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DISTRICT II

April 5, 2023

To:

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Circuit Court Judge
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Clerk of Circuit Court
Waukesha County Courthouse
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Carl Edward Cole
238 Union St.
Waukesha, WI 53188

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

2021AP835

RT1 Restoration Services, LLC v. Carl Edward Cole
(L.C. #2020CV1351)

Before Neubauer, Grogan and Lazar, 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).

Carl Edward Cole appeals from an order of the circuit court granting RT1 Restoration Services, LLC's (RT1) motion to voluntarily dismiss its claims against him. Cole argues that the court erred in multiple respects in granting RT1's motion, including by granting the motion before he could respond to it and by dismissing RT1's claims without prejudice and without awarding Cole costs. 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 We affirm.

This case arises out of actions Cole allegedly undertook to transfer certain assets to a relative after a civil jury awarded substantial damages and judgment was entered against Cole in a prior case.² RT1 filed suit on September 25, 2020, asserting a claim of fraudulent transfer against Cole and Jaime M. Toro, the alleged transferee and daughter of Cole's wife, and a fraud claim against Cole based on allegedly false testimony he gave at a supplemental examination following entry of the judgment. Following numerous unsuccessful attempts to serve the summons and complaint on Cole personally, RT1 emailed Cole the summons, complaint, and attached exhibits on November 4, 2020. RT1 again tried to personally serve Cole at his home on November 23, 2020, per his request, but Cole did not answer the door. RT1 then attempted to serve Cole by publication. On November 30, 2020, RT1 emailed a publication summons to the Waukesha Freeman for publication. But RT1 did not mail a copy of the publication summons to Cole as required under WIS. STAT. § 801.11(c).

On December 28, 2020, Cole moved to dismiss the action for lack of personal jurisdiction and insufficient service of the summons and complaint. The following week, on January 7, 2021, Cole filed four additional motions, including two more motions to dismiss. In one dismissal motion, Cole argued that RT1's claims were barred by the applicable statutes of limitation. In the other motion, Cole argued that RT1's claims should be dismissed because they

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

² The judgment was entered in *Perfection, LLC v. Cole*, Waukesha County Circuit Court case No. 2014CV449.

are subject to mandatory contractual arbitration.³ At a status conference on January 28, 2021, the circuit court set a hearing for February 5 to address the motions concerning personal jurisdiction and arbitration.

On February 4, 2021, RT1 electronically filed a letter asking the circuit court to cancel the February 5 motion hearing because it intended to voluntarily dismiss its claims against Cole either by stipulation under WIS. STAT. § 805.04(1) or by court order under § 805.04(2). RT1 served this letter on Cole via United States mail and email because Cole was representing himself and was not enrolled as an electronic filer. The court canceled the February 5 hearing without waiting for a response from Cole.

On February 8, 2021, RT1 and Cole filed additional documents with the circuit court. Cole filed a motion seeking an evidentiary hearing on his challenges to the court's subject matter jurisdiction and personal jurisdiction, a motion to compel, and an Answer to Toro's cross-claims in which Cole restated his jurisdictional objections. RT1 electronically filed a motion to voluntarily dismiss its claims against Cole without prejudice along with two supporting affidavits and a proposed order. RT1 sent copies of these filings to Cole via United States mail. That same day, the circuit court entered an order dismissing RT1's claims against Cole for lack of personal jurisdiction without prejudice and without costs.

On appeal, Cole raises a host of challenges to the circuit court's decision. Cole first challenges the circuit court's decision to cancel the February 5 motion hearing before he learned of RT1's request and could respond to it. "[A] court has the discretion to control its calendar and

³ Cole incorrectly titled this motion as a motion to dismiss for lack of subject matter jurisdiction.

to decide how much time to allot to particular matters.” *Kohl v. DeWitt Ross & Stevens*, 2005 WI App 196, ¶25, 287 Wis. 2d 289, 704 N.W.2d 586. This court will “affirm a court’s exercise of discretion in this regard if it acts reasonably.” *Id.* Here, the court acted reasonably in canceling the February 5 hearing. RT1 asked the court to cancel the hearing on February 4 because it intended to voluntarily dismiss its claims against Cole pursuant to WIS. STAT. § 805.04.⁴ The anticipated voluntary dismissal would render the hearing, which was to address several motions to dismiss filed by Cole, including his motion to dismiss for lack of personal jurisdiction, unnecessary. In light of the short window of time between RT1’s request and the motion hearing, the court acted reasonably in not waiting for a response before taking the hearing off its calendar. *See Rupert v. Home Mut. Ins. Co.*, 138 Wis. 2d 1, 7, 405 N.W.2d 661 (Ct. App. 1987) (recognizing that a circuit court has “discretionary power to control its docket with economy of time and effort”).

Next, Cole contends the circuit court erroneously exercised its discretion in dismissing the claims against him before he could file a response to RT1’s motion. Cole is correct that the court acted before he could file a response, but he has not shown that this warrants reversal. RT1 sought a voluntary dismissal after concluding the court lacked personal jurisdiction over Cole. Cole had already filed a motion to dismiss challenging personal jurisdiction. He restated his position that the court lacked personal jurisdiction over him in two filings made on the day the

⁴ Contrary to Cole’s contention, the letter request was not a substantive motion seeking a ruling or order from the court.

court granted the voluntary dismissal. Because both parties agreed that the court lacked personal jurisdiction over Cole, the timing of the dismissal is not a reason to reverse it.⁵

Cole also argues the circuit court erred in dismissing the claims against him without prejudice and without an award of costs. WISCONSIN STAT. § 805.04 permits a court to grant a voluntary dismissal “upon such terms and conditions as the court deems proper.” Sec. 805.04(2). This language affords a court discretion in setting the terms and conditions of a voluntary dismissal. *Estate of Engebose v. Moraine Ridge Ltd. P’ship*, 228 Wis. 2d 860, 864, 598 N.W.2d 584 (Ct. App. 1999). We will uphold the court’s decision “if there appears to be any reasonable basis for” it. *See Dunn v. Fred A. Mikkelson, Inc.*, 88 Wis. 2d 369, 380, 276 N.W.2d 748 (1979). Unless otherwise specified in the order, a voluntary dismissal is “not on the merits.” Sec. 805.04(2).

The circuit court did not erroneously exercise its discretion in dismissing RT1’s claims without prejudice. A dismissal for lack of personal jurisdiction is by nature not an adjudication of the merits of a claim because personal jurisdiction is a separate, threshold requirement that must be met before a court may address the merits. *See* WIS. STAT. § 801.08(1) (requiring “issues of fact and law raised by an objection to [personal jurisdiction]” to “be heard by the court ... in advance of any issue going to the merits of the case”); *see also P.C. v. C.C.*, 161 Wis. 2d 277, 297, 468 N.W.2d 190 (1991).⁶ Accordingly, where the court lacks personal jurisdiction, a

⁵ Additionally, we note that once Cole received notice of the dismissal, he could have filed a motion for reconsideration explaining why the dismissal should have been with prejudice.

⁶ Because the circuit court lacked personal jurisdiction over Cole, it appropriately did not address his motion to dismiss based on the statute of limitations. *See P.C. v. C.C.*, 161 Wis. 2d 277, 297, 468 N.W.2d 190 (1991) (recognizing that circuit court “must have both subject matter jurisdiction and personal jurisdiction” in order to address merits of a case).

dismissal without prejudice is ordinarily appropriate. See *Giese v. Giese*, 43 Wis. 2d 456, 464, 168 N.W.2d 832 (1969). In contrast, a “dismissal with prejudice is a drastic sanction” that is appropriate only where there is “misconduct or inexcusable neglect, or where the claims are unlikely to succeed.” *Haselow v. Gauthier*, 212 Wis. 2d 580, 591, 569 N.W.2d 97 (Ct. App. 1997).

Though the circuit court did not set forth its reasons for dismissing RT1’s claims against Cole without prejudice, “we may search the record to determine if it supports the court’s discretionary decision.” See *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Here, the court applied the general rule applicable to a dismissal for lack of personal jurisdiction. Cole has not shown that RT1’s failure to properly serve him was the result of misconduct or inexcusable neglect that would warrant a dismissal with prejudice. To the contrary, the record shows that RT1 attempted to personally serve Cole more than a dozen times, including once at a time and location he requested. When those efforts proved unsuccessful, RT1 attempted service by publication. Cole does not argue that the error made by RT1 in attempting publication service was the product of misconduct or inexcusable neglect. Nor has Cole shown that RT1’s claims against him are unlikely to succeed. Instead, Cole points to the time and money he has put into filing motions to dismiss and defending against Toro’s cross-claims. Those efforts do not constitute a basis under Wisconsin law for Cole’s contention that the circuit court erroneously exercised its discretion in dismissing RT1’s claims without prejudice. Absent personal jurisdiction over the parties, the circuit court appropriately decided the motion for voluntary dismissal before reaching the arbitration issue.

Finally, Cole argues that the circuit court denied him an opportunity to request an award of costs and that such an award was proper in this case. Initially, we note that though the court

stated that the dismissal was “without costs to any party,” Cole could have filed a motion to reconsider asking that the dismissal be conditioned upon an award of costs.

In addition, though we do not have a statement of the court’s reasons for not awarding costs, neither Cole nor the record shows that the court erroneously exercised its discretion in denying costs. The other motions to dismiss that Cole prepared could presumably be utilized in the future if RT1 commences another action against him. Nothing in the record suggests that RT1 did not act in good faith in attempting to serve Cole and move this action forward. The case had not progressed beyond the pleadings stage when it was dismissed; no discovery had occurred because Cole had filed motions to dismiss. *See* WIS. STAT. § 802.06(1)(b). Finally, Cole identifies no “undue hardship” or “unique prejudice” resulting from the denial of costs. *See Dunn*, 88 Wis. 2d at 382 (setting forth factors guiding a court’s discretion in determining whether to award attorney fees and costs in connection with voluntary dismissal without prejudice).

Cole contends that he had a right to seek costs under WIS. STAT. § 814.49, which states that when an action is dismissed for lack of personal jurisdiction, “the court when entering judgment dismissing the action against the defendant may order the plaintiff to pay to the defendant all reasonable actual costs, disbursements and expenses” up to \$500. Sec. 814.49(1). Cole is not entitled to costs under this section because the statute states that the court “may” order the payment of costs, thereby giving the court discretion to award them. *See id.*; *Linda L. v. Collis*, 2006 WI App 105, ¶72, 294 Wis. 2d 637, 718 N.W.2d 205 (stating that Wisconsin courts “generally construe the word ‘may’ in a statute as allowing for the exercise of discretion”). The statute does not require the circuit court to award costs, and as we have already

explained, the record does not show that the court’s decision to not award costs was an erroneous exercise of its discretion.⁷

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

⁷ To the extent we have not addressed an argument raised by Cole on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).