COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1669 **Cir. Ct. No. 2015SC1348**

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

ESTATE OF DOROTHY MATTESON, C/O ZACHERL, O'MALLEY & ENDEJAN,

PLAINTIFF-RESPONDENT,

V.

MARK NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] In this small claims action, a judgment was entered again Mark Nelson upon his default in failing to answer the complaint or

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

appear. Nelson petitioned to reopen the judgment on the ground that he did not receive notice of the summons and complaint. The circuit court denied Nelson's motion, and we affirm.

¶2 The plaintiff Estate of Dorothy Matteson, c/o Zacherl, O'Malley & Endejan, commenced this small claims action against Nelson, alleging that Nelson's child damaged the Estate's property when he threw a football through a window and took a hammer to a fence. The summons and complaint filed with the circuit court reflects that it was filed on June 18, 2015, and mailed that same day, with the signature of a deputy clerk for Fond du Lac County appearing next to the stamped date of mailing. Nelson failed to answer the complaint or appear on the return date. As a result, on July 14, 2015, a default judgment was entered against him.

¶3 Nelson then petitioned to reopen the judgment on the ground he did not receive the summons and complaint. At a hearing on the petition, Nelson told the court that he did not receive the summons and complaint. He acknowledged, however, that he did receive the judgment, which was mailed to the same address as listed on the summons and complaint. Nelson stated that he had been living at this address for six years. The court noted that its file was devoid of any "returned mail or items non-deliverable." The Estate's attorney told the court that none of the mailings he had sent Nelson had been returned either. The court found it "more believable that the mail got through" than Nelson's statement that he did not receive the summons and complaint.

¶4 WISCONSIN STAT. § 799.29(1) is the exclusive procedure for reopening a default judgment in a small claims action. WIS. STAT. § 799.01(1); ***King v. Moore***, 95 Wis. 2d 686, 690, 291 N.W.2d 304 (Ct. App. 1980). A party

moving to reopen a default judgment in a small claims action must show "good cause." Sec. 799.29(1). Where the question of proper service is involved, the party seeking to reopen the default judgment bears the burden of proof. ***Richards v. First Union Sec. Inc.***, 2006 WI 55, ¶¶2, 27, 290 Wis. 2d 620, 714 N.W.2d 913. A decision to grant or deny a motion to reopen is one within the circuit court's discretion, which we will affirm unless the court erroneously exercised its discretion. ***Kovalic v. DEC Int'l***, 186 Wis. 2d 162, 166, 519 N.W.2d 351 (Ct. App. 1994). A court properly exercises its discretion so long as it examines the relevant facts, applies a proper standard of law, and, using a demonstrated rational process, reaches a conclusion a reasonable judge could reach. ***Franke v. Franke***, 2004 WI 8, ¶55 & n.38, 268 Wis. 2d 360, 674 N.W.2d 832. Further, the evidence necessary to allow this court "to set aside such a judgment is evidence sufficient to allow a court to determine that the circuit court's findings of fact were 'contrary to the great weight and clear preponderance of the credible evidence.'" ***Richards***, 290 Wis. 2d 620, ¶27 (citation omitted). "[B]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary determinations." ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610 (citation omitted).

¶5 Although lack of personal jurisdiction over Nelson due to defective service would constitute the necessary "good cause" so as to reopen the judgment, *see* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶18, 318 Wis. 2d 216, 768 N.W.2d 53, the proof in the record that a deputy clerk of the court mailed the summons and complaint to Nelson gave rise to a presumption that he received it, which he failed to rebut. Under the authority of WIS. STAT. § 799.12(3), Fond du Lac county adopted Circuit Court Rule 5.1, which, in certain small claims actions, permits a plaintiff to serve a defendant with the summons by leaving it

with the clerk of the court who will mail it "to each defendant at the last-known address as specified in the summons." WIS. STAT. § 799.12(3). Section 799.12(3) provides that "[s]ervice of the summons is considered completed when it is mailed, unless the envelope enclosing the summons has been returned unopened to the clerk prior to the return date. All mailing of summonses shall be done in envelopes upon which the clerk's return address appears, with a request to return to that address."

¶6 The proof in the record shows that the same day the Estate filed the summons and complaint, a deputy clerk of the court mailed it to Nelson at the address listed on the summons and complaint. Upon this evidence, Nelson was required to come forward with credible evidence of nonreceipt. ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶36, 319 Wis. 2d 397, 768 N.W.2d 729; ***Mullen v. Braatz***, 179 Wis. 2d 749, 753, 508 N.W.2d 446, 448 (Ct. App. 1993). At the hearing, the court noted that the summons and complaint that was mailed to Nelson was never returned to the court. In addition, Nelson acknowledged that he has lived at this address for six years and that he received the judgment at this address. Beyond that, Nelson offered nothing other than a conclusory denial of receipt. The court found the denial was not credible.

¶7 On appeal, Nelson raises additional arguments as to why he might not have received the summons and complaint such as an error on the part of the postal service or that one of his "three teenagers" might have misplaced it. These arguments are raised for the first time on appeal. *See* ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 55, 264 N.W.2d 579 (1978). In any event, Nelson's contentions are unsupported by any evidence in the record, making them speculative and, thus, insufficient to raise an issue of fact for a fact finder. *See* ***American Family***, 319 Wis. 2d 397, ¶36. Therefore, we conclude that the circuit court did not

erroneously exercise its discretion in denying Nelson's petition to reopen the judgment.

By the Court.—Judgment and order affirmed.

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