COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0283

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

BANK OF LUXEMBURG,

PLAINTIFF-RESPONDENT,

v.

DENIS E. WERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Denis Wery, pro se, appeals a judgment of foreclosure entered in favor of the Bank of Luxemburg. He argues that (1) the Bank failed to provide him notice of the loan default; (2) the trial court erroneously held the foreclosure proceedings in his absence; and (3) the trial court

is liable to him in the sum of $1,000 for failing to grant his petition for writ of habeas corpus. We reject his challenges and affirm the judgment.

On September 23, 1997, Luxemburg commenced this mortgage foreclosure on a house Wery owned. At the time the proceedings commenced, Wery was incarcerated in Texas. He was served with an amended summons and complaint by service on the prison registrar on November 20. Wery sent a letter to the court dated December 7, referencing the case number and asking that certain documents be forwarded to the bank's attorney.

On December 11, the bank moved for summary judgment and default judgment. On December 15, Wery filed an attempted third-party action against two former tenants of the property for breach of lease and damage to the property. On December 19, Wery filed an answer attempting to raise as a defense § 893.17(2), STATS., because he was imprisoned on a criminal charge.[1] He also

[1] Section 893.17, STATS., a statute of limitation, does not provide a defense for Wery to this foreclosure action. It reads as follows:

> Transition; limitation if disability exists; temporary.
> (1) This section does not apply to a cause of action which accrues on or after July 1, 1980.
> (2) If a person entitled to commence any action for the recovery of real property or to make an entry or defense founded on the title to real property or to rents or services out of the same is, at the time such title shall first descend or accrue, either: within the age of 18 years; or insane; or imprisoned on a criminal charge or in execution upon conviction of a criminal offense, for a term less than for life, the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense; but such action may be commenced or entry or defense made, after the time limited and within 5 years after the disability shall cease or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced or entry or defense made after that period.
> (3) This section shall not operate to extend the time for commencing any action or assertion of a defense or counterclaim

(continued)

filed a petition for a writ of habeas corpus alleging that "[t]he illegality of the imprisonment consists of my right to the access of the court to defend my real property, under 893.17(2)."

At the motion hearing, the trial court found that Wery was properly served, and more than twenty days had elapsed since service of the summons and complaint.[2] The court found that Wery and his wife failed to comply with the terms of the note and mortgage, that the premises were vacant, and were not homestead, farm or charitable property. It concluded that Wery filed an answer which set forth no legal defense to the nonpayment of the loan. There was no claim for a deficiency judgment. The court ordered a three-month redemption period and entered a judgment of foreclosure and sale.

After judgment was entered, Wery filed a letter to the court requesting information. The court responded by letter explaining that at the hearing for default judgment, his papers were considered but found to raise no issue of fact or law that would preclude judgment in favor of the bank. The court explained that a writ of habeas corpus is an inappropriate remedy and, although he may have a claim against his former tenants, from a review of his pleadings it appeared that he has no defense to the foreclosure action. Wery filed additional correspondence indicating that his tenants had not paid rent to the bank as they had agreed to. He also contended that the bank had not advised him that payment was not being made until after the tenants moved out, and that the bank and the

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> with respect to which a limitation period established in s. 893.33 has expired and does not apply to s. 893.41, 893.59, 893.62, 893.73 to 893.76, 893.77 (3), 893.86 or 893.91 or subch. VIII.

[2] Wery does not challenge the method of service or the court's finding.

attorney for the bank did not respond to his requests for assistance and information.

Wery petitioned the court to proceed with his appeal in forma pauperis. The trial court held a hearing on the issue of Wery's indigency and, because Wery was incarcerated, he appeared telephonically. He testified that he felt he had a defense to the foreclosure because the bank never sent late notices advising that payments were not being made.

Wery argues that the bank failed to provide him notice of default and that he first found out about nonpayment on April 4, 1997. If Wery attempts to raise this issue as a defense, it must first be raised in the trial court in his responsive pleading. *See* § 802.02, STATS. Wery filed his responsive pleading more than twenty days from the date of service, and failed to raise this issue until after the court entered judgment of foreclosure. He then raised it only in the context of an indigency hearing. As a result, the issue is not preserved for appellate review. ***Wirth v. Ehly,*** 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1983).

In any event, Wery concedes that in April 1997 he was aware that payments were not being made.[3] The foreclosure proceedings were not filed until September 1997. Thus, Wery admits actual knowledge of the default before the foreclosure action was filed. Also, the motion hearing was not held until December, and a three-month redemption period was granted. Thus, Wery had actual notice of the default on the loan nearly one year before the redemption

[3] The bank does not allege, nor does our review of the record disclose, whether the bank sent Wery any formal notices of default.

period expired. Wery fails to identify how the alleged lack of notice from the bank would have prejudiced him in any meaningful way.

Next, Wery argues that the court erroneously held foreclosure proceedings in his absence. This argument ignores the trial court's finding that Wery was in default of answering the complaint in a timely fashion. Section 806.02, STATS. Additionally, Wery fails to provide legal authority for his proposition that his physical presence is required at a civil trial or proceeding.[4] In ***Schmidt v. Schmidt,*** 212 Wis.2d 405, 408-09, 569 N.W.2d 74, 76 (Ct. App. 1997), we discussed whether a case may proceed without the presence of an incarcerated litigant:

> When a court faces a case in which one of the litigants is incarcerated, a preliminary question it must resolve is whether the case can still move toward resolution or whether it must be held in abeyance until the incarcerated party is released. If the court finds that the case should proceed, and that to proceed the incarcerated party must appear in person, the court has authority to order that the incarcerated person be brought to the courthouse.
>
> These two determinations--if the case should proceed and how the case should proceed--are discretionary choices that rest on a variety of factors. We have surveyed case law discussing the factors that are involved, and we conclude that the court needs to make inquiries on three different issues. They are: (1) the nature of the case; (2) the practical concerns raised by having the prisoner appear; and (3) the alternative methods of providing the prisoner with access to the hearings. (Citations and footnote omitted.)

[4] Under § 809.19(1)(e), STATS., proper appellate argument requires an argument containing the contention of the party, the reasons therefor, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

We conclude that the record supports the trial court's implicit determination that Wery's physical presence was not required in order for him to provide a meaningful defense. The motion hearing was not an evidentiary hearing, but rather one for default or summary judgment. Because no material facts were in dispute, no credibility determinations were required. *See* ***id***. at 410, 569 N.W.2d at 76. This was not a case involving complex factual details. It focused on a single narrow issue, whether payments were made according to the terms of the loan agreement. *See* ***id***.

As a result, Wery could have defended by raising a legal defense in his answer and by filing an affidavit raising a dispute of material fact. S*ee* § 802.08, STATS. The court considered his answer, and other items filed. It concluded that Wery did not raise a legal defense to the complaint. Based upon the documents of record, it concluded that the bank was entitled to judgment as a matter of law. We agree that Wery filed no timely answer or affidavit raising a material issue of fact or law.[5] Thus, we conclude that the court did not erroneously exercise its discretion when it determined that the motion hearing could proceed in Wery's absence.

Next, Wery argues that the trial court is liable to him under § 782.09, STATS., in the sum of $1,000 for failing to grant his petition for writ of habeas corpus, which he filed in the mortgage foreclosure proceeding. Section 782.09 provides: "Any judge who refuses to grant a writ of habeas corpus, when legally applied for, is liable to the prisoner in the sum of $1,000." The court has the authority to order that the incarcerated person be brought to the court house in a

[5] Wery does not assert that he requested or needed additional time to prepare defensive papers.

civil proceeding. ***Schmidt***, 212 Wis.2d at 408, 569 N.W.2d at 76. "This is achieved by issuance of a writ of habeas corpus *ad testificandum*." ***Id***. Here, however, the trial court reasonably exercised its discretion when it determined that Wery's physical presence was not necessary in order to proceed with the mortgage foreclosure proceedings. Therefore, we conclude the court properly refused to grant the writ.

In any event, the writ was not "legally applied for" within the meaning of § 782.09, STATS. "Although most often inspired by other proceedings, habeas corpus nonetheless stands as an independent civil action and not as a motion in another proceeding." ***Maier v. Byrnes***, 121 Wis.2d 258, 260, 358 N.W.2d 833, 835 (Ct. App. 1984). In order to be "legally applied for" within the meaning of § 782.09, the requirements of § 782.04, STATS., must be satisfied. ***Id***. at 262-63, 358 N.W.2d at 836.[6] Here, Wery failed to meet several of the requirements, including the failure to have the petition verified. *See* ***id.*** at 262, 358 N.W.2d at 836. Also, the filing of a petition for a writ with the clerk of court

[6] Section 782.04, STATS., reads as follows:

> **Petition; contents.** Such petition must be verified and must state in substance:
>
> (1) That the person in whose behalf the writ is applied for is restrained of personal liberty, the person by whom imprisoned and the place where, naming both parties, if their names are known, or describing them if they are not.
>
> (2) That such person is not imprisoned by virtue of any judgment, order or execution specified in s. 782.02.
>
> (3) The cause or pretense of such imprisonment according to the best of petitioner's knowledge and belief.
>
> (4) If the imprisonment is by virtue of any order or process a copy thereof must be annexed, or it must be averred that, by reason of such prisoner being removed or concealed a demand of such copy could not be made or that such demand was made and a fee of $1 therefor tendered to the person having such prisoner in custody, and that such copy was refused.
>
> (5) In what the illegality of the imprisonment consists.

as a separate action is a prerequisite to an action against a judge, *see* ***id***., but Wery filed the petition in his foreclosure proceeding.

"*A statute awarding a penalty must be strictly construed, and, before a recovery can be had, the case must be brought clearly within its terms*." ***Id***. at 261, 569 N.W.2d at 836 (emphasis in original). Because Wery failed to comply with § 782.04, STATS., he fails to show that he is entitled to a penalty under § 782.09, STATS.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.