COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2183 **Cir. Ct. No. 2013CV2615**

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

DAVID CHRISTIAN,

PLAINTIFF-APPELLANT,

V.

SHAWN CHRISTIAN,

DEFENDANT-RESPONDENT,

THOMAS CHRISTIAN,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. David Christian, *pro se*, appeals from an order of the circuit court, entered upon his son Shawn Christian's motion for summary

judgment, that declared Shawn and Shawn's uncle, Thomas Christian, the owners of disputed property and granted Shawn a judgment of eviction and writ of assistance against David. David contends, among other things, that genuine issues of material fact precluded summary judgment on the question of ownership. We reject David's arguments and affirm.

BACKGROUND

¶2 On May 25, 2010, Shawn purchased a home in Milwaukee. Shawn's uncle, Thomas, co-signed the loan. David's father, Earl Christian, provided $11,500 in cashier's checks that were deposited into Shawn's bank account to finance the down payment and renovations. According to David's complaint, the money was a gift from Earl to David, not Shawn. David also claims he personally spent about $3,000 on renovations.

¶3 David and Shawn initially lived together in the house, and David paid $300 per month, either as rent or towards the mortgage payment. Shawn subsequently moved out. In September 2012, Shawn attempted to evict David by serving a five-day notice to pay rent or vacate the premises. David was allegedly growing marijuana, had stopped September's payment, and had changed the locks without permission. When the notice period expired, Shawn filed a small claims eviction action.[1]

¶4 In determining the nature of David's tenancy and, thus, the proper notice requirement, the small claims court held:

[1] The small claims case was presided over by the Honorable Mary Kuhnmuench.

> [O]ne family member, and I will make that ruling in this case, owns the property. That's the plaintiff in this case, Shawn Christian. He owns it and Mr. Dave Christian, the defendant, does not and so any tenancy or living arrangements that Mr. Dave Christian has is a tenancy at will and under the law and in that regard a 28-day notice is required.
>
> I am necessarily finding that Mr. Shawn Christian is the legal owner of this premise. There being no assertion that … Mr. Dave Christian owns the premise, nor was there any evidence provided to the Court showing that he is a legal deed holder to this property.

However, because the eviction notice was insufficient, the small claims court dismissed the action.

¶5 Shawn then served David with twenty-eight-day notices on January 25, 2013, and March 4, 2013. Before the second period expired, David commenced the underlying action, seeking a declaration of his interest in the property. Shawn counterclaimed for eviction.

¶6 In July 2013, Shawn moved for summary judgment. He noted that David's name is not on the deed to the property. He asserted that the small claims court had already determined ownership of the property and, thus, issue preclusion should apply to resolve any question of David's interest. He also noted that any ownership interest David might be claiming would violate the statute of frauds because David has no writings to back up any such claim. Shawn additionally sought default judgment on the counterclaim, because David had not filed any answer to it.

¶7 At the summary judgment hearing, the circuit court asked David what proof he had that he and Shawn purchased the property together. David answered, "Unfortunately nothing, but a father-son understanding that we are buying it together." The circuit court ultimately determined that the small claims

court had already determined ownership and, in any event, David had no writing to establish an ownership interest, contrary to the statute of frauds. Thus, Shawn was entitled to summary judgment on David's claims.

¶8 As to the counterclaim, the circuit court noted that it was not allowed to grant default judgment for failure to answer the counterclaim.[2] However, because David had not at any point contested the counterclaim, the circuit court granted a judgment of eviction on the merits. David moved for reconsideration, but the motion was denied. David now appeals. Additional facts will be discussed herein as necessary.

DISCUSSION

¶9 One of David's arguments is that the "law supports default judgment for untimely answer." He contends that he should have been granted a default judgment, for which he attempted to so move, when Shawn "fail[ed] to answer the summary judgment in a timely manner."[3] Shawn's answer, however, was timely filed twenty-four days after David's complaint.

¶10 What David is actually complaining about is his perception that a scheduling order was violated. Evidently, the parties had agreed that Shawn would file a summary judgment motion and brief by July 15, 2013, but he did not file it until July 25, 2013. Shawn explained that the filing was delayed because of

[2] *See* ***Pollack v. Calimag***, 157 Wis. 2d 222, 235, 458 N.W.2d 591, 598 (Ct. App. 1990).

[3] David filed a "motion for entry of default" that stated, in its entirety: "Plaintiff David Christian requests that the clerk of court enter against defendant Shawn Christian pursuant to Federal Rule of Civil Procedure 55(a). In support of this requested David Christian relies upon the record in this case and the affidavit submitted herein."

a fire at the Milwaukee County Courthouse, and that he filed the motion as soon as the courthouse was fully reopened. David contends that the courthouse was open earlier than Shawn's attorney had claimed.[4]

¶11 However, the July 15 filing "deadline" was not set by court order. Indeed, the only formal scheduling order in this case set September 3, 2013, as the deadline for filing dispositive motions. Thus, while David wanted the circuit court to dismiss the summary judgment motion and let the case proceed to full litigation, Shawn was correct to note that, had the circuit court been disinclined to hear the motion on August 27, 2013, Shawn could have simply refiled the motion prior to the September 3 deadline and still be in compliance with the court's order. Thus, it was not erroneous for the circuit court to disregard the claim for default and proceed with Shawn's summary judgment motion.[5]

¶12 David contends that "disputable facts by law eliminates summary judgment." We review summary judgments *de novo*, using the same methodology as the circuit court. *See* ***Schapiro v. Security Savings & Loan Association***, 149 Wis. 2d 176, 181, 441 N.W.2d 241, 244 (Ct. App. 1989). "Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving

[4] The appendix to David's reply brief includes a copy of a press release from the county executive's office. Though we question whether this document is properly included, *see* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545, 546 n.1 (Ct. App. 1989), we note that on its face, the press release only indicates that the courthouse would "partially reopen" on July 15. It does not conclusively demonstrate that Shawn could have filed his summary judgment papers earlier than he did.

[5] Also, Fed. Rule Civ. Pro. 55(a) is not the governing procedural rule here and, in any event, would not have entitled David to entry of Shawn's default. A failure to seek summary judgment by motion is not the same thing as having "failed to plead or otherwise defend."

party is entitled to judgment as a matter of law." ***Ibid.***; *see also* WIS. STAT. § 802.08(2).

¶13 The only "genuine issue of material fact" that David identifies on appeal is his claim that the "cashier's checks for $11,500 are a disputed material fact, which by law should eliminate a Summary Judgment." However, David does not adequately establish in his appellate brief just what about the checks is disputed or why it is a material fact. He appears to consider it a genuine issue of material fact that he believes the money, which he says was a gift to him, was "the major investment in the property" that somehow vests him with an ownership interest, but Shawn's answer denied that the money was a gift from Earl to David.[6]

¶14 However, in light of the fact that, as we will see below, any ownership interest David is claiming by his investment runs afoul of the statute of frauds, both the proportion and the origin of the $11,500 is irrelevant. That is, the nature of the funds' origin may present a genuinely disputed issue, but that nature is not a material fact in this case.

¶15 David also complains that the circuit court should not have relied on issue preclusion to adopt the small claims court's determination of ownership because there was no identity of the causes of action and because there was no final judgment on the merits by a court of competent jurisdiction. *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶¶22–23, 302 Wis. 2d 41, 57–59, 734

[6] It is not clear how David considers $11,500 to be "the major investment in the property." He indicated that the mortgage Shawn secured was for $45,000. Even including the $3000 David says he spent himself, that brings his total investment to $14,500, which is less than one-third of the total mortgage amount. If we consider that the purchase price of the property was likely greater than $45,000, because some of the $11,500 was meant as the down payment, then David's investment is an even lower proportion of the total.

N.W.2d 855, 864. However, David has based his argument on the standards for claim preclusion, not issue preclusion: the two are not identical and the standards are not interchangeable.

¶16 Regardless of whether issue preclusion—or claim preclusion, for that matter—applies, though, David still has a problem with the statute of frauds.[7] Every transaction by which any interest in land is created must be evidenced by a written conveyance which clearly identifies the parties, the land, and the interest conveyed. *See* WIS. STAT. § 706.02(1). "An oral contract for the conveyance of an interest in land is void." ***Trimble v. Wisconsin Builders, Inc.***, 72 Wis. 2d 435, 441, 241 N.W.2d 409, 413 (1976). By David's own admission, he has no written documents to establish his claimed ownership interest. This undisputed failure to have written documents in support of a claim of ownership is ultimately fatal to that claim and dispositive in this case, regardless of any other facts David might think are disputed.

¶17 In his reply brief, David complains that Shawn "repetitively states in his brief about ownership interest, which was **not** the request to the court. The Complaint was filed to establish Declaratory Interest of real property as per Wis. Stat. Chapter 841, through a lien secured and approved by the **Title and Deeds office.**" (Formatting in original.)

[7] We decline to undertake an analysis regarding applicability of issue preclusion, because the failure to comply with the statute of frauds is dispositive and the narrower ground. *See* ***Maryland Arms Limited Partnership v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 321, 786 N.W.2d 15, 25–26 ("[A]n appellate court should decide cases on the narrowest possible grounds.").

¶18 First, we note that David's complaint expressly requests the circuit court "correct the title record to show ownership for the plaintiff." Thus, he was requesting a declaration of his ownership interest. Second, while David's complaint referenced a lien, no copy of any lien filing was attached to his complaint. Third, the Record citation that David provides to show the lien takes us to an unrecorded "affidavit of interest." Nevertheless, we did locate a "Declaration of interest (affidavit of interest)" that bears the register of deeds' recording information. That document claims an ownership interest based on "work performed [and] materials purchased."

¶19 To the extent that David may be seeking validation of a construction lien, a lien is not an ownership interest. A lien is merely "a right to encumber property until a debt is paid." *See* ***Dorr v. Sacred Heart Hospital***, 228 Wis. 2d 425, 437, 597 N.W.2d 462, 470 (Ct. App. 1999). Additionally, construction liens are subject to rather particular requirements, particularly with respect to notice. *See* WIS. STAT. § 779.01, *et. seq.* David develops no argument on appeal to establish Shawn's indebtedness, much less the jurisdiction for or existence of a valid lien.[8] We therefore address it no further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988) (this court generally does not consider undeveloped arguments).

¶20 Based on the foregoing, the circuit court properly declared Shawn and his uncle Thomas the owners, and properly declared that David can make no claim of ownership. *See* WIS. STAT. § 841.10(1) (The circuit court decision "shall

[8] If any such argument was made in the circuit court, David does not direct us to the relevant record portions.

declare the interests of the parties.”). No argument has been raised on appeal regarding the eviction, so we need not review it for error.

By the Court.—Order affirmed.

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