COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2208 **Cir. Ct. No. 2014SC1928**

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

MICHAEL LENZ,

PLAINTIFF-APPELLANT,

V.

GUARDIAN CREDIT UNION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

¶1 BROWN, C.J.[1] Michael Lenz's failure to pay his taxes led the Internal Revenue Service to place a levy on a deposit account he held with

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Guardian Credit Union. Guardian's compliance with the levy spurred a protracted legal battle that has moved through state and federal courts prior to arriving before us. When Guardian removed the case to the federal court, the time to answer was tolled until the case was back in the state court. Therefore, we reject Lenz's argument that Guardian's motion to dismiss was untimely. We also hold that Guardian had a right to move to dismiss rather than file an answer and we reject Lenz's argument on that score as well. Finally, we point out that, in anticipation of lawsuits like this one, Congress provided statutory immunity for banks that comply with IRS levies. That immunity applies here and justifies judgment in Guardian's favor. We affirm.

Background

¶2 The facts in this case are undisputed. Michael Lenz has a deposit account with Guardian Credit Union. Guardian received a notice of levy from the IRS and then placed a hold on Lenz's account, which prevented him from accessing $1963.32. Guardian later surrendered the entire amount to the IRS.

¶3 On November 3, 2014, Lenz filed suit against Guardian in small claims court, alleging breach of contract and fiduciary duties. The return date listed on the summons was June 2, 2014. On May 29, Guardian filed a motion to remove the case to federal court. On June 2, the parties requested that the federal district court remand the case to state court based on a stipulated agreement. On June 17, Guardian filed a motion to dismiss in the state court for failure to state a claim upon which relief can be granted. On June 24, Lenz filed a motion in the state court for default judgment. Also on June 24, the federal court granted the motion to remand the case to state court. On July 22, the circuit court held a

hearing on the parties' motions for default judgment and decided in favor of Guardian, dismissing the case with prejudice. Lenz appeals.

Analysis

¶4 Lenz advances two arguments on appeal. First, he claims that the circuit court erroneously exercised its discretion in denying his motion for default judgment based on Guardian's failure to file an answer to his complaint. Second, Lenz argues that the circuit court improperly considered Guardian's affirmative defense of statutory immunity, which he did not bring up in his pleading, when deciding to grant the motion to dismiss. We will address each argument in turn.

¶5 Turning to Lenz's first argument, we will only reverse a circuit court's decision to deny default judgment if it erroneously exercised its discretion. ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9, 242 Wis. 2d 153, 624 N.W.2d 375. When the circuit court applies the correct legal standard and uses the facts on the record there is no erroneous exercise of discretion. ***Larry v. Harris***, 2008 WI 81, ¶15, 311 Wis. 2d 326, 752 N.W.2d 279.

¶6 The law required Guardian to answer Lenz's complaint, move to dismiss under WIS. STAT. § 802.06(2), or otherwise respond by the June 2, 2014 return date. *See* WIS. STAT. § 799.20(1). However, the case was removed to federal court before the return date and did not move back to state court until several weeks later. While the case was in federal court, the state court no longer had any jurisdiction over it. *See* ***Egan v. Preferred Accident Ins. Co. of New York***, 223 Wis. 129, 136, 269 N.W. 667 (1936). We are persuaded by rulings in other jurisdictions which have held that the window of time between removal to federal court and a later remand does not count against any deadlines for filing a responsive pleading. *See* ***Lucky Friday Silver-Lead Mines Co. v. Atlas Mining***

Co., 395 P.2d 477, 480 (Idaho 1964) ("[T]he period of time the cause is before the Federal court, cannot be considered in computing the time within which the appellant had to appear and plead to the cause."); *see also* ***Limehouse v. Hulsey***, 744 S.E.2d 566, 577 (S.C. 2013) (citation omitted) ("[O]nce the case was removed to federal court, the state court's jurisdiction was suspended or held in abeyance until the case was properly remanded. When the state court resumed jurisdiction, it had a duty 'to proceed as though no removal had been attempted.'"). After the removal date, any filing in state court would have no effect because the case was no longer before that court. Therefore, we hold that the deadline for Guardian to respond was tolled between removal and remand.

¶7 Furthermore, Guardian's motion to dismiss for failure to state a claim upon which relief can be granted was a permissible means of responding. *See* WIS. STAT. §§ 799.20(1) and 802.06(2)(a)6. Lenz cannot dictate the type of response Guardian must file just because he demands an answer. By statute, Guardian was free to choose any one of the alternatives listed in § 799.20(1), including a motion to dismiss. Therefore, we hold that the circuit court did not erroneously exercise its discretion when it denied Lenz's motion for default judgment.

¶8 We move on now to Lenz's second argument—that the circuit court improperly considered Guardian's affirmative defense of immunity. This court reviews a motion to dismiss de novo. ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. We accept the facts of the complaint as true, but not any legal conclusions that the plaintiff asserts. ***Id.***, ¶18. The test for determining whether the complaint failed to state a claim upon which relief can be granted requires us to decide whether the plaintiff alleged facts that, if true, suggest a violation of the applicable law. ***Id.***, ¶21.

¶9 We can dispense with this issue quickly. Lenz asserts legal conclusions that the levy was invalid and, therefore, Guardian breached its contract and fiduciary duty. However, Congress passed a law protecting organizations or individuals who honor levies that the IRS imposes by discharging them "from *any* obligation or liability to the delinquent taxpayer." *See* 26 U.S.C. § 6332(e) (2012) (emphasis added). This complete statutory immunity clearly extends to state law claims for breach of contract and fiduciary duty. Therefore, Lenz failed to state a claim upon which relief can be granted, and the circuit court properly dismissed his lawsuit. We affirm.

By the Court.—Order affirmed.

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