COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3024

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

LEMONT GREGORY,

PLAINTIFF-APPELLANT,

V.

UNITED PARCEL SERVICE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

ANDERSON, J.[1] Lemont Gregory appeals from a judgment of the small claims court dismissing his action seeking $240.00 in damages to ceramics shipped to customers via United Parcel Service (UPS). Gregory claims that both a procedural error and a substantive error entitle him to a reversal of the judgment. First, he asserts that the small claims court erred in

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

reopening the judgment granted on his motion for summary judgment. We affirm because UPS was not given notice that Gregory had moved for summary judgment and did not have the opportunity to respond to Gregory's motion. Good cause existed to support the court's decision to reopen the summary judgment, and we thus decide this case on the merits.

Next, Gregory alleges that the small claims court erred when it held that he was not a third-party beneficiary of a contract between UPS and Waupun Correctional Institution (WCI). He claims his only recourse was to seek to recover damages from WCI. Rather than address the merits of Gregory's third-party beneficiary claim, we affirm on the grounds that Gregory failed to prove his actual damages.

Gregory commenced this small claims action in Waukesha County Circuit Court to recover $240.00, the alleged cost of ceramics damaged when shipped to a third party via UPS. UPS appeared by Charles Jungbluth, a full-time authorized employee, and denied liability for damages in excess of $40.63, the alleged replacement cost of the ceramics.[2] After limited discovery, Gregory filed a motion for summary judgment. Because Gregory failed to give notice to UPS that he had filed a summary judgment motion, UPS did not respond and a court commissioner entered judgment on Gregory's behalf. As soon as UPS received notice of the judgment, it moved to reopen the case on the grounds that it had not received notice of Gregory's motion. UPS's motion was granted and the case set for trial before the Honorable Patrick L. Snyder. After trial, the court dismissed Gregory's complaint and this appeal ensued.

[2] In small claims actions, a corporation can appear by an attorney or by "a full-time authorized employe." *See* § 799.06(2), STATS.

We first consider Gregory's complaint that the small claims court erred in reopening the judgment he had obtained against UPS After the small claims court granted default judgment, when UPS failed to appear to contest Gregory's summary judgment motion, UPS filed a "Notice of Motion & Motion To-Re-Open." UPS gave as a reason for the motion that it "never received a notice for a judgment hearing from 8-11-97." On appeal, Gregory complains that UPS's failure to receive notice of the entry of judgment is not grounds to support the reopening of the case because under § 799.24(1), STATS., the clerk of court had the obligation to mail the notice of entry of judgment.

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. We will not disturb the trial court's determination absent an erroneous exercise of its discretion. *See* ***Miro Tool & Mfg., Inc. v. Midland Machinery, Inc.***, 205 Wis.2d 650, 654-55, 556 N.W.2d 437, 439 (Ct. App. 1996).

Gregory's argument misses the mark. UPS did not seek to reopen the case because it did not receive notice of the entry of judgment; rather, it sought to reopen the case because Gregory failed to serve his motion for summary judgment on UPS. Gregory's motion and supporting affidavit were filed on July 30, 1997. There is nothing in the record to establish that UPS was properly served with a copy of the motion, affidavit and notice of the date and time of the hearing on the motion.

The rules governing summary judgment and service of motions contained in the code of civil procedure apply to small claims actions because there are no alternative procedures set forth in ch. 799, STATS. *See* § 799.04(1), STATS. The code of civil procedure requires that copies of all summary judgment

motions and supporting documents be served, along with a notice of the motion, on all adverse parties twenty days before the scheduled hearing. *See* §§ 801.14(1), 802.01(2)(b), 802.08(2), STATS. The purpose of this requirement is to give the adverse party sufficient time to file opposing affidavits and briefs. *See* § 802.08(2). Fundamental fairness and due process require that a litigant be given actual notice and the opportunity to appear before a court enters an order on a motion for summary judgment.

In small claims actions a trial court may reopen a default judgment for good cause. *See* § 799.29(1), STATS.[3] The failure to give the statutorily required notice that a party is seeking summary judgment and the consequent deprivation of fundamental fairness and due process constitute good cause to set aside a judgment, and we affirm.

Gregory's second issue is that the trial court erred in holding that he could not recover his claimed damages from UPS. The record of the trial establishes that Gregory is an inmate at WCI and as a hobby he sells ceramics he makes at the prison to friends and visitors to WCI. Gregory and his customers would negotiate the price for a ceramic piece, and after Denise Edmond had collected the money and sent it to Gregory, he would make the ceramic. Gregory sent four boxes of prepaid ceramics to Edmond in Milwaukee. Gregory did not have a contract with UPS; rather, WCI had a contract. In order to ship the ceramics, Gregory had to pay WCI the cost of shipping; in turn, WCI paid UPS for all shipping from the institution. When the four packages arrived, some of the

[3] The grounds for relief from a judgment set forth in § 806.07(1), STATS., do not apply to small claims proceedings. Section 799.29(1), STATS., is the exclusive procedure for reopening default judgments granted in small claims proceedings. *See* ***King v. Moore***, 95 Wis.2d 686, 687 n.1, 690, 291 N.W.2d 304, 305, 307 (Ct. App. 1980).

ceramics were damaged. Gregory did not reimburse his customers the money paid for the damaged ceramics; he made new pieces as replacements for the damaged pieces.

Gregory filed a claim with UPS and negotiated a settlement of the claim with Pat Harris, a UPS employee. Gregory and Harris agreed that the damage to the ceramics was $240.00. Harris made UPS's check payable to WCI as the shipper. The check was intercepted by an employee of WCI who returned the check to UPS and renegotiated a settlement of $40.63, the cost of the raw materials Gregory used in making the damaged ceramics.

In dismissing his small claims complaint, the court held:

> You are a third-party beneficiary of that contract at least, but you can – you cannot have a superior claim to that of the institution, and they are the ones that accepted your money. You paid for the mailing, but you paid it in the form of giving the money to Waupun, who, in turn, gave their check or money to United Parcel Service.
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> ….
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> You cannot sue UPS, because they have satisfied the institution. If you have a claim, it's against the institution. United Parcel Services is not negligent under the full circumstances. The fact that Waupun is the one that had the claim, Waupun is the one who returned it.

Gregory's principal theory is that because he actually paid for the shipment costs, WCI had no authority to renegotiate his damages claim with UPS. He acknowledges that the shipping contract is between WCI and UPS; however, he contends the only reason is because prisoners are not permitted to go to a UPS facility to ship packages and, therefore, he is a third-party beneficiary of the contract.

We choose not to address the question of whether Gregory is a third-party beneficiary of the contract. We may affirm the trial court's decision even if the trial court reached its result for different reasons. *See* ***Lecander v. Billmeyer***, 171 Wis.2d 593, 602, 492 N.W.2d 167, 171 (Ct. App. 1992). We conclude that Gregory is not entitled to any relief because he failed to prove his actual damages. The essential purpose of any damages award is to make whole an injured party suffering actual damage or loss. *See* ***Phillips Petroleum Co. v. Bucyrus-Erie Co***., 131 Wis.2d 21, 39, 388 N.W.2d 584, 592 (1986). Gregory testified that all of the broken ceramics had been prepaid in full by his customers and he remade all the broken items rather than reimburse the money he had already received. In other words, Gregory did not refund any of the $240.00 he had received from his customers. Under this set of facts, the maximum damages Gregory is entitled to are the actual costs incurred in remaking the broken ceramics and the actual cost of reshipping the new items. The trial court had no evidence of Gregory's actual loss because he failed to present any evidence of the cost of raw materials or shipping. To award Gregory the full $240.00 would be to overcompensate him for his actual loss.[4] Therefore, we affirm.

[4] Because we have decided this case on the narrowest possible grounds, *see* ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989), we need not address the other issues raised by Gregory. We point out to Gregory that because his actual loss was not $240.00, the full amount prepaid by his customers, any agreement he reached with UPS's claim representative for that amount was void at the inception. The contract principles Gregory raised on this appeal do not apply to void agreements.

By the Court.—Judgment affirmed.

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