COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1566 **Cir. Ct. No. 2017SC1036**

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

JOHN KOHNKE,

PLAINTIFF-RESPONDENT,

V.

KENNETH ERDMAN AND ALECIA ERDMAN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

¶1 NEUBAUER, C.J.[1] Kenneth and Alecia Erdman appeal pro se from an order denying their motion to vacate a judgment of eviction, asserting that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version.

circuit court prematurely resolved the merits of the eviction action and precluded the Erdmans from filing responsive pleadings and having a trial by jury. Because they have not shown any mistake or other basis for relief from the order, we affirm.

BACKGROUND

¶2 After the Erdmans' one-year lease with John Kohnke expired in October 2016, they continued living at the residence on a month-to-month tenancy.[2] The parties negotiated for sale of the property, but no deal was ultimately made.[3] In January 2017, Kohnke served a twenty-eight-day notice terminating the tenancy. After the Erdmans had not vacated, Kohnke filed an eviction complaint against them and Ian Bird (who is not a party to this appeal).

¶3 At the March 27, 2017 return date hearing with the court commissioner, the Erdmans, claiming they were appearing "specially," asserted that the court lacked jurisdiction because of a three-year-old settlement of a prior eviction action for the same property.[4] Because of the asserted jurisdictional issue, the court commissioner determined that the matter was contested and transferred it to the circuit court for a hearing in April.

[2] We summarize the facts based on the complaint, motion documents, and hearing transcripts. When there is a material dispute of fact, we will note it.

[3] Whether the parties finally agreed to a sale was disputed. We discuss this dispute later.

[4] At the various hearings, Attorney Daniel Olson appeared for Kenneth Erdman, while Alecia Erdman did not appear at the return date hearing and then appeared pro se at the remaining hearings. For ease of reference, we will refer to them as the Erdmans.

¶4 At the April 2017 hearing, the circuit court heard arguments on the Erdmans' asserted jurisdictional issue. In rejecting the challenge, the court noted the lease that was part of the prior settlement had expired and the Erdmans' tenancy was presently month-to-month. The court concluded that the settlement did not release the Erdmans from this eviction action.

¶5 The Erdmans then requested that they be allowed to file pleadings and made a demand for a jury. After denying these requests as untimely, the court considered the merits of the eviction action, hearing testimony from the parties and admitting various documents into evidence. The Erdmans contended that they were living at the property pursuant to a renewed lease and that, in the meantime, the parties had negotiated a sale of the property. They argued that a series of communications and documents, taken together, comprised a valid sales contract, despite there being no signed contract.

¶6 The court found that there was no sale, as there was no meeting of the minds and no signed contract. Because there was also no lease in effect and the Erdmans received a valid notice to vacate, the court granted the eviction. The matter was held open to determine damages at a future hearing.[5]

¶7 In June 2017, the Erdmans moved to vacate the eviction order under WIS. STAT. § 806.07(1). They essentially asserted that the April 2017 hearing was meant to be only a hearing on jurisdiction, and they were not prepared to address the merits. At a July 2017 hearing, the circuit court expressed skepticism of the Erdmans' contention that they believed the April eviction hearing would be

[5] In May 2017, the Erdmans filed a notice of appeal of the circuit court's eviction order. Because the filing was late, we dismissed the appeal for lack of jurisdiction.

limited to their jurisdictional challenge. After hearing arguments on the motion, the court denied it on the grounds that the Erdmans had not presented any new evidence or reason upon which the court could reopen or vacate the order. The Erdmans appeal.

DISCUSSION

¶8 WISCONSIN STAT. § 806.07(1)(a) authorizes a court to relieve a party from an order or judgment on several grounds, including mistake and excusable neglect. A mistake or excusable neglect, which the moving party is obliged to show, is that type of error or neglect which might have been the act of a reasonably prudent person given the circumstances. ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999); ***Martin v. Griffin***, 117 Wis. 2d 438, 443, 344 N.W.2d 206 (Ct. App. 1984). An order or judgment may also be vacated for "[a]ny other reasons justifying relief," which requires a showing of "extraordinary circumstance[s]" and includes consideration of whether a meritorious defense exists. Sec. 806.07(1)(h); ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶¶6-7, 305 Wis. 2d 400, 740 N.W.2d 888 (citation omitted). Granting relief for any of these reasons under the statute is within the circuit court's broad discretion. ***Franke v. Franke***, 2004 WI 8, ¶54, 268 Wis. 2d 360, 674 N.W.2d 832. We limit our review to whether the circuit court erroneously exercised that discretion. ***Id.*** "A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion." ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991).

¶9 The Erdmans argue the circuit court erred when it proceeded to the merits after denying their jurisdictional defense.[6] Claiming it was the court commissioner's intent, as well as their own, to address only jurisdiction at the April hearing, they refer to the court commissioner's comment, "I will note for the minutes that the issue is pretty much going to be whether or not this Court has jurisdiction." Until jurisdiction was determined, the Erdmans contend that they deferred filing any pleadings or making a jury demand, and they did not otherwise prepare for a hearing on the merits. We find no erroneous exercise of discretion in the circuit court's denial of their challenge.

¶10 WISCONSIN STAT. § 799.206(3) governs return date hearings:

> When all parties appear in person or by their attorneys on the return date in an eviction, garnishment, or replevin action and any party claims that a contest exists, the matter shall be forthwith scheduled for a hearing, to be held as soon as possible before a judge and in the case of an eviction action, not more than 30 days after the return date.

If an eviction action is disputed or "contest[ed]," the court commissioner must immediately set the matter—the entire matter—for a hearing before a judge. ***Id.*** Indeed, specific to eviction actions, "a court or jury trial of the issue of possession of the premises" "shall [be held] and complete[d]" within thirty days of the return hearing date. WIS. STAT. § 799.20(4). We see no basis for the Erdmans' contention that they were entitled to have the issues in an eviction action divided up and handled in the piecemeal fashion they advanced. That conflicts directly with the intended dispatch (within thirty days) with which the possessory rights of

[6] The Erdmans' arguments are, at times, undeveloped or confusing. While we can show some leniency for pro se litigants, we cannot risk our neutrality and develop arguments for either party. *See* ***Larson v. Burmaster***, 2006 WI App 142, ¶47, 295 Wis. 2d 333, 720 N.W.2d 134.

the parties are to be resolved. *See* ***id.***; *see also* WIS. STAT. § 799.44(1) & (2) (if plaintiff is found entitled to possession, "the court shall immediately enter an order" for restitution and "shall immediately order that a writ of restitution be issued").

¶11 Nothing about the court commissioner's comments come close to prohibiting issues other than jurisdiction for the April hearing before the judge. In response to the Erdmans' claimed jurisdictional defense, which presented a contested case, the commissioner stated: "In order to get the issue of jurisdiction resolved, I'm going to have to send that to the judge" and "the issue is pretty much going to be" jurisdiction. Although these comments indicate the potential importance of a jurisdictional issue, they do not foreclose the consideration of other issues, especially the possessory rights of the parties.[7] This conclusion is supported by the court notice sent to all parties that scheduled the April hearing, which labeled the matter, in bold, as an "eviction hearing." Moreover, the circuit court noted that the Erdmans did not file any jurisdictional challenge, underscoring further that any alleged misguided expectation that they claim to have had about the process found no support in the record.[8]

¶12 The Erdmans' own errors are the source of their other challenges. They assert that the circuit court denied them the opportunity to file answers,

[7] The Erdmans allege that the court commissioner "multiple times … assured counsel that the eviction action would not be heard until the issue of jurisdiction was entirely resolved." This allegation that the assurances were made "on the record" is unsupported.

[8] We also note that the Erdmans' claimed "jurisdictional" defense, upon which they build their challenge, was no such thing. The circuit court rejected their contention that an earlier settlement released them from a subsequent eviction claim. We fail to see how a challenge based on a release, even if successful, amounts to a challenge to the court's jurisdiction—subject matter or personal.

counterclaims, and a demand for a jury. This is false. Although written responsive pleadings are not typically required in small claims actions, such pleadings, including counterclaims, are certainly permitted. *See* WIS. STAT. § 799.20(1); WIS. STAT. § 799.43 (in an eviction action, "[t]he defendant may plead to the complaint orally or in writing"). After they were served with the complaint, the Erdmans were free to file a pleading.

¶13 The Erdmans assert that they did not file a pleading because they did not want to "submit" to the court's jurisdiction, which is why they appeared "specially." The Erdmans err. For quite some time, "[t]he 'special appearance' procedure no longer applies in this state." ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 603, 486 N.W.2d 539 (Ct. App. 1992). As long as a defendant properly raises the defense of jurisdiction in the pleading, the defendant may take part in the proceedings without fear of having waived the defense. ***Dietrich v. Elliott***, 190 Wis. 2d 816, 825, 528 N.W.2d 17 (Ct. App. 1995). Any defenses and claims the Erdmans had could have been asserted in a responsive pleading without waiving jurisdictional defects.

¶14 Similarly, they could have demanded a trial by jury. Such demands must be in writing and filed, in eviction actions, before or at the time of joinder, which was the March 27 return date. WIS. STAT. § 799.21(3)(a). Nothing prevented the Erdmans from doing so. By failing to make a timely demand, the Erdmans' right to a "jury is waived forever." ***Id.***[9]

[9] The Erdmans also allege they were denied the right to a "neutral" court, referencing a comment made by the circuit court during the April hearing. We have reviewed the entire record, including the comment. We find not a hint of bias by the circuit court, but rather a protracted small claims proceeding handled fairly and temperately.

¶15 Overall, the Erdmans complain about defects in procedure, but it is unclear to what end. The hearing on the motion to vacate was held in July, affording the Erdmans more than three months to marshal the evidence and develop the arguments they claim they were unprepared to present at the April eviction hearing. At the motion hearing, the circuit court, expressly noting that it "certainly could consider" new evidence, provided the Erdmans ample opportunity to explain what was missing from the eviction hearing. The Erdmans, however, failed to produce any new evidence that would justify vacating the order of eviction, and they do not contend otherwise on appeal. Although we reject that the Erdmans "were coerced into a premature trial," any such error was harmless. *See* ***Dodge v. Carauna***, 127 Wis. 2d 62, 68, 377 N.W.2d 208 (Ct. App. 1985); WIS. STAT. § 805.18 (errors or defects that do not affect the substantial rights of the parties should be disregarded and will not serve as grounds to reverse or set aside a judgment).

¶16 In sum, we reject the Erdmans' contention that the circuit court erroneously exercised its discretion in denying their motion to vacate under WIS. STAT. § 806.07(1).[10]

¶17 Kohnke has moved for sanctions on grounds the appeal is frivolous under WIS. STAT. RULE 809.25(3)(c). An appeal is frivolous if it "was filed, used or continued in bad faith, solely" to harass or injure another, or if the party knew, or should have known, that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for" a change of

[10] The Erdmans generally argue that the errors in procedure amounted to a denial of due process. As discussed above, we find no such errors, and the argument is undeveloped in any event.

existing law. RULE 809.25(3)(c)1. & 2. This is a question of law. ***Larson v. Burmaster***, 2006 WI App 142, ¶45, 295 Wis. 2d 333, 720 N.W.2d 134. The entire appeal, not just one argument, must be frivolous, and we resolve any doubt against a finding of frivolousness. ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶¶25-26, 277 Wis. 2d 21, 690 N.W.2d 1.

¶18 We are certainly willing, under the appropriate circumstances, to find an appeal frivolous even against pro se litigants, *see, e.g.*, ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 609-10, 589 N.W.2d 633 (Ct. App. 1998), and some of the Erdmans' allegations and arguments reach the outer limits of the rule. But the Erdmans (or at least Kenneth) were at times represented by counsel, who had a hand in advancing these arguments, including the misguided view of jurisdiction and the procedures in this eviction action. We cannot tell with sufficient clarity, on this record, whether the source of the Erdmans' confused legal approach was counsel and his on-again, off-again involvement, or something else. Although we cannot make a finding of frivolousness on this record, we strongly advise the Erdmans to exercise caution in any continued litigation, whether it is based on old arguments already rejected or new arguments similarly thin or uninformed. We will not countenance more of the same.

By the Court.—Order affirmed.

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