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**DISTRICT II**

April 24, 2013

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

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2011AP1835	BCI of Wauwatosa, Inc. v. Michael Pitcock (L.C. # 2010CV5462)
2011AP1836	Panda Properties LLC v. Michael Pitcock (L.C. # 2010CV4743)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated appeals, Michael Pitcock and Britton Bell (the owners) appeal from orders granting summary judgment to two companies who performed improvements on their home, BCI of Wauwatosa, Inc. and Panda Properties, LLC (the contractors). In both cases, the owners did not appear at the summary judgment hearing, and the circuit court granted summary judgment against them after declining to adjourn the hearing. The circuit court later declined to vacate the orders granting summary judgment. Based upon our review of the briefs and record,

we conclude at conference that these cases are appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

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 matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 349, 353, 526 N.W.2d 822 (Ct. App. 1994).<sup>2</sup>

There are undisputed facts common to both cases. The owners entered into home improvement contracts, failed to pay the entire amount due under the contracts, were sued, failed to respond to discovery such that dispositive admissions were made, and failed to appear at the summary judgment hearing.

The owners raise numerous issues on appeal. However, the dispositive issue on appeal is whether the circuit court erroneously granted summary judgment against the owners when the owners failed to respond to discovery and therefore admitted the material facts of the contractors' claims. Moreover, the owners did not appear at the summary judgment hearing. We conclude that the circuit court did not err in either denying an adjournment of the summary

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Contrary to the contractors' suggestion, summary judgment is not a discretionary act of the circuit court. The contractors' view has not been the law in Wisconsin for many years. *Wright v. Hasley*, 86 Wis. 2d 572, 577-79, 273 N.W.2d 319 (1979).

judgment hearing or entering summary judgment against the owners based on the admissions they made in discovery.

On July 21, 2011, the circuit court convened a hearing to address the contractors' motion to deem matters admitted because the owners did not respond to requests for admission and production of documents. In lieu of appearing at the hearing, the owners sent to the court a "Notice of Medical Emergency and Unavailability." The notice stated that both owners were under medical care and were unable to continue litigating the actions or appear for the hearing. The owners claimed a history of surgeries. The court construed the owners' notice as a request for adjournment, which the court denied. The court found that the notice did not identify any medical emergency that would justify cancelling the hearing. Rather, the court found that the owners suffer from ongoing, but not emergency, health problems. The court did not accept Bell's claim that it was too stressful for her to be involved in the litigation and noted that she could have sought representation or assistance in defending the contractors' actions. The court did not accept that Pitcock could not appear in court for the reasons stated in the notice. Because the owners' notice was insufficient to support an adjournment request, the court declined to adjourn the hearing. Adjournments are discretionary with the circuit court. *Bagnowski v. Preway, Inc.*, 138 Wis. 2d 241, 249, 405 N.W.2d 746 (Ct. App. 1987). We see no misuse of discretion.

The owners next argue that the circuit court granted summary judgment on an *ex parte* basis. The owners are wrong. The owners failed to appear at a duly noticed hearing, and the circuit court denied their request to adjourn the hearing because they did not state sufficient grounds for their inability to appear at the hearing. The circuit court did not act *ex parte*.

Turning to the contractors' motion relating to the ignored discovery, the court determined that the discovery was deemed admitted. In the absence of disputed facts, the court granted summary judgment to the contractors.

The owners argue that they were not personally served with authenticated copies of Panda's amended summons and amended complaint. The amended complaint was subject to the service and filing requirements of WIS. STAT. § 801.14, *Schuett v. Hanson*, 2007 WI App 226, ¶7, 305 Wis. 2d 729, 741 N.W.2d 292, and service by mail was appropriate, WIS. STAT. § 801.14(1) and (2). "Section 801.14 assumes that an amended pleading will be served before it is filed [within a reasonable time after service]." *Schuett*, 305 Wis. 2d 729, ¶7. An authenticated copy of the amended complaint was not required.

The record reveals that the owners acknowledged receiving the amended complaint by mail. In a March 31, 2011 letter to the court, the owners requested a fifteen-day extension of time to answer the amended complaint. It appears beyond dispute that the owners received the amended complaint, and they never answered it.

An amended summons was not required as the circuit court had already acquired personal jurisdiction over the owners via personal service of the original summons. *Bell v. Employers Mut. Cas. Co.*, 198 Wis. 2d 347, 362-63, 541 N.W.2d 824 (Ct. App. 1995). The record does not support the owners' claim that either subject matter or personal jurisdiction was lacking.

The owners claim they were not served with Panda's summary judgment motion. The record reveals that the owners filed a pleading opposing Panda's motion.

We do not reach the merits of any of the owners' claims regarding the sufficiency of the contractors' complaints, that they were not liable to the contractors, that there were defects in the contractors' construction liens, and that the contractors' claims should have been arbitrated. The contractors' discovery and summary judgment motions were scheduled for the July 21 hearing, and that hearing was the time for the owners to dispute those motions and the contractors' claims. The circuit court did not find credible the owners' reasons for not appearing at that hearing. The credibility determination was for the circuit court to make. *Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

The circuit court granted summary judgment against the owners because they made dispositive admissions when they failed to respond to the contractors' requests for admission. A failure to respond to requests for admission within thirty days admits the matters set out in the requests.<sup>3</sup> WIS. STAT. § 804.11(1). The admissions made by the owners left no issues of material fact, and summary judgment was appropriate.<sup>4</sup>

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<sup>3</sup> The owners argue that the circuit court granted them a sixty-day extension of time to respond to the contractors' discovery. At the May 27, 2011 hearing, the circuit court granted the owners an additional sixty days to name their witnesses. The requests for admission that decided this case were served on or about May 27, 2011 and were not the subject of the May 27 hearing. At the May 27 hearing, the contractors noted that responses from the owners were outstanding for discovery served in March and early April. The court scheduled the contractors' motion to compel for July 21. The owners were present at the May 27 hearing, they agreed with the July 21 hearing date, and they knew that the discovery issues would be addressed on July 21. The court also confirmed that the owners understood their statutory obligation to respond to discovery.

The contractors filed a discovery sanction motion on June 30 because the owners had not responded to the discovery served at the end of May. The contractors requested that the admissions be deemed admitted for purposes of summary judgment.

<sup>4</sup> We acknowledge that on July 14, 2011 the owners filed an "Affidavit and Attachments Opposing Motions to Compel Discovery and Motion for Summary Judgment." We have reviewed these documents and we conclude that they did not create any issues of material fact to counter the admissions made when the owners failed to respond to the requests for admission.

By not responding to BCI's requests for admission, the owners admitted the following: the owners entered into a contract to install replacement windows, BCI supplied the windows, the owners did not pay the entire balance due under the contract, the owners had no intention of paying the balance due, BCI gave the required notice to the owners regarding BCI's lien rights and lien, BCI filed the lien claim, and the owners stated that they did not intend to pay the balance due.

By not responding to Panda's requests for admission, the owners admitted the following: the owners entered into a contract and two change orders for interior remodeling of their home, Panda performed under the contract, the owners ordered Panda off the property and terminated the contract without notice to Panda, the owners did not pay the entire balance due under the contract, the owners had no intention of paying the balance due, Panda gave the required notice to the owners regarding Panda's lien rights and lien, Panda filed the lien claim, and the owners stated that they did not intend to pay the balance due.

Because the owners admitted the material facts of the contractors' claims and did not show cause to adjourn the July 21 hearing, there was no basis to vacate the summary judgment orders.

The owners argue that the contractors' theft by fraud claim<sup>5</sup> was improperly pled and exemplary damages were not warranted. This issue was not litigated in the circuit court before the

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<sup>5</sup> The claim was brought pursuant to WIS. STAT. § 895.446 and WIS. STAT. § 943.20. Section 895.446(3)(c) authorizes exemplary damages for conduct which constitutes a violation of § 943.20 (theft).

circuit court granted summary judgment, and we will not address it for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).<sup>6</sup>

Upon the foregoing reasons,

IT IS ORDERED the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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<sup>6</sup> To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *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.”).

*Diane M. Fremgen*  
*Clerk of Court of Appeals*