

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1011

Cir. Ct. No. 2007SC88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHNNY LACY, JR.,

PLAINTIFF-APPELLANT,

V.

MORRIS NEWSPAPER CORPORATION OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Johnny Lacy, Jr., an inmate at the Maximum Security Prison in Boscobel, appeals pro se orders denying his motion

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

for default judgment and granting Morris Newspaper Corporation of Wisconsin's motion to dismiss. Lacy argues Morris defaulted when, in responding to his 42 U.S.C. § 1983 claim, it failed to send him copies of its answer and motion to dismiss. Lacy also argues that Morris violated his rights under the First and Fourteenth Amendments of the United States Constitution.

¶2 The circuit court denied Lacy's motion for default judgment, finding that Morris's faxed answer and motion met the requirements for joinder and that it was done prior to the return date with no prejudice to Lacy. We affirm the circuit court's ruling, but on different grounds.

¶3 WISCONSIN STAT. § 801.14 states that every written motion, other than one that may be heard *ex parte*, shall be served upon each of the parties. A motion to dismiss with prejudice cannot be heard *ex parte*. *Haselow v. Gauthier*, 212 Wis. 2d 580, 590, 569 N.W.2d 97 (Ct. App. 1997). Thus, Morris was required to serve Lacy with a copy of its answer and motion to dismiss. "[A] plaintiff may move for default judgment under WIS. STAT. § 806.02(2) for failure to serve an answer within the time specified in WIS. STAT. § 806.06(1)." *Split Rock v. Lumber Liquidators*, 2002 WI 66, ¶37 n.14, 253 Wis. 2d 238, 646 N.W.2d 19.

¶4 However, for a default judgment to be entered when an answer has been served late or filed late, a motion to strike the answer must be filed. *Id.*; see *Reynolds v. Taylor*, 60 Wis. 2d 178, 179, 208 N.W.2d 305 (1973); *Martin v. Griffin*, 117 Wis. 2d 438, 441-42, 344 N.W.2d 206 (Ct. App. 1984). Lacy failed to move to strike the late answer and, therefore, his motion for default judgment was properly denied.

¶5 The court also granted Morris's motion to dismiss because the newspaper was not acting under the color of law and therefore was not subject to

action under 42 U.S.C. § 1983. “A motion to dismiss for failure to state a claim tests whether the complaint is legally sufficient to state a cause of action for which relief may be granted.” *Gritzner v. Michael R.*, 2000 WI 68, ¶17, 235 Wis. 2d 781, 611 N.W.2d 906.

¶6 To state a claim under 42 U.S.C. § 1983, a petitioner must allege facts sufficient to show that respondents, acting under color of state law, deprived him of a specific right or interest protected by the Constitution or the laws of the United States. *Bublitz v. Cottey*, 327 F.3d 485, 488 (7th Cir. 2003). A § 1983 claim is tenable only if the respondents are state actors. *Gayman v. Principal Fin. Servs.*, 311 F.3d 851, 852 (7th Cir. 2002). Generally speaking, news outlets and publishers are not state actors for purposes of § 1983. *See, e.g. Chicago Joint Bd. v. Chicago Tribune Co.* 435 F.2d 470, 474 (7th Cir. 1970). Morris is a corporation that manages newspaper distribution in southwestern Wisconsin. Lacy does not give any reasons why Morris should be exempt from the general rule that newspapers are not state actors. Therefore, we agree with the circuit court that Morris is not subject to § 1983 and thus there are no conditions under which relief can be granted.

By the Court.—Judgment and order affirmed.

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

