



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 5, 2017

To:

Hon. Faye M. Flancher
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Mark R. Franklin
Kulig, Michalak & Franklin
P.O. Box 400
Independence, WI 54747

Edward T. Kaczmarek
33105 76th Street
Burlington, WI 53105

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

2016AP722

S. Abraham & Sons Inc. v. Edward T. Kaczmarek
(L.C. #2015CV977)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Edward T. Kaczmarek appeals pro se from a judgment granting summary judgment to S. Abraham & Sons, Inc. (SAS). 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 (2015-16).¹ We affirm the judgment of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

SAS is a wholesaler that sells goods to convenience stores for retail sales. Kaczmarek is an individual who owned and operated a convenience store in Lake Geneva. In 2013, SAS and Kaczmarek entered into an agreement whereby SAS would supply Kaczmarek's store with goods on credit. Kaczmarek personally guaranteed payment of the goods.

Eventually, Kaczmarek failed to pay for the goods as promised, and SAS stopped delivering them. SAS then brought a breach of contract claim against Kaczmarek in Racine County. It moved for summary judgment based on an affidavit and Kaczmarek's responses to discovery. Kaczmarek did not file an affidavit or statement under oath contesting the facts alleged in SAS's motion. As a result, the circuit court concluded that there were no genuine issues of material fact and granted SAS's motion. This appeal follows.

We review a grant of summary judgment de novo, using the same methodology as the circuit court. *See Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See id.*; WIS. STAT. § 802.08(2).

On appeal, Kaczmarek contends that the circuit court erred in granting summary judgment to SAS. He asserts that the venue of SAS's action was improper, as his store is in Walworth County and he resides in Kenosha County. He also maintains that he was entitled to an offset for lost profits after SAS stopped delivering goods despite a "gentleman's agreement" to do so.

The problem with Kaczmarek's venue argument is that comes too late. He did not raise it at the initial pleadings stage and has made no showing that, despite reasonable diligence, he did

not discover the issue at or before that time. *See* WIS. STAT. § 801.51. By itself, a defect in venue does not affect the validity of the judgment. Section 801.50(1).

The problem with Kaczmarek’s lost profit argument, meanwhile, is its lack of support. When a motion for summary judgment is made, an adverse party must, by affidavit or otherwise, set forth specific facts showing that there is a genuine issue of material fact for trial. *See* WIS. STAT. § 802.08(3). Kaczmarek did not do this here.

In the end, under the facts in SAS’s motion, which Kaczmarek did not properly contest, we are satisfied that it was entitled to judgment as a matter of law. Accordingly, we affirm.²

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

² To the extent we have not addressed an argument raised by Kaczmarek on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).