

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2015

Diane M. Fremgen
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. 2014AP2148

Cir. Ct. No. 2013SC002721

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JOE DEBELAK PLUMBING & HEATING COMPANY, INC.

PLAINTIFF-RESPONDENT,

v.

DANIEL BISHOP, INDIVIDUALLY, AND, D/B/A OMEGA FAMILY RESTAURANT,

DEFENDANT-APPELLANT,

**KONSTANTIOS MALTEZOS, D/B/A OMEGA FAMILY RESTAURANT AND
ANASTASIOS EVRENIADIS, D/B/A OMEGA FAMILY RESTAURANT,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
PEDRO COLON, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Daniel Bishop appeals from a circuit court order denying Bishop’s motion for sanctions pursuant to WIS. STAT. § 895.044(1). Bishop argues that the circuit court erred in: (1) concluding that Joe DeBelak Plumbing & Heating Company, Inc. (“DeBelak”) did not frivolously continue this matter in violation of § 895.044; and (2) refusing to hold an evidentiary hearing on his motion. We disagree with Bishop and affirm.

BACKGROUND

¶2 For purposes of this appeal, the following facts are undisputed unless otherwise stated.

¶3 On January 18, 2013, DeBelak filed a small claims action against “Daniel Bishop, individually and d/b/a Omega Family Restaurant,”² setting forth breach of contract and unjust enrichment claims. (Uppercasing omitted.) The complaint alleged that, in September 2011, “DeBelak entered into an agreement with the Defendants whereby DeBelak would supply labor and materials to Defendants for construction projects.” DeBelak alleged that he “provided the Defendants with the aforementioned labor and materials” but that “[the] Defendants ... failed to pay DeBelak outstanding balances due under the parties[’] agreement.” DeBelak did not attach a copy of the parties’ alleged agreement to the complaint; rather, it attached three invoices from DeBelak to “Omega Family Restaurant.” (Uppercasing omitted.) The complaint did not allege that Bishop

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

² DeBelak attached an addendum to his complaint in which he named two additional defendants whom we need not discuss because their rights are not before us on appeal.

was personally involved in any agreement nor was Bishop's name included on the invoices attached to the complaint.

¶4 Bishop was served with the summons and complaint on February 16, 2013. On February 20, Bishop's attorney contacted DeBelak's attorneys by phone and advised them that the Omega Family Restaurant was owned by a corporation and that Bishop sold his interest in that corporation in 2010. Despite Bishop's attorney's assertions, DeBelak's attorneys refused to dismiss the complaint.

¶5 On February 22, 2013, Bishop served DeBelak's attorneys with a motion for sanctions pursuant to WIS. STAT. § 802.05(3).³ The motion explained that Bishop's attorney had contacted DeBelak's attorneys on February 20 and advised them that "the Omega Restaurant identified in the complaint was in fact owned by a corporation and that Daniel Bishop sold his interest in that corporation in May, 2010."

¶6 On March 14, 2013, one of DeBelak's attorneys sent a letter to Bishop's attorney, responding to the motion for sanctions. In the letter, DeBelak's attorney faulted Bishop's attorney for failing to provide DeBelak with: (1) any evidence that Omega was operating as a corporate entity when it contracted for DeBelak's services; or (2) any evidence that Bishop was not a shareholder at that time. The letter further informed Bishop that DeBelak would "proceed to move forward with obtaining judgment" against Bishop.

³ WISCONSIN STAT. § 802.05(3)(a) requires a motion for sanctions based upon a pleading to be served upon opposing counsel twenty-one days before it is filed in court to provide the opposing party with an opportunity to withdraw or correct the pleading.

¶7 On April 26, 2013, Bishop filed the motion for sanctions for commencing a frivolous action, pursuant to WIS. STAT. § 802.05(3), that he had served upon DeBelak’s attorneys on February 22. Thereafter, on April 30, the parties appeared for an evidentiary hearing that was to be held before the small claims court commissioner. As the hearing was about to begin, DeBelak’s attorney served Bishop’s attorney with a motion to compel discovery. Because of the pending motions, the court commissioner referred the case to the circuit court.⁴

¶8 The parties appeared before the circuit court that same day.⁵ The circuit court denied DeBelak’s motion to compel discovery and suggested that Bishop’s counsel file a motion to dismiss along with his motion for sanctions. The court then gave the parties dates by which to file their written submissions and adjourned the case until July 9, 2013.

¶9 On May 29, 2013, consistent with the circuit court’s directions, Bishop filed a motion for summary judgment, seeking dismissal of DeBelak’s claims against him on the grounds that Bishop never entered into an agreement with DeBelak for services and was not a shareholder with the entity operating the Omega Family Restaurant during the relevant time period. The motion also argued that the action was frivolous and that DeBelak refused to dismiss the action when Bishop asked him to do so. As such, Bishop asked the court to impose sanctions pursuant to WIS. STAT. § 895.044(1), for DeBelak’s continuation of a frivolous action. In support, Bishop attached a “Stock Purchase Agreement,”

⁴ Court Commissioner Cedric Cornwall initially presided over this action before referring it to the circuit court.

⁵ The Honorable Mary Kuhnmuensch presided over the case upon its transfer to circuit court.

showing that Bishop sold his interest in the corporation operating Omega Family Restaurant in May 2010.

¶10 On June 10, 2013, one of DeBelak's attorneys sent Bishop's attorney a proposed stipulation and order for dismissal with prejudice. Bishop's attorney responded with his own proposed stipulation and order that dismissed DeBelak's claims against Bishop, but preserved Bishop's right to pursue sanctions. DeBelak's attorneys did not sign the revised stipulation.

¶11 On July 16, 2013,⁶ following a hearing, the circuit court denied Bishop's motion for sanctions. DeBelak then moved to dismiss Bishop from the case with prejudice, and the circuit court signed an order to that effect. Bishop appealed from the court's order denying him sanctions.

¶12 On appeal, we affirmed the circuit court in part, determining that the court did not erroneously exercise its discretion when it determined that DeBelak did not frivolously *commence* the action against Bishop in violation of WIS. STAT. § 802.05(3). We based our decision on the pre-filing research DeBelak's attorneys said that they did, which we noted the circuit court was entitled to believe. That research included the following:

- Before filing the action, DeBelak's attorneys learned that their law firm had represented a seller in a sale to Bishop of an ownership interest in the corporation that used to own Omega Family Restaurant;

⁶ The July 9, 2013 hearing original set by the circuit court was rescheduled for July 16 due to a fire at the courthouse.

- Before filing the action, the lawyers did “electronic research” which revealed that the corporation operating the Omega Family Restaurant, as well as Bishop, in his individual capacity, had been named in another lawsuit one year prior to when DeBelak allegedly performed the work subject to this litigation; and
- Additional “electronic research” revealed that the corporation operating the Omega Family Restaurant had been administratively dissolved by the Wisconsin Department of Financial Institutions on March 27, 2012.

¶13 We went on to conclude that the circuit court failed to address whether DeBelak frivolously *continued* the action pursuant to WIS. STAT. § 895.044. Accordingly, we remanded the matter “for findings” on the issue of “whether DeBelak’s willingness to dismiss its action against Bishop was sufficiently tardy to bring [§] 895.044 into play.”⁷

¶14 Upon remand, the circuit court denied Bishop’s request for an evidentiary hearing, concluding that briefing would be sufficient. Following briefing by the parties, the circuit court found that DeBelak was not tardy in seeking to dismiss the proceeding in any manner that would violate WIS. STAT. § 895.044.⁸ The court primarily relied on the fact that Bishop did not file his

⁷ We also remanded this matter to have the circuit court consider whether Bishop was entitled to costs under WIS. STAT. §§ 799.25(10) & 814.04(1). The circuit court resolved that issue on remand and neither Bishop nor DeBelak appeal that portion of the circuit court’s order.

⁸ The Honorable Pedro Colon presided over the matter upon remand.

affidavit, with the attached Stock Purchase Agreement, thereby proving that he was not a shareholder, until May 29, 2013. The circuit court found that until that time DeBelak was entitled to continue the action based upon the knowledge it “had on hand.” Bishop appeals again.

DISCUSSION

¶15 Bishop raises two issues on appeal. First, he argues that the circuit court erred when it denied Bishop sanctions pursuant to WIS. STAT. § 895.044 on the grounds that DeBelak did not improperly continue a frivolous suit under the statute. Second, he argues that the circuit court erred when it failed to conduct an evidentiary hearing upon remand. We affirm on both grounds.

¶16 We first address Bishop’s argument that the circuit court erred in concluding that DeBelak did not frivolously continue this action in violation of WIS. STAT. § 895.044. As relevant here, § 895.044(1)(b) provides that a party or attorney “may be liable for costs and fees under this section for ... continuing an action” if he or she “knew, or should have known, that the action ... 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.” Our review of a circuit court’s decision regarding whether a claim has been frivolously continued creates a mixed question of law and fact. *See Storms v. Action Wisconsin, Inc.*, 2008 WI 56, ¶35, 309 Wis. 2d 704, 750 N.W.2d 739. What an attorney knew or should have known is a question of fact, and the circuit court’s findings will not be reversed unless we determine the findings of fact are clearly erroneous. *Id.* Whether the circuit court’s factual findings support a finding that an action has no basis in law or fact is a question of law that we review *de novo*. *Id.*

¶17 Here, the parties agree that DeBelak’s action against Bishop had no basis in law or fact. The question facing the circuit court upon remand was at what point DeBelak should have known that the action was meritless. Bishop contends that DeBelak “knew, or should have known” that his action against Bishop was meritless, at the very latest, in February 2013, when Bishop’s attorney contacted DeBelak’s attorneys, both informally by phone and formally by the motion for sanctions, and informed them that Omega Family Restaurant was owned by a corporation and that Bishop was not a shareholder in that corporation during the relevant time period.⁹ DeBelak notes that this court upheld the circuit court’s decision that the action was not commenced frivolously, and contends that it was entitled to continue pursuing its claims against Bishop until Bishop produced the Stock Purchase Agreement, establishing the date that he transferred his interest in the corporation.

¶18 Upon remand, the circuit court reviewed the record and the parties’ submissions, and found that DeBelak did not violate WIS. STAT. § 895.044 by continuing the action. The court primarily relied on the fact that Bishop did not provide DeBelak with *evidence* to support Bishop’s allegations that he had sold his shares in the corporation operating the Omega Family Restaurant until Bishop filed his summary judgment motion on May 29, 2013. The circuit court stated, “I can’t find that up until [that] point that the parties knew that, in fact, Mr. Bishop did not have any shares; and, in fact, had sold all of his interests in Omega Family Restaurant[.]” The circuit court concluded that DeBelak continued the action with

⁹ To the extent that Bishop continues to argue that DeBelak frivolously commenced this action, we note that we addressed that issue during Bishop’s first appeal and will not readdress it here.

what it “had on hand” and if Bishop had turned over the Stock Purchase Agreement in the first instance “that would have resolved the whole issue.”

¶19 Implicit in the circuit court’s decision is a finding that the record supports DeBelak’s assertions that its attorneys had requested proof of Bishop’s allegations that he had sold his shares in the corporation. The following record entries support the circuit court’s finding:

- An affidavit from one of DeBelak’s attorneys, filed in support of DeBelak’s motion to compel discovery, in which the attorney avers that “[o]n a number of occasions, attorneys with this firm have requested that [Bishop], through his counsel, ... provide information and documents regarding, among other things, Bishop’s (as well as his partners’) ownership interest in Omega Family Restaurant”;
- An affidavit from another one of DeBelak’s attorneys, filed in support of DeBelak’s response to Bishop’s motion for sanctions, in which DeBelak’s attorney avers that he “requested on a number of occasions that Bishop’s counsel provide evidence confirming his assertions” that “Bishop had sold his ownership interest prior to DeBelak’s work”; and
- The March 14, 2013 letter DeBelak’s attorney sent to Bishop’s attorney in which DeBelak’s attorney complains to Bishop’s attorney that

Despite our requests, your clients have not provided us with any evidence that Omega Family Restaurant was operating as a corporate entity at the time it asked DeBelak to do the work. Your clients have not provided us with any evidence

supporting their claims that they were (or are) shareholders of a corporation, or that they were no longer shareholders at the time of the agreement between the parties as they now claim. In fact, all of our inquiries to your clients regarding any information on their involvement in making the agreement with DeBelak (or, if not them, who was) has fallen on deaf ears.

¶20 Those facts are sufficient to support the circuit court's finding that DeBelak's attorneys should not have known the action against Bishop was baseless until they received the Stock Purchase Agreement, and therefore, as a matter of law, did not continue this action frivolously. We have previously concluded that the action was not commenced frivolously. DeBelak was not required to voluntarily dismiss a properly commenced action against Bishop based solely upon Bishop's attorney's word that Bishop had sold his shares in the corporation. While Bishop's attorney's phone call and motion for sanctions may have put DeBelak on notice that Bishop was not a properly named party, Bishop has not alleged what else DeBelak could have done to conclusively determine that Bishop had sold his shares in the corporation, short of asking Bishop to provide documentation to support his assertion. In fact, as we noted when this case first came to us on appeal, DeBelak's attorney filed an affidavit in June 2013, in which the attorney averred that "Bishop's sale of his ownership interest in the restaurant in 2010, was a private sale. Any information regarding the sale was not available to the public and not readily ascertainable without conducting discovery within the context of litigation." Bishop has not challenged this finding of fact. As such, we affirm.

¶21 We also conclude that the circuit court did not erroneously exercise its discretion when it denied Bishop's request for an evidentiary hearing. Our decision in Bishop's first appeal directed the circuit court on remand to make "findings" on the issue of "whether DeBelak's willingness to dismiss its action

against Bishop was sufficiently tardy to bring [§] 895.044 into play.” The manner in which the circuit court executed that directive was within its discretion, as part of the court’s inherent authority to handle its calendar and to determine how best to address individual issues reflected in individual cases. *See Rupert v. Home Mut. Ins. Co.*, 138 Wis. 2d 1, 7, 405 N.W.2d 661 (Ct. App. 1987). In short, the circuit court followed our directions to make “findings,” made a properly supported legal finding that the continuance was not frivolous, and did not erroneously exercise its discretion in doing so.

By the Court.—Order affirmed.

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

