



## OFFICE OF THE CLERK

**Supreme Court of Wisconsin**

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January 12, 2022

**To:**

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\*Addresses continued on page 4.

You are hereby notified that the Court has entered the following order:

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Nos. 2019AP1728  
2019AP2063

Marilyn Casanova v. Michael S. Polsky, Esq. L.C.#2017CV1728  
#2017CV1133

By order issued October 18, 2021, this court granted a petition for review filed by Michael S. Polsky, Esq., Receiver (“Receiver”) and the Bank of New York Mellon Trust Company, N.A., that presented these issues for review:

1. May an undocumented, unrecorded lien . . . have priority over the Trustee's properly perfected first mortgage and security interest?
2. Did the Court of Appeals (and, by extension, this Court) lack jurisdiction over these appeals by virtue of the failure to appeal from a final order dated April 23, 2018?

On December 13, 2021, while supreme court briefing was underway, the Receiver filed a motion “to deem the [appellants-]respondents’ arguments [in their supreme court response brief]

Page 2

January 12, 2022

Nos. 2019AP1728

2019AP2063

Marilyn Casanova v. Michael S. Polsky, Esq. L.C.#2017CV1728

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regarding the receiver's fiduciary obligations forfeited." Petitioner Bank of New York Mellon Trust Company, N.A., supports the Receiver's motion.

The Receiver's motion pertains to an argument that the appellants-respondents included in their response brief filed on December 6, 2021, where they argue that the Receiver violated fiduciary obligations to them "by promoting the interests of one group of creditors" (i.e. the Bank of New York Mellon Trust Company, N.A.) over "the interests of other creditors" (i.e. the appellants-respondents). The Receiver contends this argument is forfeited pursuant to Wis. Stat. §§ 809.62 (3m) (a) and 809.62 (6) because the fiduciary duty issue was not addressed by the circuit court, was "undeveloped" in the court of appeals, the response filed in opposition to the petition for review did not mention the Receiver's fiduciary obligations, see Wis. Stat. § 809.62 (3) (e), and the appellants-respondents failed to file a formal petition for cross-review pursuant to Wis. Stat. § 809.62(3m) presenting the issue of the Receiver's alleged violation of his fiduciary obligations to creditors.

The appellants-respondents filed a response on December 22, 2021, stating that they have long maintained that the Receiver violated his fiduciary responsibility to them, as creditors of the Receivership, and they assert that their argument in the court of appeals was not "undeveloped" but rather the issue is "a simple issue which does not require extensive argument." They suggest that the Receiver's decision to continue to "participate in this case as an opponent of a group of creditors he is tasked with representing . . . is an issue which the Supreme Court may want to address."

We decline to foreclose our right to consider the fiduciary duty question at this stage of the appeal by declaring the issue forfeited. See, e.g., Estate of Miller v. Storey, 2017 WI 99, 378 Wis. 2d 358, 903 N.W.2d 759 (an appellate court may exercise its discretion to hear an issue not preserved below where the issue is a legal question, the parties have thoroughly briefed the issue, and there are no disputed issues of fact). And, we are not persuaded by the petitioners' alternative request that "a full-length, separate, cross-respondent's brief" is necessary at this time. However, we recognize that briefing has completed; the petitioners filed their reply brief on December 17, 2021 and only briefly addressed the disputed fiduciary duty issue, by essentially restating the arguments presented in this then still-pending motion. Accordingly, we will permit the Receiver and Bank of New York Mellon Trust Company, N.A. to each file a supplemental letter or a single joint letter responding to the fiduciary duty argument as presented in the appellants-respondents' response brief. The letter response shall not exceed ten pages in length if a monospaced font is used or 2,200 words if a proportional serif font is used. The appellants-respondents may file a letter-reply not to exceed five pages in length if a monospaced font is used or 1,100 words if a proportional serif font is used. Accordingly,

IT IS ORDERED that the motion filed by defendant-appellant-petitioner, Michael S. Polsky, Esq., Receiver, to deem forfeited the appellants-respondents' arguments in their supreme court response brief filed December 3, 2021 regarding the Receiver's fiduciary obligations or alternatively to allow supplemental briefing on the issue is granted in part;

Page 3

January 12, 2022

Nos. 2019AP1728

2019AP2063

Marilyn Casanova v. Michael S. Polsky, Esq. L.C.#2017CV1728  
#2017CV1133

IT IS FURTHER ORDERED that the defendant-appellant-petitioner, Michael S. Polsky, Esq., Receiver, and Bank of New York Mellon Trust Company, N.A. may, on or before January 26, 2022, each file a supplemental letter or a joint supplemental letter not to exceed ten pages in length if a monospaced font is used or 2,200 words if a proportional serif font is used, responding to appellants-respondents' argument regarding a Receiver's fiduciary duty as set forth in Section IV of the response brief filed December 3, 2021;

IT IS FURTHER ORDERED that the appellants-respondents may, on or before February 2, 2022, file a letter-reply to the petitioners' supplemental response letter(s), not to exceed five pages in length if a monospaced font is used or 1,100 words if a proportional serif font is used; and

IT IS FURTHER ORDERED that the parties are not precluded from addressing the fiduciary duty issue during oral argument.

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Sheila T. Reiff  
Clerk of Supreme Court

Page 4

January 12, 2022

Nos. 2019AP1728

2019AP2063

Marilyn Casanova v. Michael S. Polsky, Esq. L.C.#2017CV1728

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