COURT OF APPEALS
DECISION
DATED AND FILED

January 19, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0851

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

TIMOTHY G. WOLFF AND
FELISHA L. WOLFF,

PLAINTIFFS-
RESPONDENTS,

V.

ROGER M. COATES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

¶1 BROWN, J.[1] Roger M. Coates appeals an order of the circuit court denying a trial de novo of a court commissioner's decision in a landlord-tenant dispute. WISCONSIN STAT. § 799.207(3)(c) requires not only that the demand for a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All further references to the Wisconsin Statutes are to the 1997-98 version.

de novo trial be made within ten days from the date of an oral decision, but also that the demand be mailed to the other parties within ten days. Since the record shows that such mailing was not made, this court affirms.

¶2 Timothy and Felisha Wolff brought a small claims action against Coates, their former landlord, on May 13, 1998. Coates answered, denying fault, and submitted a counterclaim. The parties do not dispute that a court commissioner heard the case on July 6, 1998, and orally granted judgment to the Wolffs in the amount of $1601. Coates filed an objection to the July 6 decision of the court commissioner and a demand for a de novo trial by jury on July 16, 1998, one day before the ten-day time limit elapsed.

¶3 The appellate record shows that the case proceeded on the trial court calendar for a period of time with both parties represented by counsel. This is evident from the record in several respects. Coates's attorney filed a set of interrogatories and filed an amended answer and counterclaim. And on December 14, the trial court ordered a mediation conference to try to resolve the disputes.

¶4 On February 23, 1999, the Wolffs moved the court to deny Coates's right to a de novo trial on the grounds that the mailing to them did not take place within the ten days. The Wolffs' attorney filed an affidavit saying that he received the demand for trial on August 26, 1998, and both Wolffs averred that they never received a demand. While the appellate record does not show this, apparently the parties do not dispute that Coates filed a counteraffidavit averring that he mailed the demand on July 17, 1998. On March 4, 1999, the trial court granted the Wolffs' motion and dismissed the circuit court action for lack of proper service. Entry of judgment in favor of the Wolffs for $1601, as found by the court

commissioner, was then accomplished on March 8. Coates appeals the March 4 order dismissing his circuit court action for lack of jurisdiction.

¶5 The law is clear about how a losing party in a small claims case may demand a de novo trial in the circuit court. WISCONSIN STAT. § 799.207(3)(a) provides that there is an absolute right to have the matter heard before the circuit court "if the requirements of this section are complied with." In pertinent part, § 799.207(3)(c) states:

> The demand for trial must be filed with the court *and mailed to the other parties within 10 days from the date of an oral decision* or 15 days from the date of mailing of a written decision. Mailing of the notice and proof of such mailing is the responsibility of the party seeking review. (Emphasis added.)

¶6 Coates claims that this statute should not defeat his demand for a de novo trial. Both Coates's brief-in-chief and the reply brief are confusing, to say the least, in this regard. As best we can figure out, he makes three arguments in support of his claim. They are as follows.

¶7 First, he apparently argues that there was no judgment entered and docketed against him following the hearing before the court commissioner. Therefore, the required date for filing must change. But the statute requires notice be given within ten days of the oral decision of the court commissioner. Coates does not argue that no oral decision was made. Whether a judgment was entered or docketed against him is irrelevant to his obligation to demand a de novo trial within ten days of the court commissioner's oral decision. The issue has no merit.

¶8 Second, Coates appears to argue that since court personnel told him that he had ten "working" days from the date the judgment was docketed to file a demand, he was justified in accepting the clerk's word for it and we must adhere

to what the court personnel told him as well. This issue is also without merit. The statute is what controls, not what Coates claims a clerk told him. The statute clearly tells anyone who is interested in reading it that the demand for trial "must be … mailed to the other parties within 10 days from the date of an oral decision or 15 days from the date of mailing of a written decision." WIS. STAT. § 799.207(3)(c). That Coates did not do this is without refute.

¶9 Third, Coates seems to suggest that since the Wolffs participated in pretrial scheduling from the date of demand until their February 23 motion to dismiss the circuit court action, the Wolffs have waived any alleged defect in the demand by their inaction. Coates claims, without support in the appellate record, that it was only after the Wolffs were successful in obtaining an adjournment of one trial date that the timeliness claim was raised. If that is Coates's argument, it is without merit. Without proper demand, there is no subject matter jurisdiction by the trial court to proceed. Subject matter jurisdiction may never be waived. *See* ***Wisconsin Envtl. Decade, Inc. v. Public Serv. Comm'n***, 84 Wis. 2d 504, 515, 267 N.W.2d 609 (1978). And this is a question of subject matter jurisdiction, not personal jurisdiction. The legislature has specifically dictated what events must occur as a prerequisite to the circuit court obtaining jurisdiction over a small claims matter that has previously been heard by a court commissioner. This is not a matter where the circuit court already has the power to hear the matter but the legislature is prescribing how parties are brought into the action. WISCONSIN STAT. § 799.207 defines how the circuit court *obtains* the power to hear the case.

¶10 So, even had the parties stipulated to trying this case de novo despite an untimely notice (and there is no record of any such stipulation), the trial court would have been duty bound to deny it. The trial court simply lacked the subject

matter jurisdiction to handle this case by reason of the clear language of the statute.

¶11 Coates appears to assert that even if he was late in filing, there was "no[] prejudice." He also appears to argue that this court should reverse in accordance with WIS. STAT. § 806.07(a), which is the statute allowing a party to seek relief from a judgment or order on the grounds of mistake, inadvertence, surprise or excusable neglect. He makes a similar argument that § 806.07(1)(b) applies. This section of the statute allows relief upon a finding of newly discovered evidence. We reject the claims for several reasons. First, a § 806.07 motion is properly brought in the trial court, not this court. Second, Coates makes no argument and recites no facts that would show us what kind of mistake he made or why his neglect was excusable. Third, there is no showing of any newly discovered evidence. Fourth, and most importantly, the error made by Coates in not mailing within ten days is a question of subject matter jurisdiction. The circuit court had no subject matter jurisdiction to hear the case anyway and lack of prejudice cannot cure this defect.

¶12 Finally, Coates spends substantial time rearguing the facts behind the dispute. We are unsure whether Coates believes that the decision of the court commissioner is contrary to the great weight of the evidence and we should review the court commissioner's decision or whether Coates wants us to make a de novo factual finding based on the briefs and appendices submitted. Whatever Coates's argument actually is, we will not address it for several reasons. First, this court has no power to directly review the decision of a court commissioner. *See* ***Dane County v. C.M.B.***, 165 Wis. 2d 703, 708-09, 478 N.W.2d 385 (1992). Our power is to review the decision of a circuit court. It is the circuit court that is vested with the power to review a court commissioner's decision if certain prerequisites are

met, and then we review the circuit court's determination. Second, a court commissioner is not a court of record and we review only recorded testimony and records. Third, we cannot decide facts de novo because we are a reviewing court, not a fact-finding court. Had Coates mailed his demand to the other parties on time, he would have been able to have a full rehearing of the facts in the circuit court. That did not happen. The order of the circuit court is affirmed.

By the Court.—Order affirmed.

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