COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2890 **Cir. Ct. No. 2011CV188**

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

LILA M. BATES,

PLAINTIFF-RESPONDENT,

V.

LYLE HOFACKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: JOHN A. DAMON, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Lyle Hofacker appeals a default judgment entered in favor of Lila Bates. The circuit court concluded default judgment was proper,

pursuant to WIS. STAT. § 806.02(1),[1] because Hofacker failed to timely answer the complaint and therefore did not timely join an issue of law or fact. Hofacker contends he timely joined an issue of law by means of a letter filed with the court, in which he alleged defective service of Bates' summons. He also argues that the letter constituted a motion under WIS. STAT. § 802.06(2), and, accordingly, after the court denied the motion he was entitled to a ten-day extension of time to answer the complaint. *See* WIS. STAT. § 802.06(1).

¶2 We conclude Hofacker's letter adequately joined an issue of law, namely, whether Bates' summons was properly served. We also conclude Hofacker's letter constituted a motion under WIS. STAT. § 802.06(2). Consequently, Hofacker should have been given ten days after the denial of his motion to answer Bates' complaint. We therefore reverse the judgment and remand with directions that Hofacker be given ten days in which to file an answer.

BACKGROUND

¶3 Bates filed suit against Hofacker on May 12, 2011. She alleged that, in November 2010, Hofacker's employees or agents wrongfully harvested 11.7 acres of corn from her land. She further alleged Hofacker refused to return either the corn or the proceeds of its sale.

¶4 Bates served her summons and complaint on Hofacker on May 24, 2011, along with a notice of deposition. On June 10, Bates' attorney granted Hofacker a five-day extension of time to answer the complaint. On June 14, 2011,

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Hofacker, pro se, sent Bates' attorney a handwritten letter, which he also filed with the circuit court. The letter stated:

> Dear Attorney Krueger
>
> Upon receipt of your 3 issues on 5-24-11
>
> #1 Issue[:] 2 pages of complaint case # 11CV188 stapled together—but not attached to either of the other 2 issues. (Issue 2 & Issue 3)
>
> #2 Issue[:] 2 pages of Notice of taking Deposition NO CASE NUMBER stapled together but not attached to other 2 issues (Issue 1 & 3)
>
> #3 Issue[:] 2 pages of Summons stapled together—but not attached to either of the other 2 Issues (Issue #1 & Issue #2) Case #11CV188.
>
> Regards to Issue #1 Complaint, *there is no Endorsement*.
>
> Regards to Issue #2 Notice of taking Deposition, there is a part of an endorsement, but lacking requirements of 801.10(1) & 801.10(2)—lacking time, maybe place, manner service and upon whom the service was made.
>
> Regards to Issue #3 Complaint, *there is no endorsement period. Service doesn't comply with 801.10(1) and (2)*
>
> Therefore, *I am challenging the service of the summons.* Under 801.02(1) commencement of action has not started because of it lacking, "provided service of an authenticated copy of the summons …" Therefore you are unable to request, Taking of Deposition. *Lack of proper commencement of action under 801.10(1) and (2) I will not be answering the Complaint at this time.*

(Emphasis added.)

¶5 Bates moved for default judgment. Thereafter, Hofacker, who by then had retained counsel, answered the complaint and moved for: (1) an enlargement of time to file an answer, if the Court determined that his June 14,

2011 filing was improper; (2) an order dismissing the case for lack of personal jurisdiction; and (3) an order denying Bates' request for default judgment.

¶6 A hearing was held on August 31, 2011, during which Bates conceded that Hofacker's June 14 letter "maybe amount[ed] to a motion" alleging defective service. However, Bates argued there was no merit to Hofacker's contention that the summons was improperly served. Bates further contended Hofacker had not established excusable neglect for failing to file a timely answer. Hofacker responded that his letter constituted a timely "response" to the complaint.

¶7 The circuit court rejected Hofacker's argument. The court acknowledged that Hofacker's letter raised the issue of improper service. It noted that Hofacker had apparently interpreted WIS. STAT. § 801.10 to mean that if a summons lacked the process server's endorsement, it was not properly served and the court lacked personal jurisdiction. However, the court determined this was "an improper reading of the statute" and therefore concluded there was "no basis" for Hofacker's jurisdictional argument. The court then concluded Hofacker had not filed a timely answer and was not entitled to an enlargement of time for answering the complaint. Accordingly, the court granted Bates' motion for default judgment.

¶8 The court subsequently entered an order for default judgment, which expressly found that "the filing made by [Hofacker] on or about June 14, 2011, was inadequate to constitute a joinder of the issues in this action[.]" Following a hearing on damages, the court entered a judgment awarding Bates $44,648.66.

DISCUSSION

¶9 Whether to grant or deny a default judgment is a discretionary decision, which we will affirm unless the circuit court erroneously exercised its discretion. ***Johns v. County of Oneida***, 201 Wis. 2d 600, 605, 549 N.W.2d 269 (Ct. App. 1996). "A court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Williams Corner Investors, LLC v. Areawide Cellular, LLC***, 2004 WI App 27, ¶10, 269 Wis. 2d 682, 676 N.W.2d 168.

¶10 However, before a court may exercise its discretion to grant a default judgment, the moving party must show that "no issue of law or fact has been joined and … the time for joining issue has expired." *See* WIS. STAT. § 806.02(1); ***Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.***, 2002 WI 66, ¶37, 253 Wis. 2d 238, 646 N.W.2d 19. Whether a defendant's filing was sufficient to join issue under § 806.02(1) involves the application of statutory language to undisputed facts. This presents a question of law, which we review independently. *See* ***Johns***, 201 Wis. 2d at 605.

¶11 We conclude Hofacker's June 14 letter adequately joined an issue of law, namely, whether service of Bates' summons complied with WIS. STAT. § 801.10. In the letter, Hofacker asserted that, because the summons lacked an endorsement, "service doesn't comply with [WIS. STAT. §] 801.10(1) & (2)[.]" He continued, "Therefore, I am challenging the service of the summons." He also asserted a "[l]ack of proper commencement of the action under [WIS. STAT. §] 801.10(1) & (2)[.]" These averments are sufficient to join the legal issue of improper service. The letter was filed within the five-day extension of time for

answering Bates' complaint. Thus, because the letter joined an issue of law before the time for joining issue expired, the court was precluded from granting a default judgment under WIS. STAT. § 806.02(1).

¶12 In the circuit court, Bates conceded that the June 14 letter "seem[ed] to claim defective service." She further admitted the letter "maybe amount[ed] to a motion[.]" Nevertheless, she argued default judgment was appropriate because Hofacker's defective service argument lacked merit. The circuit court agreed, concluding that, although Hofacker timely filed a "written response" alleging "his belief … that he wasn't properly served," there was "no basis to his claim that the Court didn't have jurisdiction."

¶13 Bates cites no legal authority for the proposition that an argument must have merit in order to join an issue of law or fact. Nothing in WIS. STAT. § 806.02(1) states that a defense must be meritorious to join issue. Thus, under § 806.02(1), the operative question is not whether Hofacker's improper service defense had merit, but whether it was raised before the time for joining issue expired. Again, because Hofacker timely raised his improper service defense in the June 14 letter, the issue was joined, and the court was precluded from granting a default judgment.

¶14 Bates also suggests that, even if a nonmeritorious defense is sufficient to join issue under WIS. STAT. § 806.02(1), Hofacker's defective service defense could not join issue because it was so lacking in merit as to violate WIS. STAT. § 802.05. *See* WIS. STAT. § 802.05(2)(b) ("[C]laims, defenses, and other legal contentions" presented to the court must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."). Bates cites no authority for the

proposition that a pleading that is ultimately found to violate § 802.05 necessarily fails to join issue under § 806.02(1).

¶15 Hofacker next contends that his June 14 letter constituted a motion under WIS. STAT. § 802.06(2). He argues that, after the court denied his motion by concluding that he was properly served with Bates' summons, he was entitled to ten additional days in which to answer Bates' complaint. *See* WIS. STAT. § 802.06(1). The application of WIS. STAT. § 802.06 to undisputed facts is a question of law that we review independently. *See* ***Johns***, 201 Wis. 2d at 605.

¶16 We agree that Hofacker is entitled to ten additional days to answer Bates' complaint. WISCONSIN STAT. § 802.06(2) provides that, when served with a summons and complaint, instead of filing an answer a party may file a motion asserting certain defenses, including lack of personal jurisdiction and improper service of process. *See* WIS. STAT. § 802.06(2)(a)3., 5. If the court denies the motion, the moving party must answer the complaint "within 10 days after notice of the court's action[.]" WIS. STAT. § 802.06(1).

¶17 Hofacker's letter constitutes a motion under WIS. STAT. § 802.06(2). It is undisputed that the letter was a timely written response to Bates' complaint, in which Hofacker alleged improper service and challenged the court's jurisdiction over him. Bates admitted in the circuit court that the letter "seem[ed] to claim defective service" and "maybe amount[ed] to a motion." Moreover, the letter was clearly not intended to be an answer. It explicitly stated that, because the action was not properly commenced, Hofacker "[would] not be answering the complaint at this time." A timely written response to a complaint that alleges improper service and is, by its own terms, not an answer, can only be one other thing under Wisconsin law—a motion pursuant to § 802.06(2).

¶18 It is immaterial that the June 14 letter was not denominated a motion. We "liberally construe[]" pleadings "with a view to do substantial justice to the parties[.]" ***Studelska v. Avercamp***, 178 Wis. 2d 457, 463, 504 N.W.2d 125 (Ct. App. 1993). Here, despite its failure to use the word "motion," the June 13 letter clearly had the characteristics of a motion under WIS. STAT. § 802.06(2). Liberally construed, the letter constitutes a § 802.06(2) motion. Accordingly, after the court denied the motion, Hofacker was entitled to ten additional days to answer Bates' complaint. *See* WIS. STAT. § 802.06(1).

¶19 Bates points out that, in the circuit court, Hofacker never explicitly argued that his letter was a WIS. STAT. § 802.06(2) motion or that he was entitled to a ten-day extension of time to answer the complaint. She therefore contends he has forfeited his right to raise these arguments on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for first time on appeal generally deemed forfeited).

¶20 The forfeiture rule is a rule of judicial administration and whether to apply it lies within our discretion. ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. We decline to apply the rule in this case. Bates conceded in the circuit court that Hofacker's letter "maybe amount[ed] to a motion." The court considered the jurisdictional challenge raised by the letter and rejected it on the merits, thus treating the letter as a motion. It makes no sense to apply the forfeiture rule in this context.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.