COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1252

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

CLARENCE WERNER,

PLAINTIFF-APPELLANT,

V.

WAYNE NOHELTY, AND CITIZENS STATE BANK,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Clarence Werner, pro se, appeals an order denying his motion for a new trial. Werner claims the trial court erred by refusing to grant him a new trial based upon what he claims is newly-discovered evidence. Werner's brief poses a number of questions and claims he was wronged, but fails

to address the circuit court's determination that the evidence Werner presented was not newly-discovered evidence. Our review of the record discloses that Werner's evidence came to his attention well before he filed this action. Because there was no newly-discovered evidence that would permit granting Werner a new trial, we affirm.

¶2 A brief chronology is helpful. In 1986, Werner signed a note co-guaranteeing a loan from Citizens State Bank to James Schwartz, who was a tenant on land Werner owned.[1] Later that year, Schwartz filed bankruptcy. In 1990, Werner mediated with the bank and agreed to pay approximately $7,500 on the note. The other guarantor was to be responsible for approximately $7,500. For several years, Werner heard nothing about the debt. In 1993, the bank sued him for the amount the other guarantor had not paid. Werner appeared pro se in that litigation. Werner advised the court of his previous dealings with the bank in connection with both his guaranty and his various accounts with the bank. The court entered judgment against Werner in the amount of $9,261.14. He subsequently sued the other guarantor and was informed that the guarantor had made a $2,500 payment to the bank shortly after it commenced litigation against Werner. Werner believed that the bank never credited that amount against the judgment loan balance. Werner nevertheless satisfied the bank's judgment against him approximately one month later for $5,000.

¶3 Approximately one year after satisfying the judgment, Werner sued the bank. He claimed he had been harmed by the bank's negligence. The bank

[1] Werner's dealings were actually with the First State Bank of Elmwood. It later merged with, or was bought by, Citizens State Bank and now goes by that name. Werner also sued Wayne Nohelty, who was an officer of First State. We refer to Citizens State Bank and Nohelty collectively as the bank.

moved for summary judgment. The trial court held a hearing and told Werner, who was represented at the time, that the lawsuit appeared to be an attempt to relitigate the issues decided in the bank's earlier action against him and that unless he was able to point to specific acts of the bank's negligence, the action would be dismissed. Werner provided no specific acts of negligence other than to assert the bank somehow owed him a fiduciary duty in connection with the guaranty, presumably to keep him apprised of the status of the obligation. The court granted the motion to dismiss.

¶4 Werner subsequently moved for a new trial on the grounds of newly-discovered evidence. His motion claims that the "new evidence" was the co-guarantor's $2,500 payment. The circuit court denied the motion, determining that the evidence offered was not new. This appeal ensued.

¶5 Although Werner's motion states that it is based on § 805.15(3), STATS., we construe it to be a motion for relief from judgment under § 806.07(1)(b), STATS., because there was no trial.[2] Section 806.07(1)(b) in turn directs us to § 805.15(3), which provides:

> A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:
>
> (a) The evidence has come to the moving party's notice after trial; and

[2] Section 806.07(1)(b), STATS., provides:

> On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3)[.]

> (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
>
> (c) The evidence is material and not cumulative; and
>
> (d) The new evidence would probably change the result.

Each statutory element must be met. ***State v. Johnson***, 181 Wis.2d 470, 489, 510 N.W.2d 811, 817 (Ct. App. 1993). Whether to grant the motion is within the trial court's discretion. ***Id***.

¶6 The evidence Werner cited in his motion was not new evidence. In his own pleadings he acknowledges that on October 4, 1993, he discovered that the co-guarantor had made a $2,500 payment. He initiated the current action approximately one year later on October 3, 1994. This is not new evidence that could be considered for purposes of granting a new trial because it came to Werner's notice before initiating the action. The trial court properly exercised its discretion by denying the request for a new trial.

¶7 Werner's real argument seems to be that the $2,500 payment constituted new evidence in connection with the bank's earlier action against him. That action is not before us. Werner's appeal was filed in connection with his action against the bank. Nor does it appear that any motion in the bank's earlier action based upon "newly discovered evidence" would be timely. *See* §§ 806.07(2) and 805.16, STATS.[3]

[3] Although we do not decide the issue, it is likely that even if Werner could bring a motion for a new trial in the earlier action, it would be unsuccessful. The record before us contains some information regarding the earlier action. Based on that information, it appears, at most, the $2,500 payment might have decreased the amount of judgment, not its existence. The $2,500 payment also appears to have been credited to Werner when he settled the $9,261.14 judgment for $5,000. We also note that Werner's satisfaction of the judgment after learning of the $2,500 payment may well have waived any right he had to contest that judgment.

¶8 Because Werner's "new evidence" came to his attention prior to the time he filed his action, it is not newly discovered for purposes of granting a new trial. Accordingly, the order denying the motion for a new trial is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.