COURT OF APPEALS DECISION DATED AND FILED

August 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2103

Cir. Ct. No. 01-CV-5

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

S. EISENBERG,

PLAINTIFF-APPELLANT,

V.

ROBERT BABIKAN, BUILDING INSPECTOR, AND VILLAGE OF WILLIAMS BAY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. S. Eisenberg appeals a judgment dismissing her complaint, which sought to prevent the razing of buildings she owns, and an order evicting the tenant from one of the properties. The dispositive issues are whether the trial judge properly denied Eisenberg's motion to disqualify him from serving

as judge in the proceedings, and whether the court properly dismissed the petition as a sanction for Eisenberg's failure to comply with discovery orders. We affirm.

¶2 This action was commenced by Eisenberg's "Complaint for Restraining Order." The complaint named as defendants Robert Babikan and the Village of Williams Bay. It alleged that they issued an order to raze and remove Eisenberg's buildings. The complaint also alleged that the order suffered from various defects, and therefore, the court should issue a restraining order preventing the razing of the buildings.

¶3 In February 2001, Eisenberg filed a "Motion for Recusal for Bias, Prejudice and Judicial Misconduct." The motion recounted several actions by the trial judge that Eisenberg alleged were evidence of bias in favor of the defendants and against her. In an oral ruling on March 2, 2001, the trial judge stated that his subjective conclusion was that he is impartial. However, he stated that he would allow Eisenberg to make a further showing as to whether there was an appearance of partiality or unfairness. The trial judge eventually denied the motion, concluding that he could "objectively and subjectively … act impartially" and that there is not an appearance of partiality.

¶4 On appeal, Eisenberg argues that the trial judge was required to disqualify himself under the portion of the Code of Judicial Conduct, SCR 60.04(4) (2000), that provides that a judge shall recuse himself in a proceeding "when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial."

¶5 Violations of the Code of Judicial Conduct are not decided in the course of civil actions, or by this court. Rather, they are the subject of investigation or prosecution by the Judicial Commission. *See* WIS. STAT. §§ 757.81(4)(a) and 757.85(1) (1999-2000).[1] The comment to the SCR cited above states: "Section 757.19 of the statutes sets forth the circumstances under which a judge is required by law to disqualify himself or herself from any civil or criminal action or proceeding …." The supreme court has held that the Code of Judicial Conduct "governs the ethical conduct of judges; it has no effect on their legal qualification or disqualification to act and a judge may be disciplined for conduct that would not have required disqualification under sec. 757.19, Stats." ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 185, 443 N.W.2d 662 (1989). Therefore, in this case we apply only WIS. STAT. § 757.19, as interpreted by relevant case law.

¶6 WISCONSIN STAT. § 757.19 does not contain the same language as the SCR that Eisenberg relies on. Instead, it provides in § 757.19(2)(g) that a judge shall disqualify himself when the judge "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." In ***State v. Carviou***, 154 Wis. 2d 641, 645, 454 N.W.2d 562 (Ct. App. 1990), we stated: "Although one might reasonably conclude that whether it 'appears' a judge can act in an impartial manner is an objective test, our supreme court has held that the standard for recusal in sec. 757.19(2)(g) is solely subjective." Accordingly, "once a trial judge determines that there is no partiality or appearance of partiality under sec. 757.19(2)(g), his decision on that matter is reviewable only to establish

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

whether the trial judge himself made a determination requiring recusal and failed to heed his own finding." ***Id.*** at 646. In the present case, the trial judge determined that there was no partiality or appearance of partiality. Therefore, we affirm the denial of Eisenberg's motion to disqualify.

¶7 The remaining issue is whether the circuit court properly dismissed Eisenberg's complaint as a sanction for failure to comply with discovery orders. At a hearing on March 22, 2001, the court denied Eisenberg's motion for a protective order and granted the defendants' motion to compel discovery. Eisenberg sought to appear at her deposition by telephone because she had a premature baby at home, and the court required her to provide medical evidence demonstrating that she could not appear in person. Without attempting here to fully describe her various submissions, we can say that she ultimately failed to produce information that satisfied the court. At a hearing on April 20, 2001, the court granted the defendants' motion to dismiss as a sanction. The court entered a judgment to that effect on May 4, 2001. Eisenberg later sought reconsideration and provided additional submissions, which the court also rejected as inadequate.

¶8 To grant default judgment for a discovery violation, the circuit court must find that the non-complying party's conduct is without a clear and justifiable excuse and conclude that the noncompliance was either egregious or in bad faith. ***Brandon Apparel Group, Inc. v. Pearson Props., Ltd.***, 2001 WI App 205, ¶11, 247 Wis. 2d 521, 634 N.W.2d 544, *review denied*, 2001 WI 117, 247 WIS. 2D 1035, 635 N.W.2d 783 (Wis. Oct. 23, 2001) (No. 00-2532). We affirm the circuit court's factual findings unless they are clearly erroneous, and we review its decision to sanction a party under the erroneous exercise of discretion standard. ***Id.*** at ¶10.

¶9 On appeal, Eisenberg presents a disorganized argument as to how she believes the court erred in ordering dismissal as a sanction. Her main points appear to be the following. First, the circuit court should have granted a protective order because the court had earlier described her as not being an essential witness for the evidentiary hearing. This argument fails because the defendants' right to depose Eisenberg is not affected by whether the court regarded her as essential for that purpose. Second, she argues that the court should not have telephoned a medical office in Illinois to attempt to clarify who authored a letter Eisenberg submitted. We reject this argument because Eisenberg's attorney was present at the time and did not object, and because even if we assume, *arguendo*, that the court erred by making this inquiry, that would not bolster Eisenberg's inadequate showing of medical need.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.