

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2011

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. 2009AP2024

Cir. Ct. No. 2007CV11971

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CORY GILMORE,

PLAINTIFF-APPELLANT-PETITIONER,

V.

**TYRONE JOINER, CITIMORTGAGE, INC., MERS AND GREEN TREE
SERVICING, LLC,**

DEFENDANTS,

EARLEAN A. LASTER AND JENNIFER AMENT MOELLER,

THIRD-PARTY DEFENDANTS,

JEFFREY JENSEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Appeal dismissed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Cory Gilmore appeals from an order dismissing his claims against Attorney Jeffrey W. Jensen for legal malpractice and breach of contract in a foreclosure matter. We reject the appeal as untimely. *See* WIS. STAT. RULE 809.10(1)(e) (2009-10).¹

BACKGROUND

¶2 The facts underlying this matter are complex and involve two prior appeals. We summarize them only briefly. In light of our resolution of the instant appeal, we focus on the procedural steps taken during the litigation.

¶3 Gilmore and his mother, Dorothy Gilmore, owned residential property as joint tenants. In 1999, Dorothy Gilmore signed a mortgage on the property in favor of Green Tree Servicing, LLC (Green Tree). Someone also signed Gilmore's name on the mortgage, but Gilmore asserts that the signor forged his signature while he was in prison.² Dorothy Gilmore died in 2004, and Green Tree brought a foreclosure action in 2006. On January 26, 2007, the circuit court granted a foreclosure judgment against only Dorothy Gilmore's one-half interest in the property. Gilmore filed an appeal *pro se* on April 20, 2007.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² We are unable to locate a copy of the mortgage in favor of Green Tree in the very substantial record before us. Documents that do appear in the record suggest that a copy of the mortgage may have been attached as an exhibit to some copies of the amended complaint that Gilmore served on or about April 30, 2008. Neither the form nor the substance of the missing document is important to our resolution of the instant appeal, however, and the defect in the record is therefore not significant. The parties do not dispute that a mortgage in favor of Green Tree and containing signatures purporting to be those of Gilmore and Dorothy Gilmore was executed and recorded in 1999.

¶4 While the appeal was pending in this court, Gilmore’s brother, Tyrone Joiner, satisfied the mortgage. Green Tree moved the circuit court to vacate the judgment of foreclosure and to dismiss the foreclosure action. The circuit court granted the motion.

¶5 Green Tree also moved this court to dismiss as moot Gilmore’s appeal from the judgment of foreclosure. Gilmore, who had been proceeding *pro se*, retained Jensen.

¶6 Jensen advised Gilmore that his appeal lacked merit, and Jensen did not file a response to Green Tree’s motion to dismiss the appeal. We granted the motion to dismiss, noting the absence of any objection. Our order of dismissal allowed Gilmore twenty days to reinstate the appeal upon a showing either that the appeal was not moot or that it should be heard “notwithstanding its mootness.” *See Green Tree Servicing, LLC v. Gilmore*, No. 2007AP930, unpublished slip op. (WI App Aug. 14, 2007) (*Gilmore I*).

¶7 Gilmore did not move to reinstate the appeal. Instead, he filed a new appeal *pro se* seeking to challenge the circuit court’s order vacating the foreclosure judgment and dismissing Green Tree’s claim against him. We dismissed the appeal. *Green Tree Servicing, LLC v. Gilmore*, No. 2007AP1961, unpublished slip op. (WI App Jan. 4, 2008) (*Gilmore II*). We held that Gilmore was not aggrieved by the order that dismissed Green Tree’s claim against him. *Id.* at 3. We also held that our dismissal in *Gilmore I* resolved his challenges to a circuit court order that predated the notice of appeal filed in that case. *See id.*

¶8 In October 2007, Gilmore began the litigation underlying this appeal by filing a new lawsuit alleging irregularities in transactions affecting title to the property. In April 2008, he added Jensen as a respondent in an amended

complaint alleging legal malpractice by negligent handling of the foreclosure litigation.³ On June 24, 2008, Jensen moved to dismiss the complaint for failure to state a claim on which relief could be granted. The circuit court agreed with Jensen and dismissed the complaint by order entered on November 20, 2008. The circuit court included a statement on the face of the document that it was a final order for the purpose of appeal.

¶9 Gilmore moved to reconsider on December 8, 2008. He asserted that, in September 2008, he filed a motion to amend his complaint along with a proposed amended complaint stating a breach of contract claim against Jensen that the circuit court did not address. Gilmore submitted a letter with his motion to reconsider stating: “I understand that my complaint may not state a claim for legal malpracti[c]e. However, I hope that you consider my claim for breach of contract.” On December 23, 2008, the circuit court entered an order expressly declining to disturb its November 20, 2008 decision and order disposing of the negligence claim, but permitting Gilmore to allege breach of contract and directing Jensen to respond to that claim.

¶10 On May 4, 2009, the circuit court entered another order dismissing Gilmore’s case against Jensen, explaining that Gilmore’s breach of contract claim was simply a reassertion of the negligence claim. On June 23, 2009, the circuit court denied Gilmore’s second motion to reconsider, and Gilmore filed an appeal on August 3, 2009.

³ Gilmore’s litigation with the many other parties to the action in circuit court is not at issue in this appeal.

DISCUSSION

¶11 A party in a civil case must generally file an appeal no later than ninety days after the date that the circuit court enters a final judgment or final order. *See* WIS. STAT. § 808.04(1). A judgment or order is final when it disposes of the entire matter in litigation as to one or more of the parties and is either entered or recorded in the manner required. *See* WIS. STAT. § 808.03(1). Additionally, a final judgment or order must state on its face that it is the final document for the purpose of appeal. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶4, 299 Wis.2d 723, 728 N.W.2d 670. In this case, the circuit court entered its final order on November 20, 2008, but Gilmore failed to file an appeal within ninety days thereafter.

¶12 Gilmore protests that the order of November 20, 2008, was not final because he moved to reconsider and continued to litigate claims against Jensen until May 4, 2009. In Gilmore's view, the circuit court partially granted his motion to reconsider on December 23, 2008, and thereby deprived the November 20, 2008 order of finality. We disagree.

¶13 First, applicable authority holds that when a motion to reconsider is filed, the circuit court may deprive a judgment of finality by vacating it. *See Silvertown Enters., Inc. v. General Cas. Co of Wis.*, 143 Wis. 2d 661, 667, 422 N.W.2d 154 (Ct. App. 1988). Here, by contrast, the circuit court order of December 23, 2008, expressly confirmed the prior ruling, providing: “[t]he court affirms its decision of November 20, 2008 dismissing Gilmore's legal malpractice claims against Jensen.”

¶14 Second, a motion to reconsider could not affect Gilmore's appellate deadline unless the motion raised a new issue. *See Ver Hagen v. Gibbons*, 55

Wis. 2d 21, 26, 197 N.W.2d 752 (1972). Whether a party's motion for reconsideration raised a new issue "presents a question of law that this court reviews *de novo*." *State v. Edwards*, 2003 WI 68, ¶7, 262 Wis. 2d 448, 665 N.W.2d 136. Here, Gilmore asserted in his motion to reconsider that he was entitled to relief pursuant to a claim for breach of contract alleged in his proposed amended complaint. He argued in his motion that:

[o]n November 20, 2008, [the circuit] court issued a decision and order dismissing Gilmore's complaint against Jensen finding that the complaint fails to state a claim for legal malpractice. The court did not determine that Gilmore's amended complaint fails to state a claim for breach of contract. The plaintiff's amended complaint states a claim for breach of contract. Therefore, Gilmore is entitled to relief from the order dismissing his claims against Jensen.

¶15 Gilmore's motion did not raise a new issue. Gilmore's purported breach of contract claim was nothing more than a restatement of his negligence claim.

¶16 Gilmore's negligence claim alleged that Jensen accepted a fee "to prosecute the [foreclosure] action in a proper, skillful and diligent manner as attorney for [Gilmore]" but Jensen acted "negligently, incompetently, and unskillfully" in the representation. Gilmore's contract claim alleged an agreement between Jensen and Gilmore providing that Gilmore would pay an hourly fee, that Jensen "would exercise proper skill and care and represent [Gilmore] in the foreclosure action," and that "Jensen failed to exercise proper skill and care and violated the terms of the contract." Thus, the basis for Gilmore's breach of contract claim was the same as the basis for his negligence claim: Jensen allegedly failed to exercise proper skill and care when representing Gilmore.

¶17 As the circuit court explained, it resolved all of Gilmore’s allegations that Jensen failed to exercise proper skill and care by concluding that Gilmore failed to state a negligence claim. *See* WIS JI—CIVIL 1023.5 and WIS JI—CIVIL 1023.5A (“In providing legal services to a client, it is a lawyer’s duty to use the degree of care, skill, and judgment which reasonably prudent lawyers practicing in this state would exercise under like or similar circumstances. A failure to conform to this standard is negligence.”). Therefore, the circuit court did not resolve a new issue when it entered a second order dismissing the case against Jensen on May 4, 2009. In the order of November 20, 2008, the circuit court had already dismissed Gilmore’s claims that Jensen failed to exercise proper skill and care while representing Gilmore in the foreclosure action, and the circuit court never disturbed that order.

¶18 The May 4, 2009 order denied an effort by Gilmore to relitigate issues previously resolved against him in the order of November 20, 2008. The later order therefore was not a final order that disposed of a matter in litigation. *See Marsh v. City of Milwaukee*, 104 Wis. 2d 44, 48, 310 N.W.2d 615 (1981). Accordingly, Gilmore could not appeal from the May 4, 2009 order. It did not dispose of his claims against Jensen, because the circuit court first dismissed those claims on November 20, 2008. *See id.* at 48-49. Further, Gilmore could not seek leave to appeal the order pursuant to WIS. STAT. § 808.03(2), because “such appeal may only be granted in advance of a final judgment.” *Id.* at 49. Gilmore could obtain appellate review of the circuit court’s decision that he did not state claims against Jensen for alleged failure to exercise proper skill and care only by commencing a timely appeal from the order of November 20, 2008 dismissing those claims. He did not do so. His appeal is too late.

By the Court.—Appeal dismissed.

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

