COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP774 **Cir. Ct. No. 2006CV12290**

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

ANTHONY J. WILKS,

PLAINTIFF-APPELLANT,

V.

ACTION EXPRESS N/K/A TAYLOR MADE EXPRESS, INC.,

DEFENDANT,

M & I BANK,

GARNISHEE,

JP MORGAN CHASE,

GARNISHEE-DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 KESSLER, J. Anthony J. Wilks appeals from an order dismissing the garnishment complaint against JP Morgan Chase (Chase) where the trial court dismissed the complaint because it found that Chase had not been properly served and, thus, that it did not have personal jurisdiction over Chase. Because the trial court did not hold the evidentiary hearing to which a plaintiff is entitled when the defendant asserts lack of personal jurisdiction, and Wilks did not waive that right, we reverse and remand for the required evidentiary hearing and such further proceedings as may be required.

BACKGROUND

¶2 Wilks began a garnishment action against Chase and others. Wilks' process server filed an affidavit of service indicating that on December 22, 2006, he delivered the garnishment summons and complaint to "Bob Striepling, Sales & Service Associate" at an office of Chase bank in Milwaukee. Chase did not respond to the summons and complaint by January 11, 2007, the time for response authorized by WIS. STAT. § 812.11 (2005-06).[1] On January 22, 2007, Wilks moved for default judgment, mailing a copy to the address where Chase had been served. Thereafter, on January 29, Chase filed an answer. Chase did not move for enlargement of time to answer pursuant to WIS. STAT. § 801.15(2)(a).[2] The answer contained no objection to personal jurisdiction over Chase.[3]

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[1] WISCONSIN STAT. § 812.11 states, in pertinent part: "**Garnishee answer.** The garnishee shall, within 20 days from the service of a garnishee summons and complaint, exclusive of the day of service, serve upon the attorney for the plaintiff, and file with the clerk of court, an answer."

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] WISCONSIN STAT. § 801.15(2)(a), states, in pertinent part:

(continued)

¶3 On the Friday before the Monday hearing on the motion for default judgment, Chase served and filed a memorandum opposing the motion, arguing therein that the court lacked personal jurisdiction over Chase because of improper service under WIS. STAT. § 801.11(5)[4] because the Chase employee served was not

> When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms. The 90 day period under s. 801.02 may not be enlarged. If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect. The order of enlargement shall recite by its terms or by reference to an affidavit in the record the grounds for granting the motion.

[3] WISCONSIN STAT. § 802.06(2) requires that a defense of lack of personal jurisdiction "shall be made before pleading if a further pleading is permitted." The parties did not argue, and the trial court did not consider, whether Chase waived its objection by not complying with this statute.

[4] WISCONSIN STAT. § 801.11, "Personal jurisdiction, manner of serving summons for," states, in pertinent part:

> A court of this state having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in s. 801.05 may exercise personal jurisdiction over a defendant by service of a summons as follows:
>
> ….
>
> **(5)** DOMESTIC OR FOREIGN CORPORATIONS OR LIMITED LIABILITY COMPANIES, GENERALLY. Upon a domestic or foreign corporation or domestic or foreign limited liability company:
>
> (a) By personally serving the summons upon an officer, director or managing agent of the corporation or limited liability company either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.
>
> (b) If with reasonable diligence the defendant cannot be served under par. (a), then the summons may be served upon an officer, director or managing agent of the corporation or limited liability company by publication and mailing as provided in sub. (1).

(continued)

an "officer, director or managing agent" or "the person who is apparently in charge of the office." Chase attached an affidavit from a Chase employee in Louisiana who stated that she is a vice president of Chase, and that Striepling, the person served in Milwaukee, "is not an officer, director or manager" with Chase, is not "a person who could reasonably be considered to be in charge of the branch office" where he was served, and "is not authorized to accept service of process" for Chase.

¶4 Wilks and Chase appeared at the hearing on the motion for default judgment. Wilks filed an affidavit from the process server who stated that he had been a process server since 1989, that he had served Chase more than forty-six times at the Milwaukee branch involved here, that he learned five years previously that Striepling "is an individual who is authorized to accept service on Chase's behalf" and that he has served Striepling more than twenty times in the last five years without any statement by Chase or a client that Striepling "was not authorized to accept service on Chase's behalf."

¶5 The trial court concluded that a hearing to determine the credibility of the two competing statements was not necessary, apparently concluding that the process server's affidavit did not contradict the affidavit Chase produced.

> Well, I think their affidavit is sufficient. He said he wasn't authorized to accept service here. Your process server says he served him in the past, there's never been a problem and no one ever told you from Chase that he was not authorized to accept service.

> (c) By serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant.

> Your motion for default judgment is denied. I think there is improper service here.

STANDARD OF REVIEW

¶6 The facts here are undisputed. The only question is whether the trial court was required to hold an evidentiary hearing on the challenge by Chase to whether personal jurisdiction had properly been invoked. This involves application of a statute to a particular set of facts which is a question of law we review *de novo*. *See, e.g.*, ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528. Whether the circuit court applied the correct legal standard to the facts is also a question of law that we review *de novo*. ***Landwehr v. Landwehr***, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180. An appellate court must decide questions of law independently without deference to the decision of the trial court. ***Ball v. District No. 4, Area Bd.***, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

DISCUSSION

¶7 Two statutes are involved in the process required to resolve a dispute as to personal jurisdiction. WISCONSIN STAT. § 802.06(4) directs that "[t]he hearing on the defense of lack of jurisdiction over the person or property shall be conducted in accordance with s. 801.08." In turn, WIS. STAT. § 801.08(1) requires that "[a]ll issues of fact and law raised by an objection to the court's jurisdiction over the person … shall be heard by the court without a jury in advance of any issue going to the merits of the case."

¶8 The interplay of these statutes has been explained in ***Bielefeldt v. St. Louis Fire Door Co.***, 90 Wis. 2d 245, 279 N.W.2d 464 (1979), and more recently in ***Kavanaugh Rest. Supply, Inc. v. M.C.M. Stainless Fabricating, Inc.***, 2006 WI

App 236, 297 Wis. 2d 532, 724 N.W.2d 893. In ***Kavanaugh***, as here, the trial court granted defendant's motion to dismiss because of lack of personal jurisdiction based on the affidavit defendant submitted, but without holding an evidentiary hearing pursuant to WIS. STAT. § 801.08(1). ***Kavanaugh***, 297 Wis. 2d 532, ¶1. We agreed with the trial court that "[w]hen opposing affidavits … pose factual disputes the taking of evidence is necessitated, and an evidentiary hearing is required," ***id.***, ¶7, but explained that "a plaintiff is normally entitled to an evidentiary hearing when a defendant challenges personal jurisdiction *even if the plaintiff does not demonstrate that an evidentiary hearing is necessary*," ***id.***, ¶8 (emphasis added).

¶9 The plaintiff's right to an evidentiary hearing continues unless plaintiff expressly waives that right either by stipulating to the facts or by accepting a different procedure. ***Id.***, ¶14. Specifically, we held that the lack of the plaintiff's stipulation deprives the trial court of the power to accept as true facts asserted in the defendant's affidavit: "In the absence of an evidentiary hearing, or agreement by plaintiff that the court could decide personal jurisdiction on a particular set of facts, the circuit court had no power to accept as true the facts asserted by the parties in either the complaint or defendant's affidavits." ***Id.***, ¶11.

¶10 The transcript of the motion for default judgment hearing demonstrates no stipulation by Wilks that the statements in defendant's affidavit are true. Quite the contrary is asserted both by the process server's affidavit and Wilks' arguments. Nor is there a specific waiver by Wilks of the right to an evidentiary hearing or acceptance of a different procedure. Consequently, we conclude that Wilks was deprived of the evidentiary hearing to which he was entitled under the requirements of WIS. STAT. §§ 802.06 and 801.08, and the holdings of ***Kavanaugh***.

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

Not recommended for publication in the official reports.