

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3361

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DOUGLAS NIEMANN AND ELAINE NIEMANN,

PLAINTIFFS-RESPONDENTS,

v.

STEVE ADLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
PETER C. DILTZ, Judge. *Affirmed.*

HOOVER, J. Steve Adler appeals a trial court judgment dismissing his demand for a trial de novo before a circuit judge following the court commissioner's judgment in a small claims action. We affirm.¹

¹ Adler also presents numerous arguments challenging the substance of the court commissioner's decision. The trial court did not hear the issues because it determined that Adler's demand for a trial de novo was untimely. This court does not have jurisdiction over a court commissioner's decision and therefore only addresses the demand for trial de novo issue.

Adler rented a house from the Niemanns around June 1995. He did not have a lease, but instead rented on a month-to-month basis. On April 2, 1997, the Niemanns gave Adler a twenty-eight-day written notice terminating the tenancy. Adler remained on the property, however, requiring the Niemanns to file a small claims eviction action. The Niemanns were granted a judgment of eviction ordering Adler out of the property on May 31, 1997.

A trial was held concerning the Niemanns' claim for unpaid rent for the month of May. Adler counterclaimed, raising numerous arguments. Following the trial, the court commissioner awarded the Niemanns \$650, representing double the rent for the month of May. He also awarded Adler \$105 on his counterclaim. The Niemanns therefore netted a recovery of \$545, plus costs and attorney fees.

Adler filed a motion for reconsideration, which was denied on August 26. Pursuant to § 799.207(3), STATS., Adler filed a demand for trial, seeking a trial de novo before the circuit court. Adler signed the demand on September 10; it was *filed* September 11. The Niemanns brought a motion to dismiss on the grounds that the demand for trial was not filed within the statutory time limit of fifteen days. The court concluded that by filing the demand for trial on September 11, Adler was one day late. The court therefore dismissed the demand for trial.

Section 799.207(3), STATS., provides an absolute right to have a small claims matter heard before the court if the appealing party meets the requirements of the section. Section 799.207(3)(c) provides: “The demand for trial must be filed with the court and mailed to the other parties within ... 15 days from the date of mailing of a written decision.”

Adler first claims that he filed his demand for trial on September 10 because he signed the demand and mailed it to the clerk of court on September 10. The clerk's filing stamp on the demand, however, is September 11. Adler incorrectly asserts that the filing date is the date he mailed the demand. Rather, § 799.207(3)(c), STATS., specifically provides that the demand must be filed with the court *and* mailed to the other parties within fifteen days. Filing with the court is accomplished by having the clerk file stamp the document. The date stamp is usually accepted as proof of the date of filing. *See Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis.2d 813, 822, 284 N.W.2d 93, 97 (1979).

Adler also contends that the court commissioner's judgment denying reconsideration was rendered August 26, but not mailed until August 27. The Niemanns filed an affidavit made by their attorney that averred the mailing date was August 26. Adler offers no support for the contention that the judgment was not mailed August 26. Further, from the partial transcript provided to this court, it does not appear Adler contested before the court that the commissioner mailed the judgment on August 26. This court independently considered and researched whether the court could rely on the Niemanns' attorney's affidavit listing the mailing date of the judgment as August 26. This court concludes that whether the judgment was mailed on August 26 is an issue of fact and the court had a sufficient basis in the record making the finding that the judgment was mailed August 26. *See* § 807.17(2), STATS. Therefore, the court correctly determined that by filing the demand for trial on September 11, Adler was a day late meeting the fifteen-day time limit set forth in § 799.207(3)(c), STATS.

This court further independently considered whether § 801.15(5)(a), STATS., applied, lengthening the time in which Adler had to act following notification of the commissioner's judgment. That section provides that when a

party has a right or is required to do something within a specified time after service of a notice, three days shall be added to the prescribed period when notice is served by mail. This court concludes that § 801.15(5)(a) does not apply in the demand for trial under § 799.207(3), STATS. The latter section explicitly provides both the manner of serving notice (the mailing of the judgment) and the time period the party is required to act. The three-day extension provided under § 801.15(5)(a) appears to apply only where alternative methods of notice are contemplated, so that if the notifying party *chooses* to provide notice through mail, the recipient has three extra days in which to act. The specificity of § 799.207(3) precludes application of the three-day extension under § 801.15(5)(a).

Further, Adler claims that the court erred by failing to impose sanctions on the Niemanns for failing to respond to his interrogatories. For a court to impose sanctions, an order compelling discovery must be in place and violated. *See* § 804.12(1), STATS. There was no order compelling discovery in the small claims trial. Therefore, no order was violated that would permit imposition of sanctions.

In addition, the costs assessed against Adler were appropriate. The prevailing party in a small claims action is entitled to statutory attorney fees. Section 799.25, STATS. For a judgment granting the Niemanns \$545, \$50 for attorney fees is the correct amount. *See* §§ 799.25(10)(a) and 814.04(1), STATS. The other statutory costs were also appropriate.

By the Court.—Judgment affirmed.

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

