

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 7, 2010

David R. Schanker
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. 2008AP1439

Cir. Ct. No. 2006CV1618

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FRANK BERRYMAN,

PLAINTIFF,

V.

MEERA AGRAWAL,

DEFENDANT-APPELLANT,

NESTOR RODRIGUEZ,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,**

V.

BASHEAL (BOBBY) AGRAWAL,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Meera and Basheal Agrawal appeal judgments awarding Nestor Rodriguez \$9,112.67 from Meera based on misrepresentation, and holding Basheal jointly and severally liable for \$2,447.50 of that amount based on Rodriguez's satisfaction of a judgment in favor of their landlord, Frank Berryman. Some of the issues raised on appeal relate to the earlier judgment in favor of Frank Berryman, although no appeal was taken from that judgment. Also, the Agrawals' arguments on appeal rely on mischaracterization of the circuit's court's decision, facts outside the record, and allegations the circuit court found not credible. Rodriguez has filed a motion for attorney fees on the ground that this appeal is frivolous. We conclude that the appeal is frivolous because the Agrawals should have known that their arguments lack merit. We affirm the judgments and remand the matter to the circuit court to award the reasonable attorney fees Rodriguez incurred in this appeal.

BACKGROUND

¶2 Berryman commenced an action against Meera and Rodriguez to recover lost rents and utility payments after the tenants moved out of an apartment. Notwithstanding Meera's claim that she lived in the apartment, the circuit court found that her son, Basheal, actually lived in the apartment with Rodriguez. Meera's name was on the lease, but she did not live in the apartment. The circuit court rejected Meera's defenses and counterclaims alleging constructive eviction based on complaint letters she allegedly sent Berryman that he denied receiving.

¶3 After trial to the court, the court disallowed some of Berryman's claims and set off some of the amount due based on Berryman's failure to send written notice of the reasons for retaining the security deposit. The court granted Berryman judgment against Meera for \$3,186.16 plus costs and fees. Because Rodriguez had failed to file an answer, the court entered a default judgment against him for the full amount requested by Berryman.

¶4 Upon learning of the default judgment, Rodriguez twice moved to reopen the judgment. The circuit court denied those motions. After the first motion was denied, but before the second, Rodriguez satisfied the judgment. Rodriguez also sought and was granted permission to file a cross-claim against Meera, based on her misrepresentation that she hired an attorney to file an answer for Rodriguez, and a third party complaint against Basheal for breach of an oral lease that required Basheal to pay rent and utility bills.

¶5 After trial to the court, the court found that Rodriguez sent Meera money to retain counsel for both of them, but Meera retained counsel only for herself, leading to the default judgment against Rodriguez. The court awarded Rodriguez the amount of the default judgment less the amount he would have had to pay if he had filed an answer and proceeded to trial. The court also awarded \$1,000 punitive damages against Meera. The court entered a judgment against Basheal, but noted that, if Basheal satisfied the judgment against him, that amount would be deducted from the amount Meera must pay.

DISCUSSION

¶6 The Agrawals first argue that the default judgment against Rodriguez was entered without sufficient and fair notice. That argument fails for several reasons. First, the judgment in favor of Berryman was a final judgment as

to Berryman and it was not appealed. *See* WIS. STAT. § 808.03(1) (2007-08).¹ Issues relating to that judgment are not properly before this court. Second, any defect in the notice would be an issue for Rodriguez, not the Agrawals. Third, the record contains an affidavit of service of the motion for default judgment on Rodriguez. To the extent the Agrawals may be arguing that Meera was not served with notice of Rodriguez’s default, that is not a jurisdictional defect and Meera identifies no prejudice to her from lack of notice. *See Maier Constr., Inc. v. Ryan*, 81 Wis. 2d 463, 471, 260 N.W.2d 700 (1978), *overruled on other grounds*, *J.L. Phillips & Assocs., Inc. v. E&H Plastic Corp.*, 217 Wis. 2d 348, 361, 577 N.W.2d 13 (1998).

¶7 The Agrawals next argue that Meera’s answer to Berryman’s complaint was sufficient to constitute an answer for Rodriguez because the issue was joined. That argument also fails because this is not an appeal from the default judgment and because the Agrawals cannot appeal to vindicate Rodriguez’s rights. In addition, the timely answer of one defendant does not preclude granting default judgment against another defendant. *Estate of Otto v. Physicians Ins. Co. of Wis., Inc.*, 2008 WI 78, ¶13, 311 Wis. 2d 84, 751 N.W.2d 805.

¶8 The Agrawals next argue that “the circuit court erred in the ruling of exercise [of] legal discretion – a discretion which promotes justice between the parties” (capitalization deleted). That argument again appears to challenge the circuit court’s refusal to reopen the default judgment, an issue that cannot be

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

pursued in this appeal. Moreover, the argument is too vague to allow a meaningful response.

¶9 The Agrawals next argue that the circuit court erred by entering two judgments, one against Rodriguez and another against Meera, even though they were jointly sued for a common claim. Because Rodriguez satisfied the judgment, Meera was not prejudiced by the existence of a separate judgment against her. By letter, the circuit court informed Meera that she had no liability on the judgment as to Berryman because Rodriguez paid the judgment in full.

¶10 Citing WIS. STAT. § 806.05(1),² the Agrawals next argue that a statute of limitations barred Rodriguez's third-party complaint and cross-claim because they were not filed within six months of Berryman's complaint. The statute of limitations was not raised in accordance with WIS. STAT. § 802.06(2)(a)9. as an affirmative defense and was, therefore, waived. In addition, the Agrawals also cite no authority to support the six-month deadline or for running the time from the filing of Berryman's complaint. If they meant to cite WIS. STAT. § 802.09(1), which imposes a six-month deadline for amending a pleading, that statute applies to amendments, not initial filing of pleadings, and it specifically grants the circuit court discretion to extend the time.

¶11 The Agrawals next argue that the circuit court erred regarding the right of contribution.³ The argument appears to fault Rodriguez for paying the

² WISCONSIN STAT. § 806.05(1) governs commencement of an action for a declaratory judgment against obscene materials.

³ As part of this argument, the Agrawals describe the judgment in favor of Rodriguez as a judgment for \$11,560.17. In light of the circuit court's explanation that Meera's judgment is reduced by any amount Basheal pays, that argument constitutes a misrepresentation of the circuit court's decision.

entire amount of the default judgment. After the court denied Rodriguez's first motion to vacate the judgment, Rodriguez prudently paid the judgment and sought contribution from the Agrawals. By not filing an answer, a failure actually caused by Meera, Rodriguez lost his right to contest the amounts requested by Berryman. By satisfying the Berryman judgment in full, Rodriguez was entitled to contribution from the Agrawals for the amount he paid less the amount he would have paid if he had answered Berryman's complaint and appeared at trial. Thus, in light of the predicament Meera created, Rodriguez properly paid the entire amount of the default judgment.

¶12 Meera next argues that she should not have been named as a defendant because her name was not on the initial lease. She is referring to an earlier lease between Berryman and Rodriguez. That lease is not relevant to this dispute. As to the lease that matters, Meera signed it when her son moved into the apartment.

¶13 In their list of issues presented, the Agrawals list a claim that Berryman was unjustly enriched. However, they do not further address that issue in their brief-in-chief. Therefore, the issue is not adequately developed. In addition, as previously noted, the judgment in favor of Berryman was not appealed and issues relating to that judgment are not properly before this court. And, any windfall to Berryman is irrelevant in determining the amount of damages due Rodriguez.

¶14 Finally, we grant Rodriguez's motion to find the appeal frivolous. An appeal is frivolous if a reasonable person should have known that his or her arguments lack any reasonable basis in law or fact for reversal. WIS. STAT. § 809.25(3)(c). By raising issues that relate to a judgment from which they did not

appeal, relying on misrepresentations of the circuit court's decision, and relying on discredited testimony and facts outside the record, the appellants have filed a frivolous appeal. Although Rodriguez has submitted invoices supporting his claim for \$3,641.25 in attorney fees, we remand the matter to the circuit court to determine the factual issue regarding the amount of reasonable attorney fees Rodriguez incurred in this appeal and to grant judgment in that amount.

By the Court.—Judgments affirmed and cause remanded with directions.

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

