

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2007

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 No. 2006AP2148

Cir. Ct. No. 2006SC11347

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STEPHEN E. LEE,

PLAINTIFF-APPELLANT,

v.

LEGACY BANK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL G. MALMSTADT and MICHAEL B. BRENNAN, Judges.¹ *Affirmed,
motion granted, and cause remanded.*

¹ The dismissal was ordered by the Honorable Michael G. Malmstadt. The written order was signed by the Honorable Michael B. Brennan on behalf of Judge Malmstadt.

¶1 FINE, J. Stephen E. Lee, *pro se*, appeals the dismissal of his small-claims complaint against Legacy Bank. Legacy Bank seeks frivolous-appeal costs and fees under WIS. STAT. RULE 809.25(3).

¶2 This appeal was here before, when we determined that Legacy Bank needed to file a responsive brief even though it did not want to. *See Lee v. Legacy Bank*, No. 2006AP2148, 2007 WL 259840, at *1 (Ct. App. Jan. 30, 2007) (unpublished). Accordingly, we entered the following order:

It Is Hereby Ordered that Legacy Bank shall file a respondent's brief on this appeal that fully complies with WIS. STAT. RULE 809.19, and, in conformity with RULE 809.19(3)(a)1a, the brief shall be filed within thirty days of the issuance of this order. Lee will then have fifteen days to file a reply brief or a letter that he will not file a brief. *See* RULE 809.19(4).

Lee, 2007 WL 259840, at *1. Legacy Bank has, appropriately, filed its respondent's brief comprehensively setting out the issues it deems material to this appeal. Lee has not filed a reply brief or a letter saying that he will not file a reply brief.

¶3 We affirm the circuit court's order dismissing Lee's complaint, and, on Legacy Bank's motion, hold that Lee's appeal is frivolous under WIS. STAT. RULE 809.25(3). Accordingly, we remand to the circuit court for a determination of frivolous-appeal costs and fees. *See Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980) (court of appeals may not find facts); *Tracy v. Wisconsin Dep't of Revenue*, 133 Wis. 2d 151, 163–164, 394 N.W.2d 756, 761 (Ct. App. 1986).

I.

¶4 Lee sued Legacy Bank and Midland Credit Management, Inc., in small-claims court, alleging that Legacy Bank paid checks drawn on Lee's account with Legacy Bank that were fraudulently submitted to Legacy Bank by Midland. In the beginning of April, 2006, Lee and Midland settled Lee's claims against Midland, in return for Midland paying Lee \$500. The settlement agreement recited that it was not a release of Lee's claims against Legacy Bank. Midland is not involved in this appeal.

¶5 Legacy Bank and Lee appeared before the circuit court on July 19, 2006, on the bank's motion to dismiss Lee's complaint. The circuit court asked Lee about his complaint against the bank:

THE COURT: Sir, in reading the Complaint you filed I don't see how Legacy Bank is responsible for anything here.

I mean, your Complaint says that this -- this other agency, Midland Credit, fraudulently wrote checks and drafts on your account at Legacy Bank.

MR. LEE: Um-- um-- that's correct. And I then went to the bank to tell them that I didn't authorize demands [*sic*] drafts. What they were doing was submitting demands [*sic*] drafts to my checking account without authorization.

THE COURT: Yeah.

MR. LEE: I went to the bank to notify them that I didn't authorize that and they should stop charging me \$5.00 a day overdraft and stop paying the demand draft. And they didn't do nothing about it. They kept accepting demands [*sic*] draft [*sic*] and charging me \$5.00 a day overdraft fee and it ran up to \$363 until they finally stopped it, before they finally stopped.

....

THE COURT: Did you pay 360 some dollars?

MR. LEE: No. They didn't try to collect the -- The statement they sent me --

THE COURT: Sir, tell me what you're out?

MR. LEE: I'm not out nothing.

THE COURT: Okay. That's why you don't have a lawsuit. If you're not out nothing [*sic*] you don't sue people for nothing.

Lee then told the circuit court that he believed he was injured because, in his view, Legacy Bank violated the Uniform Commercial Code. He did not, however, point to any damages that he suffered.

¶6 The circuit court dismissed Lee's complaint, and did not rule on that aspect of Legacy Bank's motion that also sought dismissal because Lee lacked standing to sue in light of his having sought bankruptcy protection.

II.

A. *The dismissal.*

¶7 A complaint "should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660, 664 (1979) (quoted source omitted). We review *de novo* the circuit court's decision to dismiss a complaint for failure to state a claim. *Heinritz v. Lawrence Univ.*, 194 Wis. 2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). Where a circuit court considers matters outside of the complaint, the motion to dismiss may be treated as a motion for summary judgment. *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶2, 296 Wis. 2d 273, 277, 722 N.W.2d 633, 635–636. Our review of summary-judgment determinations is also *de novo*. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material

fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

¶8 The *sine qua non* of a complaint seeking damages is *damage*. See WIS. STAT. RULE 802.02(1)(a) (complaint must “show[] that the pleader is entitled to relief”). Lee admitted that he had no damages. As the circuit court ruled, that ends the matter. Accordingly, we affirm and, like the circuit court, we do not address the lack-of-standing issue. See **Gross v. Hoffman**, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

B. *Frivolous appeal costs.*

¶9 WISCONSIN STAT. RULE 809.25(3)(a) provides: “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.” An appeal is frivolous if: “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.” RULE 809.25(3)(c)2. Frivolous-appeal costs may be assessed against *pro se* appellants. See **Waushara County v. Graf**, 166 Wis. 2d 442, 451–452, 480 N.W.2d 16, 20 (1992) (*Pro se* appellants who are not prisoners “must satisfy all procedural requirements, unless those requirements are waived by the court. They are bound by the same rules that apply to attorneys on appeal. The right to self-representation is ‘[not] a license not to comply with relevant rules of procedural and substantive law.’”) (quoted source omitted); **Holz v. Busy Bees Contracting, Inc.**, 223 Wis. 2d 598, 609–610, 589 N.W.2d 633, 638 (Ct. App. 1998) (*pro se* appeal frivolous).

¶10 As Legacy Bank points out, Lee has been a prolific appellate litigator. Moreover, he does not explain how a complaint that seeks dollar damages from Legacy Bank can be viable once he admits that he has suffered no monetary loss. Further, he has neither filed a reply brief, as our order permitted him to do, nor a response to Legacy Bank’s motion for frivolous-appeal costs. Accordingly, the matters that he has not controverted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matters not refuted deemed admitted). Lee’s appeal is frivolous under WIS. STAT. RULE 809.25(3)(c)2 because his appellate contention that the circuit court erred by dismissing his claim for damages when he admitted that he had no damages cannot “be supported by a good faith argument for an extension, modification or reversal of existing law.”

III.

¶11 We affirm the circuit court’s dismissal of Lee’s complaint against Legacy Bank, find that Lee’s appeal is frivolous, and remand to the circuit court for a determination of proper frivolous-appeal costs and fees.

By the Court.—Order affirmed, motion granted, and cause remanded.

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

