COURT OF APPEALS
DECISION
DATED AND FILED

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1873-FT

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

ROBERT GOREE D/B/A GOREE'S CATFISH BAY,

PLAINTIFF-RESPONDENT,

V.

STELLA LOVE AND HENRY LOVE,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Reversed and cause remanded with directions.*

EICH, C.J.[1] Stella and Henry Love appeal from an order denying their motion to reopen a default judgment entered against them in a small claims action. We reverse.

The plaintiff, Robert Goree, brought an eviction action against the Loves, who apparently were renting a trailer site from Goree. Goree's complaint

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(a), STATS.

alleged that the parties had settled the action pursuant to an agreement that the Loves would remove their personal property from the trailer and would transfer title to the trailer to Goree in satisfaction of Goree's claim for back rent. Alleging that the Loves failed to transfer title to the trailer, Goree sought judgment for back rent, including late charges.

The record is sparse. It contains only the summons and complaint dated October 9, 1996, one or two unidentified documents, a copy of a letter from Attorney Gary George, dated February 3, 1997, indicating that he had been retained to represent the Loves in the case, and a notice of entry of judgment, dated May 8, 1997, stating that judgment was entered against the Loves on April 30, 1997, in the amount of $5,000 plus costs, for a total of $5,177. There is also a motion to "reopen judgment" filed by the Loves' successor counsel, Attorney Mark Sostarich, dated May 15, 1997, which is accompanied by an affidavit of George which states that: (1) he appeared for the Loves at a pretrial conference on March 5, 1997, where he engaged in settlement discussions with Goree's attorney; (2) settlement was not reached; (3) he "anticipated that [he] would be receiving formal ... notification from the Court regarding a scheduled trial"; (4) he never received a notice of the trial date, which apparently had been scheduled for April 30, 1997; and (5) he would have requested a postponement had he received the notice "because of a scheduled proceeding of the legislature," of which George is a member. George also states in his affidavit that he believes the Loves have "legitimate defenses" to the plaintiff's action and "wish to have their day in [c]ourt."

The only other item in the record is a twelve-page transcript of the hearing on the Loves' motion to reopen the judgment—which, we assume, had

been entered by default. At the hearing, the court informed Sostarich that the court file included a notice of trial indicating that a copy had been sent to George. Goree's counsel, Christopher Kelly, also addressed the court, recounting his version of the facts as he understood them and referring to a letter he allegedly received from George that mentioned the trial date. The letter, however, does not appear in the record before us.

It is the responsibility of the parties to ensure that evidence and other materials pertinent to the appeal are made part of the record on appeal. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). Our review is limited to those portions of the record available to us. ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). In this case the record shows only that the action was commenced, that the court entered judgment in Goree's favor, and that Goree moved to reopen the judgment based on the facts averred in George's affidavit.

The trial court ruled:

> What's before the Court is [the Loves'] motion and the Court has examined the court file prior to the hearing …
>
> I find that Attorney George and his clients were given written notice by this Court, by the clerk of this court. That appears by the notice dated March 18, 1997, [which indicates that n]otice was given to Attorney Kelly, Attorney George, Mr. Goree and Mr. and Mrs. Love.[2] Confirmation of that finding is corroborated by the letter from Mr. George to Mr. Kelly dated March 27, 1997, noting that the mater is scheduled for April 30th. He again copied his clients, he being Mr. George.

Based on those "findings," the court went on to conclude that Sostarich had not established that the failure to appear at trial was the result of

[2] The notice, like the letter from George, does not appear in the appellate record.

mistake, inadvertence, surprise or excusable neglect under § 806.07, STATS., and denied the Loves' motion to reopen.

The trial court's decision is thus based solely on two documents: the notice of trial, with its endorsements, and George's letter of March 27, 1997, to Kelly—neither of which is of record on this appeal. In his brief, Kelly insists that the court could properly find that the affidavit (which is part of the appellate record) was discredited by the March 27 letter (which is not).[3] The letter was never moved into evidence at the hearing. Had it been offered, Sostarich could have objected on hearsay grounds. Had it been admitted, it would be properly before us for consideration.

While we generally apply a presumption of regularity to court proceedings, ***State ex rel. La Follette v. Brown County Circuit Court***, 37 Wis.2d 329, 344, 155 N.W.2d 141, 149 (1967), that presumption cannot expand the appellate record to include documents—such as the notice of trial and the George letter—beyond those which have been certified to us by counsel.

The result is that the only item of evidence before us with respect to the motion to reopen is the motion itself and the sworn supporting affidavit of George stating that he never received notice of the trial.[4] The trial court remarked at the conclusion of the hearing on the motion that it was "unfortunate that the defendants have not had their day in court." We think it is equally unfortunate that

[3] The record citation in Goree's brief for the existence and content of the letter is simply a reference to counsel's own nonsworn, nontestimonial statement to the court that he had received such a letter.

[4] Kelly never objected to the affidavit. Indeed, as indicated above, he argued at the hearing that the facts stated in the affidavit were overcome by the letter of March 27, which was not placed in the record.

we have not been provided with a record that would permit us to fully assess the resulting decision. Because George's affidavit stands uncontroverted in the appellate record, however, we are constrained to reverse the order denying the motion to reopen and remand the matter to the trial court with directions to enter an order granting the Loves' motion.[5]

By the Court.—Order reversed and cause remanded with directions.

This decision will not be published. RULE 809.23(1)(b)4, STATS.

[5] Goree also moves for a finding that this appeal is frivolous under RULE 809.25(3), STATS. Because we have granted the Loves' requested relief, we deny this motion.