COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2011AP2320
2011AP2321

Cir. Ct. Nos. 2010CV926
2010SC4066

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

NO. 2011AP2320

L.P. MOORADIAN CO.,

PLAINTIFF-APPELLANT,

V.

MEDNIKOW PROPERTIES, INC.,

DEFENDANT-RESPONDENT.

NO. 2011AP2321

MEDNIKOW PROPERTIES, INC.,

PLAINTIFF-RESPONDENT,

V.

L.P. MOORADIAN CO.,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. L.P. Mooradian Co. purports to appeal from a writ of restitution. Mooradian raises numerous issues, including the timeliness of the appeal; whether the circuit court properly granted a default eviction; whether an option to purchase expired upon the termination of the lease; and whether Mooradian properly exercised the option to purchase prior to its expiration. We affirm.

¶2 The litigation in this case commenced over a decade ago, in 2002. It stems from the lease of Mednikow Properties, Inc.'s commercial building approximately two blocks from Green Bay's Lambeau Field. The lease stated, "Landlord makes available for lease the building designated as 771-773 Potts Ave, Green Bay, Wi. 54303." Mednikow owns three contiguous platted lots and the parking for the lots is adjoined. Access to the parking is also shared by tenants.

¶3 On June 15, 1999, Mooradian's president, Jody Bruley signed a new lease and addendum with Isadore Mednikow that extended the term of a previous lease by ten years. At the time, Isadore Mednikow was eighty-eight years old. The lease included no rent increases other than an annual increase to account for real estate tax increases. The addendum stated:

> It is mutually agreed by both the Landlord and Tenant that said Tenant shall have right of first refusal to purchase the property located at 771 & 773 Potts Avenue, in the Village of Ashwaubenon, Wisconsin, at the assessed value at the time of purchase, should the property be offered for sale, or [if] a buyer is interested to purchase same or upon the death of the principal shareholder of Mednikow Properties, Inc.

¶4 On August 2, 1999, the lease and addendum were recorded as a memorandum of lease, drafted by Mooradian's attorney. The memorandum of lease described the leased premises as "Lot 11, according to the recorded plat …. Tax Parcel Number VA-475."

¶5 Isadore Mednikow died on July 14, 2001. Mooradian asked to exercise the purchase right, believing Isadore to be Mednikow's principal shareholder. Isadore's estate's attorney responded that the estate was construing the addendum as a right of first refusal, and Mednikow would not be selling the property.

¶6 Mooradian filed suit, seeking a declaratory judgment allowing it to exercise the option. Mednikow argued the option was invalid, and obtained by undue influence in any event. The circuit court concluded, in part, that the addendum was a right of first refusal. Mooradian appealed and we reversed, holding the addendum was to be construed as an option to purchase the property upon the death of the principal shareholder. We remanded with directions to consider other issues that had been raised. *See* ***L.P. Mooradian Co. v. Mednikow Props., Inc.***, No. 2004AP1217, unpublished slip op. (WI App May 17, 2005).

¶7 The circuit court issued a partial summary judgment on August 25, 2006, dismissing several of Mednikow's affirmative defenses. The court also held that because it was "undisputed that Isadore was the principal shareholder of Mednikow Properties at the time the contract was entered into, the option to purchase was triggered upon his death."

¶8 The court also concluded Mednikow had failed to prove undue influence and it granted specific performance in favor of Mooradian. Although not raised by the parties, the court further concluded Mednikow had breached the

addendum by failing to timely sell, causing Mooradian damages for rent paid in the interim.

¶9 On appeal, we reversed the circuit court concerning breach of contract and damages, but affirmed the court's ruling with regard to Mooradian's ability to exercise the option. *See* ***L.P. Mooradian Co. v. Mednikow Props., Inc.***, No. 2007AP126, unpublished slip op. (WI App Apr. 8, 2008).

¶10 Mednikow then prepared to close on the sale of the property. It provided Mooradian a title insurance commitment, letter of special assessment and tax bill. In anticipation of closing, Mednikow also drafted a quit-claim deed, real estate transfer return, corporate consent resolution, and closing statement. However, Mooradian demanded that Mednikow accept certain conditions for closing, and indicated Mooradian would be willing to close only if it was allowed to buy a portion of Lot 10.[1]

¶11 Lot 10 was leased since 1970 to Packerland Glass Products, Inc. Packerland also held a right of first refusal to purchase Lot 10, which has a different street address and separate tax parcel number. Packerland uses the north half of Lot 10 as an ingress/egress and parking lot for its customers and employees.

¶12 Mooradian subsequently sought a court order forcing Mednikow to convey part of Lot 10 to Mooradian. Mednikow responded that Mooradian sought more than the option provided. The parties then apparently attempted to negotiate.

[1] Mednikow asserted that Mooradian "sent Mednikow a proposed Certified Survey Map that would have divided Mednikow's Lot 10 in half and combined the north half with Lot 11."

¶13 On February 26, 2010, Mednikow sent correspondence to Mooradian declaring it in default for failing to reimburse Mednikow for the increased real estate taxes on the property from 2001 forward. Mooradian was advised that under the lease terms it had thirty days to cure the default. On March 9, Mooradian sent correspondence to Mednikow demanding to close on the property and requesting a title insurance commitment, although the option did not require Mednikow to provide title insurance to Mooradian. On March 11, 2010, Mednikow reminded Mooradian that it remained in default on payment of the taxes and that it must cure its default no later than March 28.

¶14 On March 30, 2010, Mooradian recorded three "affidavits of adverse possession," signed by Jody Bruley, Richard Thompson and Ken Braun, father of Jody Bruley. On June 1, 2010, and thereafter, Mooradian attempted to make rental payments, although it simultaneously alleged that no further rent was due. Mednikow returned all rent checks on the grounds that the lease had terminated due to failure to cure the default within thirty days.

¶15 Mooradian then commenced three causes of action against Mednikow, including breach of lease because it refused to convey the property, adverse possession regarding a portion of Lot 10 "to the extent not part of the lease," and prescriptive easement for the same portion of Lot 10. Mooradian also filed a lis pendens on the property. Mednikow counterclaimed for eviction; a declaration that the option was extinguished when the lease terminated; a declaration that the option was extinguished because Mooradian never exercised it by tendering the option payment or closing on the transaction; statute of frauds and slander of title.

¶16 On July 9, 2010, Mednikow brought a small claims action seeking to evict Mooradian from the property. On July 23, Mooradian moved to consolidate the small claims action with the previous action. Mooradian did not file an answer to the small claims complaint.

¶17 Mednikow subsequently moved for summary judgment. On July 26, 2011, the circuit court determined Mooradian defaulted on the lease and failed to cure the default in a timely manner. The court deemed the facts of the small claims complaint admitted because Mooradian failed to answer or otherwise respond to the eviction action. The court stated that Mednikow put Mooradian on notice that it was seeking default judgment, but Mooradian failed to seek leave to respond to the complaint. The court also concluded the option to purchase had expired because Mooradian failed to enforce the option within a reasonable time, and the option terminated with the lease as a matter of law.[2]

¶18 Mooradian filed a flurry of motions and petitions during the ensuing months, including a petition for leave to appeal a nonfinal order, which we denied. On September 19, 2011, the circuit court entered a Writ of Restitution (Eviction). On September 28, 2011, Mooradian filed a notice of appeal "from the order for restitution …."[3]

¶19 We review summary judgment decisions applying the same methodology as the circuit court. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI

[2] The circuit court denied Mednikow's motion for summary judgment on its slander of title claim, finding Mednikow was unable to prove that Mooradian's claim for adverse possession failed as a matter of law.

[3] Mooradian subsequently requested a "hearing for surety" in the circuit court. The circuit court denied the request, but later set the amount for the surety.

25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. The moving party must prove there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. ***Id.***, ¶24. The interpretation of a lease also presents questions of law that we review independently. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 416, 538 N.W.2d 614 (1995).

¶20 Mooradian argues the appeal from the writ of restitution was timely, and even if untimely, the appeal should nevertheless be heard under WIS. STAT. § 807.07(1).[4] We disagree.

¶21 WISCONSIN STAT. § 799.445, which governs eviction actions, explicitly sets forth the time in which an appeal in an eviction action shall be taken. The statute provides, in relevant part, as follows:

> **799.445 Appeal**. An appeal in an eviction action shall be initiated within 15 days of the entry of judgment or order as specified in s. 808.04(2). An order for judgment for restitution of the premise under s. 799.44(1) or for denial of restitution is appealable as a matter of right under s. 808.03(1) within 15 days after the entry of the order for judgment for restitution or the denial of restitution.[5]

¶22 Here, the circuit court's July 26, 2011 Decision/Order ordered default judgment be granted. Mooradian failed to file a notice of appeal of the order within fifteen days.

¶23 Instead of filing a notice of appeal from the eviction order, Mooradian filed a petition for leave to appeal the entire July 26 Decision/Order on

[4] References to the Wisconsin Statutes are to the 2009-10 version unless noted.

[5] WISCONSIN STAT. § 808.04(2) states, "An appeal under … 799.445 shall be initiated within 15 days after entry of judgment or order appealed from."

summary judgment. Mooradian's petition specifically stated it was seeking an interlocutory appeal "from a Non Final Order dated July 26, 2011 … wherein the Court granted Defendant's motion for Default Judgment on breach of lease and defendant's Motion for Summary Judgment on the termination of Plaintiff's option to purchase."

¶24 Mooradian's petition for leave to appeal from a nonfinal order did not extend the fifteen-day deadline to file the notice of appeal under WIS. STAT. §§ 799.445 and 808.04(2). *Cf.*, ***Highland Manor Assocs. v. Bast***, 2003 WI 152, ¶¶24-25, 268 Wis. 2d 1, 672 N.W.2d 709. Mooradian attempts to excuse its failure to file a notice of appeal by asserting the July 26 Decision/Order was not a final judgment. However, WIS. STAT. § 799.445 applies to both judgments and orders. Moreover, as mentioned previously, Mooradian itself specifically characterized the July 26 Decision/Order as: "the Court granted Defendant's motion for Default Judgment on breach of lease …."

¶25 Mooradian also insists the July 26 order was not a final order for purposes of WIS. STAT. § 808.03(1), because it did not contain the "finality language" required by ***Wamboldt v. West Bend Mutual Insurance Co.***, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670. However, the eviction order contained in the court's July 26 Decision/Order was clearly final and the eviction order was not ambiguous in its language or intent. It explicitly ordered that a judgment of eviction be granted, the touchstone of finality under ***Wamboldt***. Any confusion was created by Mooradian's election to consolidate the eviction action with the large claims case, and its election to file a petition for leave to appeal all the issues on summary judgment, rather than a notice of appeal from the eviction order.

¶26 Mooradian also contends Mednikow did not move for default judgment. This contention is disingenuous. Both parties and the court understood the summary judgment proceedings to include a request for default judgment, as Mooradian's petition for leave to appeal confirmed. We also note Mednikow's brief in support of summary judgment requested default judgment:

> The above facts are not only undisputed, but deemed admitted because Mooradian failed to answer Mednikow's eviction complaint. Mednikow filed the eviction action against Mooradian on July 9, 2010 and served Jody Brul[e]y, as authorized agent of Mooradian that same day. On July 23, 2010 Mooradian filed a motion to consolidate the eviction case with this lawsuit. On July 27, 2010 the parties appeared for the return date and adjourned the case until September 1, 2010 for a hearing on the motion to consolidate. On August 24, 2010 the eviction case was transferred to the large claims court judge for further proceedings. At no time, did Mooradian file an answer, motion under WIS. STAT. § 802.06(2) or otherwise respond to Mednikow's eviction complaint.
>
> Therefore, Mednikow is thus entitled to an immediate writ of restitution and an order declaring that the Lease and Option have terminated on summary judgment as well as a default judgment.[6]

¶27 Mooradian's notice of appeal purported to appeal from the writ of restitution, but it provides no authority for tolling the deadlines under WIS. STAT. §§ 799.445 or 808.04(2) until a writ of restitution is issued. The writ of restitution is not an order or judgment of eviction. *See* WIS. STAT. § 799.44. The writ of restitution is simply the order to the sheriff requiring the sheriff to remove the tenant from the building. The eviction order was issued on July 26, 2011, and

[6] The writ of restitution itself states that the "judgment in favor of plaintiff and against the defendant in an eviction action was entered on July 26, 2011 for restitution of the [subject] premises …."

Mooradian did not file a notice of appeal until September 28, 2011. The notice of appeal was therefore untimely.

¶28 Mooradian's untimely appeal cannot be cured by WIS. STAT. § 807.07(1). An appealable order or judgment must be involved before this court has jurisdiction. *See* ***Scheid v. State***, 60 Wis. 2d 575, 583, 211 N.W.2d 458 (1973). Indeed, Mooradian concedes "there is no civil case stating whether § 807.07(1) may cure an untimely appeal." Mooradian inappropriately relies upon ***Northridge Bank v. Community Eye Care Ctr.***, 94 Wis. 2d 201, 203, 287 N.W.2d 810 (1980). However, the court in that case stated:

> The defect in this case is not one of jurisdiction. The notice of appeal was filed within the time for appeal set forth in every applicable statute. Defendant's mistake was in failing to designate with sufficient particularity the orders which were the subject of his appeal in addition to the judgment. This was a defect in the appeal papers which the court of appeals could and should have permitted to be supplied. It amounts to no more than an inconsequential violation of the rules of appellate procedure.

Id.

¶29 Mooradian's notice of appeal suffers from yet another deficiency. WISCONSIN STAT. § 799.29(1)(a) provides "[t]here shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown."[7]

[7] The exclusive procedure for eviction actions is set forth in WIS. STAT. ch. 799, which governs small claims actions. *See* WIS. STAT. § 799.01(1)(a). Therefore, it is irrelevant that the eviction action in the present case was consolidated with a large claim case.

¶30 Despite filing a flurry of motions, petitions and appeals, Mooradian never filed a motion to reopen the default judgment.[8] As the circuit court correctly observed in its July 26, 2011 Decision/Order, Mooradian also never sought leave to respond to the eviction complaint after Mednikow put it on notice that it was seeking default judgment.

¶31 In addition, although the circuit court characterized the eviction order in terms of a default judgment, we conclude that Mednikow was also entitled to an eviction order on summary judgment.

¶32 The lease irrefutably required Mooradian to pay the increases in real estate taxes. On February 26, 2010, Mednikow gave notice to Mooradian of its breach of the lease for failing to pay the real estate taxes. Mednikow further advised Mooradian it had thirty days to cure the default. The lease provided that if the default shall continue for thirty days without correction, the landlord may declare the term of the lease ended, and terminated, by giving written notice of such intentions. The circuit court properly determined that Mooradian did not cure its breach of the lease. As a result, the lease terminated as a matter of law.

¶33 As a matter of law, the option to purchase contained in the lease also terminated with the lease. *See* ***Bence***, 196 Wis. 2d at 418. The option in the present case was part of the lease. It was not a separate instrument. There was no separate consideration. Mednikow properly gave notice on February 26, 2010 of Mooradian's breach of the lease for failing to pay the increase in real estate taxes.

[8] We note that Mooradian fails to reply to Mednikow's argument regarding Mooradian's failure to move to reopen the default judgment. Arguments not refuted are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The letter specifically stated that Mooradian had thirty days to cure the default. Mooradian failed to cure the default. As a result, the lease terminated and so did the option.[9]

¶34 Mooradian argues its March 9, 2010 letter constituted an exercise of the option.[10] The letter contained its "demand to close on the property at 771-773 Potts Avenue, consistent with the Court of Appeals Decision and Judge McKay's Decision of March 3, 2010." However, Mooradian did not set a closing date, tender the purchase money, or enclose the closing documents such as a deed and closing statement. Moreover, "one to whom an offer to sell a building is made has not the right to impose additional terms and include additional property." ***Link Wholesale Grocery, Inc. v. Krause***, 257 Wis. 207, 209, 43 N.W.2d 25 (1950). Here, for years Mooradian continually demanded modifications of the option terms. Even Mooradian's March 9, 2010 letter requests a title commitment, a requirement more than Mednikow agreed to deliver.

¶35 Perhaps more importantly, however, Mooradian failed to enforce the option within a reasonable time. As the circuit court correctly stated:

> [U]nder the circumstances, it was unreasonable in this case for Mooradian to wait until March 9, 2010 to provide notice that it intended to exercise the option without additional conditions. The undisputed facts show that instead of exercising the option after the Court of Appeals opinion in 2008, Mooradian spent over a year attempting to

[9] Mooradian could not unilaterally alter its obligation to pay increased property taxes simply because the parties were, according to Mooradian, still negotiating. It is irrelevant that Mooradian disputed the amount of real estate taxes owed. Mooradian cannot dispute that it did not pay any amount due for real estate taxes prior to the thirty-day deadline.

[10] The circuit court observed that prior to the March 9 letter, "the record is rife with various counteroffers made by Mooradian in an apparent attempt to acquire the rights to additional property on Lot 10."

> haggle its way into purchasing a parking lot and additional property around the building on Lot 10 instead of exercising the option as it was articulated in the Court's previous order. The parties have been litigating regarding this option for nearly a decade. Mooradian should have been aware long before March 9, 2010 of its obligations in exercising the option. Accordingly, as in ***Megal*** [***v. Kohlhardt***, 11 Wis. 2d 70, 80, 103 N.W.2d 892 (1960)], the opportunity for Mooradian to exercise the option due to Isadore Mednikow's death had long since expired by the time it attempted to do so on March 9, 2010 as a matter of law.

The ***Megal*** case cited by the circuit court is instructive. The court in that case determined it was unreasonable for the plaintiff to delay seven months in tendering the purchase price after obtaining favorable zoning. As the circuit court in the present case correctly observed, Mooradian's opportunity to exercise the option had long since expired as a matter of law by the time it attempted to do so on March 9, 2010.

¶36 Mooradian insists it was ready, willing and able to close on the property, but was unable to do so because Mednikow refused to convey the property where the improvements were situated. Mooradian contends Mednikow refused to convey any portion of Lot 10 consistent with the prior orders of the circuit court and the court of appeals. The circuit court properly determined "this contention is without merit."

¶37 The circuit court noted that it "has been consistent in its prior orders." It also observed, "The court of appeals affirmed the Court's original ruling, which both parties reference." In particular, the court ruled:

> Plaintiff is entitled to purchase the property located at 771-773 Potts Avenue, Green Bay, Wisconsin, 54301, *in accordance with the Addendum to Lease dated June 15, 2009*, [sic] for the assessed value price of Two Hundred Sixty-Eight Thousand Seven Hundred Dollars ($268,700.00). … Therefore, the Order provides that

> Mooradian had the right to exercise the option as it was articulated in the Memorandum of Lease. A review of the Memorandum of Lease reveals that the property subject to the option is Lot 11. … No part of Lot 10 is mentioned at all.

¶38 We therefore discern no material dispute of fact as to whether the option to purchase was properly exercised prior to its expiration. Quite simply, it never was.

By the Court.—Order affirmed.

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