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DISTRICT IV

February 14, 2018

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

2017AP753 Grand View Shores Waterfront Community Association, LTD. v. Raymond W. Samars, II and Tina M. Samars (L.C. # 2017CV4)

Before Lundsten, P.J., Blanchard and Kloppenburg, 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).

Raymond W. Samars, II, pro se, appeals a default judgment in favor of Grand View Shores Waterfront Community Association, LTD. Samars contends that the circuit court erred by granting default judgment to Grand View Shores because, according to Samars: (1) Samars was not properly served with the summons and complaint; and (2) Grand View Shores' action against Samars was based on an improper amendment to the Grand View Shores Declaration of Covenants, Conditions and Restrictions (the covenants). 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 summarily affirm.

Grand View Shores filed this action against Samars on January 5, 2017.[2] Grand View Shores alleged in the complaint that Samars owns property in the Grand View Shores subdivision that is subject to the covenants. It alleged that the members of the Grand View Shores subdivision had voted to approve camping guidelines, which were recorded in the register of deeds as the first amendment to the covenants, and that Samars has refused to remove a camper from his property in violation of the first amendment to the covenants. Grand View Shores sought an order requiring Samars to remove the camper from his property, and a judgment for its costs in enforcing its guidelines. Samars failed to file a responsive pleading within the required time, and Grand View Shores moved for default judgment. On April 6, 2017, the circuit court held a hearing, and Samars appeared pro se and opposed default judgment. The court granted default judgment to Grand View Shores, awarded Grand View Shores its legal costs and disbursements, and ordered Samars to remove the camper from his property within fourteen days.

Samars contends that the circuit court erred by granting default judgment to Grand View Shores after Samars appeared at the default judgment hearing and disputed that he was properly served with the summons and complaint. *See* WIS. STAT. § 806.02(3) ("If a defendant fails to appear in an action within the time fixed in [WIS. STAT. §] 801.09 the court shall, before entering

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

[2] Grand View Shores also named as a defendant Samars' spouse, Tina M. Samars. Tina Samars signed the pro se notice of appeal, but did not sign the pro se appellant's brief submitted by Samars and did not submit a brief on her own behalf.

a judgment against such defendant, require proof of service of the summons ...."); ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 601, 486 N.W.2d 539 (Ct. App. 1992) (providing that § 806.02 "requires a plaintiff who seeks a default judgment to file with his motion for a default judgment proof of service of the summons"). Samars asserts that the court should have set an evidentiary hearing on the issue of whether Samars was properly served after Samars appeared at the default judgment hearing and disputed service. Samars cites ***Dietrich v. Elliott***, 190 Wis. 2d 816, 828, 528 N.W.2d 17 (Ct. App. 1995), for the proposition that, "[w]here service is challenged, [WIS. STAT.] § 801.10(4)(a) mandates that the statutory requirements for sufficient service must be satisfied." We are not persuaded that the circuit court erred by granting default judgment following Samars' challenge to service.

In ***Dietrich***, we stated that, "[i]n the face of a challenge to the sufficiency of service of process, the party serving the process has the burden to show that process was sufficient." ***Id.*** at 826. We also stated, however, that, in general, an affidavit of service is adequate proof of service. ***Id.*** We explained that the affidavit of service must set forth sufficient facts to constitute proof of service under WIS. STAT. § 801.10(4)(a). Because the affidavit of service Dietrich submitted did not meet the statutory requirements, we concluded that service was insufficient. *See* ***id.*** at 826-27. We explained further that, when an affidavit of service is sufficient, "a defendant may overcome such evidence with 'clear and satisfactory proofs' to the contrary." ***Id.*** at 826 (quoted source omitted). On this topic, a "trial court has broad discretion as to the nature of proof it may consider when resolving a sufficiency of process question," and "[t]he evidence may even extend to the taking of testimony." ***Id.***

Here, the process server's affidavit of service meets the statutory requirements to constitute proof of service. WISCONSIN STAT. § 801.10(4)(a) provides, in pertinent part:

> Personal or substituted personal service shall be proved by the affidavit of the server indicating the time and date, place and manner of service; that the server is an adult resident of the state of service … and is not a party to the action; ... and that the server delivered to and left with the defendant an authenticated copy of the summons. If the defendant is not personally served, the server shall state in the affidavit when, where and with whom the copy was left, and shall state such facts as show reasonable diligence in attempting to effect personal service on the defendant.

The process server's affidavit states that, at 4:00 p.m. on January 20, 2017, at Samars' usual place of residence in Illinois, the server accomplished substitute service by leaving a conformed copy of the summons and complaint with Samars' brother, Eddie Samars.[3] The affidavit states further that the server was an adult authorized to serve the court documents, with no interest in this matter, and that the server had made three prior attempts to personally serve Samars at his residence.

Samars does not argue that the server's affidavit of service on Samars does not meet the statutory criteria to constitute proof of service. Rather, he asserts only that he raised a challenge to service by disputing service at the default judgment hearing and maintains that he does, in fact, dispute that he was served.[4] However, Samars has not provided any developed legal

[3] The process server filed an affidavit of service with the same information as to Tina M. Samars.

[4] As part of this argument, Samars argues that he has evidence to support his claim that service was not accomplished at his residence. However, Samars did not submit any evidence supporting his arguments in the circuit court. Accordingly, there is no evidence in the record supporting Samars' arguments for this court to consider on appeal. *See* ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977) (review on appeal is limited to material in the record).

Additionally, Samars disputes the evidence that Grand View Shores submitted following the default judgment hearing in further support of Grand View Shores' claim that it accomplished service of the summons and complaint. Because we conclude that the default judgment was properly granted at the default judgment hearing, we do not address whether the evidence that Grand View Shores submitted following the hearing provided further support for the default judgment.

argument or supporting authority for the proposition that default judgment is improper if a party simply appears at a default judgment hearing and disputes service.

In keeping with ***Dietrich***, Grand View Shores' filing of an affidavit of substitute service is presumptive proof that the summons and complaint were properly served. *See* WIS. STAT. § 891.18 ("Whenever any notice or other writing is by law authorized or required to be served the affidavit of the person serving it, setting forth the facts necessary to show that it was duly served, shall be presumptive proof that such notice or writing was duly served."). Samars failed to provide a reason for why he was entitled to an evidentiary hearing to overcome that presumption.

Samars did not present any evidence at the default judgment hearing or offer to present any significant evidence. Samars merely stated to the court that he received information about the case in an envelope that arrived at his residence and that he did not know anyone named Eddie Samars. The circuit court found that those statements, without any further explanation or supporting evidence, were insufficient for the court to make findings regarding service. Because Samars did not provide or offer to provide any evidence to overcome the presumption of service, we reject Samars' challenge to the service of the summons and complaint.

Samars also contends that the circuit court erred by granting default judgment to Grand View Shores after Samars appeared at the default judgment hearing and asserted that the first amendment to the covenants was not supported by the proper number of votes. To the extent that Samars is asserting that default judgment was not proper after Samars asserted a defense at the default judgment hearing, we reject that contention. *See* WIS. STAT. § 806.02(1) (providing that a circuit court may grant default judgment to the plaintiff if no issue of law or fact has been

joined and time for joining issue has expired). Samars has not provided any developed legal argument or supporting authority for the proposition that default judgment is precluded if a defendant appears at a default judgment hearing and states his defense after the time to join issue has passed. To the contrary, default judgment is properly granted when, as here, no issue of law or facts has been joined when the time to do so has expired. *See* § 806.02(1).

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