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DISTRICT II

May 6, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1785

American Express National Bank v. Isaac A. Kaloti
(L.C. #2016CV2166)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Isaac A. Kaloti appeals a judgment entered in favor of American Express National Bank upon Kaloti's failure to make payments pursuant to his credit card account agreement. Kaloti argues that the circuit court should have dismissed American Express's complaint and denied its motion for summary judgment because it failed to properly serve him with the summons and complaint. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ For the reasons that follow, we affirm.

American Express filed a summons and complaint seeking a money judgment against Kaloti in the amount of \$343,717.13 plus costs and disbursements, for the balance due on his unpaid credit card. On December 12, 2016, American Express filed an affidavit of service averring that it attempted personal service on Kaloti at a residence on Red Tail Court in Brookfield, Wisconsin, Kaloti's "usual place of Abode," and that on the fifth attempt, the process server made contact with Kaloti's adult daughter, Hanan. Hanan stated that "her father has been over seas" and accepted service on his behalf. In an abundance of caution, American Express also provided proof of summons by publication in the Waukesha Freeman newspaper.

Kaloti, by retained counsel, moved to dismiss the complaint, arguing that he had moved to the country of Jordan in June 2015, and that this rendered modes of service based on his Brookfield address statutorily inadequate. Attached were affidavits from Kaloti's wife, Suhaad, and from his daughter, Hanan, averring that though they both reside at the Brookfield residence, Kaloti's "usual place of abode" has been in Amman, Jordan, since June 2015. Conspicuously absent was any affidavit from Kaloti himself. After considering the parties' briefs and oral argument, the circuit court denied the motion to dismiss, determining that substituted service at the Brookfield address was appropriate, and "that the substitute service, combined with an attempt to mail in the US Post Office and publication in the Waukesha Freeman is sufficient for this court to find there was appropriate service."

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Kaloti, by counsel, filed an answer denying that he resided at the Brookfield address and alleging that he moved to the country of Jordan in June 2015. American Express moved for summary judgment, which Kaloti opposed. At the summary judgment hearing, the circuit court rejected Kaloti's assertion that the location of his residence was a material fact, and granted judgment in favor of American Express. Kaloti appeals.

Kaloti maintains that American Express never properly served the summons and complaint under WIS. STAT. § 801.11(1), which provides for service upon a natural person as follows:

(a) By personally serving the summons upon the defendant either within or without this state.

(b) If with reasonable diligence the defendant cannot be served under par. (a), then by leaving a copy of the summons at the defendant's usual place of abode:

1. In the presence of some competent member of the family at least 14 years of age, who shall be informed of the contents thereof;

....

(c) If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the defendant, at or immediately prior to the first publication, a copy of the summons and a copy of the complaint. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.

Prior to substituted service, a party must exercise reasonable diligence in attempting to personally serve a defendant. *See* WIS. STAT. § 801.11(1)(b). Reasonable diligence is that diligence "which is reasonable under the circumstances and not all possible diligence which may be conceived." *Haselow v. Gauthier*, 212 Wis. 2d 580, 589, 569 N.W.2d 97 (Ct. App. 1997).

There is no bright line rule. Whether reasonable diligence was exercised depends on the facts of each case. *Id.* at 587. “Reasonable diligence” is treated as a finding of fact to be affirmed unless clearly erroneous. *Welty v. Heggy*, 124 Wis. 2d 318, 324, 369 N.W.2d 763 (Ct. App. 1985).

The circuit court correctly determined that the attempts to personally serve Kaloti constituted reasonable diligence under the circumstances of the case. It is undisputed that American Express was unable to personally serve Kaloti in April 2016 despite four attempts at two addresses. After four more unsuccessful attempts in December 2016, Hanan accepted service on December 6, 2016, telling American Express that her father was overseas. Given the vague information provided about Kaloti’s overseas travel, it would have exceeded the demands of reasonable diligence to require the process server to hold off on substituted service and make a further attempt at personal service without knowing Kaloti’s return date.

Kaloti argues that attempts to effectuate service at the Brookfield address were altogether improper because American Express knew or should have known that Kaloti’s “usual place of abode” was somewhere in Amman, Jordan. We are not persuaded. The circuit court found that use of the Brookfield residence for service was appropriate, and this finding is not clearly erroneous. *See Welty*, 124 Wis. 2d at 324. For one thing, it is undisputed that Kaloti’s wife, son, and daughter live at the Brookfield address, and that Kaloti still owns the Brookfield property. The court also considered the filing of two tax warrants against the defendant listing the Brookfield address as his residence; the Department of Revenue’s website of delinquent taxpayers listing the Brookfield residence as the defendant’s current address; the appearance of Kaloti’s name on the property tax bills; information showing that he recently paid two property tax installments using the Brookfield address; and the existence of a settlement letter received by American Express from Kaloti in October 2015 listing the Brookfield residence on the envelope

as his return address.² Kaloti has not provided his own affidavit and the circuit court was not required to accept family members' vague and conclusory statements that his statutory "abode" is now somewhere in Jordan. Regardless, it is the reasonableness of American Express' diligence at the time it attempted service that matters, not what Kaloti's family members subsequently alleged by affidavit.

For these and other reasons, we also reject Kaloti's argument that service by publication was improper. WISCONSIN STAT. § 801.11(1)(c) authorizes service by publication "as a class 3 notice, under [WIS. STAT.] ch. 985," if personal or substituted service cannot be accomplished "with reasonable diligence." Kaloti's primary argument is that because his "usual place of abode is in Amman, Jordan," the Waukesha Freeman cannot be "a newspaper likely to give notice in the area or to the person affected," as required by WIS. STAT. § 985.02(1). Kaloti ignores that there is no reference to a defendant's "usual place of abode" in the statutes relating to publication, and no requirement that the plaintiff must know where the defendant resides. Further, given the information American Express had at the time of publication, including that Kaloti owned and his family lived in the Brookfield property which was located in Waukesha County, the circuit court properly determined that the Waukesha Freeman was likely to provide Kaloti with notice of the summons. *See* Sec. 985.02(1). Indeed, Kaloti's attorney filed a notice of retainer soon after the initial publication, even before the final publication.

² In support of his motion to dismiss, Kaloti attached the affidavit of his cousin, Tamir Kaloti, averring that Tamir, not Kaloti, authored and mailed the October 2015 settlement letter, and that Tamir used "my uncle's Red Tail Court address in the letter and on the envelope because I did not know his address in Jordan." The circuit court was not required to credit Tamir's evasive and implausible statement that he sent the letter on Kaloti's behalf but did not know his address.

Finally, we conclude that the circuit court properly granted summary judgment in favor of American Express. We review summary judgment decisions de novo, applying the same methodology as the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

Here, American Express made a prima facie showing (1) that Kaloti had a credit card account with American Express and made charges to that account, (2) that American Express mailed periodic statements to Kaloti who never disputed the charges or calculations, (3) that Kaloti defaulted by failing to make payments, and (5) the amount of the outstanding balance currently due and owing. Kaloti does not dispute any of these material facts, which together constitute a prima facie case for recovery.

Instead, Kaloti argues that the location of his usual place of abode is a disputed fact sufficient to defeat summary judgment. We disagree. The service issue was decided when the circuit court denied Kaloti's motion to dismiss. Where Kaloti lives has no bearing on whether he is liable to American Express for defaulted credit card payments. Therefore,

IT IS ORDERED that the judgment of the circuit court is summary affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals