COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0134

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

MAXIM KLEINSMITH,

PLAINTIFF-RESPONDENT,

v.

MENARD, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Menard, Inc., appeals a small claims judgment in favor of Maxim Kleinsmith. The court entered judgment after Menard failed to appear in response to Kleinsmith's summons and complaint. Menard moved to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

reopen, but the trial court declined to do so. Menard claims that this was error because it had complied with the applicable La Crosse County Circuit Court Rule for responding in small claims actions, and that in any event, it demonstrated "good cause" for setting aside the default judgment. We reject Menard's contentions and affirm the appealed judgment.

¶2 Kleinsmith filed a small claims summons and complaint on October 22, 1999, seeking $5,000 in damages arising from his purchase of allegedly defective roofing materials from Menard. Menard prepared an "answer and appearance" that was signed by its attorney on October 29th. A Menard employee averred in an affidavit of mailing that she mailed the "Notice of Appearance and Answer" to Kleinsmith's attorney on October 29th. Upon Menard's failure to appear on the small claims return date, November 5, 1999, the court entered judgment in favor of Kleinsmith for $5,000 plus allowable costs.

¶3 When Menard received the notice of entry of judgment, it petitioned to "stay further proceedings on the judgment, reopen the judgment, and give Menard an opportunity to be heard." At the hearing on its petition to reopen, Shannon Riley, Menard's "corporate representative," appeared on behalf of Menard. She told the court that "we sent in the answer … six days before it was due and … apparently it wasn't received by the court." Kleinsmith's counsel argued that under local rules and state statute, the answer has to be received by the court by the return date, and this had not occurred. He also indicated that there had been "no showing" that the answer was returned to Menard undelivered. Accordingly, he argued that Menard had not shown "excusable neglect."

¶4 The trial court noted that the first answer and appearance in the court file "was received by the Clerk of Court's office on November 16th." The court

expressed disbelief that if it were mailed on October 29th, it was not received until eighteen days later. Riley then said, "I'm actually the person who mailed it and I did mail it on the 29th." She also told the court that the document received November 16th was a copy that was sent after the default judgment had been entered, and that she didn't "think the original was actually ever received here." The court inquired of Riley whether she had received the original answer back "as having been undelivered or anything of that nature," to which Riley replied "[n]o. I never got it back." The court concluded that "the post office has faults, [but] I don't believe that that is a reasonable explanation of what happened here," and it denied Menard's motion.

¶5 Under WIS. STAT. § 799.22(2), if a small claims defendant fails to appear on the return date specified in the summons, the court may enter a default judgment in favor of the plaintiff. Subsection 4 of that statute permits a circuit court to, by rule, "permit a defendant to join issue … by mail … within such time and in such manner as the rule permits" in lieu of a personal appearance by the defendant. *See* § 799.22(4). La Crosse County Circuit Court Rule 705 permits a defendant who is a nonresident of La Crosse County to "appear by answering mail before the return date."

¶6 Menard argues that the trial court erred in not reopening because it had demonstrated "good cause" for doing so. *See* WIS. STAT. § 799.29(1). It contends that it "met the requirements for a showing of excusable neglect establishing good cause." We disagree.

¶7 Menard asserts that Riley's affidavit of mailing shows that its answer and appearance was mailed on October 29, 1999, seven days before the November 5th return date, and further that Riley orally informed the court that she

mailed the document to the court on that date. We note, however, that Riley averred in the affidavit of mailing only that the answer and appearance were mailed to Kleinsmith's counsel, not to the circuit court. We note further that Riley's statements to the court at the hearing on Menard's motion to reopen were not under oath, and that although she said that "we sent in the answer," she did not specify that a copy had been mailed to the court. There was no indication in the record that any answer or appearance from Menard was received by the court until November 16th.

¶8 Menard complains that "[t]he transcript does not indicate that the trial court even considered the possibility that Menard's original Answer and Appearance was misplaced at the court or by the Clerk of Court's office, or that service was complete upon mailing," and it contends that "the specific and uncontested facts of this case meet the legal standard of excusable neglect…." We note, however, that Menard never presented evidence or testimony regarding these possibilities, or requested an opportunity to do so, nor did it request the court to find excusable neglect on its part. An appellant may not argue in this court that a trial court erred by failing to find certain facts, or in failing to exercise discretion, when the appellant has failed to ask the trial court to make the desired rulings. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 829, 539 N.W.2d 897 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum," and "the appellant [must] articulate each of [his or her] theories to the trial court to preserve [the] right to appeal.").

¶9 We thus conclude that the trial court's finding that Menard's answer was not received by the court on or prior to the return date was not clearly erroneous, and that, on the basis of the record before it, the court did not

erroneously exercise its discretion in determining that Menard had not provided "a reasonable explanation of what happened here."

¶10 Menard argues in the alternative that, as a matter of law, "Menard's answer was complete upon mailing and in compliance with the La Crosse County Circuit Court Rules." Again, we disagree. We conclude that the trial court reasonably interpreted La Crosse County Circuit Court Rule 705, which permits a nonresident of the county to "appear by answering mail before the return date," to require that the court *receive* a mailed answer and appearance before the time and date specified in the summons for appearance.

¶11 We agree with Kleinsmith that the small claims procedures are "geared towards personal appearances" so that disputes can be promptly determined and resolved. Unlike regular civil procedure, which requires a defendant to serve an answer on plaintiff's counsel and thereafter file it with the court, *see* WIS. STAT. § 801.14(4), small claims procedure calls for a personal appearance by the defendant on the return date. *See* WIS. STAT. § 799.22(2). As we have noted, § 799.22(4) permits a court by local rule to excuse the defendant's personal appearance on the return date if a defendant answers by mail "within such time and in such manner as the rule permits." The La Crosse County rule requires the defendant to "appear by answering mail before the return date." The standard form small claims summons and complaint which was served on Menard specifies that, to be excused from attendance on the return date, a nonresident defendant must "file an Answer … on or before the date you are scheduled to appear," and that "a duplicate copy must be served" on the plaintiff or plaintiff's counsel.

¶12 The local rule and the instructions on the summons thus make it clear that a small claims defendant's first responsibility is to timely inform the court of its desire to contest the action. We cannot therefore conclude, as a matter of law, that under the local rule "service is complete upon mailing," as would be the case under regular civil procedure,[2] and as Menard argues should likewise be the case here. Rather, we conclude that the trial court's implicit interpretation, that the rule requires a defendant's written answer or appearance to be received by the court on or before the return date, was a reasonable one.

¶13 For the foregoing reasons, we conclude that the trial court did not err in determining that Menard had not complied with the requirements to avoid a "judgment on failure to appear" under WIS. STAT. § 799.22, and that Menard had not established "good cause" to reopen the judgment under WIS. STAT. § 799.29.

By the Court.—Judgment affirmed.

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

[2] *See* WIS. STAT. § 801.14(2).