COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0183 **Cir. Ct. No. 03SC019913**

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

ALAN C. OLSON & ASSOCIATES,

PLAINTIFF-RESPONDENT,

V.

SUSANNAH Q. CAREY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 FINE, J. Susannah Q. Carey appeals, *pro se*, from the trial court's order denying her motion to re-open a default judgment entered against her in this small-claims action brought by the law firm of Alan C. Olson & Associates. We affirm the order in part, reverse in part and, remand with directions.

I.

¶2 Olson brought this small-claims action on July 24, 2003. In its complaint, Olson alleged that Carey agreed to pay Olson $2,000 for legal services, the firm performed those legal services, and Carey gave Olson a check for $2,000 that bounced. The place on the check for a date was blank. Olson's complaint sought the $2,000, a check-return fee of $25 imposed by its bank, and triple damages and costs under WIS. STAT. § 943.245.

¶3 The summons and complaint were served by the Culpeper, Virginia, sheriff on Carey on August 5, 2003. By letter dated August 18, 2003, and filed with the Milwaukee County Clerk of Circuit Court on August 20, 2003, Carey indicated that she "dispute[d] the lawsuit" because, she alleged in the letter, the legal services were "not timely provided, and, [the] check in question was returned by my bank prior to service being performed." Nevertheless, default judgment against Carey was ordered by a court commissioner on August 21, 2003, based on an affidavit of default filed by Olson on that date. Notice of Entry of Judgment against Carey for $6,203 was docketed and mailed on September 9, 2003.

¶4 By motion filed December 2, 2003, Carey sought to reopen the default judgment. The trial court held a hearing on the motion, and Carey appeared by telephone. Although the telephonic conference was held off-the-record, the trial court memorialized the discussion, and both Carey and Olson agreed that its recitation of the conference was accurate. The trial court determined that although Carey had not defaulted, there was no chance of her prevailing on the merits because, as the trial court indicated on the record after the conference and addressing its remarks to Carey:

> [T]here is no dispute in this matter in terms of the amount of [the] retainer fee that you owe Mr. Olson in this matter. And in reality, there is no dispute with respect to the check that was tendered. It was returned as insufficient funds. Although I understand the circumstances of the check and the need to hold it to a date certain to ensure that there was money to cover it, it was tendered to the bank and returned for insufficient funds.

II.

¶5 Olson asserts two issues on appeal in support of her argument that the trial court erred. First, she argues Olson's demand that she pay the dishonored check was not "supported by an affidavit of service of mailing," as required by WIS. STAT. § 943.245(4). Second, she contends that the undated check was the equivalent of a "postdated check," exempted from the provisions of WIS. STAT. §§ 943.24 and 943.245 by WIS. STAT. § 943.24(4).

¶6 A decision whether to reopen a default judgment rests within the trial court's reasoned discretion. WIS. STAT. § 799.29(1) (small claims); *see* ***State v. Omernick***, 14 Wis. 2d 285, 291, 111 N.W.2d 135, 138 (1961). A court acts within its discretion if it applies relevant law to facts of record to reach a reasonable decision. ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57, 62 (1993). The issues on appeal turn on two statutes, the interpretation of which is subject to our *de novo* review. *See* ***Boltz v. Boltz***, 133 Wis. 2d 278, 282, 395 N.W.2d 605, 606 (Ct. App. 1986). Additionally, unless there is an ambiguity or constitutional infirmity, we apply statutes as they are written. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 123–124. We address Carey's contentions on appeal against this background.

1. *Affidavit of Service.*

¶7 As Carey notes, WIS. STAT. § 943.245(4) requires that there be an "affidavit of service of mailing" with the twenty-day notice required by that section. No such affidavit is in the appellate record. Moreover, Olson's brief on appeal does not controvert this aspect of Carey's argument. Accordingly, it is conceded for the purposes of this appeal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted deemed admitted). Olson's brief also does not dispute Carey's contention that failure to comply with the affidavit-of-service requirement relieves her of liability for the exemplary damages and costs authorized by WIS. STAT. § 943.245. Thus, that aspect of Carey's contention is also admitted. *See* ***Charolais***, 90 Wis. 2d at 109, 279 N.W.2d at 499. Olson has not demonstrated that it is entitled to damages under § 943.245, and, therefore, that part of the order is reversed.

2. *Undated check.*

¶8 Whatever her intention, Carey did not give Olson a "postdated check." Rather, as we have seen, the check had no date. Carey has given us no authority, and we have found none in our independent research, that equates the two for purposes of WIS. STAT. § 943.24(4). Indeed, Wisconsin's Uniform Commercial Code decrees that an undated "instrument" takes "the date of its issue." WIS. STAT. § 403.113(2). An "instrument" is a "negotiable instrument." WIS. STAT. § 403.104(2). A "negotiable instrument" is, as material here, an "unconditional … order to pay a fixed amount of money … if … (a) [i]t is payable … to order at the time it is issued … [and] (b) [i]t is payable on demand or at a definite time." WIS. STAT. § 403.104(1). A "check" is, *inter alia*, "a draft …

payable on demand and drawn on a bank." WIS. STAT. § 403.104(6). A "check," therefore, is a "negotiable instrument." *See* ***Cirrincione v. Westminster Gardens Ltd. P'ship***, 816 N.E.2d 730, 736 (Ill. Ct. App. 2004) (applying 810 ILCS 5/3-104, which is substantially identical to § 403.104(1)). Thus, the undated check that Carey gave Olson was not "postdated" but, rather, took the date it was issued. Accordingly, the trial court did not erroneously exercise its discretion in refusing to reopen this aspect of the judgment, and Olson is entitled to the $2,000 as well as the bank-return fee of $25.

III.

¶9 This matter is remanded to the trial court with directions that it enter a revised judgment in accordance with this opinion.[1]

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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

[1] Olson's brief on appeal references affidavits filed with this court. The order granting Olson's motion to supplement the record did not encompass the affidavits. Accordingly, they are not part of the appellate record and may not be considered by us. *See* ***Howard v. Duersten***, 81 Wis. 2d 301, 307, 260 N.W.2d 274, 277 (1977).