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DISTRICT II

January 16, 2019

To:

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

2018AP1608-FT Mike Ottelien Decorating & Remediation, LLC v. Bennett
Enterprises, LLC (L.C. #2018CV1028)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Mike Ottelien Decorating & Remediation, LLC (Ottelien), appeals from the circuit court's dismissal of its complaint for want of personal jurisdiction. 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.

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

In 2016, Bennett Enterprises, LLC (Bennett), an Ohio company, entered into a contract with Precision Group Holdings, LLC, d/b/a PCG Contractors, LLC (PCG), a Georgia company, for the latter to serve as general contractor for a hotel renovations project in Ohio. Under the contract, PCG was authorized to retain subcontractors after providing Bennett with written notice so long as Bennett either explicitly approved the subcontract or implicitly approved and therefore ratified it by not responding to the written notice within fourteen days. A few months later, PCG entered into a subcontract with Ottelien, a Wisconsin company, for labor and materials on the project.

After a payment dispute arose, Ottelien sued Bennett for unjust enrichment and quantum meruit. Ottelien alleged that Bennett (and PCG) sought Ottelien's services in Racine County, Wisconsin. Bennett moved for summary judgment based on the absence of personal jurisdiction. In an accompanying affidavit, Bennett represented that it had not received notice from PCG of the Ottelien subcontract and that it had no contacts with the State of Wisconsin. Ottelien opposed the motion and filed its own affidavit, which did not directly refute Bennett's representation as to the lack of notice. At a hearing on the motion, the circuit court concluded that no evidence of notice had been provided. Hence, there was no evidence of contacts in Wisconsin and no personal jurisdiction over Bennett under WIS. STAT. § 801.05. An order dismissing the action was entered.

Ottelien challenges that decision with two arguments, neither of which we find persuasive. This court reviews whether a circuit court erred in granting summary judgment de novo. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶34, 309 Wis. 2d 365, 749 N.W.2d 211. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

At summary judgment, genuine issues of material fact may arise from reasonable inferences drawn from undisputed facts. *H&R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. Ottelien argues that it was wrongly denied an inference that Bennett either approved or ratified the subcontract on the basis of the terms of its contract with PCG. In other words, Ottelien argues the court should have inferred that the terms of the contract were followed (i.e., notice was provided), even if no evidence to that effect had been proffered. This inference is not reasonable. The circuit court correctly considered the evidence the parties provided, and Bennett’s affidavit directly contradicts the idea that notice had been provided. We see no error.

Second, Ottelien argues that, as a matter of law, summary judgment should not have been granted without an evidentiary hearing on the issue of personal jurisdiction. Pursuant to WIS. STAT. §§ 802.06(4) and 801.08, “a plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction even if the plaintiff does not demonstrate that an evidentiary hearing is necessary.” *Kavanaugh Rest. Supply, Inc. v. M.C.M. Stainless Fabricating, Inc.*, 2006 WI App 236, ¶¶8-9, 297 Wis. 2d 532, 724 N.W.2d 893. The statutory right may be waived, however, if the plaintiff accepts a different procedure. *Id.*, ¶14 (citing *Hagen v. City of Milwaukee Emp.’s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, 262 Wis. 2d 113, 663 N.W.2d 268, which resolved personal jurisdiction without a hearing with no indication that plaintiff objected to resolution on the parties’ affidavits).

Based on our review of the record, we conclude that Ottelien waived the issue by accepting the circuit court’s resolution of the case without an evidentiary hearing. At the motion hearing, when forced to identify a factual dispute, Ottelien relied on the reasonable inference theory we rejected above. The circuit court asked counsel whether Ottelien had any evidence

that Bennett received notice of the subcontract—i.e., evidence contradicting Bennett’s affidavit—Ottelien responded that it had none. While Ottelien explained to the court that controverting proof might be obtained through discovery, the court pointed out that a request for discovery had not been made and that Ottelien filed a response to the motion for summary judgment rather than seek leave to do further discovery before the court addressed the motion. No request followed, nor was an objection made when the court rendered its findings based on the uncontroverted representations in Bennett’s affidavit. In total, we find that Ottelien waived the issue.

Upon the foregoing reasons,

IT IS ORDERED that the order 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.

Sheila T. Reiff
Clerk of Court of Appeals