COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2009

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 Nos. 2008AP1916
2008AP2331

Cir. Ct. No. 2007CV15881

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

RAY PERINE,

PLAINTIFF-COUNTER-CLAIMANT-DEFENDANT-RESPONDENT,

V.

THOMAS WILD,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

MELISSA STANKE AND JAMES R. MILLER,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

VIRGINIA FUCHS, ONE WORLD REALTY LLC, GINA KONONOV, ROBBINS & LLOYD MORTGAGE CORP. AND SECURITY LENDING GROUP LLC,

THIRD-PARTY DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY and THOMAS R. COOPER, Judges. *Affirmed*.

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

¶1 CURLEY, P.J. Thomas Wild filed two separate appeals in this matter. Initially, he appealed from an order dismissing his counterclaims and third-party claims with prejudice as a sanction for his failure to comply with the trial court's orders; in his second appeal, he appeals from a judgment of eviction and a writ of restitution in favor of Ray Perine. Wild's appeals were consolidated for dispositional purposes.[1] Wild argues: (1) the trial court erred when it entered a judgment of eviction and a subsequent money judgment against him; (2) the trial court should have granted his motion for declaratory relief; and (3) the trial court should have stricken the answers filed by Perine and Melissa Stanke and should have granted his motions for default judgments against James Miller, Perine, and Stanke (collectively referred to as Perine unless otherwise specified).

¶2 In his opening brief, Wild fails to address an issue that is pivotal to the outcome of his appeal; specifically, he does not offer any argument whatsoever

[1] The Honorable Christopher R. Foley presided over the proceedings related to the order for sanctions dismissing Wild's counterclaims and third-party claims with prejudice. This order was dated July 11, 2008. Ray Perine's original eviction action remained pending, and following the dismissal order, he filed a renewed motion for a judgment of eviction and writ of restitution.

Due to judicial rotation, the Honorable Thomas R. Cooper presided over the proceedings that resulted in the order evicting Wild and requiring that he pay restitution to Perine. A judgment was entered on September 29, 2008, evicting Wild and awarding Perine restitution and costs. Another judgment subsequently was entered affirming Judge Foley's July 11, 2008 order. Given that the July 11, 2008 order was a final, appealable order, we reference that as the document appealed from and not the subsequently entered judgment affirming the order.

regarding the dismissal of his claims as a sanction for his failure to comply with the trial court's orders. Because we conclude that the trial court properly exercised its discretion when it dismissed Wild's claims as a sanction, with the exception of his argument that the trial court should have granted his motions for default judgments, we do not reach the substantive issues Wild raises on appeal. Accordingly, we affirm.

I. BACKGROUND.

¶3 The consolidated appeals in this matter arise out of a small claims eviction action commenced by Perine against Wild. In response, Wild filed an answer, counterclaims, and a third-party summons and complaint naming Stanke and Miller as third-party defendants.[2] The original action subsequently was removed to large claims court.

¶4 The property where Wild was residing at the time Perine filed his eviction action previously belonged to Wild and had been sold at a sheriff's auction following a judgment of foreclosure. Prior to confirmation of the sheriff's sale, however, Wild sold the property for $109,000, and an agreement was entered into whereby Wild was allowed to retain possession of his house with an option to buy it back at a later date (buyback option) provided that he made all of the

[2] Perine was also named as a third-party defendant; however, this designation was improper. *See* WIS. STAT. § 803.05(1) (2007-08) (A defendant may use impleader only to join "a person not a party to the action."). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Wild later amended his pleadings and named additional third-party defendants. Wild's claims on appeal do not involve these additional parties; therefore, we do not reference them further.

agreed-upon rent payments established by the terms of the residential lease agreement he entered into.[3]

¶5 In his counterclaim and third-party complaint, Wild made numerous allegations based on the buyback option. At the heart of his allegations was his contention that the buyback option was disguised as a rescue plan to help him avoid losing his property through foreclosure, when in reality he was defrauded. Among other things, he claimed that Perine, Stanke, and Miller conspired against him and made intentional misrepresentations regarding the sale of the property and the residential lease agreement that Wild entered into.

¶6 Perine filed a motion for a judgment of eviction and a writ of restitution when Wild failed to pay rent owed in accordance with the terms of the lease agreement. During the motion hearing, Wild's counsel made the following suggestion to the court:

> One more fact that I want on, and I have advised my client to put the money that he would owe into a separate account in the event he loses [the motion].
>
> And I think it would be fair if you were to deny their motion for judgment. That the order includes an account be kept until resolution is made.

Wild's attorney restated this point later in the hearing:

> Like I sa[id], I think it would be fair to order mister—my client, Mr. Wild, to pay a monthly payment in an escrow account he cannot touch until this matter's resolved. That would be fa[i]r. There is little remedy if the

[3] Based on our resolution of this appeal, we need not delve further into the specific facts underlying how Miller, Perine, and Stanke came to be involved with the purchase of and subsequent dealings related to the property where Wild was evicted from or the details surrounding the amended lease agreement that Wild signed.

> property is sold only to find out Mr. Perine was never the owner….

¶7 The trial court denied Perine's motion for a judgment of eviction, finding that there were disputed issues of material fact. The trial court followed the suggestion of Wild's attorney and entered an order requiring Wild to, among other things, deposit into a trust account all past due rents and to continue making monthly deposits into the trust account until the matter was fully resolved. The trial court's order further provided: "In the event that Wild fails to make said payments on [sic] a timely manner, and upon good cause shown, the Court shall determine the appropriate remedy." During the hearing, the trial court warned Wild's attorney that Wild "would be very ill-advised to not make [the] payments."

¶8 Despite the trial court's warning, Wild failed to make the required deposits. Perine filed a motion for sanctions against Wild based on Wild's failure to comply with the trial court's order. The trial court did not grant Perine's motion at that time; instead, it gave Wild an additional opportunity to make the required payments. In affording Wild time to make the payments, however, the trial court once again warned Wild's attorney regarding the effects of nonpayment, stating:

> And if [Wild] shouldn't pay this, this I know this isn't fair, and if ultimately what I end up doing is striking his pleadings because he didn't comply with the order I'll feel very badly about that because I think there are very significant issues here that need to be litigated. But if [Wild] doesn't do this, Mr. Raneda [Wild's attorney], it's very likely I'm going to say: Okay, I'm done with this. He is not doing what I told him to do. I understand there may be economic realities that are influencing that to some extent, but I'm highly likely to say this is a mess.
>
> … I think I'm comfortable with saying primarily of his own making. And I'm going to say this is egregious and without justifiable excuse I'm striking his pleadings. I don't want to do that.

¶9 The trial court subsequently issued an order reflecting its rulings on the motion. On the same day that the order was issued, Wild's counsel filed a letter with the trial court advising that Wild was unable to meet the financial conditions imposed upon him. The following day, Perine filed another motion for sanctions against Wild based on Wild's continuing failure to comply with the trial court's orders.

¶10 In granting Perine's motion, the trial court found that Wild's continued refusal to comply with its orders was "egregious," "repetitive," and "without justifiable excuse." The trial court stated:

> [Wild's] view of the world is apparently that because only his view of the facts is correct that he ought to be able to live in this property, property that is presumptively Mr. Perine's without paying any rent for as long as it takes to resolve this lawsuit.
>
> Whatever I have, strengths or weaknesses are as a Judge, I do think that a sense of fundamental fairness is one of my strengths. And the assertions that that would be a fair assertion that that would be fair just is laughable in my opinion.
>
> That gets us back to the fundamental legal issue. The Plaintiff seeks sanctions and sanctions are warranted … not because I'm granting summary judgment for the Plaintiff; sanctions are warranted because Mr. Wild did not comply with a valid court order directing him in the interest of fairness to pay rent for the use of the property until we sort it out whether the presumptive ownership of Mr. Perine was or was not valid.
>
> You can't impose the sanctions that the Plaintiff seeks and that I suggested I was very seriously considering unless that noncompliant behavior is egregious and without justifiable excuse….
>
> ….
>
> But the caselaw is quite clear that egregious doesn't have to be defiant, it doesn't have to be intentional, it doesn't have to be disrespectful. It has more to do with

> behavior that is repetitive. And this is my terminology. Not the caselaw. But it's conduct that prevents a Court from fulfilling it[]s ultimate function. And part of the ultimate function is making sure that the interests of the parties are reasonably protected during the pendency of an action and in that sense it's egregious and without justifiable excuse.
>
> ….
>
> It isn't fair. It isn't fa[i]r because [Wild] can't pay it. But it also isn't fair to the presumptive owner of this property that he be living there free until hell freezes over, which appears to be when we're going to get to the merits of this case.
>
> So I'm granting the motion, Mr. Raneda. It's egregious. And it's without justifiable excuse. It's repetitive. It's clear that it's going to continue….
>
> I have cajoled. I've given him opportunity. I have done everything that I can do short of this. And you know, he isn't complying with the order.
>
> I'm granting the motion for sanctions in the form of a dismissal of his counterclaims and Third-Party complaint….

The court then entered a written order confirming its oral decision, dismissing all of Wild's counterclaims and third-party claims with prejudice.

¶11 Perine subsequently filed a renewed motion for a judgment of eviction and writ of restitution. That motion was granted based on the trial court's conclusion that once Wild's counterclaims and third-party complaint were dismissed, the disputed issues of material fact that previously precluded the trial court from entering judgment in favor of Perine no longer existed. The trial court denied Wild's request for relief pending appeal. Wild now appeals.

II. ANALYSIS.

A. Wild's claims were properly dismissed as a sanction for his conduct.

¶12 "[W]e review a [trial] court's decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion." ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. Where the trial court "examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion," we will affirm. ***Id.*** "The issue is not whether we, as an original matter, would have imposed the same sanction as the [trial] court; it is whether the [trial] court exceeded its discretion in imposing the sanction it did." ***Id.***

¶13 Trial courts have the power to impose dismissal as a sanction. *See, e.g.*, ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991), *overruled on other grounds by* ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898; *see also* WIS. STAT. § 805.03 (permitting dismissal whenever a party fails "to obey any order of [the] court"). "Because dismissal is such a harsh sanction, however, the supreme court has held that dismissal is proper only when the plaintiff has acted in bad faith or has engaged in egregious misconduct." ***Schultz***, 248 Wis. 2d 746, ¶9.

¶14 "The authority to impose sanctions is essential to the [trial] court's ability to enforce its orders and ensure prompt disposition of lawsuits." ***Johnson***, 162 Wis. 2d at 274. However, it is not warranted "unless bad faith or egregious conduct can be shown on the part of the non-complying party." ***Id.*** at 275. In addition, a trial court erroneously exercises its discretion in ordering dismissal if the aggrieved party can establish "a clear and justifiable excuse" for his or her conduct. *See* ***Trispel v. Haefer***, 89 Wis. 2d 725, 733, 279 N.W.2d 242 (1979).

Therefore, on review, "we will sustain the sanction of dismissal if there is a reasonable basis for the [trial] court's determination that the noncomplying party's conduct was egregious and there was no 'clear and justifiable excuse' for the party's noncompliance." ***Johnson***, 162 Wis. 2d at 276-77.

¶15 We noted at the outset that it is problematic that Wild does not argue in his opening brief that the trial court erroneously exercised its discretion in dismissing his claims as a sanction. As a consequence, Perine asserts that Wild forfeited "any legal challenge to the propriety of the [Trial] Court's Order dismissing his claims as a sanction, and this appeal must be affirmed on that ground alone."

¶16 In his reply brief, Wild asserts that the forfeiture argument has no merit. He relies on WIS. STAT. § 809.10(4) for the following proposition: "An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon."

¶17 Wild's argument misses the mark. It is true that we can review the sanctions order, along with all other prior nonfinal judgments, orders, and rulings. The problem for Wild is that by not making arguments related to the sanctions order in his opening brief, he is precluded from doing so now. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (despite the fact that "plaintiffs specified as objectionable that portion of the judgment dismissing with prejudice their complaint against the individual defendants[, t]hat issue has not been briefed or argued on appeal, and we deem it abandoned"); *see also* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7,

292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). This amounts to a concession by Wild that the sanctions order dismissing his counterclaim and third-party claims was appropriate.

¶18 Despite this concession by Wild, we are nevertheless convinced that if Wild had challenged the sanctions order on appeal, he would not have succeeded. It is apparent from the record that the trial court reviewed the relevant facts, which included Wild's numerous failures to comply with its orders. In doing so, the trial court applied the proper standard of law by finding that Wild's conduct was egregious and without justifiable excuse. The trial court stated that Wild's conduct prevented it from fulfilling its ultimate function, part of which was to ensure "that the interests of the parties are reasonably protected during the pendency of an action and in that sense it's egregious and without justifiable excuse." *Cf.* ***Dawson v. Goldammer***, 2006 WI App 158, ¶27, 295 Wis. 2d 728, 722 N.W.2d 106 (upholding trial court's decision to strike counterclaim where "[t]he [tenants'] conduct interfered with the court's ability to administer the case and the [landlords'] ability to defend the [tenants'] counterclaims").

¶19 The trial court reasonably concluded that it was not fair to Perine, as the presumptive owner of the property, to allow Wild to live on the property for free until the merits of the case were resolved. Accordingly, we conclude that the trial court "examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion" in dismissing Wild's counterclaims and third-party claims as a sanction. *See* ***Schultz***, 248 Wis. 2d 746, ¶8.

¶20 Because the record confirms the trial court's finding that Wild's conduct in failing to obey the court's orders was egregious and without a clear and justifiable excuse, we hold that the trial court properly exercised its discretion by dismissing Wild's claims. Consequently, Wild's right to pursue the claims he raises on appeal was extinguished due to his failure to comply with the trial court's orders.[4] As such, with the exception of his argument that he was entitled to default judgments, we do not reach the substantive grounds Wild raises on appeal. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). We are in agreement with Perine that "[i]f a party could, as Mr. Wild seeks to do here, simply ignore a sanctions order and seek to appeal from other underlying orders on summary judgment and other matters, it would nullify the sanctions and undermine the Court's authority to enforce its own orders."

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[4] The trial court's order for sanctions could be read to leave open for resolution the validity of the affirmative defenses raised by Wild in response to Perine's eviction action. The sanctions order, which makes no mention of Wild's affirmative defenses, stated, in relevant part:

> 1. The motions for sanctions are GRANTED. As a sanction for Mr. Wild's egregious failure to obey the Court's orders:
>
> > a. All of Mr. Wild's counterclaims and third-party claims, including the third-party claims alleged against newly named third-party defendants in Mr. Wild's June 2, 2008 Second Amended Answer, Affirmative Defenses, Counterclaim and Third-Party [Complaint], shall and hereby are dismissed, with prejudice.

Wild does not make this argument on appeal, and we need not develop it for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) ("[T]o decide [the] issues, we would first have to develop them. We cannot serve as both advocate and judge."). We briefly note, however, that based on our review of the record, we conclude that it was implicit in the trial court's order that all of Wild's claims—including those asserted as affirmative defenses—were dismissed. This is logical since there is significant overlap between the allegations set forth in Wild's affirmative defenses and the claims that were expressly dismissed by the sanctions order.

B. Perine, Stanke, and Miller are not entitled to costs and fees under WIS. STAT. RULE 809.25(3).

¶21 Perine, Stanke, and Miller ask us to conclude that Wild's appeals are frivolous because Wild failed to identify any error with the sanctions order. *See* WIS. STAT. RULE 809.25(3)(c)2.[5] RULE 809.25(3) specifically provides that "[a] motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief." Our supreme court, in ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621, elaborated on this requirement:

[5] WISCONSIN STAT. RULE 809.25, captioned "**Costs and fees**," reads in relevant part:

> **(3)** FRIVOLOUS APPEALS. (a) If an appeal or cross–appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section. A motion for costs, fees, and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross–appeal is filed, no later than the filing of the cross–respondent's brief. This subsection does not apply to appeals or cross−appeals under s. 809.107, 809.30, or 974.05.
>
> (b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross−appellant or the attorney representing the appellant or cross−appellant or may be assessed so that the appellant or cross−appellant and the attorney each pay a portion of the costs, fees and attorney fees.
>
> (c) In order to find an appeal or cross−appeal to be frivolous under par. (a), the court must find one or more of the following:
>
> ….
>
> 2. The party or the party's attorney knew, or should have known, that the appeal or cross−appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

> In order for parties before the court of appeals to have the proper notice and opportunity to be heard, parties wishing to raise frivolousness must do so by making a separate motion to the court, whereafter the court will give the parties and counsel a chance to be heard. *We caution that a statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue.*

(Emphasis added.) Perine, Stanke, and Miller have not filed separate motions alleging frivolousness based on Wild's failure to identify error with the sanctions order; consequently, we conclude that notice was insufficient to raise the issue.

¶22 We recognize that Perine previously requested that we impose sanctions on Wild for the filing of his first appeal. Miller joined in this request, which was based on Wild's counsel's refusal to voluntarily dismiss the first appeal as to Perine. In a prior order of this court, we concluded that we had jurisdiction over Wild's appeal as to Perine and denied Perine's motion to dismiss. However, we ordered that the request for sanctions be held in abeyance pending our consideration of the merits of the appeal.

¶23 The basis for the initial request for sanctions is separate from the basis for sanctions asserted by Perine, Stanke, and Miller in their response briefs. Therefore, the initial request cannot be relied upon to circumvent the requirement that separate motions be filed to raise frivolousness. As to the request for sanctions that was held in abeyance, we deny it at this time based on our prior conclusion, as set forth in this court's order dated April 28, 2009, that we have jurisdiction over Wild's appeal as to Perine.

C. Wild is not entitled to sanctions.

¶24 In his reply brief, Wild also seeks sanctions. His request is based on what he perceives to be "repeated, always baseless and annoying" requests for

sanctions by Perine, Stanke, and Miller, which "are clearly designed to send a chilling message to Wild and to his attorney." He further asserts that Perine's, Stanke's, and Miller's "obsession with Wild's attorney is annoying and amounts to harassment." Accordingly, he asks that we exercise our inherent authority to impose sanctions. *See* ***Aspen Servs., Inc. v. IT Corp.***, 220 Wis. 2d 491, 497, 583 N.W.2d 849 (Ct. App. 1998) ("The trial courts and the appellate courts of this state do have statutory and inherent authority to enforce civility in the courtroom.").

¶25 We decline Wild's invitation to impose sanctions. We are wholly unconvinced that the conduct he references in his brief supports the imposition of sanctions. We also take this opportunity to clarify for Wild that although we did not specify this in our April 28, 2009 order, his prior request for sanctions was denied.

D. Wild's motions for default judgments were properly denied.

¶26 We briefly address Wild's argument that the trial court should have stricken the answers filed by Perine and Stanke and should have granted his motions for default judgments against Miller, Perine, and Stanke. Based on our review of the record, we conclude the trial court properly exercised its discretion in denying Wild's motions. *See* ***Binsfeld v. Conrad***, 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851 ("A [trial] court's decision whether to grant default judgment is reviewed under an erroneous exercise of discretion standard. A discretionary decision will be affirmed if it is based on the facts of record and the appropriate law.") (citation omitted).

¶27 First, as to Perine, Wild overlooks that a default judgment is not available on a counterclaim. *See* ***Keene v. Sippel***, 2007 WI App 261, ¶18, 306 Wis. 2d 643, 743 N.W.2d 838 ("[A] defendant has no standing to move for default

judgment on a counterclaim to which a plaintiff has failed to reply."). Moreover, to the extent that Perine's answer may have been untimely by one day, the trial court properly found that the error was the result of excusable neglect.

¶28 Next, in asking that default judgment be entered against Stanke, Wild fails to address the effect that his amended third-party complaint had on his original third-party complaint. The trial court found that the operative pleading as to Stanke was the amended third-party complaint and that "there is no question but that the … responsive pleading [Stanke filed] to that amended pleading was timely." *See* ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 487, 596 N.W.2d 358 (1999) ("An amended complaint supplants the original complaint when the amended complaint makes no reference to the original complaint and incorporates by reference no part of the original complaint."). Wild does not explain how the trial court erred in this determination, and we will not develop an argument for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (appellate court "cannot serve as both advocate and judge" by developing arguments for the parties).

¶29 Lastly, as to Miller, we likewise conclude that the trial court properly denied Wild's motion for a default judgment. During the course of the proceedings in this matter, Miller filed two motions for a more definite statement, the second of which was denied by the trial court. *See* WIS. STAT. § 802.06(5). Thereafter, Miller complied with the trial court's order requiring him to file and serve a responsive pleading on or before April 28, 2008. Wild subsequently filed a motion for a default judgment against Miller based on his contention that parties are limited to one motion for a more definite statement. The trial court disagreed and denied the motion. Wild has not convinced us that the trial court's

determination in this regard amounts to an erroneous exercise of discretion. *See* ***Binsfeld***, 272 Wis. 2d 341, ¶20.

By the Court.—Order and judgment affirmed.

Not recommended for publication in the official reports.