COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
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.

No. 01-1058

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

ASSOCIATED/F&M BANK,

PLAINTIFF,

V.

RAY A. JOHNSON, ELIZABETH L. JOHNSON, AMERICAN BANK OF WISCONSIN AND USA FINANCIAL SERVICES, INC.,

DEFENDANTS,

DONNA WALKER,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

BADGER CAPITOL CORPORATION,

INTERVENING DEFENDANT-RESPONDENT,

ERIC L. JENSEN AND DIANE M. MCKEEVER,

INTERVENING DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Oconto County: GORDON MYSE, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This appeal arises from a summary judgment dismissing Donna Walker's action to foreclose a lien based upon a money judgment she obtained against Ray Johnson. At the time Walker's judgment was docketed, Johnson owned the real estate upon which Walker seeks foreclosure. Walker's judgment was later ordered satisfied. Walker argues she is entitled to collaterally attack the order satisfying the judgment. She contends that Johnson's bankruptcy did not discharge her judgment lien and, due to Johnson's fraud on the court, the order satisfying the judgment should be set aside. In addition, Walker claims that the lis pendens filed in her foreclosure action nullifies the effect of the satisfaction of judgment.

¶2 Because Walker grounds her attack on allegations of fraud on the court, we conclude she is entitled to collaterally attack the order satisfying Walker's judgment against Johnson. We further conclude that whether the order satisfying the judgment should be set aside raises issues of fact that must be addressed to the trial court. Summary judgment disposition is not appropriate. Because the issues concerning the effect of the lis pendens were not addressed by the trial court, we do not address them for the first time on appeal.

¶3 Therefore, we sustain the circuit court's decision to permit intervention and to reopen the foreclosure judgment. These rulings were not

directly challenged on appeal. However, we reverse the judgment dismissing Walker's foreclosure action and remand for further proceedings consistent with this opinion.

BACKGROUND

¶4 The underlying facts are stipulated. In 1987 in Milwaukee County, Walker obtained a valid judgment in the sum of $39,323.49 against Ray Johnson. She docketed that judgment with the Oconto County clerk of court on August 7, 1987. At the time of docketing, Johnson owned real estate in Oconto County to which the judgment attached as a judgment lien.[1]

¶5 In 1988, Johnson and his wife declared bankruptcy and listed their obligation to Walker as an unsecured debt. They did not, however, list as an asset their interest in the Oconto County real estate. The Johnsons were discharged of all obligations listed, including the debt to Walker, in March 1989.[2]

¶6 Walker took no action to foreclose her judgment lien until 1992, when Associated/F&M Bank initiated an action against Johnson to foreclose a mortgage on the Oconto County real estate. Associated filed a lis pendens giving notice of its foreclosure action. Walker filed a cross-complaint in that action. In 1993, Associated stipulated to a dismissal of its foreclosure complaint. The court

[1] "Black's [Law Dictionary] defines a judgment lien as '[a] lien binding the real estate of a judgment debtor, in favor of the holder of the judgment, and giving the latter a right to levy on the land for the satisfaction of his judgment to the exclusion of other adverse interests subsequent to the judgment.'" ***Wozniak v. Wozniak***, 121 Wis. 2d 330, 334, 359 N.W.2d 147 (1984).

[2] The Johnsons filed a second bankruptcy some time later; it is not material to our analysis.

ordered dismissal of the bank's complaint. The order expressly stated that Walker's cross-claim would proceed. The lis pendens was not ordered discharged.

¶7 In 1995, pursuant to WIS. STAT. § 806.19(4)(a), Johnson sought from the Oconto County Circuit Court a satisfaction of the judgment obtained by Walker. The court granted the satisfaction, which was filed with the Oconto County Circuit Court on December 11, 1995. Before he obtained this satisfaction, however, Johnson had sold the Oconto County real estate. Walker maintains that she received no notice of either the application for satisfaction or the entry of the order of satisfaction of her judgment. There is no proof to the contrary.

¶8 In November 1998, Walker filed a motion for judgment on her cross-claim. The trial court granted Walker's motion and, in November 1998, entered a judgment of foreclosure and order for sheriff's sale.[3]

¶9 In March 1999, before the sheriff's sale took place, Eric Jensen and Diane McKeever sought to intervene in the foreclosure action. They claimed that they had purchased the property in January 1996 and that Walker's underlying judgment had been satisfied. Intervention was granted, and the scheduled sheriff's sale was stayed.

¶10 Pursuant to WIS. STAT. § 806.07, Jensen and McKeever filed a motion for relief from the foreclosure judgment, claiming that they were innocent purchasers for value. Walker contended that Johnson fraudulently obtained the order for satisfaction of judgment and, therefore, the order was invalid. The

[3] Judge Larry Jeske entered the judgment of foreclosure.

parties stipulated to the underlying facts and submitted their dispute on briefs for summary judgment resolution.

¶11 The trial court determined that the order satisfying Walker's judgment had the effect of discharging her judgment lien. The court held that Walker "may seek to vacate that order based upon the provisions of [WIS. STAT.] § 806.07 but may not mount an independent collateral attack on that [order]." It concluded that because Walker's foreclosure action depended upon the validity of the judgment lien, her attempt to foreclose must fail. The trial court reopened Walker's judgment of foreclosure and dismissed her foreclosure action.

STANDARD OF REVIEW

¶12 This matter came before the trial court on motion for summary judgment. We review a motion for summary judgment de novo, using the same methodology as the trial court. ***Dekker v. Wergin***, 214 Wis. 2d 17, 20, 570 N.W.2d 861 (Ct. App. 1997). Because this methodology is well known, we do not repeat it here except to note that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

DISCUSSION

1. Collateral Attack

¶13 Walker argues that the trial court erred when it held that she could not collaterally attack, on the basis of fraud, the order satisfying her judgment against Johnson. We agree. The Wisconsin Supreme Court has defined collateral attack as an "attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted

for the purpose of vacating, reviewing, or annulling it." ***In re Estate of Boots***, 73 Wis. 2d 207, 215, 243 N.W.2d 225 (1976) (quoting ***Zrimsek v. American Auto. Ins. Co.***, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959)).

> The general rule is stated in 49 C.J.S., Judgments, p. 792, sec. 401, as follows:
>
> A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect of its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding, except … for fraud in its procurement.

Boots, 73 Wis. 2d at 216 (quotation omitted). This reference was quoted with approval in ***Kriesel v. Kriesel***, 35 Wis. 2d 134, 138-39, 150 N.W.2d 416 (1967), and ***Sinnott v. Porter***, 57 Wis. 2d 462, 466, 204 N.W.2d 449 (1973). In addition, this rule has been recognized as the Wisconsin law in the case of ***Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co.***, 357 F. Supp. 399, 410 (W.D. Wis. 1972).[4]

¶14 "While a direct attack should be initiated in the court which entered the initial judgment or order, a collateral attack based upon actual or constructive fraud upon the court may be brought in a different court." ***Hammes v. First Nat'l Bank & Trust Co.***, 79 Wis. 2d 355, 372, 255 N.W.2d 555 (1977) (Hansen, J., concurring).

¶15 Under WIS. STAT. § 806.07, the court's equitable powers to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud

[4] *See also* ***In re Komarr's Estate***, 68 Wis. 2d 473, 482, 228 N.W.2d 681(1975); ***Schramek v. Bohren***, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988); ***State v. Madison***, 120 Wis. 2d 150, 153, 353 N.W.2d 835 (Ct. App. 1984).

on the court are not reduced. WIS. STAT. § 806.07(2);[5] ***Walker v. Tobin***, 209 Wis. 2d 72, 78, 568 N.W.2d 303 (Ct. App. 1997). Subsection (2) adds "an important reminder that orders of relief from judgment do not reduce the court's power to entertain an independent equitable action, for example, an action based on fraud, to relieve a party from judgment." ***Id.***

¶16 "Upon a showing of proper circumstances, and when required by the ends of justice, appropriate relief against a judgment may be had in equity, the power of equity in this connection being inherent and existing irrespective of any statute authorizing such relief." ***Id.*** at 77-78. This issue is addressed to trial court discretion, and "each case must stand on its own peculiar merits." ***Id.*** The elements of such an action include:

> (1) a judgment which ought not, in equity and good conscience, to be enforced;
>
> (2) a good defense to the alleged cause of action on which the judgment is founded;
>
> (3) fraud, accident, or mistake which prevented the [appellant] in the judgment from obtaining the benefit of his [claim];
>
> (4) the absence of fault or negligence on the part of [appellant]; and
>
> (5) the absence of any remedy at law.

Id. at 79. Because Walker bases her attack on fraud on the court, we conclude that Walker is entitled, in this foreclosure proceeding, to collaterally attack the order of satisfaction.

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[5] WISCONSIN STAT. § 806.07(2) provides in part: "This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court."

¶17 We note that WIS. STAT. § 806.07(2) does not prescribe a time limitation for bringing independent actions. ***Id.*** at 80. "In the absence of a controlling statute, the only time limitation is the equitable doctrine of laches." ***Id.*** (citation omitted). Because the issue of laches was not addressed by the trial court, we do not address it for the first time on appeal.[6]

2. The validity of the order satisfying the judgment

¶18 Next, Walker maintains that Johnson's fraud on the court nullifies the order discharging the judgment lien under WIS. STAT. § 806.14(4). She argues that Johnson committed fraud in three respects:

> (1) Johnson failed to list the real estate as an asset in the bankruptcy court proceedings;
>
> (2) Johnson failed to notify the circuit court of the pending foreclosure when he sought discharge of the judgment lien, and
>
> (3) Johnson failed to provide Walker with notice of his application for the discharge of the judgment lien as required under WIS. STAT. § 806.19.

¶19 She contends that Johnson's fraud on the court results in an invalid satisfaction of judgment. The procedural posture of this case precludes our consideration of the merits of her claims. These issues raise questions of fact, which are not amenable to summary judgment resolution. WIS. STAT. § 802.08. These issues, as well as other grounds upon which Walker might chose to rely in her attempt to show that the order of satisfaction should be set aside, may be addressed at the trial on remand.

[6] Walker also argues that her attack on the order is not collateral. However, in view of the law in Wisconsin that fraud is a ground for collateral attack, that issue need not be examined. *See* ***State Central Credit Union v. Bayley***, 33 Wis. 2d 367, 372-73, 147 N.W.2d 265 (1967).

¶20 Jensen and McKeever suggest that Johnson's bankruptcy results in a discharge of the judgment lien as a matter of law. We disagree. Strictly speaking, a bankruptcy discharge of an underlying debt does not in itself discharge the judgment lien. A docketed judgment creates a lien that amounts to a right to subject a judgment debtor's land to satisfaction of the judgment. WIS. STAT. § 806.15. "[A] discharge in bankruptcy voids all aspects of all judgments to the extent of the debtor's personal liability." ***In re Spore***, 105 B.R. 476, 478 (1989). In order to obtain a discharge of a judgment lien, however, a party must resort to WIS. STAT. § 806.19(4). ***Id.*** That section states that a bankruptcy discharge provides grounds to obtain satisfaction of a judgment lien. ***Id.***[7] Notice to the judgment creditor is required. WIS. STAT. § 806.19(4)(c). Because a bankruptcy discharge does not by itself remove a properly docketed judgment lien, Jensen and McKeever's argument to this effect fails.[8]

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[7] WISCONSIN STAT. § 806.19(4)(a) and (c) provides:

> (a) Any person who has secured a discharge of a judgment debt in bankruptcy and any person interested in real property to which the judgment attaches may submit an application for an order of satisfaction of the judgment and an attached order of satisfaction to the clerk of the court in which the judgment was entered.
>
> ….
>
> (c) Any person submitting an application and attached proposed order shall serve a copy of the completed application and attached proposed order on each judgment creditor for each of the judgments described in the application within 5 business days after the date of submission.

[8] "Ordinarily, liens and other secured interests survive bankruptcy." ***Farrey v. Sanderfoot***, 500 U.S. 291, 297 (1991).

3. The Lis Pendens

¶21 Next, Walker argues that all actions or orders affecting real estate that come into existence after the filing of the lis pendens are of no effect.[9] A lis pendens may be discharged upon the condition and in the manner provided by WIS. STAT § 811.22 for discharging an attachment or by WIS. STAT. § 806.19(1)(a) for satisfying a judgment. WIS. STAT. § 840.10(3). Here, the lis pendens was not discharged and, consequently, Walker contends that it provided Jensen and McKeever legal notice of Walker's pending foreclosure claim.

¶22 Walker's premise, that from the time of filing the lis pendens a subsequent purchaser or encumbrancer shall be bound by the proceedings in the action to the same extent and in the same manner as if a party is correct. However, from this premise, Walker maintains that if a subsequent judgment lien would be ineffective against her foreclosure rights, an order satisfying a judgment

[9] Under WISCONSIN STAT. § 840.10, a lis pendens may be filed with the register of deeds in the county in which the real estate is located when the action demands relief that "might confirm or change interests in the real property." ***Interlaken Serv. Corp. v. Interlaken Condo. Ass'n***, 222 Wis. 2d 299, 307, 588 N.W.2d 262 (Ct. App. 1998). A lis pendens contains the names of the parties, the object of the action and a description of the land affected. WIS. STAT. § 840.10. "The statute further provides that from the time of filing of the lis pendens a subsequent purchaser or encumbrancer shall be bound by the proceedings in the action to the same extent and in the same manner as if a party thereto." ***Belleville State Bank v. Steele***, 117 Wis. 2d 563, 566-67, 345 N.W.2d 405 (1984). The purpose of § 840.10 is to protect the courts' and the litigants' interests in the finality of the judgment, as well as the additional objective of giving prospective purchasers and encumbrancers notice of pending actions so that they may avoid "buying a lawsuit." ***Id.*** at 574-75. "The common law rule of lis pendens, a phrase that literally means a pending lawsuit, comports with the maxim *Pendente lite nihil innovetur*: 'Nothing should be changed during the pendency of an action.'" ***Id.*** at 571. A lis pendens "is a legal notice to any such person not having knowledge of the proceedings at the time his interest was procured or derived. As to the parties to the action ... who appear and participate in the proceedings, the lis pendens serves no real purpose and actually has no application." ***Hailey v. Zacharias***, 39 Wis. 2d 536, 537-38, 159 N.W.2d 667 (1968).

should, as a matter of law, share the same fate. This argument, however, was not addressed by the trial court and we do not address it for the first time on appeal. Walker may address this issue on remand.

4. Jensen's and McKeever's arguments

¶23 In response to Walker's arguments, Jensen and McKeever raise a number of issues that were not addressed by the trial court: (1) Walker's judgment lien rights expired; (2) Johnson's mother's homestead exemption extinguished Walker's lien rights in May 1995; (3) Walker knew or should have known of the 1995 order satisfying her judgment; (4) an innocent purchaser must be able to rely on the judgment docket and not the lis pendens; (5) Johnson can only obtain relief in bankruptcy court; (6) there was no equity in the Oconto County real estate at the time of the 1988 bankruptcy filing; and (7) the order satisfying judgment effectively dismissed Walker's foreclosure action. Because the trial court did not rule on these issues, we do not address them for the first time on appeal. These issues may also be addressed on remand.

CONCLUSION

¶24 We conclude that because Walker bases her attack on fraud on the court, she may, in this foreclosure proceeding, collaterally attack the order satisfying her judgment against Johnson. We have no opinion whether she may ultimately prevail in her attack; her claim for relief from the order is addressed to the trial court's discretionary equitable powers. Because Walker's allegations of fraud on the part of Johnson involve issues of material fact, these issues are not appropriate for summary judgment resolution and must be addressed on remand. We further conclude that Johnson's bankruptcy does not discharge an otherwise valid judgment lien against the real estate in question, but merely provides

grounds to do so under WIS. STAT. § 806.19(4).[10] Because the effect of the lis pendens was not addressed by the trial court, we do not address it for the first time on appeal.[11] The remaining issues raised, but not addressed by the trial court, may also be addressed on remand.

By the Court.—Judgment reversed in part; affirmed in part and cause remanded with directions. No costs to either party.[12]

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

[10] We reject intervenor Badger Capitol Corporation's argument for the reasons stated in our opinion.

[11] Eric Jensen and Diane McKeever filed a cross-appeal arguing that the trial court erroneously denied their motion for fees and costs under WIS. STAT. § 814.025. Pursuant to WIS. STAT. § 809.25(3), they also move for costs, fees and actual attorney fees on the ground that Walker filed her appeal without any reasonable basis in law or equity. Because Walker prevails in her appeal, we deny Jensen and McKeever's motion and deny relief on cross-appeal.

[12] This was an expedited appeal under WIS. STAT. RULE 809.17. We admonish counsel for both parties because their briefs failed to comply with WIS. STAT. RULE 809.19(1)(e). This section applies in expedited cases and requires adequate legal citation to support each proposition of law stated in their briefs. Because the legal citations were not adequate to support the propositions of law asserted, the case is removed from the expedited appeals procedure. *See* WIS. STAT. RULE 809.83.