COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2635 **Cir. Ct. No. 2007CV7035**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WAUWATOSA SAVINGS BANK,

PLAINTIFF-RESPONDENT,

V.

LARRY N. SCRUGGS,

DEFENDANT-APPELLANT,

ADVANCED PROPERTIES & INVESTMENTS, LLC, RELIABLE WATER SERVICES, LLC, A. J. GRAF PLUMBING AND CITY OF MILWAUKEE,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Larry N. Scruggs, *pro se*, appeals from a trial court order denying Scruggs's motion to reopen a default judgment pursuant to WIS. STAT. § 806.07(1)(d) and (h) (2011-12).[1] We conclude, as we did in 2011 when Scruggs appealed a similar order, that Scruggs lacks standing to challenge the default judgment because he was dismissed as a party in 2009. In addition, this court concludes that the appeal is frivolous because Scruggs "knew, or should have known, that the appeal … was without any 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 remand for the assessment of costs and fees, including reasonable appellate attorney fees, pursuant to RULE 809.25(3).

BACKGROUND

¶2 This is the second time this court has considered an appeal from the denial of a motion to reopen the 2007 default judgment of foreclosure in Milwaukee County Circuit Court Case No. 2007CV7035. In 2011, we considered two consolidated appeals filed by Scruggs on behalf of himself and Advanced Properties & Investments, LLC. *See* ***Wauwatosa Savings Bank v. Larry N. Scruggs, Jr.***, Nos. 2010AP1271 and 2010AP1858, unpublished slip. op. and order (WI App Sept. 27, 2011). We summarized the facts concerning the denial of the motion to reopen the default judgment as follows:

> Wauwatosa Savings Bank, n/k/a Waterstone Bank, SSB, commenced a foreclosure action against Advanced Properties & Investments, LLC, Scruggs, Reliable Water Services, LLC, and A.J. Graf Plumbing on June 22, 2007.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> Advanced Properties and Scruggs, who is the sole shareholder of Advanced, did not file responsive pleadings. On September 24, 2007, the circuit court entered a judgment of foreclosure by default against Advanced Properties and Scruggs. On March 4, 2009, the bank moved to dismiss Scruggs from the action because he was not a titleholder on the foreclosed property, and thus was not a necessary party. The circuit court granted the motion. On March 9, 2009, an order was entered confirming the sheriff's sale.
>
> On November 19, 2009, Scruggs filed a motion under WIS. STAT. § 806.07 (2009-10), to reopen on behalf of himself, personally, and Advanced Properties, arguing that he and Advanced Properties had not been properly served. The circuit court held a lengthy evidentiary hearing on March 5, 2010. On April 7, 2010, the circuit court entered an order denying the motion to reopen. On May 24, 2010, Scruggs filed a notice of appeal, listing himself and Advanced Properties as the appellants.

Scruggs, Nos. 2010AP1271 and 2010AP1858, unpublished slip op. and order, ¶¶2-3 (footnote omitted).

¶3 In that appeal, Scruggs raised six issues, including issues related to Wauwatosa's service of the amended complaint, Wauwatosa's filing of an Affidavit of Correction, and the sheriff's sale. In its response, Wauwatosa refuted Scruggs's arguments and also asserted that Scruggs lacked standing to pursue the appeal because he was dismissed as a party in 2009. Further, Wauwatosa asserted Scruggs could not represent Advanced Properties and Investments, LLC, because he is not a licensed attorney in Wisconsin.[2]

¶4 This court agreed with Wauwatosa's standing arguments and did not address the merits of Scruggs's arguments. Specifically, this court held:

[2] The record indicates that Scruggs has a law degree but is not licensed to practice in Wisconsin.

> Advanced Properties is not a proper party to the appeal from the order denying the motion to reopen. Scruggs filed the notice of appeal on behalf of Advanced Properties, but he had no authority to do so because Advanced Properties is a corporation. "Only a lawyer can sign and file a notice of appeal on behalf of a corporation." ***Jadair Inc. v. United States Fire Ins. Co.***, 209 Wis. 2d 187, 213, 562 N.W.2d 401 (1997). Where, as here, a person who is not a lawyer files a notice of appeal on behalf of a corporation, "the notice of appeal is fundamentally defective, and [we are] without jurisdiction." ***Id.***
>
> We also conclude that Scruggs, personally, has no standing to appeal the order denying the motion to reopen because he was not a party to the judgment confirming the sheriff's sale. He was dismissed from the action on the grounds that he did not hold title to the disputed property on March 4, 2009, before the order confirming the sheriff's sale was entered on March 9, 2009. As a non-party to the order confirming the sheriff's sale, Scruggs had no right to bring a motion to reopen and, by extension, no right to file an appeal from the order denying the motion to reopen. Scruggs contends that he had a right to initiate this appeal on his own behalf because he was originally named as a party to this action, he is the sole member and owner of Advanced Properties, and "[t]he ultimate loss of property and resources are [his] sole burden." Scruggs' argument fails because, although he was originally named as a defendant, he was dismissed from this action as an unnecessary party and his status as shareholder in the corporation does not give him the right to participate personally in the action.

Scruggs, Nos. 2010AP1271 and 2010AP1858, unpublished slip op. and order, ¶¶4-5 (footnote omitted; brackets in ***Scruggs***). Scruggs did not file a petition for review with the Wisconsin Supreme Court.

¶5 Two years after this court affirmed the trial court's order denying Scruggs's motion to reopen the default judgment, Scruggs filed a motion to "reopen void default judgment, vacate and di[s]miss pursuant to [WIS. STAT. §] 806.07(1)(d) and (h)." (Capitalization and bolding omitted.) He raised issues related to the service of the original and amended complaint and sought to reopen

the judgment in the interest of justice, citing § 806.07(1)(h). In subsequent correspondence with the trial court, Scruggs stated that the motion "is his own motion and Advanced Properties and future parties will assert their own claims by separate legal counsel."

¶6 In response, Wauwatosa noted that the same issues had been previously addressed by the trial court and the court of appeals. Wauwatosa asserted that "if Scruggs was dissatisfied with the Court of Appeals' Decision," he should have filed "a Petition for Review with the Supreme Court," which he did not do. Wauwatosa argued that Scruggs had "no standing to assert any claims on his behalf," again citing this court's 2011 decision. Wauwatosa also argued the merits of the issues Scruggs presented.

¶7 The trial court denied Scruggs's motion on grounds that it was not brought within a reasonable time and was barred by claim preclusion.[3] The trial court also said that it was "persuaded by and adopts the arguments made in [Wauwatosa's] brief." This appeal follows.

DISCUSSION

I. Standing.

¶8 On appeal, Scruggs argues that the default judgment should be reopened for numerous reasons. However, he does not address, in either his opening brief or in his reply brief, the standing issue that was the basis for this

[3] The Honorable Paul R. Van Grunsven denied Scruggs's 2013 motion. The Honorable William Sosnay denied the 2009 motion to reopen that was addressed in this court's 2011 decision.

court's decision in 2011, despite the fact that Wauwatosa raised the standing issue in its trial court brief and the trial court adopted Wauwatosa's reasoning in its order denying Scruggs's motion.[4]

¶9 Once again, we conclude that Scruggs lacks standing. "As a non-party to the order confirming the sheriff's sale, Scruggs had no right to bring a motion to reopen and, by extension, no right to file an appeal from the order denying the motion to reopen." *See* ***Scruggs***, Nos. 2010AP1271 and 2010AP1858, unpublished slip op. and order, ¶5. Scruggs has not argued—much less demonstrated—that this conclusion is erroneous. We affirm the order denying Scruggs's motion because he lacks standing.

II. Sanctions.

¶10 In addition to affirming the trial court's order, this court will address the issue of sanctions. WISCONSIN STAT. RULE 809.25(3)(a) provides: "If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees, and reasonable attorney fees under this section." In ***Howell v. Denomie***, 2005 WI 81, 282 Wis. 2d 130, 698 N.W.2d 621, our supreme court stated: "Sanctions for a frivolous appeal will be imposed if the court concludes that the 'party or party's attorney knew, or should have known, that the appeal ... [had no] 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.'" ***Id.***, ¶9 (quoting RULE 809.25(3)(c)) (ellipses and bracketing in

[4] In both his opening brief and his reply brief, Scruggs simply mentions that this court held that he lacked standing to appeal. He does not attempt to address Wauwatosa's arguments that he continues to lack standing.

original). "[A]n appellate court decides whether an appeal is frivolous solely as a question of law." ***Id.***

¶11 ***Howell*** also discussed the procedure for seeking sanctions at the court of appeals:

> In order for parties before the court of appeals to have the proper notice and opportunity to be heard, parties wishing to raise frivolousness must do so by making a separate motion to the court, whereafter the court will give the parties and counsel a chance to be heard. We caution that a statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue. The court of appeals may also raise the issue of a frivolous appeal on its own motion, but it must give notice that it is considering the issue and grant an opportunity for the parties and counsel to be heard before it makes a determination.

Id., ¶19.

¶12 In this case, before the briefs were filed, Wauwatosa moved to dismiss the appeal, to summarily affirm the trial court's order, and for sanctions. By order dated February 10, 2014, we denied the motions, concluding that dismissal was not "required at this juncture" and that "the issues should be resolved with the benefit of full briefing." As to Wauwatosa's motion for sanctions, we stated: "Wauwatosa is free to renew its request for sanctions within the timeframe and in the manner contemplated by ***Howell***."

¶13 Wauwatosa did not file another motion for sanctions after Scruggs filed his brief. Instead, Wauwatosa presented its argument for sanctions in its response brief. ***Howell*** does not suggest that a party can renew a previously denied motion for sanctions by simply raising the matter in a brief. *See* ***id.***, ¶19. Because Wauwatosa did not file a separate motion for sanctions after its first motion was denied, the issue was not properly noticed. *See* ***id.***

¶14 Nonetheless, this court is troubled by Scruggs's failure to recognize this court's prior ruling that he lacks standing. Accordingly, we issued an order on September 18, 2014, indicating that on our own motion, we would consider whether the appeal is frivolous and whether the imposition of sanctions is appropriate. We ordered Scruggs to show cause why the appeal should not be declared frivolous, and we gave Wauwatosa an opportunity to respond.

¶15 As noted, Scruggs did not address, in either his opening brief or in his reply brief, the standing issue that was the basis for this court's decision in 2011. In his response to the order to show cause, Scruggs briefly addresses standing, asserting for the first time that "application of standing to deny review is contrary to [t]he Constitution and a violation of due process." Scruggs also freely acknowledges that he is raising the same issues that were raised in 2011, stating: "Wauwatosa's actions in this litigation have made it necessary to file the subsequent same appeal."[5] Finally, Scruggs again argues why he believes the 2007 default judgment is void.

¶16 Having considered Scruggs's filing, as well as Wauwatosa's response urging this court to impose sanctions, we conclude that the appeal is frivolous because Scruggs "knew, or should have known, that the appeal … was without any 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. Scruggs has not shown an adequate basis in

[5] Scruggs also complains that in the prior appeal, "this court never addressed the merits pertaining to jurisdiction and due process." If Scruggs disagreed with this court's 2011 decision, his remedy was to file a petition for review with the Wisconsin Supreme Court, which he chose not to do.

the law to raise these same issues on appeal for the second time. Having concluded that the appeal is frivolous, we remand for the assessment of costs and fees, including reasonable appellate attorney fees, pursuant to RULE 809.25(3).

By the Court.—Order affirmed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.