COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1906

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DAVID J. WINKEL,

PLAINTIFF-RESPONDENT,

v.

JEANETTE M. WILKE AND RONALD E. WILKE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed in part; reversed in part and cause remanded.*

NETTESHEIM, J. Jeanette M. and Ronald E. Wilke appeal pro se from an order denying their motion to reopen a default judgment entered against them in a small claims action commenced by their former lawyer, David J. Winkel. The Wilkes' principal claim is that the judgment is invalid because they did not receive notice of the hearing date before a judicial court commissioner.

We affirm the order as to Jeanette. We reverse the order as to Ronald and remand for further proceedings. We reject the balance of the Wilkes' arguments.

Winkel's small claims action sought attorney's fees for legal services previously rendered to the Wilkes. The summons and complaint listed the Wilkes' address as "816 W. Capital Drive, Appleton, WI 54914." However, the summons and complaint were personally served on Jeanette on August 5, 1997, at W3162 Lochbur Lane, Appleton, Wisconsin. Ronald was served at the same address by substituted service. The affidavit of service indicates the Lochbur Lane location as "(New Address)."

On August 15, 1997, the Wilkes, acting pro se, answered the complaint and also counterclaimed against Winkel. The Wilkes' answer included the following recital: "Defendant(s) request all documents/communications be sent to both addresses." The answer listed separate addresses for Ronald and Jeanette. Ronald's address was listed as "P.O. Box 77, Neshkoro, Wisc. 54960." Jeanette's address was listed as "W3162 B. Lochbur Lane, Appleton, Wisc. 54915," the same address at which she was personally served.

On August 21, 1997, the clerk for the small claims court mailed separate notices of a Mediation Orientation Session to Ronald and Jeanette. The envelope for these notices contains a "window" which reveals the address recited on the enclosed notice. The notices recited the Capitol Dr. address recited in Winkel's pleading,[1] not the Lochbur Lane or P.O. Box addresses which Jeanette and Ronald had respectively recited in their answer and counterclaim. Thus, the

[1] Winkel's pleading spelled the street address as "Capital" Dr. The clerk used the street address as "Capitol" Dr. We will use the clerk's spelling in our opinion.

notices were not mailed to the addresses provided by Jeanette and Ronald in the answer and counterclaim.[2]

The mailing to Ronald was returned to the clerk with the postal notation "Wilke Ronald, Moved Left No Address, Unable To Forward, Return To Sender." The envelope also bears a handwritten address next to the window listing the P.O. Box address that Ronald had provided in the answer and counterclaim. It thus appears that the clerk placed the handwritten address on the envelope after it was returned. The clerk then remailed the notice to the P.O. Box address previously provided by Ronald. In response to this remailing, the Wilkes appeared for the mediation session, but mediation failed.

Thereafter, Winkel moved to strike the Wilkes' counterclaim and the Wilkes responded with a motion to strike Winkel's motion. The Wilkes' motion again listed their respective addresses as set out in their answer and counterclaim.

On October 3, 1997, the clerk mailed separate notices of a hearing to the parties, scheduling the matter for November 10, 1997.[3] As with the mediation notices, these notices were misdirected to the Capitol Dr. address, not the Lochbur address for Jeanette or the P.O. Box address for Ronald. Both notices were returned to the clerk undelivered. The returned envelope for Jeanette's notice carries the postal notation "Forward Time Exp, RTN To Send, Wilke Jeanette,

[2] It is not clear whether these notices were mailed in a single envelope or in separate envelopes. The appellate record includes one envelope which was returned to the clerk by the postal authorities. This envelope refers to the mailing to Ronald since it advises that Ronald had moved and left no forwarding address.

[3] It is clear that the clerk used separate envelopes for these mailings since the appellate record includes both envelopes which were again returned by the postal authorities.

W3162 Lochbur Ln #B, Appleton WI 54915-8924, Return To Sender." Jeanette's envelope also carries the handwritten notation "Hearing notice for 11-10, Remailed 10-8-97."

The returned envelope for Ronald's notice carries the notation "Wilke, Ronald, Moved Left No Address, Unable To Forward, Return To Sender." However, unlike the envelope regarding the mediation notice, there is nothing on this envelope reciting Ronald's correct address. Also, unlike Jeanette's envelope, there is no indication on this envelope that the notice was remailed to Ronald.

Neither Jeanette nor Ronald appeared before the court commissioner for the hearing. The court commissioner entered a default judgment against the Wilkes and dismissed their counterclaim.

The Wilkes then took a direct appeal to this court. We dismissed the appeal on jurisdictional grounds because a court commissioner's order cannot be appealed directly to the court of appeals. This court lacks jurisdiction over an appeal brought from a court commissioner's ruling. *See* ***Dane County v. C.M.B.,*** 165 Wis.2d 703, 709, 478 N.W.2d 385, 387 (1992).

Thereafter, the Wilkes brought a motion in the circuit court seeking to vacate the default judgment on grounds of excusable neglect pursuant to § 806.07(1)(a), STATS. The court conducted a hearing and denied the Wilkes' motion. The Wilkes again appeal.

We begin by addressing a threshold argument raised by Winkel. He contends that the Wilkes' appeal is not properly before us because they sought relief under § 806.07(1), STATS., whereas the proper statutory relief lies in § 799.29(1), STATS. Because the Wilkes originally appealed the default judgment

to this court instead of demanding a trial in the circuit court within ten days pursuant to § 799.207(2)(b), STATS., Winkel reasons that the Wilkes are foreclosed from pursuing this appeal.

However, Winkel fails to cite to any portion of the appellate record revealing where, when or how this issue was raised. Nor does he address any trial court ruling on this issue. To the contrary, Winkel states that the only issue which the trial court addressed at the hearing was the Wilkes' complaint that they had not received notice of the trial date. Although we are not required to do so, we have independently reviewed the record in an effort to learn whether Winkel raised this issue in the trial court. He did not. We deem this issue waived.

Turning to the Wilkes' appeal, we begin by noting that the issue in this case is not one of personal jurisdiction. The Wilkes submitted to the jurisdiction of the court by filing their answer and counterclaim and by failing to raise any jurisdictional defense. Instead, the issue turns on whether the Wilkes received fair and proper notification of the hearing date. If they did, they have not established excusable neglect. If they did not, they have established excusable neglect.

The issue with regard to Jeanette will not long detain us. The notice of the hearing, although originally sent to the Capitol Dr. address, was returned with a postal notation indicating the Lochbur Lane address as the proper forwarding address. This forwarding address was the address that Jeanette had indicated as her correct address in the answer and counterclaim. The postal notation also indicates that the time for forwarding by the postal authorities had expired. The envelope carries the handwritten notation that this notice was remailed on October 8, 1997. A reasonable inference is that this remailing was

directed to the forwarding address. Since this remailing was directed to the last address that Jeanette had provided to the court in her answer and counterclaim, we reject Jeanette's argument that she did not receive notice of the hearing date. As the trial court aptly noted, if Jeanette had changed her address thereafter, it was her duty to so inform the court.

The situation is different as to Ronald. Again, the notice of hearing was mailed to the Capitol Dr. address, not the address that Ronald had listed as his designated address in the answer. The returned envelope did not provide a forwarding address and the envelope carries no notation that the notice was remailed to Ronald at the address he had provided in his answer. Nothing in the record indicates that Ronald had changed his mailing address from that which he provided in his answer.

Winkel offers a variety of theories as to why Ronald might have received notice of the hearing. For instance, Winkel notes that Ronald had appeared at the mediation session, even though the notice of that session was also misdirected by the clerk. However, the envelope regarding the mediation session carries a handwritten entry listing Ronald's correct address. Presumably that notice was remailed which accounts for Ronald's appearance at the mediation session. In contrast, the envelope relating to the notice of hearing carries no such indication.

Winkel also points to postjudgment proceedings and mailings to which the Wilkes responded. But our focus is properly on the important question of whether the record establishes that Ronald received notice of the hearing date, not posttrial proceedings.

Winkel also represents that "[t]he mediators stated to the parties at the mediation on October 2, 1997 that the trial would be held on November 10, 1997." However, Winkel fails to cite to the record where this statement is memorialized. And our independent review of the record fails to confirm this representation.

Winkel also states that the Wilkes contacted the court commissioner's office the day before the hearing to verify that it was still scheduled. However, Jeanette, not Ronald, placed the call. And her representation at the motion hearing was that she was not provided the date of the hearing during the telephone call.[4]

We cannot discount the possibility that the Wilkes are playing games with Winkel, the trial court and us. However, we do not decide cases on the basis of such conjecture. We can only operate on the basis of the trial court record. That record supports Ronald's argument. The clerk's office repeatedly erred by misdirecting important mailings to incorrect addresses in the face of the Wilkes' express designation in their responsive pleading as to their correct addresses and their express request that all notices and documentation be sent to those addresses.

The Wilkes raise a variety of other issues challenging the default judgment. These arguments are presented in a disorganized and scattered fashion in their pro se brief. To the extent that we understand them, we deem them waived, meritless or not properly before us. "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal."

[4] The trial court did not take testimony at the hearing on the motion to vacate the default judgment. Instead, the parties merely debated the question via arguments.

State v. Waste Management, Inc., 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

We affirm the order denying relief from the default judgment against Jeanette. We reverse the order as to Ronald and remand for further proceedings on Winkel's complaint against Ronald.

No costs to any party.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.