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**DISTRICT II**

February 12, 2020

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

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2019AP683-FT

Cadbury Solutions, LLC v. Kenny Woods (L.C. #2016CV2138)

Before Neubauer, C.J., Davis, and Dugan, 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).**

Cadbury Solutions, LLC, appeals a circuit court order dismissing its action against Kenny Woods and D. Alan Meeker without prejudice. Pursuant to a presubmission conference

and this court's order of May 29, 2019, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2017-18).<sup>1</sup> Upon review of those memoranda and the record, we reverse.

The parties are involved in separate lawsuits both here and in Texas. Woods first filed suit against Cadbury and its individual members in Texas. Cadbury filed suit in Wisconsin, alleging various business torts against Woods and Meeker.

Woods moved to dismiss the Wisconsin case or alternatively, for a stay under WIS. STAT. § 801.63, “in order to permit the Texas lawsuit to move forward.” Meeker, too, filed a motion to dismiss and alternatively asked that the case be stayed “until final judgment is entered in the Texas Action.” Cadbury opposed dismissal. On June 14, 2017, the day before the circuit court was to deliver its oral ruling, Woods submitted a letter “respectfully asking that the Court stay its ruling pending a decision by the Court of Appeals in Texas.” That same day, the circuit court entered the following order:

Accordingly, pursuant to WIS. STAT. § 801.63, the Court GRANTS both Defendants Wood[s'] and Meeker's alternative Motions for a Stay of this Waukesha action pending a determination by the Court of Appeals in Texas. Defendants Wood[s] and Meeker are to keep this Court apprised as to the status of both appeals in Texas.

NOW THEREFORE, it is Ordered that this matter, in its entirety, is STAYED pending a decision by the Texas appellate courts. A status conference shall be held shortly after a final decision by the Texas appellate courts.

In October 2018, the Texas Court of Appeals issued a decision affirming in part and reversing in part the decision of its lower court. At a January 2019 status conference in Wisconsin, a newly assigned circuit court judge told the parties that it wished to “take the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

temperature as to where the parties are at.” Cadbury stated that the June 2017 stay order should remain in effect until the appellate process was complete in Texas. The circuit court responded, “I have a desire not to do that,” and lamented that this had caused “772 days ... to count on my calendar.” The court asserted that Cadbury would bear the burden of keeping the stay order in place, stating: “[If] you want me to continue to have this on my calendar, you’re going to have to convince me that I should do that.” The court told the parties to brief whether the stay should remain in place and scheduled a hearing for May 1, 2019.

Cadbury’s brief informed the circuit court that a petition for review had been filed in Texas,<sup>2</sup> and asserted that the June 2017 stay order should remain in effect until the appellate process in Texas was complete. In response, Woods wrote that he “has no objection to the stay remaining in place while the Petition for Review at the Texas Supreme Court is pending.” Likewise, Meeker wrote a letter advising that he did “not object to Cadbury’s request that the stay currently in place in this action remain in place, at least until the Texas Supreme Court rules on the Petition for Review.”

Despite the absence of a motion and though the parties agreed that the stay should remain, the circuit court skipped over the question of whether the stay should be lifted and dismissed the case without prejudice. In its written dismissal order, the court stated:

Upon review of the written submittals of the parties and based upon the decision of the Texas Court of Appeals, Second Court of Appeals at Fort Worth, Texas, Case No. 02-17-00176-CV which is in effect and unreversed, recognizing that all matters pending in this action are subject to a choice of law contractual provision

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<sup>2</sup> By letter, Cadbury informed this court that on November 15, 2019, the Supreme Court of Texas granted its petition for review.

requiring litigation in Texas, this Court dismisses this action. This dismissal is without prejudice and the parties may seek to reopen this litigation if the decision of the Texas Court of Appeals is reversed in relevant part that indeed would permit this litigation to proceed in Wisconsin.

On appeal, Cadbury argues that the circuit court's order dismissing the action without prejudice will unfairly allow the statute of limitations to run on his claims, while Meeker's brief argues that his earlier-filed motion to dismiss should be granted on the merits. For his part, Woods has informed this court that he "will not be filing a response brief" and "declines his right to do so."

We conclude that the circuit court erred by implicitly lifting the stay of proceedings on its own motion and immediately dismissing the case without prejudice. We reverse on this narrow ground and will not address the issues in the parties' memorandum briefs.

WISCONSIN STAT. § 801.63 authorizes Wisconsin courts to stay proceedings "to permit trial in a foreign forum." Subsection (3) sets forth the criteria for a circuit court to consider when deciding a motion to stay. Subsection (4) provides:

Jurisdiction of the court continues over the parties to a proceeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay order and take any further action in the proceeding as the interests of justice require.

Sec. 801.63(4). After "the lapse of 5 years following the last court order," jurisdiction terminates, and "the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action." *Id.*

Here, five years had not elapsed, there was no “motion” to modify the stay, and, in fact, the parties agreed that the stay should remain in place until the Texas case became final. Insofar as the circuit court implicitly lifted the June 2017 stay, it mentioned its displeasure with having an old case (“772 days”) on its calendar. The court did not reference the “interests of justice,” *see* WIS. STAT. § 801.63(4), or the factors to be considered in deciding whether to grant a stay, *see* § 801.63(3), each of which bears not on the court’s interests, but on the parties’ interests in having a “convenient, reasonable and fair place of trial.” *See* § 801.63(3)(d). The passage of time and a nonfinal decision from a Texas intermediate court do not justify the court’s implicit decision to lift the stay.

Even if the circuit court had properly lifted the stay, it lacked authority to sua sponte dismiss the case without prejudice. Its order was entered without motion, prior to the scheduled hearing date, and with the parties in agreement that the stay should remain in place. Meeker concedes and it cannot reasonably be disputed that the court’s dismissal order did not decide and was not responsive to the earlier-filed motions to dismiss for prejudice made pursuant to WIS. STAT. § 806.02. There is no statutory basis for the court’s order dismissing Cadbury’s lawsuit without prejudice. We reverse and remand for further proceedings. Therefore,

IT IS ORDERED that the order of the circuit court is reversed and the cause remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*