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DISTRICT IV

September 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP679 Wells Fargo Bank, N.A. v. Michael J. Harrop and Jane Doe Harrop (L.C. # 2010CV2598)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Wells Fargo Bank appeals an order that dismissed its foreclosure action against Michael Harrop with prejudice two months after the circuit court had issued a decision dismissing the action without prejudice. The bank challenges the validity of the second order on both procedural and substantive grounds. Harrop moves for an award of attorney fees on the ground that the appeal is frivolous. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the circuit court's order, but decline to find the appeal frivolous.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

On October 26, 2011, following a trial to the court, the circuit court issued a bench ruling that the action would be dismissed without prejudice because Wells Fargo Bank had failed to prove that it owned the note upon which it was seeking to foreclose. The court directed Harrop to draft an order to that effect.

After obtaining the trial transcript, Harrop submitted a proposed order on December 20, 2011,[2] that set forth the circuit court's key findings of fact regarding the bank's failure to meet its burden of proof and that would dismiss the action without prejudice. That same day, the bank faxed an objection to the inclusion of findings in fact in the order, and submitted an alternative proposed order that simply dismissed the matter without prejudice. The bank argued that a dismissal without prejudice was not a dismissal on the merits and therefore should not address them. The circuit court signed the bank's proposed order on December 30, 2011.

On January 5, 2012, Harrop responded to the bank's objection in a letter that apparently crossed in the mail with the court's order. He argued that the written order should include factual findings because they accurately reflected the court's bench ruling and because the court was obligated under WIS. STAT. § 805.17(2) to make separate findings of fact after a trial to the court. Harrop suggested that "the real question" was how the court could issue an order dismissing the action without prejudice after the matter had been taken to trial.

The circuit court then scheduled a hearing on the question whether the dismissal should be with or without prejudice. At the hearing on February 23, 2012, the circuit court stated:

[2] We note the cover letter is dated 2010, but that is plainly a typographical error.

> Frankly, I am reconsidering, and I am dismissing this case with prejudice. Probably I just signed that order just a little too quickly. I'm supposed to hold them for five days and didn't, so that's my error.

The bank objected on the grounds that Harrop had not filed a reconsideration motion and that the bank had not been afforded an opportunity to brief the issue. The court noted that the parties had already submitted letter briefs, and directed Harrop to submit a new proposed order dismissing the action with prejudice for the reasons stated on the record. Harrop did so, and the court signed the new order on February 29, 2012.

On this appeal, the bank argues that the second order should be reversed because: (1) there was no violation of the five-day rule; (2) the circuit court provided no other explanation for its conclusion that the dismissal should be with prejudice; (3) the court did not provide the bank an opportunity to brief the issue of prejudice; and (4) dismissal with prejudice could lead to the inequitable result that no one is entitled to enforce the note.

Harrop responds that: (1) it is irrelevant whether the circuit court violated the five-day rule because the court had authority to reconsider its order under WIS. STAT. § 805.17(3), based upon Harrop's letter questioning the basis for dismissal without prejudice; (2) it was obvious that the court was relying on the parties' posttrial submissions for its reconsideration of the prejudice issue; (3) the bank did brief the issue of prejudice in its objection letter and had ample notice of the hearing if it had wanted to submit an additional response; and (4) the preclusive effect of the order in this case upon a second foreclosure action is not properly before this court. We agree with Harrop on each point.

First, courts are typically not bound by the labels litigants place on their submissions, and there are no magic words required in order to request that a court reconsider a ruling. Thus, a

letter received by the circuit court after it has issued an oral or written decision that takes issue with the circuit court's reasoning may properly be construed as a motion for reconsideration. Whether Harrop knew that the court had already signed the bank's proposed order or was merely responding to the court's bench ruling, Harrop's letter to the court plainly questioned the court's ruling on prejudice and was submitted within the twenty-day deadline set forth in WIS. STAT. § 805.17(3).

Second, the bank is off base in suggesting that the sole reason for the circuit court's reconsidered decision to dismiss the action with prejudice was its perceived violation of the five-day rule. The court signed the bank's proposed order before it received Harrop's response to that order. Taken in that context, the court's comment that it had acted too quickly in signing the bank's proposed order dismissing the action without prejudice plainly implies that the court would not have signed the bank's order if it had first seen Harrop's response explaining why the dismissal should be with prejudice. The next obvious inference is that the circuit court found Harrop's argument on prejudice to be persuasive. In any event, even when a circuit court provides an erroneous or inadequate explanation for its decision, the principle of efficient judicial administration allows this court to affirm if the record shows the decision was proper. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). We are satisfied that a determination that a party has failed to meet its burden of proof at trial is a decision on the merits that should be issued with prejudice.

Third, we agree with Harrop that the bank had sufficient time to file a response to Harrop's letter if it had chosen to do so. Even if the bank did not initially recognize Harrop's letter as a motion for reconsideration, the circuit court order scheduling a hearing on the question of prejudice put the bank on notice that the matter was going to be revisited.

As to preclusive effect, this court will not issue an advisory opinion as to any question of claim or issue preclusion that may be raised in a subsequent foreclosure action.

Although we conclude that the circuit court order dismissing the action with prejudice was valid, we are not persuaded that the appeal was wholly frivolous in light of its unusual procedural posture.

IT IS ORDERED that the order dismissing the foreclosure action with prejudice is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the motion to declare the appeal frivolous is denied.

Diane M. Fremgen
Clerk of Court of Appeals