COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP757 **Cir. Ct. No. 2006CV3023**

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

RICHARD J. CLAPPER,

PLAINTIFF-RESPONDENT,

HARRY J. ANDRUSS AND KAY LEICHT,

PLAINTIFFS,

V.

JOHN AHLF,

DEFENDANT-APPELLANT,

UBS GROUP, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. John Ahlf appeals an order which denied his motion for reconsideration of a prior order granting summary judgment in favor of Richard Clapper, Harry Andruss, and Kay Leicht on a series of claims relating to business franchise agreements entered into by the parties.[1] We conclude that our jurisdiction over the order is limited to the sole new issue which was raised in the reconsideration motion—namely, whether Ahlf was entitled to any offsets against the judgment. We further conclude that the circuit court properly denied that requested relief. Accordingly, we affirm.

BACKGROUND

¶2 Clapper, Andruss, and Leicht filed suit against Ahlf and UBS Group in September 2006, seeking to rescind certain business contracts based upon alleged violations of Wisconsin franchise law, and to collect damages for the alleged violations as well as for misrepresentation claims. The plaintiffs alleged that any arbitration and choice of law clauses in the contracts were unenforceable because the contracts were themselves void.

¶3 The plaintiffs eventually moved for summary judgment based upon the defendants' failure to respond to the plaintiffs' request for admissions. The requested admissions included various statements that Ahlf had made misrepresentations to the plaintiffs for the purpose of inducing them to purchase franchise business opportunities, that he represented to the plaintiffs that the

[1] Although counsel has submitted a brief which purports to also represent UBS Group, Inc., UBS Group did not file a separate notice of appeal, and is therefore not a party to this appeal.

franchises which he sold them were not required to be registered under Wisconsin law, and that the violations entitled the plaintiffs to rescind the contracts. Ahlf appeared on his own behalf at the motion hearing by telephone and claimed that his failure to respond was the fault of his attorney, who had since withdrawn. Ahlf also objected to being held to account for what he characterized as "something [his] employer did." The court noted that Ahlf had ample time to retain successor counsel, and that the pro se response Ahlf eventually submitted in response to the plaintiffs' discovery requests was inadequate because, in addition to being untimely, it did not comply with statutory requirements such as being signed and notarized. Accordingly, the court deemed the facts set forth in the plaintiff's request for admissions to be admitted.

¶4 Based on the admissions, the circuit court issued a summary judgment decision on November 26, 2007, which stated in relevant part:

> IT IS ORDERED, ADJUDGED AND DECREED:
>
> On Claims 1-4, [t]hat judgment is entered in favor of plaintiffs against defendants John Ahlf and UBS Group, Inc., jointly and severally, in the amount of $60,029.13, plus taxable costs and disbursements in the amount of $874.53, for a total judgment amount of $60,903.66. Claims 5 [and] 6 are dismissed.

On December 20, 2007, Ahlf filed a motion for reconsideration claiming: (1) he was not liable because he was merely an employee of UBS Group; (2) he was not granted sufficient time to retain successor counsel; (3) there was insufficient evidence produced to establish fraud; (4) the contracts were governed by the laws of Iowa; (5) the contracts required arbitration; (6) the contracts were between the plaintiffs and UBS Group, and Ahlf had not signed them; and (7) the plaintiffs had themselves committed fraud and UBS Group would be filing suit against them for loss of funds, slander, tortious acts, and interference with a contract. The circuit

court denied the reconsideration motion on February 4, 2008, and Ahlf filed a notice of appeal from that decision on March 21, 2008. Upon reviewing the record, this court questioned the scope of our jurisdiction in this matter and asked the parties to address the timeliness of the notice of appeal as a threshold matter in their briefs.

DISCUSSION

¶5 The filing of a timely notice of appeal is necessary to give this court jurisdiction over an appeal from a final judgment or order. WIS. STAT. RULE 809.10(1)(e) and (4) (2007-08).[2] In a civil action such as this one, where no notice of entry of judgment was filed, the time to appeal is ninety days from the entry of a final judgment or order. WIS. STAT. § 808.04(1).

¶6 A judgment or order is final when it disposes of the entire matter in litigation as to one or more of the parties. WIS. STAT. § 808.03(1). "A court disposes of the entire matter in litigation in one of two ways: (1) by explicitly dismissing the entire matter in litigation as to one or more parties or (2) by explicitly adjudging the entire matter in litigation as to one or more parties." ***Tyler v. Riverbank***, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. Thus, a memorandum opinion which decides outstanding issues but does not explicitly dismiss one or more of the parties or grant judgment in a party's favor is not final and appealable. ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶39, 299 Wis. 2d 723, 728 N.W.2d 670. Moreover, from September 1, 2007 forward, the final document must have "'a statement on the face of [it] that it is final for the purpose

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of appeal. Absent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal.'" ***Tyler***, 299 Wis. 2d 751, ¶25.

¶7 A motion for reconsideration does not affect the time to appeal a final order unless it follows a trial to the court or other evidentiary hearing. *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 535, 499 N.W.2d 282 (Ct. App. 1993). We have jurisdiction to review an order denying reconsideration when the motion for reconsideration raised issues separate from those which had been determined in the order from which reconsideration was sought. *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988); *cf.* WIS. STAT. § 805.17(3) (which provides a mechanism for motions for reconsideration following a trial to the court). Such jurisdiction is limited, however, to reviewing only the new issues presented on reconsideration. ***Harris v. Reivitz***, 142 Wis. 2d 82, 86-89, 417 N.W.2d 50 (Ct. App. 1987).

¶8 Here, there is no dispute that Ahlf filed his notice of appeal more than 90 days after the initial summary judgment decision on November 26, 2007, but within 90 days after the order denying reconsideration on February 4, 2008. Ahlf first argues that his appeal was timely because the order denying reconsideration was the only final and appealable document in the record. He points out that the summary judgment did not contain the mandatory finality language required by ***Wambolt***. We agree that the summary judgment was defective in that regard. Nonetheless, we are satisfied that the summary judgment unambiguously disposed of all pending claims by granting judgment in the plaintiffs' favor on claims 1 through 4 and dismissing claims 5 and 6. In other words, the judgment did not merely decide issues; it explicitly disposed of the entire matter in litigation. Therefore, it was a final and appealable document and

Ahlf's time to appeal began to run upon its entry. Because Ahlf did not file his notice of appeal within 90 days after the summary judgment, we do not have jurisdiction to consider any issues which had already been determined by that judgment.

¶9 Ahlf concedes that he had raised the issues of his limited liability as an employee; the sufficiency of his time to find counsel; and the necessity of arbitration prior to the entry of summary judgment. He maintains that his arguments regarding the sufficiency of the evidence to establish fraud on his part; the applicability of Iowa law; whether he was an actual party to the contracts; and his right to an offset against the damage award based on alleged misconduct by the plaintiffs all presented new issues. However, the admissions Ahlf made by default included the facts that Ahlf offered franchise opportunities for sale; that he made false and misleading statements to the plaintiffs which induced them to purchase the franchise opportunities; that he failed to register the franchise opportunities as required by Wisconsin law; and that his violation of Wisconsin franchise law entitled the plaintiffs to rescind their contracts. We therefore agree with the plaintiffs that the summary judgment decision necessarily decided that there was sufficient evidence to establish that Ahlf committed fraud and was a party to the contracts. The summary judgment decision also granted the plaintiffs judgment on their 4th claim that the choice of law provision was unenforceable since the contracts were rescinded, thus plainly deciding that issue as well.

¶10 In sum, Ahlf's arguments that the circuit court erroneously exercised its discretion in accepting the admissions that established his fraud and his participation in the contracts, and that the court failed to explain why it was applying Wisconsin law, boil down to contentions that those issues were *wrongly* decided, not that they were left *undecided* by the summary judgment. Those were

all issues that could have been raised in a timely appeal from the summary judgment decision without first filing a separate motion for reconsideration. Therefore, we have no jurisdiction to consider them at this time.

¶11 That leaves only Ahlf's claim that he was entitled to some sort of offset against the damage award based upon alleged misconduct by the plaintiffs. The plaintiffs argue that Ahlf *could have* raised his claim for an offset at the summary judgment hearing. We take that as an implicit concession that the issue had not been raised prior to the motion for reconsideration. We will therefore treat the question of an offset as a new issue and will accept jurisdiction over the order denying reconsideration for the limited purpose of reviewing that issue.

¶12 Ahlf made conclusory allegations in his motion for reconsideration that UBS Group had proof in its possession that the plaintiffs had themselves committed fraud, slander, interference with a contract, and other tortious acts. Ahlf did not specify any facts upon which those allegations were based, or provide the court with any legal authority which would allow him to recover an offset based upon his allegations. Nor did Ahlf file a counterclaim in the action setting forth the nature of this claim. Further, Ahlf has not developed any such argument on the present appeal. We therefore conclude that the circuit court properly determined that Ahlf had failed to present adequate grounds for reconsideration.

¶13 Finally, the plaintiffs move to impose double costs, additional interest and attorney fees against Ahlf on the grounds that the appeal was taken for the purposes of delay and had no reasonable basis in law. We do not agree that the appeal was without any reasonable basis in law, however, given the omission of the finality language from the summary judgment decision. If we had agreed with Ahlf's contention that the judgment was ambiguous with regard to disposing of the

entire matter in litigation and thus deemed it nonfinal, we would have proceeded to consider several other issues which would appear to have had at least arguable merit. We also cannot conclude that the appeal was taken solely for the purpose of delay when Ahlf obviously believed, even if mistakenly, that he could raise issues decided by the summary judgment in an appeal from an order denying reconsideration. We therefore deny the motion for double costs, additional interest and attorney fees.

By the Court.—Order affirmed.

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