COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP2989
2009AP856

Cir. Ct. No. 2007FJ1

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

ORLANDO RESIDENCE LTD,

PLAINTIFF-RESPONDENT,

V.

KENNETH E. NELSON, NASHVILLE LODGING COMPANY AND SUSAN NELSON,

DEFENDANTS-APPELLANTS,

NASHVILLE RESIDENCE CORPORATION,

DEFENDANT,

ROBERT W. BAIRD & CO., INC. AND U.S. BANK NATIONAL ASSOCIATION,

GARNISHEES.

APPEALS from a judgment and an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed*.

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

¶1 LUNDSTEN, J. These cases arise from Orlando Residence's efforts to collect on a Tennessee judgment against Kenneth Nelson. As part of those efforts, Orlando Residence obtained a judgment in Wisconsin based on the Tennessee judgment. Kenneth and his wife, Susan Nelson, appeal the Wisconsin judgment along with an order denying relief from the judgment. The Nelsons argue that the Tennessee judgment is not entitled to full faith and credit, that the Wisconsin judgment should be modified because it is based on an incorrect interest calculation, that laches bars Orlando Residence from reaching Susan's separate property, and that assets titled in Susan's name are her separate property. We affirm the judgment and order.

Background

¶2 To quote the Nelsons' brief, the Tennessee judgment "was the culmination of more than 21 years of litigation in Tennessee federal and state courts including four appellate decisions." The most recent of those appeals became final in December 2006. *See* ***Orlando Residence, Ltd. v. Nashville Lodging Co.***, 213 S.W.3d 855, 857-61 (Tenn. Ct. App. 2006), *reh'g denied* (Aug. 1, 2006), *permission to appeal denied* (Tenn. Dec. 27, 2006).

¶3 Shortly thereafter, Orlando Residence filed the Tennessee judgment in Wisconsin in an effort to reach the Nelsons' assets. The Nelsons have lived in Wisconsin since 1990.

¶4 After conducting supplementary proceedings, the circuit court determined that the amount owed on the Tennessee judgment, including interest, is $1,218,512.40. The court also determined that assets titled to Susan were not her separate property and were, therefore, available to satisfy the judgment.

Discussion

A. Full Faith And Credit

¶5 The Nelsons argue that the Tennessee judgment is not entitled to full faith and credit because it was obtained without due process. The Nelsons rely on cases in which a court has refused to give a foreign judgment full faith and credit or comity after concluding that the judgment was obtained without due process. *See* ***Griffin v. Griffin***, 327 U.S. 220, 227-29 (1946); ***Starr v. George***, 175 P.3d 50, 55-58 (Alaska 2008); ***State ex rel. Eaglin v. Vestal***, 719 P.2d 163, 165-66 (Wash. Ct. App. 1986); ***R.R. Gable, Inc. v. Burrows***, 649 P.2d 177, 179-80 (Wash. Ct. App. 1982).

¶6 In none of the cited cases, however, is there any indication that the alleged due process violation had already been litigated in the foreign forum. Here, in contrast, the Nelsons have raised and litigated the fairness of the procedures in question in the Tennessee forum. *See* ***Orlando Residence***, 213 S.W.3d at 861, 864-65. The Nelsons cite no authority establishing that they are entitled to re-litigate issues already litigated in another forum simply because those issues relate to due process. Accordingly, we agree with the circuit court that the Tennessee judgment is entitled to full faith and credit.

B. Interest Calculation

¶7 During the course of the supplementary proceedings, Orlando Residence submitted an exhibit showing that the total amount due on the Tennessee judgment, including interest, is $1,218,512.40. The Nelsons stipulated to the exhibit and, so far as we can discern, never argued during the supplementary proceedings that the exhibit was inaccurate. The circuit court relied on the amount in the exhibit when it entered judgment against the Nelsons.

¶8 The Nelsons moved for relief from the circuit court's judgment under WIS. STAT. § 806.07.[1] They asked the circuit court to modify the judgment because Orlando Residence incorrectly calculated interest under Tennessee law. The circuit court denied the motion, concluding that relief under § 806.07 was not appropriate.

¶9 The Nelsons do not dispute that they failed to make a timely objection to Orlando Residence's exhibit. Thus, we agree with Orlando Residence that the Nelsons forfeited the right to direct review of whether interest was calculated incorrectly. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (objection not made in the circuit court is waived).

¶10 The question remains, however, whether the circuit court should have granted relief under WIS. STAT. § 806.07. The purpose of § 806.07 is to "'achieve a balance between fairness in the resolution of disputes and the policy favoring the finality of judgments. The statute … authoriz[es] a circuit court to

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

vacate judgments on various equitable grounds.'" ***Franke v. Franke***, 2004 WI 8, ¶20, 268 Wis. 2d 360, 674 N.W.2d 832 (citation omitted). A grant or denial of relief under § 806.07 is a matter for the circuit court's discretion. ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, ¶5, 305 Wis. 2d 400, 740 N.W.2d 888.

¶11 The Nelsons argue that Orlando Residence, in its exhibit, intentionally misrepresented the amount of interest due, and that relief is therefore justified under WIS. STAT. § 806.07(1)(c).[2] This argument fails because the Nelsons point to no facts establishing that Orlando Residence engaged in intentional misrepresentation.

¶12 Alternatively, the Nelsons characterize Orlando Residence's exhibit as a "mistake," thus warranting relief under WIS. STAT. § 806.07(1)(a).[3] They argue that the equities tilt in their favor given that the alleged mistake resulted in a difference of hundreds of thousands of dollars in interest. The Nelsons assert that Orlando Residence should not receive such a substantial windfall at the Nelsons' expense based on Orlando Residence's own error.[4] The circuit court, however, could have reasonably determined that, if there was a large mistake, that was all

[2] WISCONSIN STAT. § 806.07(1)(c) refers to "[f]raud, misrepresentation, or other misconduct of an adverse party."

[3] WISCONSIN STAT. § 806.07(1)(a) refers to "[m]istake, inadvertence, surprise, or excusable neglect."

[4] The Nelsons assert that the correct total, including interest, is $342,082.01, not $1,218,512.40. Orlando Residence does not concede that the $1,218,512.40 calculation is incorrect, and, for reasons that the Nelsons fail to explain with sufficient clarity, $342,082.01 represents a far smaller sum than the principal amount of $797,615 listed in the Tennessee judgment. Additionally, we note that the Nelsons have previously asserted that the correct calculation is $956,477, not $342,082.01. Regardless, we need not decide the correct calculation in order to dispose of the Nelsons' arguments that the circuit court should have granted relief under WIS. STAT. § 806.07.

the more reason why the Nelsons should have realized it immediately and made a timely objection. The court reasonably concluded that the policy favoring finality of judgments outweighed any potential unfairness to the Nelsons, particularly given their unexplained failure to object and the lengthy history of this case. As the circuit court observed, this case "cries out for finality."

¶13 The Nelsons also argue that the circuit court should have granted relief under WIS. STAT. § 806.07(1)(h), a "catch-all" provision. *See* ***Brown v. Mosser Lee Co***., 164 Wis. 2d 612, 616, 476 N.W.2d 294 (Ct. App. 1991). The Nelsons fail, however, to develop any separate argument tailored to this particular subsection of § 806.07(1). We therefore consider § 806.07(1)(h) no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

¶14 Accordingly, we are satisfied that the circuit court reasonably denied relief under WIS. STAT. § 806.07.

C. Laches

¶15 The Nelsons argue that laches bars Orlando Residence from reaching Susan's separate property. This argument is misguided because Orlando Residence is not asking to reach Susan's separate property; rather, Orlando Residence seeks to reach property that is *not* Susan's separate property. We recognize that the parties dispute whether assets titled to Susan are Susan's separate property. That, however, is a different issue which we address next.[5]

[5] If the Nelsons intended part of their laches argument to be that laches bars Orlando Residence from reaching certain property that is *not* Susan's separate property, the Nelsons have (continued)

D. Property Titled To Susan

¶16 There is no dispute that some of the assets the circuit court deemed available to satisfy the judgment are titled to Susan. The Nelsons argue, on four different grounds, that these assets are Susan's separate property and, therefore, are not available to satisfy the judgment. We address and reject each asserted ground in the subsections below.

1. 1984 Property Agreement

¶17 It is undisputed that, before moving to Wisconsin in 1990, the Nelsons lived in California. The Nelsons argue that, in 1984, when they lived in California, they made an unwritten property agreement that controls ownership of assets at issue here. They assert that they proved the existence of the agreement based on the fact that they maintained at least some separate accounts. The Nelsons argue that, under pre-1985 California law, such evidence is sufficient for a fact finder to infer the existence of an agreement.[6]

¶18 Orlando Residence concedes that California law applies to this issue. Still, the Nelsons' argument falls short for at least two reasons.

¶19 First, the California case law that the Nelsons cite at most supports the proposition that a fact finder *may* draw the inference the Nelsons wanted the court to draw here. *See* ***DeBoer v. Neilson***, 371 P.2d 745, 750-51 (Cal. 1962) (it is

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not sufficiently developed their argument, and we address it no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[6] The Nelsons also rely on the circuit court's acknowledgment that they had an "understanding as to how they conducted their marriage," but the Nelsons provide no detail as to what this "understanding" was. Accordingly, it does not help them.

not essential in all cases to show an "'express agreement'"; a change in property's status may be shown by the "'nature of the transaction'" or "'surrounding circumstances'" (citation omitted)). The Nelsons provide no authority suggesting that a fact finder is *required* to draw such an inference.

¶20 Second, the Nelsons do not come to terms with a finding by the circuit court that their testimony about how they managed their assets at the pertinent time was lacking in credibility. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998) ("When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses …."). Thus, even if the Nelsons' testimony was, as they characterize it, "unrebutted," they did not prove the existence of an unwritten property agreement.

2. 1990 Property Agreement

¶21 The Nelsons argue that Orlando Residence is barred from reaching property titled to Susan based on a property agreement Susan and Kenneth executed in 1990. The 1990 agreement classifies all property "owned by" Susan as her separate property.

¶22 It is undisputed that, if Wisconsin law applies, the 1990 agreement does not bind Orlando Residence because Orlando Residence did not have notice of the agreement at the time Kenneth's obligation to Orlando Residence arose. *See* WIS. STAT. § 766.55(4m). Indeed, the agreement did not *exist* at that time.

¶23 The Nelsons argue, however, that, under California law, a property agreement between spouses binds a creditor even when the agreement is executed after an obligation arises. According to the Nelsons, the creditor's remedy under California law is to bring an action alleging fraudulent transfer within seven years

of the date of the agreement. The Nelsons argue that California law governs. We disagree.

¶24 The circuit court found that the Nelsons executed the 1990 agreement in Wisconsin after they became domiciled in Wisconsin, and the Nelsons do not challenge that finding. Moreover, several provisions in the 1990 agreement show that it was drafted pursuant to Wisconsin law. In addition, the agreement states that "[t]he validity and construction of this Agreement shall be governed by the laws of the State of Wisconsin." Given all these facts, we agree with the circuit court that the 1990 agreement's effect on Orlando Residence is governed by Wisconsin law. Therefore, the agreement does not bind Orlando Residence.

¶25 The Nelsons also argue, somewhat circuitously, that applying the Wisconsin notice requirement to the 1990 agreement is contrary to *Wisconsin* law. They point to provisions in Wisconsin's marital property law stating that that law "does not affect" the property available to satisfy an obligation they had before moving to Wisconsin and "does not alter" the relationship between them and their creditors in respect to any obligation existing before they moved to Wisconsin. *See* WIS. STAT. §§ 766.03(6) and 766.55(3).[7] The Nelsons argue that applying the

[7] These provisions read, in pertinent part, as follows:

> **766.03 Applicability.**...
>
> ….
>
> **(6)** This chapter does not affect the property available to satisfy an obligation incurred by a spouse that is attributable to an obligation arising when one or both spouses are not domiciled in this state ….
>
> **766.55 Obligations of spouses.**...

(continued)

Wisconsin notice requirement is contrary to these provisions because Orlando Residence's position would be improved compared to what it would have been if the Nelsons still lived in California. We do not find this argument persuasive because the Nelsons have the analysis backwards. It is not Orlando Residence that has sought to improve its position by invoking Wisconsin's marital property law; it is the *Nelsons*. They are the ones who have attempted to vary their pre-existing creditor-debtor relationship with Orlando Residence by executing a Wisconsin agreement under Wisconsin's marital property law. Orlando Residence seeks only to be left in the position it would have been absent that agreement.

3. California Evidentiary Presumption

¶26 The Nelsons argue that the circuit court should have applied an evidentiary presumption found in CAL. EVID. CODE § 662. That provision states: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." The Nelsons do not explain how Wisconsin law differs, but we assume they seek application of the California presumption because, under Wisconsin's marital property law, "proof that title to an asset is in one spouse or the other will not rebut the basic presumption [that property is marital]." ***Lloyd v. Lloyd***, 170 Wis. 2d 240, 255, 487 N.W.2d 647 (Ct. App. 1992).

….

> **(3)** This chapter does not alter the relationship between spouses and their creditors with respect to any property or obligation in existence on the determination date.

The Nelsons' determination date is the date they became domiciled in Wisconsin. *See* WIS. STAT. § 766.01(5)(b).

¶27 The circuit court concluded that the California presumption does not apply and that, even if it did, Orlando Residence rebutted the presumption because the Nelsons used joint funds for the assets titled to Susan and because the Nelsons' claim that the assets remained separate was a "sham" to avoid any obligation to Orlando Residence.

¶28 We begin with the question of whether the California presumption applies. In support of the circuit court's decision, Orlando Residence argues that the presumption, as a rule of evidence, should not apply to a Wisconsin proceeding involving Wisconsin property, particularly given that the assets titled to Susan did not exist until some time after the Nelsons moved to Wisconsin. The Nelsons' argument is unclear, but appears to be a variation of their argument regarding the 1990 property agreement. The Nelsons' argument boils down to an assertion that the California presumption must apply because Wisconsin's marital property law cannot "alter" their relationship with a creditor in respect to an obligation that existed before they moved to Wisconsin. *See* WIS. STAT. § 766.55(3). The Nelsons do not dispute, however, that the assets titled to Susan did not exist until some time after they moved to Wisconsin.

¶29 We find the Nelsons' argument based on WIS. STAT. § 766.55(3) unsatisfactory for much the same reason as before. It is not Orlando Residence that has sought to alter Kenneth's pre-existing obligation by applying Wisconsin's marital property law. Rather, it is the Nelsons who have sought to alter that obligation by titling assets to Susan *after* moving to Wisconsin. The Nelsons do not assert that the funds used to pay for those assets were Susan's separate property.

¶30 Alternatively, we uphold the circuit court's finding that, even if the California presumption applies, Orlando Residence rebutted the presumption because the Nelsons used joint funds for the assets titled to Susan and because the Nelsons' claim that the assets remained separate was a "sham" to avoid any obligation to Orlando Residence.

¶31 The Nelsons argue that the circuit court's findings are contrary to ***Broderick v. Broderick***, 257 Cal. Rptr. 397 (Ct. App. 1989). They rely on a statement in that case that "the presumption [arising from title] cannot be overcome *solely* by tracing the funds used to purchase the property." ***Id.*** at 400 (emphasis added). ***Broderick*** is distinguishable, however, because it did not involve any allegation of sham transactions. Accordingly, we are not persuaded by the Nelsons' reliance on ***Broderick***. *Cf.* ***Haines v. Haines***, 39 Cal. Rptr. 2d 673, 683 (Ct. App. 1995) (distinguishing ***Broderick*** and holding that the presumption in favor of title did not apply when there were allegations of duress).

4. Court's Reference To Assets "Held Jointly"

¶32 Finally, the Nelsons rely on an isolated portion of the circuit court's decision in which the court stated that certain assets are "now held jointly" by the Nelsons. The Nelsons argue that, under California law, a conveyance to spouses as joint tenants creates a rebuttable presumption that each spouse's interest in the joint tenancy is separate property. We are not persuaded. Even assuming that California law applies to this question, the circuit court's decision is not a deed conveying property to the Nelsons. It is more reasonable to read the court's "held jointly" statement, in context, as an indication of the court's view that the assets were not Susan's separate property.

Conclusion

¶33 In sum, for all of the reasons stated above, we affirm the circuit court's judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.