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DISTRICT III

January 30, 2018

To:

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Daniel S. Peterson
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You are hereby notified that the Court has entered the following opinion and order:

2016AP1886

EZ Marketing Trust v. Herbert J. Cuene, Jr.
(L. C. No. 2013CV81)

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Daniel Peterson, pro se, appeals a judgment in favor of Herbert J. Cuene, Jr., and DC Docks and Boatlifts, Inc. (Cuene). 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.

This matter arose from Cuene's purchase of a boatlift and dock business in Door County from EZ Marketing Trust, Peterson, and DC Boatlift Dock & Trailer LLC. The latter entities commenced a lawsuit seeking, among other things, replevin of certain personal property they alleged was not included in the sale and wrongfully retained by Cuene. The complaint alleged Peterson was "executor/director" of the trust, and registered agent of the limited liability company. Peterson's attorney contacted Cuene's attorney to request he admit service on behalf of the defendants. Cuene's attorney did so with Cuene's express permission and filed an admission of service. Cuene then filed an answer and counterclaim, alleging Peterson had misrepresented the value of the business, breached a non-compete agreement, and breached an implied warranty concerning the condition of certain equipment.

Peterson, pro se, filed an amended complaint, alleging among other things that Peterson "has been assigned all rights owned by EZ Marketing Trust and DC Docks and Boat Lifts, Inc. [sic] against Defendants." The amended complaint again sought replevin of certain personal property allegedly remaining on site and alleged various other causes of action. Cuene filed an answer to the amended complaint, and an amended counterclaim. Cuene subsequently filed a second amended counterclaim and a third-party complaint with court permission alleging claims of intentional misrepresentation, misrepresentation under WIS. STAT. § 100.18, civil theft, breach of contract and breach of implied warranty. Cuene also filed a motion for summary judgment.

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

Peterson, pro se, responded to the second amended counterclaim by filing a motion to dismiss, challenging the circuit court's competency to proceed on the grounds of insufficiency of service of process of his original complaint, among other things. The circuit court denied Peterson's motion to dismiss, and subsequently granted judgment in favor of Cuene. Peterson now appeals.

Peterson again challenges the service of process of his own summons and complaint. Peterson argues that his service here fell short of the strict statutory requirements, thus depriving the circuit court of personal jurisdiction. He further challenges Cuene's admission of service and contends the time for Cuene to "present arguments for the validity" of the admission of service "is NOW extinguished."

However, when an attorney acknowledges receipt of a document as an attorney on behalf of a client, it may be presumed in the absence of contradiction that the attorney was authorized by the client to accept it. See *Mared Indus., Inc. v. Mansfield*, 2005 WI 5, ¶¶20-21 & n.11, 277 Wis. 2d 350, 690 N.W.2d 835. As the circuit court properly observed, the evidence in this case was uncontradicted that Cuene's attorney formally acknowledged receipt of an authenticated copy of the summons and complaint, pursuant to actual authority expressly granted by Cuene. For more than half a century, admission of service by an attorney with actual authority has constituted proper grounds to effectuate service pursuant to WIS. STAT. § 801.11(1)(d). See, e.g., *Mared Indus.*, 277 Wis. 2d 350, ¶20 n.10.

In any event, even if there was an issue regarding lack of personal jurisdiction based on insufficiency of service of process of the summons and complaint, it would have been Cuene's affirmative defense to raise, not Peterson's. WISCONSIN STAT. §§ 802.06(2) and (8)(a) require

the defendant to assert a defense, based on insufficiency of service, in a responsive pleading or by motion, or it is waived. Cuene’s answer and counterclaim did not include an affirmative defense regarding insufficiency of service or lack of personal jurisdiction. In fact, Peterson commenced the action and then continued the action in Door County for over two years, seeking subsequent relief, until he filed his “motion to dismiss all counterclaims and third party complaint” Peterson will not now be heard to raise insufficiency of service of his own original summons and complaint in response to a second amended pleading.² See *Honeycrest Farms, Inc. v. Brave Harvestore Sys., Inc.*, 200 Wis. 2d 256, 265, 546 N.W.2d 192 (Ct. App. 1996).

Therefore,

IT IS ORDERED that the judgment 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
Acting Clerk of Court of Appeals

² We note that Peterson has filed a document in this court entitled “PROCEDURAL HISTORY CREATING COMMERCIAL LIABILITY FOR: DANIEL S. PETERSON.” We will not consider this document as it is not demonstrated to be part of the record on appeal. See *State ex rel. Wolf v. Town of Lisbon*, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977).