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DISTRICT III

September 25, 2018

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

2018AP394-FT Preferred Acceptance Company v. William Hazuga
(L. C. No. 2016PR47)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Preferred Acceptance Company appeals an order denying its motion for reconsideration of an order invalidating certain mortgages.[1] Based upon our review of the briefs and record, we dismiss the appeal for lack of jurisdiction. Further, because we conclude that the appeal is

[1] Pursuant to this court's order of May 1, 2018, and a presubmission conference, this is an expedited appeal under WIS. STAT. RULE 809.17 (2015-16), and the parties have consequently submitted memo briefs. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

frivolous, we grant William Hazuga's motion for costs and reasonable attorney fees and remand this matter to the circuit court to determine the proper amount. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

On February 23, 2018, Preferred Acceptance filed a notice of appeal from a January 9, 2018 order denying its motion for reconsideration. In an earlier order, we recounted that a final order was entered October 16, 2017, in which the circuit court declared six mortgages given to Preferred Acceptance invalid, void and unenforceable. Because no timely appeal was filed as to that order, we lack jurisdiction to review it. *See* WIS. STAT. § 808.04(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).

Although the notice of appeal was timely filed as to the January 9, 2018 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. *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 motion for reconsideration not be used to extend the time to appeal from a judgment or order when, as here, 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 were or could have been raised in an appeal from the October 16, 2017 order, we directed the parties to address jurisdiction as the first issue in their appellate briefs. 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.

In April 2016, Hazuga applied for the informal administration of his father's estate. In July 2016, Preferred Acceptance filed a claim against the estate for over $129,000 allegedly due on notes secured by mortgages on the decedent's home. Hazuga, as personal representative of the estate, objected to this claim, partially on the grounds that "[n]o accounting of disbursements, payments, interest, etc.," had been provided to show how Preferred Acceptance calculated the amount claimed due. Hazuga therefore put Preferred Acceptance to its proof. The circuit court subsequently entered a scheduling order requiring that all discovery be completed and any materials intended to be used at trial disclosed by December 16, 2016.

When Preferred Acceptance failed to disclose anything by that deadline, Hazuga moved for summary judgment and asked the circuit court to declare the mortgages invalid. Hazuga recounted that Preferred Acceptance had failed to provide "note(s) or evidence of the terms of any indebtedness allegedly secured by the mortgages." In an April 2017 memorandum opposing Hazuga's summary judgment motion, Preferred Acceptance claimed it had just recently located "the mortgage note" and attached a copy of that note to its memorandum. After two hearings and additional briefing, the court ultimately barred Preferred Acceptance from introducing any evidence at trial; granted Hazuga's motion for summary judgment; and invalidated the mortgages as a sanction for failing to comply with its scheduling order.

In its brief, Preferred Acceptance contends that its reconsideration motion altered its time by which to appeal. Under WIS. STAT. § 805.17(3), the filing of a reconsideration motion within twenty days of the entry of judgment alters the appeal deadlines for appellate review of the judgment and delays the commencement of appeal periods. In this court's earlier order, however, we noted that the reconsideration motion did not affect the time for appealing the October 16, 2017 order because the motion was not filed after a trial to the court or other evidentiary hearing,

as required by § 805.17(3). *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533-35, 499 N.W.2d 282 (Ct. App. 1993) (Section 805.17(3) does not apply to reconsideration motions in a summary judgment context.). Citing ***Schessler v. Schessler***, 179 Wis. 2d 781, 785, 508 N.W.2d 65 (Ct. App. 1993) (per curiam), Preferred Acceptance nevertheless summarily argues that the time by which it needed to appeal was extended under § 805.17(3) because the underlying motion hearings "amounted to a bench trial." We are not persuaded.

In ***Schessler***, this court held that WIS. STAT. § 805.17(3) applied to extend the time to appeal where the circuit court acted as fact-finder at an evidentiary hearing by weighing testimony and other evidence presented and by assessing the credibility of witnesses. ***Id.*** at 784-85. Neither of the hearings in the present case was evidentiary in nature because no testimony was taken or other evidence presented. Rather, the parties' attorneys merely made arguments relative to the pending motions for summary judgment and invalidation of the mortgages. As this court already stated in our earlier order, § 805.17(3) does not apply to extend appellate deadlines because Preferred Acceptance's reconsideration motion did not follow a trial to the court or any other evidentiary hearing.

Preferred Acceptance alternatively contends, again in conclusory fashion, that for the first time in its reconsideration motion it alleged that "compulsory equitable principles were ignored" when the circuit court chose to invalidate the mortgages. The record, however, shows that Preferred Acceptance made similar arguments at both hearings preceding the October 16, 2017 final order. Although Preferred Acceptance conceded at the first hearing that it failed to comply with discovery deadlines, it argued that "the Draconian remedy sought by the Estate would result in one of the most egregious examples of unjust enrichment" and later claimed any sanction

"should still be something that is just and equitable," noting "[w]hat is requested is not." After the circuit court ruled at the second hearing that invalidating the mortgages was "an appropriate sanction," Preferred Acceptance argued "the ultimate equitable provision in our law is that cases should be decided on their merits." Preferred Acceptance added that ruling the estate's debt "is avoided entirely" because Preferred Acceptance did not timely find its note "is wholly beyond the pale of inequitable principles." Because the reconsideration motion did not raise any new issue but, rather, simply repeated and rephrased arguments it had already made, we lack jurisdiction to review the order denying reconsideration. *See* ***Silverton Enters.***, 143 Wis. 2d at 665. As we lack jurisdiction to review the only order from which Preferred Acceptance timely appealed, we must dismiss this appeal.

Hazuga argues that Preferred Acceptance's appeal is frivolous and requests attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3). Based on our discussion above, Preferred Acceptance knew or should have known that its arguments regarding the threshold issue of this court's jurisdiction lacked a reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. Therefore, we conclude the entire appeal is frivolous. We will grant Hazuga's motion for costs and reasonable attorney fees and remand this matter to the circuit court to determine the proper amount.

Upon the foregoing,

IT IS ORDERED that the appeal is dismissed for lack of jurisdiction and the cause is remanded to the circuit court with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals