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DISTRICT II

February 22, 2023

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:

2022AP567

Jory Tia Valentine v. David James Decker (L.C. #2020CV88)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Jory Tia Valentine, pro se, appeals from an order dismissing David James Decker (personally and with prejudice) from Valentine's lawsuit alleging injuries arising from allegedly unsafe conditions of a rental unit she was living in. Valentine argues the circuit court erred in dismissing Decker from the lawsuit because she had excusable neglect for failing to comply with a court order requiring her to respond to Decker's summary judgment motion. 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 (2021-22).¹ Because Valentine failed to raise excusable neglect in the circuit court, she has forfeited this issue, and we therefore affirm.

In January 2020, Valentine filed a personal injury lawsuit against Decker, Decker Properties, Inc., and Acuity, A Mutual Insurance Company alleging she was injured by toxic mold in her rental unit located at 1450 South Coachlight Drive in New Berlin. In October 2021, Decker filed a motion for summary judgment seeking to dismiss himself personally from the case. In an Affidavit supporting the motion, Decker averred that he is the owner and a member of Decker Properties, Inc., which is a real estate management company, and that he has never personally owned the property located at 1450 South Coachlight Drive. Decker further stated that “[d]uring all relevant times, [he has] never conducted business personally, rather only as a member of the corporation, Decker Properties, Inc.”

After a number of adjournments, Decker’s summary judgment motion was set to be heard on February 10, 2022. When Valentine’s attorney could not appear in court on February 10, 2022, because he was in the emergency room, the circuit court adjourned the summary judgment motion hearing to March 29, 2022. The court ordered Valentine to file a response to the summary judgment motion “within seven days of the date of this order [February 10, 2022.]” Specifically, the order required her to file “a letter indicating whether Plaintiff objects to: a. David Decker’s Motion for Summary Judgment requesting dismissal of him personally from the action[.]” If she objected, the order also required that Valentine “file a brief setting forth the legal basis for the objection.” The court’s order indicated that “this new date [March 29, 2022] will not be adjourned

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

for any reason, so Plaintiff’s counsel is encouraged to engage co-counsel if necessary in this matter.”

On February 22, 2022, Valentine’s attorney contacted the circuit court, requested a transcript from the February 10th hearing so that he could “attend to what [he] must attend to[.]” and advised the circuit court that he was still recuperating from a health issue. Neither the attorney nor Valentine, however, ultimately filed any objection to dismissing Decker. As a result, on March 9, 2022, the court granted Decker’s motion for summary judgment and dismissed him personally from the case.

Valentine now appeals.

Valentine argues that her failure to comply with the circuit court’s order directing her to object to Decker’s dismissal is attributable to excusable neglect—namely, the failing health and ultimate death of her attorney. In his Response brief, Decker asserts that Valentine raises excusable neglect for the first time on appeal and therefore has forfeited the argument. Valentine did not file a Reply brief refuting Decker’s assertion.

This court does not consider arguments raised for the first time on appeal. *Brooks v. Hayes*, 133 Wis. 2d 228, 241, 395 N.W.2d 167 (1986). This is particularly true when an issue raised requires factfinding by the circuit court. After the circuit court dismissed Decker from the case, Valentine could have filed a motion pursuant to WIS. STAT. § 806.07, wherein she could have sought relief from the order based on “excusable neglect[.]” Sec. 806.07(1)(a). Had Valentine filed that motion, the circuit court would have made factual findings as to whether Valentine established excusable neglect sufficient to vacate its order. *See, e.g., Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶44, 326 Wis. 2d 640, 785 N.W.2d 493 (noting that “§ 806.07(1)(a) permits relief on

a finding of ‘excusable neglect’”). That never happened here, and this court does not make factual findings. *See, e.g., Rucker v. DILHR*, 101 Wis. 2d 285, 290, 304 N.W.2d 169 (Ct. App. 1981) (“It is for the trial courts and not appellate courts to weigh the evidence in dispute and to determine the credibility of witnesses.”). Thus, we cannot address her excusable neglect argument. Moreover, Valentine failed to file a Reply brief wherein she could have attempted to refute Decker’s contention that she forfeited her right to raise excusable neglect. Her failure to file a Reply brief means she concedes the point. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (When an appellant does not reply to a proposition asserted in the responsive brief, we may take it as a concession.).

Therefore,

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