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**DISTRICT IV**

June 18, 2013

To:

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

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2012AP2088

Anthony Smith v. Town of Beloit Police Department  
(L.C. # 2011CV2093)

Before Sherman, Blanchard and Kloppenburg, JJ.

Anthony Smith appeals an order dismissing Smith's defamation action on summary judgment. Smith contends that the circuit court erroneously exercised its discretion by denying Smith's motion to extend the time to file his summary judgment response. 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).<sup>1</sup> We summarily affirm.

In November 2011, Smith filed this defamation action against the Town of Beloit Police and Fire Departments and Police Officer Allan Cass (collectively "Beloit"). According to

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

Smith's complaint, Smith had previously filed a federal racial discrimination action against the Town of Beloit. In the course of the discrimination action, Cass filed an affidavit with the federal court stating that when he was a police officer with the City of Beloit, it was common knowledge within the police department that Smith was under investigation for drug dealing. Cass averred that he had informed the Town of Beloit Police Chief of the suspicions as to Smith's alleged involvement in drug activity. These were the statements at issue in the defamation action.

In the defamation action, Beloit filed its answer in January 2012, denying liability and asserting truth, statutory immunity, and common law immunity as affirmative defenses. On April 11, 2012, Beloit moved for summary judgment. Beloit filed a supporting affidavit by its attorney, averring that attached were true and accurate copies of: (1) a November 2010 affidavit signed by Cass and submitted by the defense in Smith's federal case, averring that when Cass was a police officer for the City of Beloit, it was common knowledge within the department that Smith was under investigation for drug dealing, and that Cass informed the Town of Beloit Police Chief of the suspicions that Smith was allegedly involved in drug activity; (2) a City of Beloit police report from February 1993, indicating that an investigation into a stab wound received by Smith produced a statement by Smith's girlfriend that Smith had been in possession of cocaine; and (3) a City of Beloit police report from June 1994, indicating that a confidential informant's tip led to a search of Smith that revealed over \$400 in cash that tested positive for narcotic residue.

The circuit court extended the time for Smith to file a summary judgment response to July 15, 2012. On July 11, 2012, Smith moved to stay the proceedings because Smith was experiencing mental health problems. The court denied the motion, explaining that Smith had

not provided a basis to stay the proceedings. Smith failed to file a summary judgment response by the July 15 deadline. On July 23, 2012, Smith moved to extend the time to file his response. The court denied the motion. On August 3, 2012, the court granted Beloit's motion for summary judgment and dismissed Smith's defamation action. Smith moved for reconsideration, which the court denied.

Smith contends that the court erroneously exercised its discretion by denying Smith's July 23, 2012 motion to extend the time to file a summary judgment response. Smith contends that his failure to file a timely summary judgment response was the result of excusable neglect, because Smith was suffering from mental illness. *See* WIS. STAT. § 801.15(2)(a) (motion to extend time after time has passed "shall not be granted unless the court finds that the failure to act was the result of excusable neglect"). Smith contends that the court failed to properly exercise its discretion because the court did not expressly consider whether excusable neglect existed to extend the time for Smith to file a response. We disagree.

"The power conferred upon the circuit court by [WIS. STAT. §] 801.15(2)(a) is highly discretionary." *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982). "When the circuit court sets forth the reasons for its decision under [§] 801.15(2)(a), [we] will focus on the facts of record to determine whether they support the court's reasons." *Id.* at 471. If the circuit court does not adequately explain its decision, we will examine the record to "determine whether the circuit court exercised its discretion and whether the facts provide support for the circuit court's decision." *Id.*

Here, the circuit court explained that it denied Smith's July 23, 2012 motion to extend the time to file a summary judgment response "for the reasons previously noted," because "[n]othing

has changed.” In the court’s prior order denying Smith’s motion to stay the case, the court explained that: “After consideration of the request, it is denied. Plaintiff has not stated a sufficient basis for his request in light of the issues involved, and the age of the case, and Defendants’ rights to have this case move forward.”

We conclude that the court properly exercised its discretion by denying Smith’s request for an extension. Smith’s motion for a stay was based on Smith’s assertion that he was suffering from “a serious medical condition and is unable to complete the response within the time period that the court has ordered,” and stated that he was experiencing “a significant increase in anxiety” which “made coping with circumstances more difficult.” Smith’s motion to extend the time to file a response again stated that Smith had “a serious medical condition and [was] unable to complete the response within the time period that the court ha[d] ordered.” The court, in effect, determined that Smith’s assertion of mental problems did not provide a reasonable explanation for Smith’s failure to meet the summary judgment response deadline. *See id.* at 468 (explaining that, under WIS. STAT. § 801.15(2)(a), a court must first consider whether there are reasonable grounds for noncompliance with a deadline; that is, whether noncompliance “might have been the act of a reasonably prudent person under the same circumstances”).

Even if we were to conclude that the court’s exercise of discretion was not adequately explained on the record, we nevertheless conclude that the record supports the court’s decision as a proper exercise of discretion. Our review of the record shows that Smith failed to provide the court with pertinent information about the onset, expected duration, or nature of the illness to allow the court to evaluate the request for an extension. While Smith was pro se throughout the course of this action, the court granted Smith several extensions to allow him to retain an attorney or otherwise determine how to proceed, and the case had been pending for more than

eight months. It was within the court's discretion to determine that Smith had not acted reasonably in failing to file a response or obtain counsel if that was necessary for him to file a response by the extended deadline. *See Hedtcke*, 109 Wis. 2d at 468. We discern no error in the court's exercise of its discretion.

We turn, then, to whether the circuit court properly granted summary judgment following Smith's failure to file a response.<sup>2</sup>

Summary judgment is properly granted if there is no response after a moving party makes a prima facie case for summary judgment. *See Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983). We conclude that Beloit made a prima facie case for summary judgment, and thus summary judgment was appropriate.

“Where the defendant is the moving party, a prima facie case consists of a defense that would defeat the plaintiff's cause of action.” *Bushko v. Miller Brewing Co.*, 134 Wis. 2d 136, 155, 396 N.W.2d 167 (1986). Here, Beloit submitted evidence that Smith had contacts with the City of Beloit Police Department that indicated Smith was involved in drug-related activities prior to Cass's statement that it was common knowledge in the police department that Smith was under investigation for drug-related activity. Thus, Beloit presented a prima facie case of the defense of substantial truth to Smith's defamation action. *See Anderson v. Hebert*, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275 (explaining that “[t]ruth is an absolute defense

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<sup>2</sup> Smith argues that the circuit court failed to consider the merits of the case in granting summary judgment and relied entirely on Smith's failure to file a response. However, we review an order on summary judgment de novo, independently from the circuit court's analysis. *Dawson v. Goldammer*, 2006 WI App 158, ¶29, 295 Wis. 2d 728, 722 N.W.2d 106. Accordingly, the procedure followed by the circuit court is irrelevant for purposes of our review.

to a defamation claim,” and that “[i]t is not necessary that the ‘statement in question be true in every particular. All that is required is that the statement be substantially true.’” (quoted source omitted)). Smith failed to respond, and thus summary judgment was appropriate.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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