COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1079 **Cir. Ct. No. 2006CV161**

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

ANDREW H. SELENSKE,

PLAINTIFF-APPELLANT,

V.

RICHARD P. SELENSKE, RNS FARMS LLC AND PETER SELENSKE FARMS, INC.,

DEFENDANTS-RESPONDENTS,

JPR FARMS, LLC, BLACK-JACK RENTALS, LLC AND ICE AGE TRAIL ALLIANCE, INC.,

APPELLATE-INTERVENORS-RESPONDENTS.

APPEAL from an order of the circuit court for Langlade County: ROBERT R. RUSSELL, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Andrew Selenske obtained a money judgment against RnS Farms LLC and Peter Selenske Farms, Inc. Andrew[1] subsequently attempted to enforce that judgment by execution against real property owned by JPR Farms, LLC, Black-Jack Rentals, LLC, and Ice Age Trail Alliance, Inc. (collectively, the Owners). The circuit court concluded that, despite Andrew's previously filed lis pendens, Andrew could not execute against the Owners' property because that property was not owned by the judgment debtors on the date the judgment was entered or at anytime thereafter. We agree and affirm.

BACKGROUND

¶2 Andrew alleges that, in 1984, he "expressly or impliedly" formed a general partnership to conduct a farming business in Langlade County with his mother, Louise Selenske; his brother, Richard Selenske; and Peter Selenske Farms. According to Andrew, he contributed a vehicle, money, corn, and other property to the business, and the other partners contributed real estate and personal property. Andrew further asserts he "expended substantial time and effort into the farm," which caused its value to increase.

¶3 As of 2003, Louise was the sole owner of Peter Selenske Farms, which owned the real property where the farm was located. *See* ***Selenske v. Estate of Selenske***, Nos. 2012AP644, 2012AP1093, 2012AP1829, unpublished slip op. ¶3 (WI App June 18, 2013). Louise also owned other parcels of non-farm real estate. ***Id.*** In 2003 and 2004, Louise conveyed both the farm and non-farm real estate to Richard, along with her stock in Peter Selenske Farms. Richard then

[1] Because this appeal involves multiple individuals with the last name Selenske, we refer to them by their first names.

transferred title to the real property to RnS Farms, an entity that was owned by Richard's fifteen-year-old son but managed by Richard. ***Id.***, ¶4.

¶4 In 2006, a guardianship was established for Louise, and her guardian commenced a lawsuit seeking to set aside the 2003 and 2004 transfers based on undue influence. ***Id.***, ¶6. After Louise's death in January 2007, the claim was continued by her sons, William and Robert, who were appointed special administrators for her estate. ***Id.***, ¶6 n.2. A jury ultimately found that the transfers to Richard were the result of undue influence. As a result, a judgment was entered on August 25, 2008, declaring the transfers void and restoring title to both the real property and the stock to Louise's estate.

¶5 Meanwhile, on August 9, 2006, Andrew filed the instant lawsuit against Richard, Louise, Peter Selenske Farms, RnS Farms, and Melinda Olsen, the guardian of Louise's estate, asserting claims for dissolution of partnership and unjust enrichment. Andrew filed a lis pendens on the real property the same day. Following Louise's death, Andrew voluntarily dismissed Louise and Olsen as defendants. The circuit court later granted Andrew summary judgment and, in June 2009, entered a judgment in the amount of $479,004.97 against Richard, RnS Farms, and Peter Selenske Farms.

¶6 Richard and RnS Farms subsequently moved to vacate the June 2009 judgment. The circuit court granted that motion on February 12, 2010, and the case was reopened. Andrew then filed an amended summons and complaint, which named as defendants Richard, Louise, Olsen, Louise's estate, RnS Farms, and Peter Selenske Farms, and which again asserted claims for dissolution of partnership and unjust enrichment. In September 2012, Andrew's claims against Louise, her estate, and Peter Selenske Farms were dismissed with prejudice.

¶7 Two years later, in September 2014, Andrew moved the circuit court to reinstate the previously vacated June 2009 judgment. The court granted that motion at a hearing on April 1, 2015, after Richard indicated he did not oppose it. Later that month, the court entered a written order stating, in relevant part:

> The judgment granted by this Court on June 10, 2009, is hereby reinstated. The plaintiff shall have and recover from the defendants, RnS Farms LLC and Peter Selenske Farms Inc the sum of Four Hundred Seventy Nine Thousand Four Dollars and Eight[y] Seven Cents ($479,004.87). It is noted that defendant, Richard P. Selenske, is currently in bankruptcy and this order does not reinstate the judgment as to him.

¶8 While the instant case was pending, Louise's estate sold real property to the Owners in September 2011 and December 2014. After the June 2009 judgment was reinstated, Andrew sought to enforce the judgment by executing against the Owners' property. However, the Langlade County sheriff refused to execute against the Owners' property without a court order.

¶9 Andrew therefore filed a motion in the circuit court to "enforce execution against property." The court denied Andrew's motion, reasoning that "to execute on the real property in this case, a showing has to be made that the real property is owned by the debtor." Based on the evidence before it, the court found "that the debtors do not own the subject property; and therefore, an execution … is not proper." The court rejected Andrew's argument that he could execute against the Owners' property based solely on the lis pendens he filed in May 2006. Andrew now appeals.

DISCUSSION

¶10 Neither Andrew nor the Owners address the applicable standard of review. When reviewing a circuit court's rulings, we accept the court's factual

findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2015-16).[2] However, the application of those facts to a statute or legal standard is a question of law that we review independently. ***County of Sawyer Zoning Bd. v. DWD***, 231 Wis. 2d 534, 538, 605 N.W.2d 627 (Ct. App. 1999).

¶11 Andrew argues the circuit court erred by denying his motion to enforce execution because the lis pendens he filed in 2006 remains attached to the Owners' property. He asserts the Owners are "subsequent purchasers in accordance with WIS. STAT. [§] 840.10(1)(a)" and are therefore "bound by the proceedings in [this] action to the same extent and in the same manner as if they were parties. In other words, they purchased the property subject to the [l]is [p]endens and are bound by the resolution of the case to which it relates."

¶12 Andrew's argument reveals a fundamental misunderstanding of real property law and the law governing the enforcement of judgments. WISCONSIN STAT. § 815.02 provides that a money judgment, like the one at issue in this case, may be enforced by execution. WISCONSIN STAT. § 815.03, in turn, permits three forms of execution: execution against the judgment debtor's property; execution against the person of the judgment debtor; and execution to compel delivery of property. *See also* ROBERT A. PASCH, 12 WISCONSIN PRACTICE SERIES, WISCONSIN COLLECTION LAW § 14.2 (2d ed. 2006). Here, only the first method is relevant: Andrew is attempting to enforce the June 2009 judgment by execution against real property. However, the circuit court concluded he could not do so

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

because the property in question was not owned by the judgment debtors. We agree with that conclusion.

¶13 Pursuant to WIS. STAT. § 815.05(1s):

> If the execution is against the property of the judgment debtor, the execution shall require the officer to whom it is directed to satisfy the judgment out of the personal property of the debtor, and if sufficient personal property cannot be found, *out of the real property belonging to the judgment debtor on the day when the judgment was entered in the judgment and lien docket in the county or at any time thereafter*.

(Emphasis added.) As explained above, Louise transferred the property at issue in this case to Richard in 2003 and 2004, and Richard subsequently transferred it to RnS Farms. However, those transfers were declared void on August 25, 2008, and title to the property was restored to Louise's estate. The money judgment in the instant case against RnS Farms and Peter Selenske Farms was not entered until June 10, 2009. Accordingly, at the time the judgment was entered, the relevant property was owned by Louise's estate, not by either judgment debtor.[3] Moreover, there is no evidence in the record that RnS Farms or Peter Selenske Farms owned the property at any time thereafter. As a result, § 815.05(1s) does

[3] The record reflects that Andrew's claims against Peter Selenske Farms were dismissed with prejudice in September 2012, before the June 2009 judgment was reinstated. Nevertheless, when the circuit court reinstated the June 2009 judgment, it expressly stated that judgment was reinstated with respect to both RnS Farms and Peter Selenske Farms. Neither Andrew nor the Owners explain this discrepancy. In any event, it is not material to our resolution of this appeal.

not permit Andrew to enforce the June 2009 judgment by execution against the property.[4]

¶14 In response to the Owners' argument regarding WIS. STAT. § 815.05(1s), Andrew observes that subsection begins with the words, "*If* the execution is against the property of the judgment debtor …." (Emphasis added.) Based on this language, Andrew argues the statute "[c]learly … contemplates a situation where the execution is against property which is not the property of the judgment debtor." We disagree. As noted above, Wisconsin law permits three different methods of execution: execution against the judgment debtor's property; execution against the person of the judgment debtor; and execution to compel delivery of property. *See* WIS. STAT. § 815.03; PASCH, *supra*, § 14.2. The use of the word "if" at the beginning of § 815.05(1s) merely reflects the fact that the method of execution discussed in that subsection—execution against the judgment debtor's property—is only one of three permissible methods. Andrew's reading of § 815.05(1s)—namely, that it implies a judgment creditor can execute against real property not owned by the judgment debtor—is therefore unreasonable.

¶15 Andrew's argument that the lis pendens he filed in May 2006 permits execution against the Owners' property is similarly unavailing. A lis pendens is not a lien capable of execution. *See* ***Kensington Dev. Corp. v.***

[4] In addition, the Owners assert that neither WIS. STAT. § 815.05(2) nor (3) permits Andrew to execute against the Owners' property. As with § 815.05(1s), the Owners argue Andrew cannot rely on § 815.05(2) because the judgment debtors did not own the property in question at the relevant time. The Owners argue § 815.05(3) is inapplicable because this case does not involve an attempt to execute "upon a judgment to enforce a lien upon specific property." Andrew fails to respond to the Owners' arguments regarding § 815.05(2) and (3), and we therefore deem them conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Israel, 142 Wis. 2d 894, 904, 419 N.W.2d 241 (1988) ("The sole purpose of a lis pendens is to give constructive notice to third parties of pending judicial proceedings involving real estate. The lis pendens does not create or serve as a lien on real property."). Accordingly, a lis pendens does not provide a basis for execution under WIS. STAT. § 815.05(3). Moreover, Andrew cites no law supporting the proposition that the filing of a lis pendens creates an exception to the requirement in WIS. STAT. § 815.05(1s) that execution must be against property that was owned by the judgment debtor at the time judgment was entered or thereafter. While Louise owned the property in question at the time the lis pendens was filed, Andrew's claims against Louise and her estate were subsequently dismissed, and he never obtained a judgment against those parties.

¶16 Andrew emphasizes that, once a lis pendens is filed, subsequent purchasers of property are bound by the proceedings in an action where relief is demanded affecting the property to the same extent and in the same manner is if they were parties. *See* WIS. STAT. § 840.10(1)(a). While that is a correct statement of the law, Andrew does not explain why it permits him to execute against the Owners' property under the factual circumstances of this case. By virtue of the lis pendens, the Owners are bound by the outcome of this lawsuit only to the extent Louise's estate is bound. *See* ***Gaugert v. Duve***, 2001 WI 83, ¶18, 244 Wis. 2d 691, 628 N.W.2d 861 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 44 (AM. LAW INST. 1982)). Because Andrew's claims against the estate have been dismissed, neither the estate nor the Owners are bound by the June 2009 judgment.

¶17 Finally, Andrew argues that "the failure of the Estate of Louise Selenske to intervene when specifically granted permission by the [circuit court] to do so … constitutes a waiver of this issue on the part of the Estate of Louise

Selenske." However, Louise's estate does not own the property against which Andrew seeks to execute. Andrew's claims against the estate have been dismissed, and the estate is not a party to this appeal. The sole issue on appeal is whether Andrew can execute against *the Owners'* property. Andrew does not argue the Owners waived their right to oppose the execution, and in fact, the Owners could not be viewed as having waived that right as they participated in the circuit court proceedings and successfully moved to intervene in this appeal over Andrew's objection. Moreover, it is well-settled the estate could not waive the Owners' right to object to execution against their property. *See* ***Honeycrest Farms, Inc. v. Brave Harvestore Sys., Inc.***, 200 Wis. 2d 256, 267, 546 N.W.2d 192 (Ct. App. 1996) ("[O]ne party cannot waive the rights of another."). Andrew's waiver argument therefore lacks merit.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.