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DISTRICT III

August 16, 2016

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

2015AP1378 William Hopf v. Robert Bordeau (L. C. No. 2013CV179)

Before Stark, P.J., Hruz and Seidl, JJ.

William Hopf appeals an order denying reconsideration of an order dismissing, on summary judgment, his tortious interference with contract action against Robert Bordeau and the City of Sturgeon Bay (collectively, "the City"). In an earlier order, this court determined we lack jurisdiction to review the March 24, 2015 order dismissing the action because Hopf's July 2, 2015 notice of appeal was not timely filed as to that order. *See* WIS. STAT. § 808.04(1) (2013-14)[1] (in a civil matter in which no notice of entry of judgment is given, a notice of appeal must be filed within ninety days after entry of the judgment or order appealed from); *see also* WIS. STAT. RULE 809.10(1)(e) (this court lacks jurisdiction if notice of appeal is not timely filed).

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

Although the notice of appeal was timely filed as to the June 1, 2015 order denying reconsideration, we noted an appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the order sought to be reconsidered.[2] *See* ***Silverton Enters., Inc. v. General Cas. Co.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). The concern is that a reconsideration motion should not be used to extend the time to appeal from a judgment or order when that time has expired. ***Id.***; *see also* ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 25-26, 197 N.W.2d 752 (1972). Because it was unclear from the record whether the motion for reconsideration presented issues that could have been raised in an appeal from the March 24, 2015 order dismissing the action, we directed the parties to address jurisdiction as the first issue in their appellate briefs.

In order for this court to have jurisdiction over an appeal from the denial of a motion for reconsideration, "a party must present issues other than those determined by the original final order or judgment[.]" ***Marsh v. City of Milwaukee***, 104 Wis. 2d 44, 45, 310 N.W.2d 615 (1981). Stated another way, an "order is not appealable where ... the only issues raised by the motion were disposed of by the original judgment or order." ***Ver Hagen***, 55 Wis. 2d at 25. 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. To determine whether new issues exist, we must compare the issues raised in the motion for

[2] Although Hopf moved for reconsideration, the motion did not affect the time for appealing because it was not filed after a trial to the court or other evidentiary hearing. *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993) (WISCONSIN STAT. § 805.17(3) does not apply to reconsideration motions in a summary judgment context.).

reconsideration with those disposed of in the original order. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 87, 417 N.W.2d 50 (Ct. App. 1987).

It is undisputed that David Graves operated an excursion boat business in the Sturgeon Bay Harbor on land the City leased to Graves. Graves built a pier for the business under a Department of Natural Resources ("DNR") permit that was granted to the City. After the business failed, Graves agreed to sell the pier, which included the dock, gangway and landing, to Hopf for $8,000, with $1,000 down and the remainder to be paid upon the pier's removal. Their agreement explicitly excluded "the piles to hold the dock."

Hopf contacted Bordeau, the City's public works superintendent, for advice on removing the pier. Before the pier's removal, the City's attorney wrote the parties a letter advising that the pier is attached to the City's property and may not be removed without written approval from the DNR and the City. The letter included reference to the DNR permit which provided: "[I]f you wish to alter the project or permit conditions, you must first obtain written approval of the Department." The DNR permit also warned that "you, your agent and any involved contractors or consultants may be considered a party to the violation of [WIS. STAT. § 30.292] for any violations of [WIS. STAT. ch. 30] or this permit." The letter explained that removal of the pier alone would expose the piles driven into the lakebed, creating a hazardous condition and unsafe obstruction to navigable waters. The letter continued:

> If the pier structure is to be removed, it must be approved by the [DNR]. Our expectation would be that the pilings which support the pier structure would be removed as well. That, however, must be determined by [the DNR]. In any event, the city will not allow Mr. Graves, Mr. Hopf, or any other person to remove any portion of the former Harbor Lady pier structure without authorization from the [DNR]. Any such removal must be in compliance with Wisconsin law and City of Sturgeon Bay Municipal Codes.

> You are further notified that any entry upon the property of the City of Sturgeon Bay … for the purpose of removal of the pier structure or any portion thereof is not permitted, and will be considered a trespass.

Graves thereafter informed Hopf that if he wanted the pier, he also had to remove the pilings. Graves averred that "[s]imultaneous, with the re-negotiations with Mr. Hopf, I also contacted the City about buying the [pier]. … I offered to sell the [pier] to the City for $5,000." When Graves's negotiations with Hopf for removal of the pilings failed, Graves sold the pier to the City. Hopf filed the underlying suit against the City for tortious interference with a contract, claiming $32,000 in damages, representing the difference between the price he would have paid under his agreement with Graves and the cost of acquiring a pier elsewhere. The elements of a claim for tortious interference with a contract are: (1) the plaintiff had a contract or a prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the interference by the defendant was intentional; (4) there was a causal connection between the interference and damages; and (5) the defendant was not justified or privileged to interfere. ***Briesemeister v. Lehner***, 2006 WI App 140, ¶48, 295 Wis. 2d 429, 720 N.W.2d 531.

The parties filed competing motions for summary judgment. In its motion, the City argued that any contract between Hopf and Graves for removal of the pier was illegal absent City and DNR approval; the City did not tortiously interfere with the alleged contract because the City conveyed truthful information to protect its legal interests; and finally, that Bordeau and the City are immune from suit. In his motion, Hopf argued his contract with Graves was legal and enforceable, and any performance issues related to removal of the pilings were between Hopf and Graves. Hopf therefore claimed the City's belief that a possible outcome would be illegal did not grant it the authority to declare an agreement illegal from inception. Hopf further

contended the agreement did not violate state law because WIS. STAT. §§ 30.12 and 30.208 govern the placement of a structure, not its removal. Although a DNR water management specialist indicated the DNR would prohibit the removal of the pier without removal of the pilings, Hopf emphasized that the specialist also confirmed the DNR did not require a permit for removal of the pier. Hopf additionally disputed the City's immunity claim. Ultimately, Hopf argued that despite knowledge of the contract between Hopf and Graves, the City intentionally and wrongfully interfered by falsely asserting that City and DNR approval were required to remove the pier, and by later usurping the deal from Hopf.

After a hearing and supplemental briefing, the circuit court granted summary judgment in favor of the City, concluding that although Hopf had a contract with Graves, there was "no credible evidence from which a jury could reasonably conclude that the City intentionally acted with the purpose to improperly induce Graves to not complete … the contract or enter into a modified one." Specifically, the circuit court concluded the City's letter did not interfere with the contract but, rather, simply alerted the parties "to an interest of the City that it needed to protect." The court also determined that the City's decision to accept Graves's offer to purchase the pier after the Hopf/Graves negotiations were at an impasse could not reasonably have been intended to interfere with an ongoing viable contract.

Relevant to this appeal, Hopf's motion for reconsideration argued he was entitled to a trial because: (1) issues of fact precluded summary judgment; (2) the circuit court misapplied the summary judgment standard; and (3) a dispute as to intent is a question of fact for a jury. Specifically, Hopf reiterated his contentions, based on the evidence, that the City interfered with the Hopf/Graves contract, that the interference was intentional, and that it caused damage to Hopf. Hopf asserted that the circuit court impermissibly weighed the evidence and decided

issues of fact, rather than determining whether genuine issues of material fact existed with respect to interference and intent. As in his supplemental brief on summary judgment, Hopf also argued intent was a question of fact.

Hopf contends this court has jurisdiction to review the order denying reconsideration because his reconsideration motion presented "new, but related issues." We are not persuaded. The issues presented in Hopf's motion for reconsideration could have been reviewed in an appeal from the May 24, 2015 order. Rather than presenting new issues, Hopf's reconsideration motion reveals a litigant hoping the court would come to a different conclusion based on variations of old arguments. Accordingly, we lack jurisdiction to review the order denying reconsideration. *See* ***Silverton***, 143 Wis. 2d at 665. Because we lack jurisdiction to review the only order from which Hopf timely appealed, we must dismiss this appeal.

Upon the foregoing,

IT IS ORDERED that the appeal is dismissed for lack of jurisdiction.

Diane M. Fremgen
Clerk of Court of Appeals