COURT OF APPEALS
DECISION
DATED AND FILED

September 11, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP661 **Cir. Ct. No. 2006SC24251**

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

ASSET ACCEPTANCE LLC, ASSIGNEE BALLY'S TOTAL FITNESS,

PLAINTIFF-RESPONDENT,

V.

MIGUEL CURIEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

¶1 FINE, J. Miguel Curiel appeals from an order denying his motion to reopen a default judgment entered in this small-claims case. The crux of his contention is that the circuit court erred in determining that he had not shown excusable neglect for not responding to the small-claims complaint and that he did not have a meritorious defense to the action. Curiel also claims that the circuit

court improperly did not strike the brief of Asset Acceptance, LLC, which was given to his lawyer the morning of the hearing on his motion to reopen the default. We affirm.

¶2 Asset Acceptance sued Curiel in small-claims court for $4,592.91, alleging, as set out in the pre-printed small-claims form complaint: "That defendant and/or defendant's spouse breached their agreement with plaintiff by failing to remit minimum monthly payment due, pursuant to the above-referenced contract, thereby defaulting upon the conditions of the contract." The caption of the complaint listed the plaintiff as "Asset Acceptance LLC, Assignee Bally's Total Fitness." (Uppercasing omitted; space inserted between the words "Assignee" and "Bally's.")

¶3 Asset Acceptance could not personally serve Curiel, so it served him by publication and mailing. *See* WIS. STAT. RULES 799.12(4) & (6), 801.11(1)(c). When Curiel did not appear on the date set for the hearing, a default judgment was entered against him. *See* WIS. STAT. RULE 799.22(2). He timely filed a motion to reopen the default. *See* WIS. STAT. RULE 799.29(1).

¶4 In order to get relief from a default judgment, the person against whom it has been entered must show that the default was the result of "excusable neglect" and that he or she has a meritorious defense to the action. ***J.L. Phillips & Assocs., Inc. v. E & H Plastic Corp.***, 217 Wis. 2d 348, 358, 577 N.W.2d 13, 17 (1998) ("[A] party moving to vacate a default judgment pursuant to § 806.07(1)(a) must: (1) demonstrate that the judgment against him or her was obtained as a result of mistake, inadvertence, surprise or excusable neglect; and (2) demonstrate that he or she has a meritorious defense to the action."). The circuit court here ruled that neither of these prerequisites was met.

¶5 We need not decide whether Curiel showed excusable neglect when he did not respond to the summons and complaint (he claims that he never received the documents in the mail, and although there is a presumption that matters mailed pursuant to statutory authority are received, WIS. STAT. RULE 891.46, denial of receipt presents an issue of fact on which the party seeking to overcome the presumption has the burden of proof, WIS. STAT. RULE 903.01), because he did not, as the circuit court correctly ruled, show that he had a meritorious defense. ***J.L. Phillips***, 217 Wis. 2d at 358, 577 N.W.2d at 17 (whether a defaulting party has a meritorious defense is a question of law that we decide *de novo*).

¶6 Curiel's defense was based on two things. First he contended that the small-claims complaint was wrong when it alleged that he breached a contract with the "plaintiff"—that is, Asset Acceptance. The circuit court ruled that the misnomer in the pre-printed complaint was insignificant because the caption clearly showed that Asset Acceptance was suing as the assignee of Bally's Total Fitness, with whom Curiel *did* contract. The circuit court's ruling is consistent with WIS. STAT. RULE 805.18 (errors not affecting a party's "substantial rights" may be disregarded).

¶7 Second, in an argument building in part on Curiel's first contention, Curiel asserts that the complaint did not comply with the pleading requirements of the Wisconsin Consumer Act and, therefore, was a nullity. *See* WIS. STAT. § 425.109. If Asset Acceptance was Bally's assignee, then the pleading requirements of the Wisconsin Consumer Act did not apply to its small-claims action against Curiel. *See* ***Rsidue, L.L.C. v. Michaud***, 2006 WI App 164, ¶¶20–25, 295 Wis. 2d 585, 597–599, 721 N.W.2d 718, 724–725 (Wisconsin Consumer Act's pleading requirements do not apply to assignees of creditors). In

determining that Asset Acceptance was Bally's assignee, the circuit court not only looked at the caption of the complaint, but also an affidavit submitted by the Assistant Vice President of Asset Acceptance's legal department that averred that Asset Acceptance was Bally's assignee. Although Curiel contended that the affidavit and Asset Acceptance's brief were given to him the morning of the hearing and, therefore, should have been disregarded, he did not object that the affidavit was hearsay. Thus, it was properly considered by the circuit court. *See* WIS. STAT. RULE 799.209(2) (small-claim procedures not governed by the rules of evidence except the rules protecting privilege and concerning HIV test results); ***Wittig v. Hoffart***, 2005 WI App 198, ¶3 n.2, 287 Wis. 2d 353, 358–359 n.2, 704 N.W.2d 415, 417 n.2 (unobjected-to hearsay is competent and admissible).[1] We affirm.

By the Court.—Order affirmed.

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

[1] As we have seen, Curiel also argues that the circuit court erred in not striking Asset Acceptance's brief and the supporting affidavit because, as noted, it was given to Curiel's lawyer the morning of the hearing. Circuit courts are given broad discretion in the conduct of matters before them, *see* WIS. STAT. RULE 906.11, and Curiel has not shown that the circuit court erroneously exercised that discretion.