

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 1, 2018**

Sheila T. Reiff  
Clerk of Court of Appeals

**NOTICE**

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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 No. 2016AP1885**

**Cir. Ct. No. 2012CV1155**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**WELLS FARGO BANK, N.A.,**

**PLAINTIFF-RESPONDENT,**

**v.**

**AMIN U. SHAIKH AND NAHEED SHAIKH,**

**DEFENDANTS-APPELLANTS,**

**CITIBANK, N.A. AND CAMBECK PETROLEUM CORPORATION,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Rock County:  
BARBARA W. MCCRORY, Judge. *Dismissed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This appeal arises from a consolidated case consisting of two actions: (1) a foreclosure action brought by Wells Fargo Bank,

N.A., against Amin Shaikh and Naheed Shaikh; and (2) a declaratory judgment action brought by the Shaikhs against Wells Fargo asserting that Wells Fargo lacked the right to enforce the note and mortgage at issue in the foreclosure action. In August 2015, the circuit court entered an order for judgment and judgment in foreclosure in the consolidated case, which stated that, “Wells Fargo is entitled to foreclosure upon the note and mortgage.” In February 2016, the court entered an order in the consolidated case, signed by the judge, dismissing the Shaikhs’ claims against Wells Fargo with prejudice and including the statement, “This is a final judgment for purposes of appeal if signed by a circuit court judge.” In June 2016, the Shaikhs moved the court “to enter a final order for purposes of appeal in this case” because the August 2015 judgment concerning the foreclosure action did not include a statement that it was a final judgment or final order for purposes of appeal. On June 30, 2016, the court entered an order stating that, “WHEREAS the Court does not contemplate any additional matters in litigation at this state of the foreclosure proceeding; IT IS HEREBY ORDERED that this Order shall serve as a final order for purposes of appeal.”<sup>1</sup>

¶2 The Shaikhs appeal the June 2016 Order, challenging certain of the circuit court’s rulings leading up to and including the August 2015 Default Foreclosure Judgment.

¶3 We conclude that this appeal was untimely filed. The February 2016 Dismissal Order was the final order for purposes of this appeal because it disposed

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<sup>1</sup> We will refer to the August 2015 order for judgment and judgment in foreclosure as the August 2015 Default Foreclosure Judgment, to the February 2016 memorandum decision and dismissal order as the February 2016 Dismissal Order, and to the June 2016 order as the June 2016 Order.

of all issues between Wells Fargo and the Shaikhs in both of the actions in the consolidated case. The June 2016 Order did not render the February 2016 Dismissal Order any less final, nor did it extend the time during which the Shaikhs could appeal under WIS. STAT. § 808.04(1) (2015-16).<sup>2</sup> Accordingly, we dismiss this appeal for lack of subject matter jurisdiction because the Shaikhs failed to timely file their appeal within ninety days of the February 2016 Dismissal Order as required by § 808.04(1).

### **BACKGROUND**

¶4 This appeal concerns two consolidated actions and three orders entered in August 2015, February 2016, and June 2016.

¶5 The two consolidated actions are a foreclosure action filed by Wells Fargo against the Shaikhs, and a declaratory judgment action filed by the Shaikhs against Wells Fargo asserting that Wells Fargo lacked the right to enforce the note and mortgage at issue in the foreclosure action. We will generally use the following terminology to refer to these aspects of this case: “the consolidated case,” and its component “foreclosure action” and “declaratory judgment action.”

¶6 The first of the three orders is the August 2015 Default Foreclosure Judgment, granting Wells Fargo’s motion for a default judgment in the foreclosure action. The circuit court entered an order for judgment signed by the judge and stating, “IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED ... That Wells Fargo ... is entitled to foreclosure upon the note and

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

mortgage.... The Rock County Clerk of Courts shall enter this Judgment”; and a judgment in foreclosure signed by the clerk stating, “IT IS HEREBY ADJUDGED, DECLARED AND DECREED ... That Wells Fargo is entitled to foreclosure upon the note and mortgage.” Below the clerk’s signature on the Judgment, the statement “THIS IS THE FINAL JUDGMENT FOR THE PURPOSE OF APPEAL” was crossed out with the judge’s initials alongside.

¶7 The second order is the February 2016 Dismissal Order, granting both parties’ motions to dismiss the Shaikhs’ claims in the declaratory judgment action. The order provided as follows:

For the reasons stated in the Court’s memorandum decision ... [t]his case is dismissed. This dismissal is with prejudice.... **THIS IS A FINAL JUDGMENT FOR PURPOSES OF APPEAL IF SIGNED BY A CIRCUIT COURT JUDGE.**

The order was electronically signed by the judge.

¶8 In June 2016, the Shaikhs moved the circuit court “to enter a final order for purposes of appeal in this case” because the August 2015 Default Foreclosure Judgment did not include a statement that it was a final judgment or final order for purposes of appeal, and because that language was crossed out with the judge’s initials alongside. On June 30, 2016, the circuit court entered an order stating:

WHEREAS the Court entered an Order for Judgment and Judgment (“Judgment”) on August 12, 2015;

WHEREAS the Judgment did not state that it was a final order or final judgment for purposes of appeal;

WHEREAS it is the Court’s intention that the Judgment shall be a final judgment for purposes of appeal;

WHEREAS *Wambolt v. West Bend Mutual Ins. Co.*, 2007 WI 35, ¶¶39, 49, 299 Wis.2d 723, 728 N.W.2d 670 requires the Court to indicate an order or judgment is a final order or final judgment for purposes of appeal; and

WHEREAS the court does not contemplate any additional matters in litigation at this state of the foreclosure proceeding;

IT IS HEREBY ORDERED that this Order shall serve as a final order for purposes of appeal.

At the bottom, after the circuit court judge’s signature, the order states, “**THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.**”

¶9 The Shaikhs filed a notice of appeal of the June 2016 Order on September 27, 2016.

#### **DISCUSSION**

¶10 As stated, the Shaikhs appeal the June 2016 Order, challenging certain of the circuit court’s rulings leading up to and including the August 2015 Default Foreclosure Judgment. As we explain, the problem for the Shaikhs is that the entire matter in litigation between them and Wells Fargo was disposed of by the February 2016 Dismissal Order, and it is undisputed that the Shaikhs did not file their appeal within ninety days of the entry of that order as required by WIS. STAT. § 808.04(1). That is, while the August 2015 Default Foreclosure Judgment was not a “final” judgment for purposes of this appeal, the February 2016 Dismissal Order was, because it disposed of all issues between Wells Fargo and the Shaikhs in both of the actions within the consolidated case. The June 2016 Order did not render the February 2016 Dismissal Order any less final, nor did it extend the time during which the Shaikhs could appeal under § 808.04(1). Accordingly, we dismiss this appeal for lack of subject matter jurisdiction because

the Shaikhs failed to timely file their appeal within ninety days of the February 2016 Dismissal Order.

¶11 A party in a civil case must generally file an appeal no later than ninety days after the date that the circuit court enters “a final judgment or order.” WIS. STAT. § 808.04(1); § 808.03(1). A judgment or order is final when it “disposes of the entire matter in litigation as to one or more of the parties.” WIS. STAT. § 808.03(1).<sup>3</sup> Determining whether a document is a final order or judgment for the purposes of appeal is a question of law that we review de novo. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶14, 299 Wis. 2d 723, 728 N.W.2d 670.

¶12 The Shaikhs advance two arguments in support of their position that this appeal is timely: (1) the issue of timeliness is not properly before this court because Wells Fargo raises it for the first time on appeal; and (2) the June 2016 Order is the final order for purposes of this appeal because the August 2015 Default Foreclosure Judgment and the February 2016 Dismissal Order were either non-final or ambiguous orders, and we must construe those documents in order to preserve the Shaikhs’ right to appeal. We address each argument in turn.

*I. Whether Timeliness is an Issue Properly Before this Court*

¶13 We first address the Shaikhs’ argument that this question is not properly before us because Wells Fargo improperly waited to raise the timeliness issue “for the first time on appeal.” More specifically, the Shaikhs assert that, “If

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<sup>3</sup> Under WIS. STAT. RULE 809.50(1), a party may file a petition for leave of the court of appeals permitting appeal of a non-final judgment or order that is not appealable as of right within fourteen days after entry of the judgment or order. The Shaikhs did not avail themselves of this option as to any of the rulings they challenge.

Wells Fargo's position was the court's orders prior to the June [30], 2016 order were final orders for purposes of appeal, then Wells Fargo should have raised this with the circuit court." This forfeiture argument is frivolous for at least the following reasons. As a matter of common sense, Wells Fargo had no cause to clarify the finality of the orders and judgments that were in its favor; as a matter of practicality, Wells Fargo could not argue that the Shaikhs' appeal was untimely until the Shaikhs appealed.

¶14 Moreover, as a matter of law, we must address the timeliness of this appeal because it is the duty of this court to take notice of its jurisdiction and dismiss any appeal where jurisdiction is lacking. "The timely filing of a notice of appeal is necessary to give the court of appeals subject matter jurisdiction over an appeal." *State v. Sorenson*, 2000 WI 43, ¶16, 234 Wis. 2d 648, 611 N.W.2d 240; *see also* WIS. STAT. RULE 809.10(1)(e) ("The notice of appeal must be filed within the time specified by law. The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal."); *Falk v. Industrial Comm'n*, 258 Wis. 109, 111, 45 N.W.2d 161 (1950) ("In several decisions this court has reiterated the rule that when an appeal is not taken within the statutory period allowed therefor the court had no jurisdiction of the matter."). A court must raise questions of subject matter jurisdiction even if the parties do not, and subject matter jurisdiction cannot be obtained by a party's waiver or consent. *Admiral Ins. Co. v. Paper Converting Machine Co.*, 2012 WI 30, ¶21, 339 Wis. 2d 291, 811 N.W.2d 351. Therefore, regardless of when Wells Fargo raised the issue of timeliness, and even if it did not, we must determine whether the Shaikhs timely filed this appeal.

*II. Whether the August 2015 Default Foreclosure Judgment or the February 2016 Dismissal Order were “Final” for Purposes of Appeal*

¶15 The Shaikhs argue that the June 2016 Order was the final order for purposes of this appeal because the February 2016 Dismissal Order and the August 2015 Default Foreclosure Judgment were either non-final or ambiguous orders, and we must construe those documents in order to preserve the Shaikhs’ right to appeal. *See Wambolt*, 299 Wis.2d 723, ¶4 (appellate courts shall “liberally construe ambiguities to preserve the right of appeal”). The Shaikhs’ appeal was untimely if either of the two earlier documents was a final order or judgment for purposes of appeal. *See Admiral Ins. Co.*, 339 Wis. 2d 291, ¶22. Accordingly, we review each document in turn.

*A. The August 2015 Default Foreclosure Judgment*

¶16 We begin with the August 2015 Default Foreclosure Judgment, which granted Wells Fargo’s motion for default judgment in foreclosure, held that Wells Fargo was entitled to foreclosure on the note and mortgage, and entered judgment accordingly. The Shaikhs direct our attention to two items on the August 2015 Default Foreclosure Judgment which together, they argue, create ambiguity as to whether the document was a “final” judgment: (1) the crossed-out “final judgment” language and (2) the caption containing only the foreclosure action case number, and not the declaratory judgment action case number with which the foreclosure action was consolidated. They argue that because these facts rendered the August 2015 Default Foreclosure Judgment ambiguous, this court should liberally construe that judgment to allow their appeal to proceed. *See id.*, ¶3 (“If [the appellate court] conclude[s] that there is any ambiguity in an order or judgment about whether it disposes of the entire matter in litigation as to one or

more of the parties, [the court] will construe the ambiguity so as to preserve the right to appeal.”).

¶17 We conclude that the August 2015 Default Foreclosure Judgment was not a final judgment for purposes of appeal, but not because, as the Shaikhs suggest, the document was ambiguous. Rather, the August 2015 Default Foreclosure Judgment simply did not dispose of the entire matter in litigation, because the judgment did not address the Shaikhs’ claims in the declaratory judgment action. *See id.*, ¶27 (“To constitute a final order or judgment, the document must explicitly dismiss or adjudge the *entire matter* in litigation as to one or more parties.” (emphasis added)).

#### *B. The February 2016 Dismissal Order*

¶18 The February 2016 Dismissal Order was unambiguously a “final” order for purposes of appeal. The Shaikhs themselves sought the February 2016 Dismissal Order because, as they acknowledged to the circuit court, they had “not been able to file an appeal as a matter of right because of the pending claims [Wells Fargo sought] to dismiss.” The February 2016 Dismissal Order, which was issued in response to both parties’ motions to dismiss, and which dismissed the Shaikhs’ remaining claims against Wells Fargo that were pending in the declaratory judgment action, contained the “final judgment” language missing from the August 2015 Default Foreclosure Judgment and explicitly stated that “this case” was dismissed with prejudice. As stated, “[t]o constitute a final order or judgment, the document must explicitly dismiss or adjudge the entire matter in litigation as to one or more parties.” *Id.* Because the February 2016 Dismissal Order did just that, we conclude that it was a final order for the purposes of appeal.

¶19 The Shaikhs argue that the February 2016 Dismissal Order was not a final order for purposes of appeal for three reasons: (1) the caption contained only the case number for the declaratory judgment action; (2) the order dismissed only the Shaikhs' claims filed in the declaratory judgment action, and said nothing explicitly about the earlier August 2015 Default Foreclosure Judgment being a final order for purposes of appeal in the foreclosure action; and (3) the circuit court unambiguously stated in the June 2016 Order that that order was a final order for purposes of appeal. According to the Shaikhs, the confluence of these factors created ambiguity, which we should liberally construe to preserve their right of appeal. We are not persuaded and reject each of their three arguments for the following reasons.

¶20 First, the missing case number in the caption of the February 2016 Dismissal Order did not create ambiguity because as we have explained the record was clear at the time the February 2016 Dismissal Order was issued that the foreclosure action and the declaratory judgment action had been consolidated into a single case. The unambiguous consolidation of the two actions merged them into one case, regardless of what case numbers appeared in the caption. *See First Trust Co. v. Holden*, 168 Wis. 1, 7, 168 N.W. 402 (1918) (effect of consolidation was to merge the actions into one, even though the parties retained the titles of the original actions and treated them as separate and distinct actions after consolidation).

¶21 Second, the Shaikhs point to the fact that the February 2016 Dismissal Order dismissed only the Shaikhs' claims pending in the declaratory judgment action, and did not specifically reference or reiterate the rulings from the August 2015 Default Foreclosure Judgment. However, this fact did not create any ambiguity as to whether the order disposed of the entire matter in litigation

because the claims dismissed by the February 2016 Dismissal Order were the only remaining unresolved claims and the order explicitly contained a finality statement.

¶22 The Shaikhs do not dispute that following the August 2015 Default Foreclosure Judgment, the only outstanding claims requiring resolution were their claims in the declaratory judgment action. Additionally, the Shaikhs appear to acknowledge that the entire matter in litigation consisted of claims from both of the actions in the consolidated case. However, they seem to argue that in a consolidated case such as this one, where the circuit court addressed the two sets of claims in two consolidated actions sequentially, such that when one set of claims was adjudged the other set remained pending, the circuit court was required to specifically state in the later-entered order (the February 2016 Dismissal Order) that the first-entered order (the August 2015 Default Foreclosure Judgment) had been in fact final. Because the court did not do so in the February 2016 Dismissal Order, so their argument goes, and in light of the alleged ambiguity, the court was required to enter an additional order doing so, which is why the Shaikhs maintain that they requested the June 2016 Order. We disagree.

¶23 The February 2016 Dismissal Order contained an explicit finality statement as to “the issues between Wells Fargo and the Shaikhs,” and it unambiguously dismissed the Shaikhs’ only remaining claims pending in the declaratory judgment action. Any alleged ambiguity created by the lack of a finality statement in the August 2015 Default Foreclosure Judgment was resolved by the February 2016 Dismissal Order’s unambiguous resolution of each outstanding claim in the consolidated case coupled with that finality statement. In sum, we conclude that the February 2016 Dismissal Order was a “final order” for purposes of appeal because it finally disposed of “the entire matter in litigation”

and we reject the Shaikhs' arguments to the contrary. *Admiral Ins.*, 339 Wis. 2d 291, ¶27.

¶24 Finally, the Shaikhs' reliance on the June 2016 Order does not save their appeal. The June 2016 Order did not render the February 2016 Dismissal Order any less final. See *Harder v. Pfitzinger*, 2004 WI 102, ¶2, 274 Wis. 2d 324, 682 N.W.2d 398 (a final order remains final notwithstanding subsequent actions in the circuit court). Nor does the notice of appeal of the June 2016 Order give this court jurisdiction over final orders entered prior to June 2016 that were not timely appealed, such as the final February 2016 Dismissal Order. See *Laube v. City of Owen*, 209 Wis. 2d 12, 15, 561 N.W.2d 785 (Ct. App. 1997) (appeal from July 1996 order did not bring September 1995 order before the court if the 1995 order was final). Instead, this court has jurisdiction over a prior final order only if a timely notice of appeal was filed from the prior final order. *Townsend v. Massey*, 2011 WI App 160, ¶11, 338 Wis. 2d 114, 808 N.W.2d 155; see also WIS. STAT. RULE 809.10(1)(e). Because the Shaikhs filed their appeal more than ninety days after the February 2016 Dismissal Order explicitly dismissed the entire matter in litigation, their appeal was untimely and this court lacks jurisdiction to consider it.

## CONCLUSION

¶25 Because the Shaikhs did not file a timely appeal, we lack subject matter jurisdiction and must dismiss the appeal. No party shall recover its WIS. STAT. RULE 809.25 appellate costs.

*By the Court.*—Appeal dismissed.

Not recommended for publication in the official reports.

