COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2352 **Cir. Ct. No. 2007SC9145**

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

STUART RONALD ENGERMAN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL BOUSHELE,

DEFENDANT-APPELLANT,

GRACE EPISCOPAL CHURCH,

GARNISHEE.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] Russell Boushele appeals the August 2011 order of the circuit court denying his motion to reopen a small claims default judgment against him obtained by Stuart Engerman in October 2007. For the following reasons, this court affirms.

BACKGROUND

¶2 Engerman, pro se, commenced this small claims action by filing a summons and complaint on August 13, 2007, against Boushele, asserting a money claim in the amount of $4,455. Engerman alleged that Boushele had signed a residential lease agreement to pay Engerman $475 per month by the first of every month, with a late fee penalty of $10 per day, and that Boushele had failed to pay rent under this agreement for five months, April through August 2007. The complaint also alleged that Boushele "agreed verbally" to pay a total of $770 in interest on five loans taken out by Engerman and failed to make this payment.[2]

¶3 The summons and complaint listed Boushele's address as 2035 Ellen Avenue, Madison, Wisconsin, which was the same address listed for Engerman.

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Boushele has requested that this court certify this case to the Wisconsin Supreme Court, so that it may consider taking the appeal "to develop, clarify, and harmonize the law" regarding motions to reopen small claims judgments. For reasons that should be obvious from the text of this opinion, this court declines to certify this appeal.

[2] It may be readily inferred from the complaint that Engerman's total claim of $4,455 represented the sum of three amounts: the $475 in monthly rent, multiplied by five months; the $770 in loan interest payments; and the $10 daily late fee, multiplied by 131 days from the time of the rent allegedly due on April 1, 2007.

¶4 The summons stated that Boushele had until 9:00 a.m. on September 10, 2007, to file an answer to the complaint. It also showed the stamp of the clerk of circuit court, next to stamps reflecting August 13, 2007, as the date of issuance and mailing.

¶5 The record reflects that on August 30, 2007, the summons and complaint mailed by the clerk's office to Boushele were returned to that office by the U.S. postal service, stamped by the postal service as "not deliverable as addressed" and "unable to forward."

¶6 As reflected in an affidavit of a representative of a newspaper of general circulation filed with the clerk on September 26, 2007, Engerman had the newspaper, on September 20, 2007, publish a legal notice reciting the terms of the summons and complaint. This notice stated in part that Boushele was to provide a written answer by October 4, 2007, at 9:00 a.m., through the clerk's office, and cautioning that, "If you do not appear or answer, the plaintiff may win this case and a judgment entered for what the plaintiff is asking."

¶7 On October 5, 2007, the clerk entered a judgment in favor of Engerman, upon a finding of default through nonappearance by Boushele, in the amount of $4,455, plus the cost of the filing fee and service, for a total judgment of $4,625.35.

¶8 Approximately three years later, on November 10, 2010, Engerman, again pro se, used the October 5, 2007 default judgment as the basis to file an earnings garnishment notice, naming Boushele as the debtor being garnished and Grace Episcopal Church as the garnishee.

¶9 Aspects of the record are difficult to interpret, but it appears to reflect that there was, at least initially, a defective attempt by Boushele to file an answer to the earnings garnishment and also, at least initially, a defective attempt by Engerman to object to the answer and demand a hearing. In any case, on July 11, 2011, a court commissioner addressed the earnings garnishment request, Boushele's answer, and Engerman's objections.

¶10 In his answer Boushele stated:

> I would like my day in court [to] answer [to] this garnishment, because I was never sent any papers … [to] go to court on this, and I never saw any papers [stating] what this money is due for, because I [haven't] rent[ed] from Stuart Engerman since Aug[.] of 2007, and when I was renting from him it was a month to month rent.

(Capitalization altered from original).

¶11 In his objection to this answer, Engerman stated:

> Originally I attempted to serve Mr. Boushele by sending copies of my Small Claims action to his last known address, and by contacting his attorney. Failing that, I published a notice in the Wisconsin State Journal as required. I contacted friends and family in an effort to locate Mr. Boushele. Since Mr. Boushele left abruptly owing me several months [in] rent I believe he was trying to avoid detection and service. Although Mr. Boushele last sublet from me in August 2007 as he states …, at the time he absconded he owed me 5 months back rent. Per my small claims action, he owes me that rent, plus interest, plus late fees, plus cost of these actions.

On July 11, 2011, the court commissioner sustained Engerman's objections, ordered that the garnishment procedure could proceed, and explained to Boushele his rights to a trial de novo in the circuit court. Boushele timely demanded a trial before the circuit court.

¶12 On August 15, 2011, this time through an attorney, Boushele filed with the circuit court a written "motion to reopen default judgment." In this motion, Boushele argued that there was good cause to reopen the default judgment because: (1) Engerman had failed to exercise reasonable diligence in serving the original small claims complaint; (2) there was a lack of proof of "personal and substituted service" of the original small claims complaint; (3) there was a failure of service of the original complaint by publication; (4) the judgment was based on "a mistakenly applied excessive monthly late rent penalty exceeding what is allowed by law"; (5) Boushele denied owing the alleged unpaid rent and any amount of interest on loans taken out by Engerman; and (6) Boushele should be allowed to pursue counterclaims against Engerman.

¶13 On August 17, 2011, the circuit court issued an order denying this motion as "untimely and barred by § 799.29(1)(c), [Wis.] Stats.," and ***King v. Moore***, 95 Wis. 2d 686, 690-91, 291 N.W.2d 304 (Ct. App. 1980).

DISCUSSION

I. Argument that *King v. Moore* Has Been Abrogated by Legislative Action

¶14 Boushele argues that this court should reverse the circuit court's decision to deny his motion to reopen on the grounds that ***King***, the case on which the court relied in denying the motion, needs to be "modernized" by this court to reflect what he submits is the obvious intent of legislative activity since ***King***'s release. For the following reasons, this court rejects this legislative abrogation argument and concludes that the circuit court was correct in deciding that ***King*** remains controlling law.

¶15 In ***King***, the plaintiff appealed from an order granting defendants' motion to reopen a default judgment in a small claims action for unpaid rent and other relief. ***Id.*** at 687. Defendants had moved to reopen the judgment more than ninety days after judgment was entered. ***Id.*** This court concluded that the motion was untimely under WIS. STAT. § 299.29(1) (1977), which contained a ninety-day time limit.[3] ***Id.*** at 690-91. The court rejected the defendants' argument that the motion was timely under WIS. STAT. § 806.07(1) and (2) (1977), the more general statute governing civil actions, which provides that motions to reopen "shall be made within a reasonable time, and, if [on the basis of mistake, inadvertence, surprise or excusable neglect or the basis of fraud, misrepresentation, or other misconduct of an adverse party], not more than one year after the judgment was entered." ***Id.*** at 688-89 (quoting § 806.07(2) (1977)).

¶16 This court explained its decision in the following terms:

> Both secs. 299.04(1) and 801.01(2), Stats., specifically limit the application of the general rules of civil procedure to circumstances where no different procedure is prescribed. By adopting sec. 299.29(1) in ch. 407, Laws of 1963, the legislature prescribed a 90-day limit on

[3] WISCONSIN STAT. § 299.29(1) (1977) is the predecessor statute to the renumbered WIS. STAT. § 799.29, which contains a twelve-month time limit. Section 799.29 provides in relevant part:

> **(1)** MOTION TO REOPEN. (a) There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.
>
> ….
>
> (c) In … actions [other than ordinance violation cases] under [Chapter 799, "Procedure in small claims actions"], the notice of motion must be made within 12 months after entry of judgment ….

> applications for relief from default judgments in ch. 299 actions. This limit was adopted on the recommendation of the Wisconsin Judicial Council, which urged it in order to keep "(i)n line with the philosophy that small claims practice (should) be more summary and … proceedings … more speedily terminated" than in other kinds of civil actions.
>
> We conclude that sec. 299.29(1), Stats., provides the exclusive procedure for reopening a default judgment in small claims proceedings. Since the defendants failed to bring their motion within the 90-day time period provided by that section, the trial court had no jurisdiction to grant the relief requested.

Id. at 690-91 (footnote and citations omitted).

¶17 Thus, as applicable here, ***King*** holds that the predecessor statute to WIS. STAT. § 799.29, WIS. STAT. § 299.29(1) (1977), "provides the exclusive procedure for reopening a default judgment in small claims proceedings," and when the statutory time period to bring the motion has expired, the "trial court [has] no jurisdiction to grant the relief requested." ***King***, 95 Wis. 2d at 690-91; *see also* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶10, 318 Wis. 2d 216, 768 N.W.2d 53 ("Section 806.07 does not apply to small claims cases. The applicable statute is WIS. STAT. § 799.29." (citing ***King***, 95 Wis. 2d at 689-90)). In short, there is no question that, if ***King*** is applied, Boushele's motion to reopen was untimely under § 799.29. The question is whether there is some reason why this court should not apply ***King*** here.

¶18 Boushele's argument is difficult to track, but its essence appears to be the following. The premise of ***King*** is that the legislature intends small claims practice to be summary in nature and speedy. Consistent with that goal, the legislature established the more restrictive reopening procedure for small claims actions. However, since ***King*** was issued in 1980, the legislature "has signaled"

on several occasions its intent for small claims procedures to be less summary in nature, and so the premise of ***King*** no longer exists. Such "signal[s]" occurred, Boushele apparently contends, in 1987, when the time for reopening was lengthened to six months, and then again in 2003, when the time was lengthened to twelve months. Other relevant changes in the direction of a "less summary" small claims procedure, Boushele argues, include increases in the monetary limits for small claims cases and stricter service requirements.

¶19 Boushele's argument fails for at least the reason that it runs afoul of the rule of statutory interpretation that, once a published decision (here, ***King*** in 1980 and ***Mercado*** in 2009) interprets a statutory provision, that judicial construction "becomes part of the statute unless [the statute is] subsequently amended by the legislature." *See* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶31 n.17, 274 Wis. 2d 220, 682 N.W.2d 405; *see also* ***State v. Rosenburg***, 208 Wis. 2d 191, 196, 560 N.W.2d 266 (1997). Indeed, much of Boushele's discussion serves in part to confirm legislative acquiescence to ***King***, because despite the many *other* changes in small claims procedure cited by Boushele, the legislature has *not* altered or repealed provisions in WIS. STAT. § 799.29(1)(c) in the way that matches the interpretation Boushele asks this court to apply. If the legislature had at any point intended to abrogate ***King***, then it presumably would have significantly modified or repealed the pertinent provisions of § 799.29 in a way that accomplished this clearly, just as it did when it made the other modifications that Boushele cites. Boushele fails to explain how any of the changes the legislature has made to WIS. STAT. ch. 799 created any inconsistency or ambiguity as to the applicability of § 799.29 or the vitality of ***King***. To the extent that his argument is coherent, it appears to be purely speculative.

II. Alleged Failure of Service in 2007

¶20 Boushele asks that this court "find the October 5, 2007 default judgment … void due to the lack of personal jurisdiction from ineffective service by publication due to the respondent['s] failure in reasonable diligence." This argument is also unavailing for at least two reasons.

¶21 First, Boushele took insufficient steps to alert the circuit court to the nature of this argument, with supporting legal authority, so that a proper record could be made and a decision squarely rendered. In nine dense pages of single-spaced type, Boushele's motion to reopen the default judgment purports to raise many issues, including making references to allegedly defective service. However, nowhere in his motion is there a clear explanation, with citations to legal authority, describing the circumstances under which a court may or must reopen a small claims default judgment and deem it void after the time for a proper motion to reopen has passed, based on allegedly defective service. Accordingly, Boushele forfeited this issue by failing to sufficiently develop it in the circuit court. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45, 327 Wis. 2d 572, 786 N.W.2d 177 (issues not raised in circuit court are forfeited on appeal); ***State v. Agnello***, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (party must state objections with specificity in circuit court in order to preserve them for appeal).

¶22 Second, Boushele's argument is similarly undeveloped in this court. It is true that his argument is lengthy, and includes citations to cases such as ***West v. West***, 82 Wis. 2d 158, 166, 262 N.W.2d 87 (1978), which hold that "[a] void judgment may be expunged by a court at any time." However, those cases involve WIS. STAT. § 806.07 (or a predecessor statute), and their applicability here is not

obvious. There may be viable legal arguments to be made that a circuit court presented with an adequate factual record has authority to decide, or must decide, that a small claims judgment is void due to defective service, and that such a decision may or must be rendered even after the statutory period for a motion to reopen has lapsed. Such arguments would need to reference relevant statutes and case law that take into account the nature of small claims actions, including any relevant constitutional due process considerations, providing both this court and the opposing party a chance to evaluate them. However, Boushele has not offered such an argument. In appealing the circuit court order, Boushele assumed the responsibility of supporting his request for relief, and this court declines to decide an issue that he does not sufficiently address on appeal. *See* ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (appellant "must present developed arguments if it desires this court to address them"); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

CONCLUSION

¶23 For these reasons, this court concludes that the circuit court was correct in relying on ***King*** in denying the motion to reopen, and that Boushele failed to present a developed legal argument either to the circuit court or now on appeal demonstrating that the circuit court could have or should have granted his motion, filed nearly four years after entry of the small claims judgment, to reopen the judgment on the grounds that it was void due to a lack of service.

By the Court.—Order affirmed.

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