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DISTRICT II

April 27, 2016

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Circuit Court Judge
Sheboygan County Courthouse
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Sheboygan, WI 53081

Hon. Rebecca L. Persick
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You are hereby notified that the Court has entered the following opinion and order:

2015AP2252-FT

In re the marriage of: Jane A. Kettler v. John A. Psihoyios
(L.C. #2011FA511)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

John A. Psihoyios appeals a circuit court order declining to reconsider its decision to deny Psihoyios's WIS. STAT. § 806.07 (2013-14)¹ motion for relief. Pursuant to a presubmission conference and this court's order of November 19, 2015, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1). Upon review of those memoranda and the record, we

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

summarily affirm the order. WIS. STAT. RULE 809.21.

On December 20, 2013, the circuit court entered a judgment of divorce providing that Psihoyios would make an equalization payment to his ex-wife, Jane Kettler, “by prompt transfer of \$154,350.54 of pretax funds from [Psihoyios’s] Kohler 401(k) account including gains or losses from date of divorce to date of transfer” through a Qualified Domestic Relations Order (QDRO). In January 2014, Psihoyios timely moved for relief from the judgment, requesting permission to pay the equalization sum in cash rather than through a QDRO. At a hearing on February 11, 2014, the circuit court orally denied the motion. The court’s written order entered March 12, 2014, explicitly “confirm[ed] the provisions of the divorce judgment,” providing that the equalization payment “be effected by a transfer from [Psihoyios’s] 401(k) plan” by QDRO. The circuit court further found that the submitted QDRO was “properly drafted” and approved the order. Psihoyios did not appeal.

On March 10, 2015, Psihoyios filed a motion under WIS. STAT. § 806.07(1)(a) and (b), seeking relief from the circuit court’s order denying his 2014 motion for relief from the divorce judgment’s equalization payment provision. Specifically, he renewed his request that the equalization payment be made in cash, asserting that the large appreciation in his 401(k) account’s value resulted in an overpayment to Kettler. At a hearing, Kettler argued that Psihoyios was merely reasserting claims made in his January 2014 motion for relief and that the § 806.07 motion was an untimely attempt to appeal the original judgment. Reasoning that the

motion was filed more than one year after its February 2014 oral ruling, the circuit court denied the motion as untimely under § 806.07(2).²

Psihoyios moved for reconsideration, arguing that the circuit court erred by using the date of its oral ruling rather than its written order in calculating the one-year period under WIS. STAT. § 806.07(2). By written order of August 21, 2015, the circuit court denied reconsideration. The court stated that Psihoyios's § 806.07 motion seeking relief from the property division equalization payment was "in essence [a motion] seeking relief from a denial of relief stemming from a Judgment entered on December 20, 2013." Determining that § 806.07 "should not be read to permit reconsideration of motions to reconsider ad infinitum," the circuit court concluded that even assuming it erred in denying Psihoyios's January 2014 motion for relief from judgment, "his remedy [was] to appeal that decision." Psihoyios appeals.³

We conclude that on these facts, Psihoyios was not entitled to seek relief from the divorce judgment's property equalization provision by way of a WIS. STAT. § 806.07 motion seeking relief from the circuit court's order denying his 2014 motion. It is undisputed that Psihoyios did not appeal either the final divorce judgment, or the circuit court's oral ruling and written order denying relief from that judgment. The time to appeal has long passed. *See* WIS. STAT. RULE

² WISCONSIN STAT. § 806.07(2) provides that a motion for relief must be made within a reasonable time "and, if based on sub. (1)(a) ... not more than one year after the judgment was entered or the order or stipulation was made." Section 806.07(2) further provides that "[a] motion based on sub. (1)(b) shall be made within the time provided in s. 805.16." WISCONSIN STAT. § 805.16 states that a motion claiming newly discovered evidence "may be made at any time within one year after verdict." Sec. 805.16(4).

³ The notice of appeal is only timely from the circuit court's August 21, 2015 order denying reconsideration. Our jurisdiction is limited to review of any new issues presented on reconsideration. *Harris v. Reivitz*, 142 Wis. 2d 82, 86-89, 417 N.W.2d 50 (Ct. App. 1987). Having considered our jurisdiction, we are satisfied that the issues raised by Psihoyios on appeal are properly before this court.

809.10(1)(e); WIS. STAT. § 808.04(1). A WIS. STAT. § 806.07 motion for relief may not be used as an “end run” to effect an appeal outside the statutory time limits. *Cf. Eau Claire Cty. v. Employers Ins.*, 146 Wis. 2d 101, 109, 111, 430 N.W.2d 579 (Ct. App. 1988) (Section 806.07 “does not authorize the trial court to essentially expand the time for appeal when the time for such appeal has passed.”). That Psihoyios’s 401(k) account appreciated more than he expected does not change our analysis. The divorce judgment explicitly contemplated that the equalization sum would include “gains or losses from date of divorce to date of transfer” and the circuit court considered this in denying Psihoyios’s January 2014 motion for relief. We are not persuaded that Psihoyios’s “newly discovered evidence” claim is anything more than an attempt to reargue his January 2014 motion for relief. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) (“A matter once litigated may not be relitigated in a subsequent [] proceeding no matter how artfully the [litigant] may rephrase the issue.”).⁴

Finally, we deny Kettler’s WIS. STAT. RULE 809.25(3) motion for attorney fees and costs for a frivolous appeal. An appeal is not frivolous merely because the court does not agree with the appellant’s argument. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 614, 345 N.W.2d 874 (1984). While we reject Psihoyios’s arguments, there is nothing to suggest that those arguments were not made in good faith. Therefore, we cannot conclude that this appeal is frivolous.

⁴ Similarly, we reject Psihoyios’s attempts to cast his WIS. STAT. § 806.07 motion as properly seeking relief from the circuit court’s March 2014 order denying his motion for relief from judgment. “Section 806.07 provides courts with a means to relieve a party from the oppression of a final judgment.” *Bank One Wis. v. Kahl*, 2002 WI App 312, ¶15, 258 Wis. 2d 937, 655 N.W.2d 525. The circuit court’s decision denying his 2014 motion for relief only confirmed those provisions of the original judgment Psihoyios now seeks to challenge, and Psihoyois offers no authority for the proposition that a litigant may seek § 806.07 relief from an order denying relief from the underlying judgment.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the respondent's motion for attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3), is denied.

Diane M. Fremgen
Clerk of Court of Appeals