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May 13, 2015

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

2014AP1298 Talmer Bank and Trust, as successor in interest to First Banking Center v. Buddy R. Short, C&B Trucking, LLC, Capital One Bank, Lake Como Beach Property Owners Assn. and Unknown Spouse of Buddy R. Short a/k/a Collene Short (L.C. #2011CV1262)

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

Collene Short a/k/a Unknown Spouse of Buddy R. Short, appeals from an order denying reconsideration of a motion to file a late answer and to vacate a judgment of foreclosure. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21.¹

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On August 23, 2011, Talmer Bank, as successor in interest to First Banking Center, commenced a foreclosure action against Buddy Short and his business, C&B Trucking, LLC. An Answer and Affirmative Defenses was filed by Attorney Randall Leece, identifying Buddy Short as “a married man.” An amended summons and complaint was subsequently filed, adding as defendants “Unknown Spouse of Buddy R. Short,” as well as two subordinate lienholders. Attorney Leece filed an admission of service “on behalf of Buddy R. Short, the Unknown Spouse of Buddy R. Short and C&B Trucking, LLC.” Attorney Leece also filed an answer and affirmative defenses to the amended complaint on behalf of “Buddy R. Short, unknown spouse, and C&B Trucking.”

On June 4, 2012, Talmer Bank filed a motion for summary judgment.² On July 16, 2012, the circuit court entered Findings of Fact, Conclusions of Law and Judgment granting summary judgment. On October 17, 2013, Talmer Bank purchased the property at a sheriff’s sale after the twelve-month redemption period had expired.

On October 31, 2013, Collene by a new attorney moved to file a new answer. The circuit court denied the motion and Collene sought reconsideration, and also moved to reopen the judgment of foreclosure, pursuant to WIS. STAT. §§ 805.17(3) and 806.07(1)(b), (c), (h) and (2). Collene failed to submit a brief in support of her motions, and did not offer testimony or witnesses at the hearing. The circuit court denied the motions, based upon the fact that Collene

² In her brief to this court, Collene contends transcripts for the July 16, 2012 hearing were requested, but “never submitted by the court reporter.” Collene also represents to this court that Attorney Leece “appeared at the hearing.” Talmer Bank contends in its response brief to this court that Attorney Leece “appeared on behalf of Buddy, C&B Trucking, and [Collene]” The contention is not refuted and is therefore deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

had already filed an answer via Attorney Leece. The court also found no newly discovered evidence, fraud, misrepresentation or other conduct justifying equitable relief. Collene now appeals.

Collene argues Talmer Bank failed to personally serve her with the amended summons and complaint, and therefore the circuit court lacked jurisdiction over her person. Talmer Bank responds that Collene's argument has "metamorphosed between her original motion and this appeal." It contends Collene moved for reconsideration and to vacate the judgment "because of newly discovered evidence, an adverse party's fraud, or other good cause." Talmer Bank insists Collene's appeal "abandons those arguments and harnesses itself to newly raised issues of personal service and personal jurisdiction." It notes that a party must raise its arguments before the circuit court or forfeit the right to raise them on appeal. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). Collene fails to reply to this argument, and the issue is therefore deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we affirm the circuit court because Collene has forfeited the arguments she makes on appeal.

However, we would affirm the circuit court's order even if we reached the merits of Collene's arguments. WISCONSIN STAT. § 801.11(1)(b)2. provides that a circuit court may exercise personal jurisdiction over a defendant by substituted service. When an attorney formally admits service of a summons and complaint on behalf of a client, it may be presumed that he was authorized to do so. *See Big Valley Farms, Inc. v. Public Service Corp.*, 66 Wis. 2d 620, 626, 225 N.W.2d 488 (1975). Moreover, an attorney's continuing representation of a party is a fact that lends additional support to the prima facie case of agency. *See id.* (and *Fontaine v. Milwaukee Cnty. Expressway Comm.*, 31 Wis. 2d 275, 279, 143 N.W.2d 3 (1966)). Here,

Attorney Leece admitted service of the amended summons and complaint on behalf of Collene, answered the pleading on her behalf, and represented Collene at the summary judgment hearing.

After the circuit court denied Collene's motion to file a late answer, she subsequently filed a motion for reconsideration of the denial of the motion to file a late answer pursuant to WIS. STAT. § 805.17(3). However, on appeal Collene abandoned her § 805.17(3) motion. In any event, § 805.17(3) involves post-trial or post-judgment motions, rather than pre-trial motions as involved in the present case.

Collene also filed a motion to vacate the foreclosure judgment on the basis of newly discovered evidence, fraud, misrepresentation or other grounds for equitable relief under WIS. STAT. §§ 806.07(1)(b), (c) and (h). In this regard, we note that Collene's affidavit in support of her motion to file a new answer failed to sufficiently allege that Attorney Leece was not authorized to accept service on her behalf. Her affidavit in support of reconsideration and to vacate judgment averred that she "did not authorize Attorney Leece to accept service on my behalf nor to file an answer in this proceeding." However, that averment did not constitute newly discovered evidence as it would have been known at the time of the motion to file a new answer. Significantly, Collene also failed to testify at the hearing on the motions for reconsideration and to vacate, and she did not offer witness testimony or submit a brief in support of the motions. The circuit court found Collene "fail[ed] to support her claim because she has nothing other than the mere bald statements in her filed affidavits, and that's not an equitable reason." The court also found "no scintilla of evidence" of fraud or misconduct. The court properly exercised its discretion in denying the motions.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE
809.21.

Diane M. Fremgen
Clerk of Court of Appeals