COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP400 **Cir. Ct. No. 2009TR31480**

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

GREGORY C. MALLETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Order affirmed; appeal dismissed.*

¶1 CURLEY, P.J.[1] Gregory C. Mallett appeals from a circuit court order dismissing his appeal of a municipal court judgment convicting him of speeding. He argues that, pursuant to WIS. STAT. § 807.07(1) (2007-08),[2] the City

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2007-08).

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of Milwaukee (City) waived its right to object to the circuit court's jurisdiction based on Mallett's failure to serve the City with a written notice of appeal because the City participated in the pretrial conference.[3] Because the City's appearance at the scheduled pretrial conference at which it filed its motion to dismiss does not constitute participation in the proceedings, and even if it did, the filing of the motion to dismiss preserved the issue, the City did not waive its jurisdictional objection. As a result, the circuit court order is affirmed and the case is dismissed.

I. BACKGROUND.

¶2 According to the record, on January 25, 2009, Mallett, while driving in the City of Milwaukee, received a citation for exceeding speed zones (16-19 mph). He contested the ticket, which was amended to exceeding speed zones/posted limits speed over 17 mph, and eventually was given a trial date of October 5, 2009, in the Milwaukee Municipal Court.[4] At that time, the City called as a witness the officer who gave Mallett the ticket and Mallett also testified. After hearing the testimony, the municipal court judge found Mallett guilty and he was fined $109, to be paid by December 4, 2009, or his driver's license would be suspended for 730 days.

¶3 Within twenty days of the trial date of October 5, 2009, Mallett filled out a notice of appeal that requested a trial on the record and filed it with the

[3] Although the parties use the term "jurisdiction," it is more accurate to say that the question raised touches on the competency of the circuit court to proceed. For convenience, we use the term "jurisdiction."

[4] The record contains documents with varying descriptions of the speeding violation for which Mallett was charged and the subsequent amendment thereto. The exact nature of the underlying charge is irrelevant for purposes of this appeal.

municipal court. Shortly thereafter (still within twenty days of the trial date), he filled out an amended notice of appeal that requested a trial *de novo* with a six-person jury instead of a trial on the record.

¶4 The matter was then transferred to the Milwaukee County Circuit Court. The next entry in the record reveals that the circuit court, on November 2, 2009, sent out a notice of hearing to Mallett and to another person, presumably a City of Milwaukee attorney. The notice stated that a pretrial conference was scheduled for December 18, 2009, at 8:30 a.m., in front of Judge Dominic Amato. The next document in the record is entitled "Notice of Motion and Motion to Dismiss." It was filed in Judge Amato's court on December 18, 2009. Also filed was a brief in support of the motion to dismiss in which the City Attorney's Office claimed it never received a written notice of appeal and the only document received by the City from Mallett was a motion for discovery which was sent by mail and received by the City Attorney's Office on November 13, 2009. The City argued in its brief that inasmuch as WIS. STAT. § 800.14, which governs appeals from judgments of municipal courts, requires written notice of appeal to be given to the other party in a lawsuit within twenty days after judgment, and because that directive had not been met, it was entitled to dismissal. The judgment roll reflects that on December 18, 2009, Judge Amato dismissed the case.[5] This appeal follows.

[5] There were no transcripts prepared in the case as Mallett advised in a letter to the Clerk of the Court of Appeals that "no testimony was taken in the lower court." It is unclear which court Mallett is referring to.

II. ANALYSIS.

¶5 As correctly noted in the City's brief, WIS. STAT. § 800.14 governs the procedure to be used when appealing a judgment entered in a municipal court. Pertinent to this appeal, § 800.14(1) directs that "[t]he appellant shall appeal by giving the municipal judge and other party written notice of appeal within 20 days after judgment." The judgment was entered on October 5, 2009. Thus, the written notice of appeal needed to be given to the municipal judge and the City by October 26, 2009. *See* WIS. STAT. § 990.001(4)(a) ("The time within which an act is to be done or proceeding had or taken shall be computed by excluding the first day and including the last…."). The municipal judge was notified in writing of the appeal on both October 19, 2009, and October 23, 2009. According to the City's briefs filed in the circuit court and in this court, the City's first knowledge of the case came when Mallett's discovery notice arrived in the mail on November 13, 2009, a date well past the twenty days afforded by the statute.

¶6 As there is no dispute that Mallett failed to give written notice to the City of his intent to appeal, ordinarily this would end the matter and the case would be dismissed. However, Mallett has argued that the City's conduct falls within the ambit of WIS. STAT. § 807.07 and that, as a result, the City has waived its right to raise its jurisdictional objection. WISCONSIN STAT. § 807.07(1) reads:

> **Irregularities and lack of jurisdiction over the parties waived on appeal; jurisdiction exercised; transfer to proper court. (1)** When an appeal from any court, tribunal, officer or board is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction over the parties of the appellate court, unless the respondent moves to dismiss such appeal before taking or participating in any other proceedings in said appellate court. If it appears upon the hearing of such motion that such appeal was attempted in good faith the court may allow any defect or omission in

> the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken.

¶7 Specifically, Mallett contends that the City was obligated to move expeditiously in objecting to the omitted written notice of appeal or lose its right to contest the issue and that because the City attended the pretrial conference where it filed its motion to dismiss, the City participated in the proceedings; thus, waiving its jurisdictional objection. For his first proposition that the City was required to raise its objection expeditiously, he cites the 1866 case of ***Aetna Life Insurance Co. v. McCormick***, 20 Wis. 265 (1866). For his second proposition that the City participated in the pretrial conference and thus waived any jurisdictional objections, he cites to ***Ozaukee Finance Co. v. Cedarburg Lime Co.***, 268 Wis. 20, 66 N.W.2d 686 (1954), and the 1876 case of ***Coad v. Coad***, 41 Wis. 23 (1876).

¶8 The City responds that the facts in the cases cited by Mallett are distinguishable. This court agrees. The City was neither obligated to "expeditiously" object to the lack of service in order to preserve the objection nor did its appearance at the pretrial conference constitute participation, resulting in waiver of the objection. This is so because the City promptly filed its motion to dismiss based on lack of written notice of the appeal.

¶9 Whether the City waived the defense of lack of jurisdiction is a question of law for our independent review. *See* ***Artis-Wergin v. Artis-Wergin***, 151 Wis. 2d 445, 452, 444 N.W.2d 750 (Ct. App. 1989).

¶10 Mallett contends that the ***Aetna Life Insurance Co.*** case required the City to promptly object to the missing written notice of appeal: "'The application to set aside proceedings for irregularity should be made as early as possible, or, as

it is commonly said, in the first instance; and where there has been any irregularity, if the party overlook it, and take steps in the cause, he cannot afterwards revert back to the irregularity and object to it.'" ***Id.***, 20 Wis. at 269, [*7-8] (citation omitted). Thus, Mallett submits that the City was obligated to raise the issue of the lack of service "in the first instance" or lose the defense. *See* ***id.*** He theorizes that the City most likely had notice of the appeal in November 2009, but because the City did not object until December 2009, the objection was untimely.

¶11 In ***Dietrich v. Elliott***, 190 Wis. 2d 816, 528 N.W.2d 17 (Ct. App. 1995), the court explained when the lack of service of process or lack of jurisdiction is waived: "[Section] 802.06(8)(a) provides that a defense based on a lack of jurisdiction or insufficiency of service of process is waived 'only 1) if it is omitted from a motion [consolidating defenses], or 2) if it is neither made by motion under this section nor included in a responsive pleading.'" ***Dietrich***, 190 Wis. 2d at 824 (citations omitted; bracketing in ***Dietrich***). In ***Dietrich***, Elliott's defense based on a lack of personal jurisdiction was found valid even after an earlier judge assigned to the case had denied it on two separate occasions, the case had proceeded forward, and the defendant had been deposed. ***Id.*** at 824-25.

¶12 We learn from ***Dietrich*** that a lack of service of process defense survives after the motion to dismiss is denied and the case proceeds. Extrapolating from ***Dietrich***, this court concludes that a lack of written notice of appeal defense should be treated similarly. Here, the City promptly filed its motion in the circuit court seeking a dismissal. Although the only information concerning the events at the time of the pretrial conference come from the judgment roll, this court notes that the entry advises: "Motion hearing[.] Defendant Gregory C[.] Mallett in court. Genevieve O'Sullivan Crowley appeared for the Milwaukee, City of. Filed

by the City of Milwaukee: Motion to Dismiss appeal. Court granted Motion to Dismiss. Case closed."

¶13 According to this entry, little else was done by the circuit court except to note the appearances of the parties and grant the motion.[6] Mallett also appears to argue that in order for the City to be heard on its motion, the City was required to make a special appearance in the court; however, the special appearance procedure no longer applies in Wisconsin. *See* ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 603, 486 N.W.2d 539 (Ct. App. 1992).

¶14 This court next addresses Mallett's second argument. He argues that the ***Ozaukee Finance Co.*** case stands for the proposition that waiting until the date of the pretrial proceeding to raise your objection to service constitutes participation in the proceedings and thus the objection is waived. While he has correctly stated the holding in that case, the issue presented here is controlled by ***Dietrich***, which states: "'If a defendant has properly raised his objection to jurisdiction in his answer, he may later take part in pretrial discovery or otherwise contest the merits of the action without waiving his objections to personal jurisdiction.'" ***Dietrich***, 190 Wis. 2d at 21 (quoting ***Danielson v. Brody Seating Co.***, 71 Wis. 2d 424, 431, 238 N.W.2d 531 (1976)). Despite the fact that this case involves an appeal from a municipal court decision, which does not require the filing of a complaint or an answer, ***Dietrich***'s rationale is nevertheless applicable. The City made its objection known at the first scheduled hearing, and if the

[6] Mallett failed to include in the record the CD recording of the proceeding. It is Mallett's duty to ensure that the record is sufficient for the court to review the issues raised on appeal. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

judgment roll entry is accurate, did so immediately, before anything other than the appearances were placed on the record. While the City was not obligated to file an answer, it did raise the issue immediately after appearing in court. Thus, the City did not "participate" in the pretrial conference.

¶15 Moreover, a case concerning the precursor statute to WIS. STAT. § 807.07—WIS. STAT. § 269.51—supports this conclusion. In ***Monahan v. Wisconsin Department of Taxation***, 22 Wis. 2d 164, 125 N.W.2d 331 (1963), the supreme court concluded that a failure to serve a petition for review on the agency within the time frame set by a separate statute was fatal.

> [W]here a statute requires that service of a notice of appeal be made within a certain specified time and this has not been done, the above quoted provision of sec. 269.51(1) [i.e., now § 807.07(1), which is essentially the same and provides, "If it appears upon the hearing of such motion [to dismiss the appeal] that such appeal was attempted in good faith the court may allow any defect or omission in the appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken."] cannot be resorted to for the purpose of curing the defect. This is because the service of the notice within the required time is a prerequisite to the appellate court obtaining jurisdiction to act in the absence of some other statutory provision conferring such jurisdiction.

Monahan, 22 Wis. 2d at 169-70 (citation omitted). WISCONSIN STAT. § 800.14 required written notice of the appeal be given to the City within twenty days.

¶16 Mallett failed to provide written notice of his appeal to the City and the City objected. Consequently, he has failed to perfect his appeal. Because the twenty-day limit has long since passed, this appeal must be dismissed.

By the Court.—Order affirmed; appeal dismissed.

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