issue because it is an issue of law and both parties have had a full opportunity to address it.

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

manner. The defendant must be named in the summons. § 801.09(1). *See also* ***Bulik v. Arrow Realty, Inc.***, 148 Wis. 2d 441, 445, 434 N.W.2d 853 (Ct. App. 1988). The failure to name the defendant in a summons is a fundamental defect in the summons and deprives the court of personal jurisdiction over the defendant, even if there is no prejudice. ***Id.*** at 446-47. When a party is seeking to vacate a default judgment for lack of personal jurisdiction, the burden of proof to show lack of personal jurisdiction is on that party. ***Richards***, 290 Wis. 2d 620, ¶¶2, 27.[5]

¶11 There are two cases that are particularly relevant to the issue before us: ***Hoesley***, 46 Wis. 2d 501, and ***Johnson***, 331 Wis. 2d 51.

¶12 In ***Hoesley***, the summons and complaint referred to the defendant as "an association" named "La Crosse VFW Chapter, Thomas Rooney Post," but the intended defendant was in fact a corporation and its correct name was "Thomas Rooney Post No. 1530, Veterans of Foreign Wars of the United States." ***Hoesley***, 46 Wis. 2d at 502. The supreme court stated the applicable rule as follows:

> An amendment of a summons may be allowed to correct a mistake in the name of a party plaintiff or defendant as set out therein. The general rule is that if the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit, or

[5] The defendants are mistaken in arguing that the burden is on Red Star Yeast to show either that there was no defect in the summons or that the defect was not fundamental but instead was technical and did not prejudice the defendants. *See* ***American Family Mut. Ins. Co. v. Royal Ins. Co.***, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992) (If a defect in a summons is technical, not fundamental, the court has jurisdiction if the defendant was not prejudiced by the defect.). In ***Richards v. First Union Sec., Inc.***, 2006 WI 55, ¶27, 290 Wis. 2d 620, 714 N.W.2d 913, the court held that, in the context of a motion to set aside a default judgment, the burden to make this showing is on the party moving to vacate the default judgment.

> even after judgment, and a judgment taken by default is enforceable.[6] [Footnote added.]

Id. Because the plaintiff had served the correct party and, thus, an amendment to reflect the correct name would not have the effect of bringing in an additional party, the supreme court concluded that the service of process was valid and gave the circuit court personal jurisdiction over the corporation. ***Id.*** at 502-504.

¶13 ***Johnson*** addresses a different fact situation, one in which the wrong defendant was named. ***Johnson***, 331 Wis. 2d 51, ¶3. The summons and complaint named "Cintas Corporation" instead of the proper corporate entity, "Cintas No. 2." ***Id.***, ¶3. The plaintiff served the registered agent for Cintas No. 2. ***Id.***, ¶4. Both Cintas Corporation and Cintas No. 2 were existing corporate entities. ***Id.***, ¶3. Neither corporation responded to the complaint, and the plaintiff obtained a default judgment against Cintas No. 2. ***Id.***, ¶¶4-7. We concluded that, because the summons named the wrong corporate defendant, the circuit court did not have personal jurisdiction over Cintas No. 2, and therefore we reversed the default judgment. ***Id.***, ¶17. We discussed ***Hoesley*** and distinguished it, explaining: "[I]n ***Hoesley*** the plaintiff simply mislabeled the correct defendant, i.e., the entity allegedly liable in the action, as distinguished from selecting the wrong corporate defendant," that is, a separate legal entity. ***Id.***, ¶14 & ¶15 n.6.

¶14 Red Star Yeast asserts that the facts in this case are like those in ***Hoesley*** and that case controls. In contrast, the defendants assert that this case is like ***Johnson***. According to the defendants, MRI Network Sales Consultants of

[6] Whether Red Star Yeast has amended or must amend the summons and complaint is not addressed by the parties and therefore we do not discuss this topic.

Plantation is the "wrong" defendant because it is a nonexistent entity and therefore cannot be the same entity as Rabrob.

¶15 We agree with Red Star Yeast that this case, like ***Hoesle***y, involves a mislabeling of the correct defendant rather than a naming of the wrong defendant. There is no doubt that Rabrob is the correct defendant, that is, the entity that entered into the contract with Red Star Yeast. Bass's affidavit avers that he is the managing director of Rabrob Corp., he refers to the "contractual relationship between Rabrob Corp. and plaintiff Red Star Yeast Company," and he explains Rabrob's view of the dispute with Red Star Yeast. Indeed, the defendants' brief in the circuit court states that Rabrob is the correct defendant.

¶16 As for the use of the name MRI Network Sales Consultants of Plantation in the summons, the defendants contend that this is not simply a matter of "mislabeling" of the correct defendant, as occurred in ***Hoesley***. The defendants assert that MRI Network Sales Consultants of Plantation is not a name under which Rabrob does business. However, they do not point to any evidence in the record to support this assertion. We do not accept factual assertions in briefs as true when they are not supported by the record. *See* ***Dieck v. Antigo Sch. Dist.,*** 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990). Our own review of the record shows that Bass signed his affidavit as "Managing Director of Rabrob Corp. d/b/a/ MRI Network Sale Consultants of Plantation," while the contract with Red Star Yeast is signed by an employee of "MRI–Sales Consultants of

Plantation"—leaving out "Network." Thus, the record shows that both names were used as a d/b/a for Rabrob.[7]

¶17 We conclude that the use of one of Rabrob's d/b/a names in the summons instead of its correct corporate name is a mislabeling of the correct defendant. MRI Network Sale Consultants of Plantation is not the name of a separate legal entity and there is no doubt that Rabrob is the correct defendant. We therefore reject the defendants' contention that the summons named the wrong party.

¶18 In summary, because use of MRI Network Sales Consultants of Plantation in the summons was a mislabeling of the correct defendant, Rabrob, rather than a naming of the wrong defendant, and because Rabrob was properly served, the circuit court had personal jurisdiction over Rabrob. Accordingly, the default judgment against MRI Network Sales Consultants of Plantation is not void on this ground.

CONCLUSION

¶19 We affirm the circuit court's orders denying the defendants' motion to vacate the default judgment against MRI Network Sales Consultants of Plantation and denying their motion for reconsideration.

By the Court.—Orders affirmed.

[7] It may be that Rabrob uses only one of the two names as a d/b/a and that the other name is simply a mistaken representation of that one name. Assuming without deciding that there would be proper service on Rabrob only if the summons used Rabrob's exact d/b/a name, the defendants have not met their burden of proving that Rabrob did not use MRI Network Sales Consultants of Plantation as a d/b/a.

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