OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 30, 2020

To:

Hon. Eric J. Lundell
Circuit Court Judge
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Kristi Severson
Clerk of Circuit Court
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Jens Hubert Loberg
Loberg Law Office
359 W. Main Street
Ellsworth, WI 54011

Steven L. Miller
Miller Appellate Practice, LLC
P.O. Box 655
River Falls, WI 54022

Anthony Kerschbaum
3491 St. Croix Trail South, Box 234
Afton, MN 55001

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

2018AP1906 Anthony Kerschbaum v. Daniel Diebel
(L. C. No. 2018CV174)

Before Stark, P.J., Hruz and Seidl, JJ.

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).

Anthony Kerschbaum, pro se, appeals the dismissal of his lawsuit alleging Daniel Diebel's breach of a lease option agreement. 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] We summarily reverse and remand the cause for further proceedings.

After making a down payment to purchase a lot on the St. Croix River in Somerset, Kerschbaum financed the remaining purchase price with a note and mortgage from Daniel Diebel and the Rand Mortgage Company 401(k) Profit Sharing Plan (collectively, Diebel). The mortgage was subsequently foreclosed upon. The parties then entered into a series of leases, each with an option for Kerschbaum to purchase the property.

The present appeal involves the final agreement between the parties providing that Kerschbaum would make monthly lease payments commencing May 1, 2017, for a twelve-month term. The agreement also provided Kerschbaum with the option to purchase the leased premises if he exercised the option by delivering written notice personally or by certified mail to Diebel prior to expiration of the lease term. In the agreement, Diebel also warranted that "Lessor is the legal owner of the leased premises and shall not sell leased premises so long as lessee is current on all payments and obligations under the terms and conditions of this agreement."

On May 7, 2018, Kerschbaum filed a pro se summons and complaint alleging that Diebel had listed the property for sale without notifying him. Kerschbaum also alleged Diebel had informed him that "he would not honor the option agreement …." Kerschbaum alleged Diebel breached the parties' contract, sought to enjoin any sale of the property to a third party, and also sought an order directing the sale of the property to him at the agreed upon option price.

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

On August 7, 2018, Diebel filed a motion to dismiss together with a supporting affidavit. Diebel's affidavit averred that on or about March 7, 2018, he had approached a realtor to list the property for sale. Subsequent to placing the property on the market, a potential buyer engaged a title company to conduct a preliminary title search, and it was discovered that Kerschbaum had recorded a lis pendens on the premises and commenced the lawsuit. Diebel further averred that he retained an attorney anticipating service of legal process, but that ninety days had passed since the filing of the lawsuit, and he had not been served. Diebel sought dismissal of the action on the merits with prejudice. The circuit court granted the motion to dismiss with prejudice and also released the lis pendens. Kerschbaum now appeals.

Kerschbaum argues on appeal that "Wisconsin case law has long held that an action should not be dismissed with prejudice unless there has been serious and egregious action by a party." Moreover, Kerschbaum argues that a matter should not be dismissed with prejudice for lack of personal jurisdiction. Kerschbaum also asserts, "Because the merits of the case were never litigated, the matter should have been dismissed without prejudice."[2]

WISCONSIN STAT. § 801.02(1) sets forth the procedures necessary to commence a civil action:

> A civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the

[2] We note Kerschbaum's principal brief to this court failed to provide citations to the record on appeal, in violation of WIS. STAT. RULE 809.19(1)(d) and (e). Moreover, Kerschbaum refers to the parties by party designations such as "Plaintiff/Appellant" and "Defendant/Respondent" rather than by party names as required by RULE 809.19(1)(i). We admonish Kerschbaum that future failures to adhere to the rules of appellate procedure may result in sanctions.

> complaint is made upon the defendant under this chapter within 90 days after filing.

Failure to comply with WIS. STAT. § 801.02(1) constitutes a fundamental error, which necessarily precludes personal jurisdiction. ***American Family Mut. Ins. Co. v. Royal Ins. Co.***, 167 Wis. 2d 524, 534, 481 N.W.2d 629 (1992). The failure to serve a party with an authenticated copy of the summons and complaint within ninety days of filing renders the original pleading a legal nullity which is a fatal defect, requiring dismissal of the action. ***Bartels v. Rural Mut. Ins. Co.***, 2004 WI App 166, ¶16, 275 Wis. 2d 730, 687 N.W.2d 84. This requirement exists regardless of whether the defendant had actual notice of the action, because service made in accordance with the manner prescribed by statute is a condition precedent to a valid exercise of personal jurisdiction. ***Danielson v. Brody Seating Co.***, 71 Wis. 2d 424, 429-30, 238 N.W.2d 531 (1976). Moreover, the ninety-day period under § 801.02 may not be enlarged. *See* WIS. STAT. § 801.15(2)(a).

Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh. *See* ***Mech v. Borowski***, 116 Wis. 2d 683, 686, 342 N.W.2d 759 (Ct. App. 1983). "If the statutory prescriptions are to be meaningful, they must be unbending." ***Id.***

Kerschbaum fails to demonstrate compliance with the statutory requirements of WIS. STAT. § 801.02(1). He conceded by affidavit in the circuit court that he was unable to arrange for personal service upon the defendants within ninety days of filing "because of a lack of a physical address." Nevertheless, Kerschbaum contends that the complaint should not have been dismissed because he made a good faith effort to arrange for service.

Kerschbaum's good faith is not material, as the failure to serve an authenticated summons and complaint within ninety days of filing is a fundamental defect preventing the circuit court from acquiring personal jurisdiction over Diebel. The court had no authority to extend the time period for service of process, and the court thus properly dismissed the action. To conclude otherwise would essentially permit enlargement of the period for service past the ninety-day limitation, contrary to the express language of WIS. STAT. § 801.15(2)(a).

Our conclusion that dismissal was required does not end the analysis, however, because the issue remains whether the circuit court erroneously exercised its discretion by dismissing the action on the merits with prejudice. *See* ***Haselow v. Gauthier***, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997). Wisconsin courts have repeatedly emphasized that dismissals with prejudice are only appropriate in cases of misconduct, inexcusable neglect, or where it is clear the plaintiff cannot recover under any circumstances. ***Id.*** at 591.

Here, the circuit court failed to articulate its reasoning in dismissing the complaint with prejudice. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342-43, 340 N.W.2d 498 (1983). For a discretionary decision of this nature to be upheld, however, there should be some evidence in the record that discretion was in fact exercised and the basis of that exercise of jurisdiction should be set forth. ***Id.*** at 342. Accordingly, we reverse and remand for the court to hold a hearing and other proceedings necessary to exercise its discretion in determining whether Kerschbaum's failure to timely serve Diebel was the result of bad faith, egregious conduct, or inexcusable neglect. *See* ***Haselow***, 212 Wis. 2d at 591.

Diebel concedes that the proper exercise of discretion requires the circuit court to explain its reasoning, but he asserts that when the court does not do so, a reviewing court may search the

record to determine if it supports the court's decision. *See, e.g.*, ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. We may do so, but we need not do so. Given the scant record in this case, and the need for us to find facts in order to support the circuit court's decision, we instead reverse and remand to the circuit court to properly exercise its discretion in determining if the matter should be dismissed with or without prejudice.

In this regard, we note the circuit court signed the proposed order of dismissal solely on the basis of Diebel's motion, together with his supporting affidavit, and Kerschbaum's affidavit in opposition to the motion. Diebel's affidavit in support of his motion to dismiss attached correspondence from his attorney to Kerschbaum dated June 20, 2018, stating:

> As a follow-up to the voice messages I left for you on Monday and last Thursday, please be advised that I have been retained to represent Mr. Diebel in the above. A review of the online court records indicates that service has yet to be perfected and Mr. Diebel likewise confirmed same. If you provide me with conformed copies of the pleadings, [Diebel] will admit service.

Diebel further averred in his affidavit that his attorney's June 20 letter to Kerschbaum "failed to generate a response." Diebel also averred, "telephone contact was attempted on more than one occasion but also [was] unsuccessful."

Kerschbaum filed an affidavit in response to the motion to dismiss, disputing facts in Diebel's affidavit. Kerschbaum averred, "I spoke on the telephone with [Diebel's attorney] sometime in July of 2018 …. [Diebel's attorney] told me his client would admit service of the pleadings if I provided him a copy. I mailed a copy of the pleadings to [Diebel's attorney's] office on July 27, 2018."

The day following the order dismissing the case, Diebel's attorney sent correspondence to the circuit court, stating:

> While the [circuit court] approved the Order to Dismiss in the above yesterday, I find it necessary to issue a short response for the record stating my position to the Affidavit Mr. Kerschbaum filed on Friday. Not only do I vehemently oppose several of his assertions, I find them personally offensive. I did not speak with Mr. Kerschbaum "sometime in July of 2018" as he states nor did I receive a certified copy of the pleadings after his alleged July 27, 2018 mailing. I am absolutely awestruck that Mr. Kerschbaum went to the extent of filing a falsified Affidavit in an effort to oppose the Motion to Dismiss.

Regardless of Kerschbaum's averment that he mailed "a copy" of the pleadings to Diebel's attorney, there is no indication in the record on appeal that Kerschbaum provided Diebel's attorney with *authenticated* copies of the pleadings. If the circuit court finds that Diebel's counsel in his June 20, 2018 correspondence agreed to admit service of an authenticated summons and complaint by mail, but Kerschbaum failed to mail an authenticated copy of the pleadings, dismissal with prejudice may be appropriate, in the court's discretion, as inexcusable neglect. But Kerschbaum's affidavit alleges a different "oral agreement" that merely required mailing "a copy" of the pleadings. Kerschbaum avers he mailed a copy of the pleadings to Diebel's attorney on July 27, 2018. If the court finds after a hearing that Kerschbaum was not credible in averring that an oral agreement only required mailing a "copy" of the pleadings—or that Kerschbaum failed to mail a "copy"—there may also be sufficient evidence for a dismissal with prejudice.[3]

[3] The fact remains, however, that Diebel's counsel did not admit service and Kerschbaum did not timely accomplish service. We cannot tell from the record whether, in dismissing the matter with prejudice, the circuit court considered that Kerschbaum had alternative forms of service available to him prior to the expiration of the ninety-day period. For example, WIS. STAT. § 801.11(1)(c) permitted (continued)

In any event, an appellate court is precluded from making factual determinations when the evidence is in dispute. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). It is also not an appellate court's function to review questions as to the credibility of witnesses or the weight of their testimony—the circuit court is in a much superior position to observe the witnesses, and it is free to accept or reject a witness's testimony. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980).[4]

Accordingly, we reverse the order and remand for the circuit court to properly exercise its discretion in determining whether Kerschbaum's complaint should be dismissed with prejudice.

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service by publication of the summons as a class 3 notice, under WIS. STAT. ch. 985, and mailing a copy of the summons and complaint if the defendant's post office address was known. Here, Kerschbaum knew Diebel's post office address—the Lease With Option To Purchase provided Diebel's address for purposes of notice as a St. Paul, Minnesota, post office box.

Another alternative available to Kerschbaum prior to the expiration of the ninety-day period was to serve and file a notice of dismissal at any time before service by Diebel of responsive pleadings or motions. *See* WIS. STAT. § 805.04(1). Unless otherwise stated in the notice of dismissal or stipulation, such a voluntary dismissal "is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim." ***Id.*** Thus, in determining whether the matter should be dismissed with prejudice the court could properly consider whether Kerschbaum could have voluntarily moved to dismiss his action prior to the expiration of the ninety-day period and refiled the claim under a different case number.

[4] Diebel also argues that the lawsuit was properly dismissed on the merits with prejudice—as unlikely to succeed—because Kerschbaum failed to state a claim upon which relief may be granted. In this regard, Diebel argues Kerschbaum did not exercise the option prior to the expiration of the lease term, and Diebel thus had no obligation under the option agreement to honor the option. Diebel also argues that Kerschbaum does not deny he was in default on the lease, and therefore Diebel was not prohibited under the option agreement from selling the premises. Diebel further argues the complaint "consists entirely of conclusory statements devoid of any facts." We will not address this issue as it is clear the case was properly dismissed for lack of personal jurisdiction. Moreover, Diebel's motion sought to dismiss "on the grounds that service of process has been untimely and insufficient as required by Wis. Stat. § 801.02 and the 90 day period may not be enlarged pursuant to § 801.15(2)(a)." The only question remaining is whether it should be with or without prejudice.

In that regard, the court must determine whether Kerschbaum's failure to timely serve Diebel was the result of bad faith, egregious conduct, or inexcusable neglect.

Therefore,

IT IS ORDERED that the order is summarily reversed and the cause is remanded for further proceedings.

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

Sheila T. Reiff
Clerk of Court of Appeals