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DISTRICT II

May 19, 2021

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

2019AP1438

Seth Kroenke v. Paul E. Foley (L.C. #2018CV234)

Before Neubauer, C.J., Davis and Stark, 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).

Paul E. Foley appeals from a circuit court dismissal order. Foley's appeal brings before this court an earlier order granting partial summary judgment to Seth and Jennah Kroenke on their breach of contract claim arising from their purchase of Foley's house.¹ Foley also

¹ After obtaining partial summary judgment, the Kroenkes withdrew the balance of their claims against Foley. The circuit court proceedings then concluded with the order from which this appeal is taken. The partial summary judgment order is before this court pursuant to WIS. STAT. RULE 809.10(4).

challenges the circuit court’s refusal to reconsider the grant of partial 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 (2019-20).² We affirm the order dismissing the case.

After they purchased Foley’s house, the Kroenkes sued Foley for breach of contract and misrepresentation arising from undisclosed property defects. Foley answered the complaint, but he did not respond to the Kroenkes’ requests for admission. The Kroenkes sought summary judgment arguing that Foley’s failure to respond to their requests for admission left no material factual issues in dispute.³ Foley neither sought relief from the admissions he made nor filed an affidavit in opposition to the summary judgment motion.⁴ In light of Foley’s failure to counter the Kroenkes’ showing on summary judgment, the circuit court granted summary judgment to the Kroenkes on their breach of contract claim and awarded damages. Foley sought reconsideration, which the circuit court denied.

We review the circuit court’s grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). “We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

³ WISCONSIN STAT. § 804.11(1)(b) provides that a matter is deemed admitted unless, “within 30 days after service of the request ... the party to whom the request is directed serves” either an answer or an objection.

⁴ While Foley filed a document captioned “Affidavit,” it was unsigned and unsworn and offered no evidentiary facts. The affidavit was not sufficient to oppose summary judgment. *See Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106.

matter of law.” *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

A party opposing summary judgment may not rest on mere denials or upon the pleadings. *Dawson v. Goldammer*, 2006 WI App 158, ¶30, 295 Wis. 2d 728, 722 N.W.2d 106. The party “must affirmatively ‘counter with evidentiary materials demonstrating there is a dispute.’” *Id.*, ¶31 (citations omitted). When the opposing party fails to raise an issue of material fact in an opposing affidavit, summary judgment can be rendered on that basis alone. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983). A failure to respond to requests for admission can also be a basis for summary judgment. *Id.* at 630.⁵

On appeal, Foley asks this court to conclude that his oral presentation at the summary judgment hearing created the factual dispute necessary to avoid summary judgment. As the circuit court determined at the summary judgment hearing, Foley neither responded to the requests for admission nor opposed summary judgment with affidavits creating any material questions of fact, and his pro se status did not excuse these failures. The summary judgment procedure requires an opposing affidavit, *id.* at 632, and argument at a summary judgment hearing is not a substitute. The undisputed facts in the summary judgment record established that Foley failed to disclose property defects and breached the contract. We agree with the circuit court that the record shows no basis to excuse Foley’s failure to respond to discovery or comply with the summary judgment procedure. The circuit court properly granted summary judgment on the Kroenkes’ breach of contract claim.

⁵ A party who does not timely respond to a request for admission has admitted the matter. *Mucek v. Nationwide Communications, Inc.*, 2002 WI App 60, ¶26, 252 Wis. 2d 426, 643 N.W.2d 98.

As Foley concedes in his appellate briefs, his motion for reconsideration presented materials he offered to the circuit court at the summary judgment hearing. We have already held that Foley's presentation at the summary judgment hearing was not sufficient as a matter of law to counter the Kroenkes' showing on summary judgment. We review the circuit court's denial of a motion for reconsideration for an erroneous exercise of discretion. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Because Foley presented nothing new to the circuit court, the court did not err in denying his motion for reconsideration.

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