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DISTRICT IV

July 28, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2380

State of Wisconsin ex rel. Titus Henderson v. John Valenti
(L.C. # 2010CF109)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Titus Henderson appeals orders denying his motion for default judgment and granting John Valenti's motion for summary judgment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

This case is a continuation of prison civil rights litigation that Henderson commenced against Valenti and others in 2010 and which has previously been before us. At the time, we summarily affirmed the dismissal of all of the named defendants with the exception of Valenti, whose dismissal by the circuit court we summarily reversed.

Following remittitur, Henderson moved for default judgment against Valenti. The circuit court denied the motion, in part, on the ground that Henderson failed to submit proof of service on Valenti as required as a prerequisite to default judgment by WIS. STAT. § 806.02(2) and (3). See *Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 601, 486 N.W.2d 539 (Ct. App. 1992). Henderson does not challenge the circuit court's finding that there is no proof of service on Valenti.² Because Henderson's failure to submit proof of service is dispositive of the default judgment issue, we will not consider the remainder of the court's opinion denying the motion on substantive grounds or Henderson's argument that the court failed to exercise its discretion properly. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

Henderson's complaint identified Valenti as: "Administrative Counsel Decision-Maker For Procedural Policies. He is responsible for creating, establishing, and setting forth policy and procedures for Wis. Dept. of Corr. based upon law." The circuit court, after finding that the materials Valenti submitted in support of his motion established a prima facie case that Valenti was the "wrong person," that is, that "he has never been an employee of the State of Wisconsin

² Henderson argues that the circuit court erred in denying his request for an evidentiary hearing on the "personal jurisdiction" issue, which the circuit court assumed to be related to the default judgment motion. Henderson moved for default judgment. In doing so, he is statutorily required to produce proof of service, which he did not do. Although citing numerous inapposite cases, Henderson points us to no statute which requires or case which holds that he is entitled to an evidentiary hearing in lieu of producing proof of service under the WIS. STAT. § 806.02 default judgment procedure. The circuit court properly exercised its discretion in denying the request for a hearing.

or the Department of Corrections, he has never been a consultant or contractor to them or been involved in any other way in the development, adoption or enforcement of their policies or rules,” granted Valenti’s motion for summary judgment.³ The court found that Henderson offered no supported contrary facts; thus, there were no genuine issues of material fact in dispute. We agree with the circuit court and conclude as a matter of law that Henderson has stated no sustainable cause of action against Valenti because Valenti is not the individual that Henderson has identified as having worked for the Department of Corrections and promulgated the policies at issue.

Finally, we conclude that the circuit court properly exercised its discretion in permitting Valenti to file a second motion for summary judgment. The circuit court explained: “Valenti plainly had nothing to do with the Department of Corrections or its treatment of Henderson and it would be a gross and manifest injustice to permit the suit against him to continue.” WISCONSIN STAT. § 802.10(3)(h) permits the circuit court to establish a scheduling order that addresses “[t]he appropriateness and timing of summary judgment adjudication under s. 802.08.” *See also Hefty v. Strickhouser*, 2008 WI 96, ¶45, 312 Wis. 2d 530, 752 N.W.2d 820 (“[S]cheduling orders may trump WIS. STAT. § 802.08(2).” (emphasis deleted)). Here, the court specifically found that the second motion “is supported by new evidence.” Thus, we conclude that the circuit

³ *See* WIS. STAT. § 802.08.

court properly exercised its discretion in amending its scheduling order to permit Valenti to file a second motion for summary judgment.⁴

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Henderson raises a constitutional challenge related to the application of WIS. STAT. § 801.02(7)(c) and the circuit court’s alleged “sua sponte” dismissal of “civil claims.” It does not appear that Henderson raised this issue below; therefore, we will not consider it on appeal. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).