

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2006

Cornelia G. Clark
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. 2005AP2254

Cir. Ct. No. 2004CV7087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

FIDELIS OMEGBU,

PLAINTIFF-APPELLANT,

v.

**RICHARD E. WAGNER,
GERMANTOWN MUTUAL INSURANCE COMPANY
AND WILLIAM NORTH,**

DEFENDANTS-RESPONDENTS.

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

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

¶1 CURLEY, J. Fidelis Omegbu appeals, *pro se*, the dismissal of his suit against his former landlord, Richard Wagner, Wagner's property manager, William North, and Wagner's insurance company, Germantown Mutual Insurance

Company (collectively, Wagner), on claim preclusion grounds. Omegbu contends that the trial court erred when it: (1) refused to enter a default judgment against the property manager; (2) refused to award costs to him when Wagner's attorneys were late in answering interrogatories; (3) refused Omegbu's request to file an amended complaint; and (4) dismissed his case on claim preclusion grounds.¹ Because the trial court properly exercised its discretion in denying Omegbu's requests: (1) for a default judgment; (2) for sanctions against Wagner; and (3) to file an amended complaint, we affirm. In addition, because Omegbu failed to appear at the eviction trial commenced by Wagner, resulting in a default judgment which was never appealed, he cannot challenge the default judgment in this suit because he was required by the "common-law compulsory counterclaim" rule to file a counterclaim in the eviction action. Thus, his suit is prohibited on claim preclusion grounds.

I. BACKGROUND.

¶2 On November 15, 2003, Fidelis Omegbu leased a property located at 2105 South 14th Street in the City of Milwaukee, owned by Richard Wagner. William North was the property manager for Wagner. The lease required Omegbu to pay rent on the first day of every month. The lease also obligated Omegbu to

¹ Omegbu has identified seventeen issues on appeal. The first couple of issues touch on the underlying causes of action, which the trial court never addressed, and therefore, are not properly before us. Two of the claims are directed at two parties who were dismissed from this case at an earlier hearing and who are not parties to this appeal. That dismissal order disposed of the entire matter in litigation as to those parties, and thus, was an appealable order. Because Omegbu did not bring an appeal of that order within ninety days of the signing of that order, this court has no jurisdiction over those issues. *See* WIS. STAT. § 808.03 (2003-04).

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

keep only one car at the property, mow the lawn, and place his trash in a provided receptacle.

¶3 Problems arose between Wagner and Omegbu over the lease provisions, and when Omegbu failed to pay rent on July 1, 2004, Wagner served Omegbu with a “5 day Notice to Quit or Pay Rent.” When no rent was paid, Wagner began eviction proceedings against Omegbu. Omegbu was served with the summons and complaint. On the scheduled hearing date, however, Omegbu failed to appear. The trial court entered a default judgment in Wagner’s favor, along with costs and a writ of restitution. Omegbu then filed a motion seeking to reopen the judgment, but it was denied. Rather than appealing the default judgment, several days later Omegbu started this suit, alleging four claims. The causes of action alleged against Wagner are: (1) “breach of contract; breach of habitable conditions of Milwaukee building codes”; (2) “malicious prosecution and abuse of process ... and a tort liability”; (3) “ejectment bond ... property confiscated illegally”; and (4) “constructive eviction and negligent misrepresentation.” Omegbu sought to include two other parties to this action and he filed an amended complaint adding them to the suit. These other parties sought dismissal. The trial court granted their motion and, because the sole purpose of the amended complaint was to add these new parties, the amended complaint was dismissed by the trial court.

¶4 Omegbu also sought to have a default judgment entered against North because he did not file an answer. The trial court refused, finding that the complaint did not state a cause of action against the property manager. Omegbu also sought costs because interrogatories he served were not timely answered. The trial court refused to grant costs, noting that Wagner had changed attorneys and that the attorneys had advised Omegbu that, as a result, a slight delay would occur

in answering the interrogatories. In addition, Omegbu sought to name Wagner's insurance carrier as a party. The trial court granted this request. Approximately seven months after the case was filed, Omegbu also requested permission from the trial court to file another amended complaint. The trial court denied Omegbu's request.

¶5 Wagner filed a motion seeking dismissal of all causes of action on claim preclusion grounds. At the hearing on the motion, the trial court determined that WIS. STAT. § 799.43 required Omegbu to raise all his defenses to the eviction by filing a counterclaim in the eviction action. Inasmuch as Omegbu failed to do so and did not appeal the trial court's entry of the default judgment or its denial of his motion seeking to reopen the judgment, the trial court concluded that dismissal on claim preclusion grounds was appropriate. Omegbu appeals the dismissal.

II. ANALYSIS.

¶6 Omegbu first complains that the trial court erred in not granting default judgment against the property manager, William North. Omegbu sought a default judgment against North because he failed to file an answer. Trial courts have discretion whether to grant or deny default judgments. *See Wisconsin Pub. Serv. Corp. v. Krist*, 104 Wis. 2d 381, 395, 311 N.W.2d 624 (1981).

¶7 The record supports the trial court's discretionary decision to deny Omegbu's default judgment request. The trial court explained to Omegbu that he had no cause of action against North because North was the agent for the owner, and the relief Omegbu sought could be obtained only from the owner. As the trial court noted, it made no difference that North may have collected the rent or dealt with Omegbu directly, because in doing so, he was acting as Wagner's agent, and thus had no personal liability to Omegbu. Consequently, the trial court concluded

that the complaint did not state a claim against North and refused to enter a default judgment against him. We agree with the trial court's conclusion. The complaint called into question duties owed to Omegbu by the property owner. Thus, the trial court properly exercised its discretion when it refused to grant a default judgment against North because North did not own the property and his role as an agent for Wagner did not transform him into the owner. Therefore, the complaint did not state a cause of action against North.

¶8 Next, Omegbu argues that the trial court should have granted his motion for costs when Wagner did not timely answer his interrogatories. WISCONSIN STAT. § 804.12 regulates the remedies available when a party fails to honor a discovery request. A trial court has discretion to order sanctions for discovery requests that are not promptly met. Sec. 804.12(2). The trial court explained its decision not to grant costs:

I'm not going to give sanctions. There's been two changes of lawyers. They've been working on it. They have corresponded with you, and you're going to get them next week. That's good enough. We don't have any dates set in this case yet. There's been no prejudice. And so your request for sanctions is denied.

¶9 Here, the trial court properly exercised its discretion in denying costs because a reason existed for the failure to answer the interrogatories—a change of lawyers. Moreover, Omegbu was advised of the delay and he suffered no prejudice. Under these circumstances, the trial court's determination that no sanctions were required was a proper exercise of discretion.

¶10 Third, Omegbu complains that the trial court should have permitted him to file an amended complaint. A trial court's decision to grant leave to amend

a complaint is discretionary when done after the expiration of six months. *See* WIS. STAT. § 802.09(1).

¶11 On March 7, 2005, the trial court denied Omegbu’s request to file an amended complaint adding additional causes of action.² At the hearing, Wagner’s attorney stated he was opposed to any amendment that would add additional claims. In denying Omegbu’s motion, the trial court remarked that “[w]e’ve got plenty of claims.” We agree. Omegbu’s original complaint, along with the attachments, is thirty-six pages long. Omegbu had already filed an amended complaint that was dismissed. The case had been pending for seven months when Omegbu asked to file another amended complaint. Under the facts here, we are satisfied that the trial court properly exercised its discretion in denying Omegbu’s belated request.

¶12 Omegbu’s final issue is his contention that the trial court erred in granting Wagner’s motion seeking dismissal of the entire suit on claim preclusion grounds. The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. *See Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738. Application of the doctrine of claim preclusion is a question of law, which this court reviews *de novo*. *Kruckenbergh v. Harvey*, 2005 WI 43, ¶17, 279 Wis. 2d 520, 694 N.W.2d 879. The doctrine has three elements: “(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation that

² The trial court did permit Omegbu to file an amended complaint adding Wagner’s insurance company.

resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits.” *Id.*, ¶21 (citation omitted). In addition, another rule, the “common-law compulsory counterclaim” rule, impacts a claim preclusion analysis. *A.B.C.G. Enter. v. First Bank S.E., N.A.*, 184 Wis. 2d 465, 474, 515 N.W.2d 904 (1994). That doctrine requires a defendant to counterclaim if its claim, when brought in a subsequent, separate action, would nullify the initial judgment or impair rights established in the initial action.” *Id.*

¶13 Here, the parties are identical and the prior eviction action resulted in a judgment. The causes of action in Omegbu’s suit all revolve around the landlord-tenant relationship Omegbu had with Wagner. In applying the “common-law compulsory counterclaim” rule, we observe that if Omegbu were successful in his suit against Wagner, it would nullify the initial judgment and possibly impair rights established in the initial action. Consequently, Omegbu was required to file a counterclaim in the original eviction action setting forth his claims against Wagner in the context of their landlord-tenant relationship. He failed to do so. Further, WIS. STAT. § 799.43 supports our conclusion, as § 799.43 directs a defendant in an eviction suit to file a counterclaim for any claim related to the rented property. *See also Rossow Oil Co. v. Heiman*, 72 Wis. 2d 696, 242 N.W.2d 176 (1976). Thus, Omegbu could not maintain a separate suit for claims against Wagner that stemmed from the landlord-tenant relationship. For the reasons stated, the order dismissing Omegbu’s suit is affirmed.

By the Court.—Order affirmed.

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