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DISTRICT II

May 17, 2023

To:

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Circuit Court Judge
Electronic Notice

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

2020AP729

Titus Henderson v. Brian Foster (L.C. #2017CV918)

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).

Titus Henderson appeals pro se from a circuit court order dismissing his claims on summary judgment. He contends that the order should be reversed because of three nonsubstantive errors: (1) the court should have granted his motion for substitution; (2) the court should have entered default judgment against one of the defendants; and (3) he was disconnected from the last few minutes of the telephonic summary judgment hearing. 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.

Henderson is an inmate confined in the Wisconsin prison system. In August 2017, he filed a summons and complaint in state court, alleging various claims against numerous state officials, including Secretary of State Douglas La Follette.

The defendants removed the case to federal court based on federal claims alleged in the complaint. Following Henderson's disavowal of any federal claims, the case was remanded back to state court.

Months after remand to state court, in July 2018, Henderson moved for substitution of judge. The record does not include an order denying the motion.

Henderson also moved for default judgment against Secretary of State La Follette for allegedly failing to file a timely answer to the complaint. The circuit court denied this motion, reasoning that (1) the defendants did file a timely answer in federal court asserting that Secretary of State La Follette had not been properly served and otherwise denying the allegations against him; and (2) when Henderson showed that service had been properly effectuated, the defendants promptly filed an amended answer, again denying the allegations against Secretary of State La Follette.

The defendants eventually moved for summary judgment, and the circuit court held a telephonic hearing on the motion. Towards the end of the hearing, when it became apparent that

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

the court would not rule in his favor, Henderson terminated the phone call. The court observed, “The record should reflect the plaintiff hung up in the middle of the hearing and did not wish to hear the ruling of the Court. He hung up on the parties.” The court subsequently entered an order dismissing Henderson’s claims on summary judgment. This appeal follows.

On appeal, Henderson first contends that the circuit court should have granted his motion for substitution. He submits that he was entitled to substitution under WIS. STAT. § 801.58.

WISCONSIN STAT. § 801.58 establishes the procedure for substitution of a judge in a civil case. It provides that a plaintiff requesting substitution must do so “not later than 60 days after the summons and complaint are filed.” Sec. 801.58(1). Here, Henderson filed his motion for substitution well beyond this statutory deadline. Accordingly, his motion was untimely, and no substitution was required.

Henderson next contends that the circuit court should have entered default judgment against Secretary of State La Follette. Again, he complains that Secretary of State La Follette failed to file a timely answer to the complaint.

We review a circuit court’s decision on whether default judgment is warranted under the erroneous exercise of discretion standard. *Waukesha County v. S.L.L.*, 2019 WI 66, ¶10, 387 Wis. 2d 333, 929 N.W.2d 140. In this case, the circuit court found that Secretary of State La Follette had filed timely answers to the complaint—both initially when service was at issue and again after service was resolved. The record supports this finding. With no other basis for default judgment, we are satisfied that the court properly exercised its discretion in denying Henderson’s motion.

Finally, Henderson contends that he was disconnected from the last few minutes of the telephonic summary judgment hearing. He blames a malfunctioning prison phone for the disconnection.

As noted above, the circuit court found that Henderson hung up the phone as opposed to being accidentally disconnected. We cannot say that this finding is clearly erroneous. *See Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, ¶25, 405 Wis. 2d 616, 985 N.W.2d 69 (“Factual findings made by the circuit court will not be disturbed unless they are clearly erroneous.”). Accordingly, Henderson’s final claim must fail.²

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

² Henderson raises additional claims for the first time in his reply brief. We need not address them. *See State v. Reese*, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 (explaining that this court need not address arguments that are raised for the first time in the reply brief).

