COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP77 **Cir. Ct. No. 2006CV639**

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

PATRICK SWEENEY,

PLAINTIFF-APPELLANT,

V.

WILLIAM J. PETSKA, KIMBERLY R. PETSKA, NOW KNOWN AS KIMBERLY R. OEMIG AND RUTH M. BAKER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Patrick Sweeney appeals an order denying a motion to amend his complaint. Sweeney contends the circuit court erred by denying the motion because justice requires an amendment of the pleadings. Sweeney also claims he should have been allowed to amend the complaint to conform to the evidence. We reject Sweeney's arguments and affirm the order.

BACKGROUND

¶2 In January 2003, William and Kimberly Petska executed a mortgage and note payable to Sweeney in the amount of $174,459.96 plus interest. Kimberly's mother, Ruth Baker, signed both the mortgage and the note as a partial guarantor to secure a maximum value of $65,000. In December 2006, Sweeney commenced a foreclosure action against William, with no service of the summons and complaint upon Kimberly or her mother. In April 2007, the court entered a default judgment against William. The judgment included language indicating "[t]hat no deficiency judgment shall be entered against [William]."

¶3 Sweeney obtained possession of the real estate, made changes to the property and leased it to a third party. In January 2008, Sweeney filed a motion to reopen and amend the judgment to remove the language waiving a deficiency judgment. Sweeney also moved to amend the complaint, seeking to add both Kimberly and her mother as defendants and seeking additional property used to secure the promissory note. After a hearing, the court denied Sweeney's requests and this appeal follows.

DISCUSSION

¶4 On appeal, Sweeney challenges only the circuit court's denial of his motion to amend the complaint. WISCONSIN STAT. § 802.09(1) (2007-08)[1] provides, in relevant part:

> (1) Amendments. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

¶5 Because Sweeney's motion was filed well beyond the six-month time period, it required judicial approval. Wisconsin embraces a policy that favors the liberal amendment of pleadings. ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶25, 303 Wis. 2d 94, 735 N.W.2d 418. Once judgment has been entered, however, "the presumption in favor of amendment disappears in order to protect the countervailing interests of the need for finality."[2] ***Id.***, ¶26.

¶6 The decision whether to grant a motion to amend a complaint lies within the circuit court's discretion. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463. We affirm a circuit court's exercise of discretion if the court applied the correct legal standard to the facts of record in a reasonable manner. *See* ***id.*** The circuit court "in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment." ***State v. Peterson***, 104 Wis. 2d 616, 634, 312 N.W.2d 784 (1981).

[2] To the extent Sweeney contends the default judgment was not final because the sheriff's sale had not yet occurred, he is mistaken. As a matter of substantive law, Wisconsin statutes provide for a foreclosure action that has two steps: the judgment of foreclosure and sale, and the proceedings after the judgment. ***Shuput v. Lauer***, 109 Wis. 2d 164, 171, 325 N.W.2d 321 (1982). The judgment of foreclosure and sale disposes of the entire matter in litigation and is a final judgment appealable as a matter of right under WIS. STAT. § 808.03(1). ***Id.*** at 172. The proceedings after the judgment of foreclosure, i.e., the sale itself, judicial confirmation, and the computation of the deficiency, "are analogous to the execution of a judgment and simply enforce the parties' rights which have been adjudicated ...." ***Id.*** at 173. Confirmation of the sale is the last judicial act in a foreclosure action, and the order confirming sale is also a final order appealable as of right under § 808.03(1). ***Id.*** at 172.

¶7 Here, the court concluded Sweeney failed to present a good reason to allow the amendment and it would result in unfair prejudice to both Kimberly and her mother. The court recounted the procedural background, noting Sweeney had waived a deficiency in the default judgment and provided no reason for failing to seek the deficiency from the start. The court continued: "Apparently, the implication or inference is that he [will not] recover as much money … from the pending sale of the real estate … [and] … he now wants to seize the remaining collateral because, apparently, the real estate isn't worth enough to satisfy the deficiency." The court further noted that the two new defendants "would be subject to loss of assets that are now theirs and right now free and clear because of the waiver of the deficiency."

¶8 Regarding the deficiency itself, the court noted that calculating the deficiency was impossibly complicated by the various improvements that had since been made to the property as well as the altered real estate climate. The court stated: "[H]ad this sale taken place back in 2007, we might have a substantially different sale price than we would have today in late 2008 given the change in economic values in real estate in Wisconsin and across the country." The court concluded that Sweeney's apparent "change of heart" did not justify the amended complaint—he "could have named the two new parties in his original complaint and asked for replevin of the remaining security and a deficiency judgment at that time." The court ultimately held: "[F]or lack of good cause, unfair prejudice to the two new defendants, because of inability to calculate a deficiency judgment without guessing, I'm denying Mr. Sweeney's request to [amend the complaint]." Under the standards set forth above, the court properly exercised its discretion in denying the motion, and we therefore affirm the order.

¶9 Citing WIS. STAT. § 802.09(2), Sweeney alternatively argues he should have been allowed to amend the pleadings to conform to the evidence. Sweeney's reliance on this subsection of the statute, however, is misplaced. The statute provides, in part:

> If issues not raised by the pleadings *are tried by express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

WIS. STAT. § 802.09(2) (emphasis added). This subsection is designed to allow the court to adjust the pleadings to reflect the case as it was actually litigated and the issues that were actually developed at trial. *See* ***Peterson***, 104 Wis. 2d at 629. Here, the underlying matter was resolved by default judgment. Neither the deficiency issue nor the propriety of adding additional defendants was tried by express or implied consent. Indeed, the "parties" were not even named. Section 802.09(2) is therefore not applicable.

By the Court.—Order affirmed.

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