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DISTRICT IV

April 22, 2013

To:

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

2010AP2912

Titus Henderson v. Rick Raemisch (L.C. # 2010CV109)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Titus Henderson appeals an order dismissing his complaint. 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 (2011-12).¹ We affirm the dismissal as to all defendants except John Valenti, on which we reverse.

We first address the arguments as to the defendants other than Valenti. The circuit court dismissed the complaint on the ground that these defendants were not timely served. In response to the motion to dismiss, Henderson had argued that service was timely, based on his interpretation of certain provisions related to counting time. The court rejected those arguments. Henderson's opening brief on appeal does not repeat those arguments, and therefore we do not address them.

Instead, Henderson argues that he did not receive proper notice of when the time for service began to run; that the court did not timely determine his indigency; and that there were other claimed obstacles to Henderson making timely service. However, it does not appear that Henderson raised any of these issues in his initial response to the motion to dismiss. To the extent he raised them in his motion for reconsideration, the circuit court rejected them on the ground that motions for reconsideration should not be used to present arguments that were previously available, but were not presented. Henderson has not persuaded us that this was an improper basis to deny reconsideration.

As to defendant Valenti, Henderson argues that the court erred in dismissing Valenti because Valenti did not move to dismiss and did not otherwise raise the defense of lack of personal jurisdiction in an answer. In our order of March 14, 2013, we noted that Valenti had not filed a brief in this appeal, and we provided a further opportunity for him to do that. In

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

response, Valenti's attorney informed us by letter that he has "reviewed the brief filed by the other defendants, and would rely on their arguments."

The brief of the other defendants does not address Henderson's argument that Valenti did not move to dismiss or raise a defense of lack of personal jurisdiction, and therefore that brief does not help Valenti. Turning to the record, it does not appear to contain a motion to dismiss from Valenti. Nor does Valenti's answer (filed after the dismissal) appear to raise such a defense. At the hearing on the other defendants' motion to dismiss, the court asked counsel for Valenti whether Valenti had moved for dismissal, and counsel said he had not. However, in its written decision dismissing the complaint, the court stated: "The defendants have moved to dismiss on grounds that the service was not timely." That statement does not appear to reflect a correct understanding of the record, because Valenti apparently did not file such a motion.

Although Valenti has not filed a brief, we have considered whether dismissal of him due to lack of timely service can be sustained on the current record. In its decision, the circuit court stated that "[t]he defendants" were served on June 2, 2010. As to the defendants other than Valenti, the court's statement about the date of service has support in the record, in the form of an affidavit and a receipt of service submitted by Henderson as to service on those defendants. However, we did not locate evidence in the record to support a finding that Valenti was served on June 2, 2010, or on any other date. We acknowledge the likelihood that Valenti was served, if at all, near in time to the defendants, but without evidence establishing the date of service, we have no basis on which to affirm the circuit court's conclusion that service on Valenti was untimely. Therefore, we reverse the dismissal as to Valenti only.

IT IS ORDERED that the order appealed from is summarily reversed under WIS. STAT. RULE 809.21 as to defendant John Valenti and summarily affirmed as to all other defendants.

Diane M. Fremgen
Clerk of Court of Appeals