

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2010

A. John Voelker
Acting 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. 2009AP943

Cir. Ct. No. 2009CV62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTRY WIDE HOME LOANS SERVICING, L.P.,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. ANDERSON,

DEFENDANT-APPELLANT,

**BARBARA E. ANDERSON, OPTION ONE MORTGAGE CORPORATION,
AMERICAN TITLE & ABSTRACT CO., INC. AND CITIZENS COMMUNITY
FEDERAL,**

DEFENDANTS.

APPEAL from orders of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Affirmed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Thomas Anderson, pro se, appeals two orders in this foreclosure action. The first order granted Country Wide Home Loans Servicing, L.P.'s motion for voluntary dismissal. We conclude the circuit court properly exercised its discretion by permitting Country Wide to voluntarily dismiss its action against Anderson. The second order denied Anderson's motion to dismiss. We conclude we lack jurisdiction to review that order because it is not a final order.

BACKGROUND

¶2 Country Wide filed this foreclosure action on January 16, 2009.¹ On February 10, 2009, Anderson filed a motion to dismiss, alleging multiple violations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 (2006) (RESPA). Country Wide filed a motion to voluntarily dismiss its foreclosure action "with rights to re-open subject to terms of a workout."² The circuit court granted Country Wide's motion on February 25, 2009. On March 5, it summarily denied Anderson's February 10 motion to dismiss. Anderson now appeals.

¹ According to public records, the January 16 action was the second foreclosure action filed against Anderson. The first, Eau Claire County Circuit Court Case No. 2008CV735, was dismissed based on Country Wide's failure to properly serve Anderson.

² Country Wide asserts its motion was mailed on February 7, 2009, before Anderson's motion to dismiss. As proof, it includes a February 7, 2009 letter to the circuit court in its appendix. That letter does not appear in the record, and we will not consider it. *See Jenkins v. Sabourin*, 104 Wis.2d 309, 313-14, 311 N.W.2d 600 (1981). Thus, we regard February 17, 2009, the date Country Wide's motion was filed, as the controlling date.

DISCUSSION

¶3 Anderson first seeks review of the circuit court’s February 25, 2009 order, which granted Country Wide’s motion for voluntary dismissal. Country Wide contends that order is unreviewable, asserting that an order dismissing its claims without prejudice is not final under WIS. STAT. § 808.03(1).³ Country Wide raised an identical claim in an earlier motion to dismiss Anderson’s appeal, which we denied on June 10, 2009. In that order, we explicitly determined that the voluntary dismissal order was a final order for purposes of appeal:

We conclude that this order is also a final order as defined in WIS. STAT. § 808.03(1). The order is not a continuance pending settlement negotiations. It is a dismissal. The fact that the court is willing to reopen the case upon presentation of further pleadings does not undermine finality. ... As it now stands, the circuit court considers the case closed.

Our June 10, 2009 order fully resolved the jurisdictional issue, and we decline to consider it again.

¶4 Anderson’s claim fails on the merits, however. Anderson argues the circuit court erred by permitting Country Wide to dismiss its action. He contends Country Wide’s motion, which was entitled, “Application and Order for Dismissal,” violated WIS. STAT. § 802.01(2)(a) because it was not framed as a motion. Paragraph 802.01(2)(a) provides that an application to the court for an order “shall be by motion which, unless made during a hearing or trial, shall be

³ WISCONSIN STAT. § 808.03(1) grants this court jurisdiction over all final judgments and orders, which it defines as those judgments, orders or dispositions that dispose of the entire matter in litigation as to one or more parties.

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

made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” In sum, the statute specifies the content of a motion, but does not require that it be entitled as such. Although the better practice is to clearly identify motions, “[n]o modern court would deny relief, justified by facts brought to its attention, merely because counsel used a misnomer.” 10 TED M. WARSHAFSKY & FRANK T. CRIVELLO II, WISCONSIN PRACTICE SERIES, TRIAL HANDBOOK FOR WISCONSIN LAWYERS § 4.01 (3d ed. 2008).

¶5 Anderson also suggests the circuit court erroneously exercised its discretion when granting Country Wide’s motion. A circuit court has discretion to grant the plaintiff’s motion for voluntary dismissal on terms and conditions as the court deems proper. See WIS. STAT. § 805.04(2); *Clark v. Mudge*, 229 Wis. 2d 44, 48-49, 599 N.W.2d 67 (Ct. App. 1999). Factors to consider when reviewing a motion for voluntary dismissal include:

[1] the plaintiff’s diligence in bringing the motion; [2] any ‘undue vexatiousness’ on the plaintiff’s part; [3] the extent to which the suit has progressed, including the defendant’s efforts and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff’s explanation for the need to dismiss.

Id. at 49 (quoted source omitted).

¶6 Here, Country Wide filed its motion before any responsive pleading. The lawsuit had not progressed beyond the preliminary stages. Anderson does not argue he engaged in extensive trial preparation, nor could he given the short time between the suit’s commencement and Country Wide’s motion. Anderson does not suggest the voluntary dismissal was unduly vexatious; in fact, Country Wide stated it sought dismissal to attempt a workout. Thus, Anderson potentially stands

to benefit from Country Wide’s voluntary dismissal. We conclude the circuit court appropriately exercised its discretion when granting Country Wide’s motion.

¶7 Anderson also challenges the circuit court’s March 5, 2009 order denying his motion to dismiss. However, we do not have jurisdiction to review that order. In *Grulkowski v. DOT*, 97 Wis. 2d 615, 616, 294 N.W.2d 43 (Ct. App. 1980), we held that an order denying an objection to the circuit court’s jurisdiction was not appealable as of right because it did not dispose of the entire matter in litigation. For the same reason, the order denying Anderson’s motion to dismiss is not a final order, and we lack jurisdiction to take any action on it.⁴ See *State v. Knapp*, 2007 WI App 273, ¶7, 306 Wis. 2d 843, 743 N.W.2d 481 (per curiam). “The proper mechanism to seek immediate review in these circumstances is by leave to appeal under WIS. STAT. RULE 809.50.” *Id.*

¶8 Anderson raises myriad other issues, which we decline to consider.⁵ We remand the record to the circuit court so that it has jurisdiction should Country Wide decide to reopen the case.

⁴ Because of this case’s procedural posture, we must briefly address a potential source of confusion. Ordinarily, an appeal from a final order brings before us all prior nonfinal judgments, orders and rulings adverse to the appellant. WIS. STAT. RULE 809.10(4). In this case, the final order is the circuit court’s February 25, 2009 order granting Country Wide’s motion for voluntary dismissal. The circuit court’s order denying Anderson’s motion to dismiss is dated March 5, 2009. It is not a *prior* nonfinal order and is therefore not reviewable under RULE 809.10(4). Accordingly, we affirm only the circuit court’s February 25 order, even though Anderson appeals both that order and the March 5 order.

⁵ We decline to consider Anderson’s remaining arguments because either Anderson failed to raise them in the circuit court, or the circuit court did not address them. See *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶20, 278 Wis. 2d 388, 692 N.W.2d 304 (court need not consider claims not yet addressed by the circuit court); *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593-94, 218 N.W.2d 129 (1974) (court need not decide issues first raised on appeal). Specifically, we decline to consider whether Country Wide: (1) failed to comply with the order dismissing case No. 2008CV735; (2) violated RESPA; (3) violated various Wisconsin statutes, including WIS. STAT. §§ 706.13, 801.14, 802.05, 840.10, or 943.60; or (4) submitted fraudulent
(continued)

By the Court.—Order affirmed and cause remanded.

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

documents to the circuit court. Anderson may pursue these issues should Country Wide opt to reopen the foreclosure action.

