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DISTRICT III

January 10, 2023

To:

Hon. Gregory J. Strasser
Circuit Court Judge
Electronic Notice

Justin J. Bates
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
Electronic Notice

Benjamin J. Krautkramer
Electronic Notice

Scott A. Swid
Electronic Notice

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

2021AP1932

Brian Letarski Construction v. Benjamin J. Hackett
(L. C. No. 2020CV262)

Before Stark, P.J., Hruz and Gill, 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).

Brian Letarski Construction (BLC) appeals from an order that denied reconsideration of a previously issued summary judgment order dismissing BLC's breach of contract and unjust enrichment claims against Benjamin and Stephanie Hackett. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We dismiss the appeal for lack of jurisdiction.

An appeal cannot be taken from an order denying a motion for reconsideration that presents the same issues as those determined in the judgment or order sought to be reconsidered.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

See Silvertown Enters., Inc. v. General Cas. Co., 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). If such an appeal were allowed, the concern is that a motion for reconsideration must 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, 197 N.W.2d 752 (1972). Here, an order dismissing BLC’s complaint and amended complaint on summary judgment was entered on July 26, 2021, and BLC did not timely appeal that order. We therefore directed the parties to address whether BLC’s reconsideration motion raised any new issues.

BLC filed a complaint for breach of contract and unjust enrichment alleging that the Hacketts had entered into a contract to have BLC perform remodeling work on their residence; that BLC had performed the work specified in the contract and additional work; and that the Hacketts had failed to make a final due payment of \$38,578.48. In lieu of filing an answer, the Hacketts moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

The Hacketts attached to their dismissal motion copies of the construction contract and a series of change orders adjusting the work to be done and the amount owed. The Hacketts asked the circuit court to incorporate the contract and change orders into the complaint by reference—without converting the dismissal motion to a motion for summary judgment—because the complaint had referred to the contract and “revisions, corrections, and adjustments” requested by the Hacketts. *See Soderlund v. Zibolski*, 2016 WI App 6, ¶¶37-38, 366 Wis. 2d 579, 874 N.W.2d 561 (2015) (discussing the “incorporation by reference” doctrine). The Hacketts argued that many of the change orders were unenforceable under the terms of the contract, as well as under Chapter 110 of the Wisconsin Administrative Code, because they were unsigned, and that the complaint failed to state a claim because it did not specify what provisions of the contract or

change orders were alleged to have been breached. The Hacketts further pointed out that a claim for unjust enrichment is not available where there is an enforceable contract between the parties.

In response to the motion to dismiss, BLC argued that change orders merely need to be in writing, not signed. BLC further contends that the Hacketts should be estopped from challenging the enforceability of change orders because the Hacketts are the party that sought the orders by which BLC performed the work. BLC then made a series of factual allegations outside of the pleadings regarding what payments were required and had been made, “as an offer of proof, subject to the opportunity to provide admissible evidence” in the event that the motion to dismiss would be converted to a motion for summary judgment pursuant to WIS. STAT. § 802.06(2)(b). Finally, BLC noted that its unjust enrichment claim was pled in the alternative, in the event that the contract or any of the change orders were deemed to be unenforceable.

After reviewing the parties’ arguments, the circuit court first stated that it would treat the Hacketts’ motion to dismiss as one testing the sufficiency of the complaint pursuant to WIS. STAT. § 802.06(2)(a)6. The circuit court next noted that although the complaint itself did not specify whether the amount of money BLC claimed the Hacketts owed was based upon the initial contract or the change orders, the motion to dismiss was premised on the assumption that the amount claimed to be due was based exclusively on the change orders. After finding that the administrative code and the contract itself required change orders to be signed and that the change orders at issue here were unsigned, and also declining to apply the estoppel doctrine, the court concluded that “any claims asserted in the complaint that are based upon the non-payment of the change orders at issue, fail to state a claim upon which relief can be granted.” The court also concluded that the complaint failed to state a claim for unjust enrichment. However, the court further determined that BLC’s breach of contract claim, as pled, was broad enough to

encompass a claim that was not based upon the change orders. The court then granted the Hacketts' motion to dismiss in part, but it stated:

[T]he court will allow the plaintiff to present affidavits to show that its claim for breach is not based upon non-payment of the change orders at issue. If the plaintiff can submit such affidavits, the court will allow the defendants to respond and, if procedurally proper, will convert the motion to dismiss to a motion for summary judgment, on the breach of contract claim, under ... § 802.06(2)(b).

BLC subsequently filed an amended complaint and an affidavit by Brian Letarski. The Hacketts moved to dismiss the amended complaint. They argued it still lacked sufficient specificity to show that the amount BLC claimed the Hacketts owed resulted from a breach of the original contract, rather than the unsigned change orders. Citing the Letarski affidavit, BLC responded that the contract called for payment in four installments totaling \$434,909.00 and that the Hacketts had paid only three installments totaling \$398,764.56. BLC also asked the court to reconsider its decisions on estoppel and unjust enrichment.

The circuit court dismissed the amended complaint on the grounds that BLC had not sought, and the court had not granted, leave to file it under WIS. STAT. § 802.09. The court accepted the Letarski affidavit as timely filed and stated that the procedural status of the case was now that of a motion for summary judgment. However, the court then concluded that the Letarski affidavit was insufficient to create a material issue of fact for trial, without providing an opportunity for discovery or other evidentiary submissions by the parties. Specifically, the court noted that the Letarski affidavit “blends non-payment of change orders with the terms of what was to be paid on the contract, without identifying what would be at issue, at trial, other than claims already dismissed.” The court therefore also dismissed the original complaint in an order entered on July 26, 2021.

Rather than appealing from the order dismissing the complaint and amended complaint, BLC moved for reconsideration. The reconsideration motion stated three grounds: (1) the Hacketts failed to submit any materials with admissible facts to create a prima facie case for summary judgment; (2) the only affidavit in the record—the Letarski affidavit—must be taken as true; and (3) the circuit court should have denied the Hacketts’ original motion to dismiss the complaint without converting the motion to one for summary judgment.

We note that BLC cited WIS. STAT. § 802.06(2)(b), regarding the procedure for converting a motion to dismiss to a motion for summary judgment, in both of its briefs responding to the motions to dismiss, and it explicitly argued in the second brief that the Letarski affidavit was sufficient to establish the right to a trial on the breach of contract claim. Thus, any questions regarding whether the circuit court applied the proper procedure and whether the facts of record supported its decision were fully preserved. We therefore conclude that all of the issues raised in the reconsideration motion could have been raised on a direct appeal from the July 26, 2021 order.

BLC argues that the July 26, 2021 order was not final for purposes of appeal because the circuit court subsequently issued a scheduling order on the motion for reconsideration. However, events that occur subsequent to the entry of a judgment or order do not control its finality. See *State v. Wright*, 143 Wis. 2d 118, 124, 420 N.W.2d 395 (Ct. App. 1988). Rather, a judgment or order is final and appealable as of right when it disposes of the entire matter in litigation as to one or more of the parties. WIS. STAT. § 808.03(1); *Tyler v. RiverBank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. The July 26 order dismissed the entire matter in litigation between the parties and also contained a statement of finality. Because BLC’s motion

for reconsideration presented the same issues as those determined in the final July 26 order, BLC cannot separately appeal the order denying reconsideration.

As a final matter, we note that counsel for the appellant made an ad hominem attack on the circuit court judge in the appellant's brief that was not supported by any facts of record. We admonish counsel for the failure to comply with SCR 20:8.2.

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

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

Sheila T. Reiff
Clerk of Court of Appeals