

RECEIVED
05-04-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT: II

CITY OF PORT WASHINGTON,
PLAINTIFF-RESPONDENT,

v.

APPEAL NO. 2021AP000449 FT,
2021AP000450 FT

CIRCUIT COURT CASE NO.
2020CV000386,
2020CV000387

SANDRA J. KOZIOL,
DEFENDANT-APPELLANT.

APPEAL FROM VERBAL ORDER FOR JUDGMENT DISMISSING MID-
MORaine MUNICIPAL COURT CONVICTION APPEAL TO CIRCUIT COURT
AND APPEAL FROM WRITTEN ORDER ON MOTION TO RECONSIDER DATED
MARCH 19, 2021 OF THE OZAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE STEVEN M. CAIN, PRESIDING

DEFENDANT-APPELLANT'S MEMORANDUM BRIEF

PERRY P. LIEUALLLEN, LLC
200 E. Dekora Street
Saukville, WI 53080

262-284-6966

Attorneys for Defendant-Appellant

By: Perry P. Lieuallen

State Bar No. 1015094

STATEMENT OF THE ISSUES

Did the trial court err in granting the Motion to Dismiss filed by Plaintiff-Respondent ("City"), finding the Defendant-Appellant, Sandra J. Koziol ("Koziol") did not perfect her appeals from municipal court to the circuit court by mailing a copy of the Notice of Appeals to the other party within the requirements of Wis. Stats. § 800.14(1); requiring Koziol provide proof to the Court other than an exact copy of the signed letter from Koziol's counsel's staff forwarding the same with the Notices of Appeals to City?

ANSWERED BY THE TRIAL COURT: No. The Court ruled it had no jurisdiction to hear the appeal as a result of a lack of jurisdiction.

Did the trial court err in not granting the Motion for Reconsideration filed by Koziol?

ANSWERED BY THE TRIAL COURT: No. The Court ruled that it would not consider the Affidavit of Mailing and did not have newly discovered evidence to review.

STATEMENT OF THE CASE AND RELEVANT FACTS

This is an appeal by Koziol to the decision by the Circuit Court of Ozaukee County, Wisconsin, granting City's Motion to Dismiss Koziol's Appeals to the Circuit Court from the lower municipal court finding her guilty of OWI and Refusal.

On August 11, 2019 in Port Washington, Wisconsin, Koziol was issued two citations, one for OWI-1st Offense and one for Improper Refusal. Koziol was found guilty of both of those citations in a court trial before the municipal court on December 8, 2020, and on December 9, 2020, Notices of Appeal were timely filed with Mid- Moraine Municipal Court. (R.1, pp. 1-2 of 20CV386 & 20CV387, App. A. and B.) On December 16, 2020, Koziol's counsel's staff mailed to the City, by regular U.S. Mail, a letter and the copies of the Notices of Appeals filed with the municipal court. (R. 10, pp. 2, 4-5, 20CV387, App. C.)

On December 21 and 22, 2020, the municipal court file was transmitted and filed with the Circuit Court of Ozaukee County. On January 5, 2021, the City filed a Notice of Motion, Motion and Memorandum in Support of Motion to Dismiss Appeals and Requests for Trial in both cases (R. 7,

pp. 1-7, 20CV387, App. D.) and an accompanying Affidavit of Eric E. Eberhardt, in both cases, alleging that the appeal was defective for failure to provide written notice of appeal to the City. (R. 9, pp. 1-4, 20CV387, App. E.) Koziol filed in both cases copies of a letter with the Notices of Appeals that was forwarded to the City on December 16, 2020, with the Circuit Court on January 8, 2021. (R. 10, pp. 2, 4-5, 20CV387, App. C.) The trial court held a hearing on February 1, 2021, wherein both parties presented oral argument and the trial court issued an oral decision granting the City's Motion to Dismiss. On February 2, 2021, Koziol filed a Notice of Motion and Motion for Reconsideration in both cases (R. 11, pp. 1-6, 20CV387, App. F.) and a follow up letter regarding the request for reconsideration in both cases on March 1, 2021. (R. 15, pp. 1-9, 20CV387, App. G.) The City filed in both cases a Response in Opposition to Motion for Reconsideration on March 1, 2021 (R. 16, pp. 1-3, 20CV387, App. H.)

The trial court held a hearing on March 1, 2021, wherein both parties presented oral argument and the trial court issued an oral decision denying Koziol's Motion for

Reconsideration.

The Court issued an Order in both cases denying Koziol's Motion for Reconsideration on March 19, 2021 (R. 28, p. 1, 20CV387, App. I.); no written order was filed in regard to the hearing on February 1, 2021. A timely Notice of Appeal was filed in both cases on March 15, 2021, and the matter is now before this Court for briefing.

ARGUMENT

I. Issue 1: Did the trial court err in granting the Motion to Dismiss filed by the City finding that Koziol did not perfect her appeals from municipal court to the circuit court by mailing a copy of the Notice of Appeals to the other party?

The trial court erred in concluding that Koziol did not perfect her appeals to the circuit court from the decisions of the municipal court.

Whether Koziol complied with Wis. Stat. § 801.14 seeking to appeal presents a question of law which the appellate court reviews *de novo*. See ***Wellin v. American Family Mut. Ins. Co.***, 2006 WI 81, ¶ 16, 292 Wis. 2d 73, 717 N.W.2d 690 (the interpretation and application of statutes and case law to facts of a particular case present questions of law which appellate courts decide *de novo*.)

The City claimed, and the trial court found, that Koziol did not comply with § 801.14(1) Wis. Stats., because Koziol did not have additional proof of mailing other than a copy of the exact letter mailed. § 801.14(1), Wis. Stats., states as follows:

Appeals from judgments, decisions on motions brought under s. 800.115, or determinations regarding whether the defendant is unable to pay the judgment because of poverty, as that term is used in s. 814.29(1)(d), may be taken by either party to the circuit court of the county where the offense occurred. The appellant shall appeal by giving the municipal court and other party written notice of appeal and paying any required fees within 20 days after the judgment or decision. No appeals may be taken from default judgments.

The above statute language does not require that the written notice shall be mailed by certified mail, registered mail, personal service or any other type of mail with a proof of delivery. The statute clearly states that an appellant need only provide the other party with written notice of the appeal within 20 days after the judgment or decision. Koziol's counsel's office staff mailed to the City a letter and copy of the Notice of Appeals as required and furnished the Trial Court with a copy of the same.

The Wisconsin Supreme Court in ***American Family Mut. Ins. Co. v. Golke***, 2009 WI 81, ¶ 33, 319 Wis.2d 397, 768 N.W. 2d

729 found the following in regard to this issue:

"The legislature has long recognized that first-class mail service is an efficient mechanism that is reasonably calculated to provide actual notice of possible or pending litigation and effective alteration of substantive legal rights and interests. See, e.g. Wis. Stat. § 631.36(36)(2)(b)-(c) (providing for cancellation of insurance policies ten days after notice is sent by first class mail); Wis. Stat. § 968.04(3)(b) 2 (providing for a person's arrest on a warrant issued if he fails to appear for court as directed in a summons served by mail); Wis. Stat. § 48.977(4)(c)2 (providing for notice of a hearing on a petition to appoint a guardian for a child to be sent to the child's parents and others by first-class mail); Wis. Stat. § 146.819(3)(a) (providing for the deletion or destruction of a medical patient's records 35 days after notice is sent by first-class mail)."

At the time the Circuit Court granted the City's Motion to Dismiss, the Circuit Court stated (R. 34, p. 8, 20CV387, App. J.) "There's just nothing of evidentiary value that was filed in opposition to the motion that would allow Ms. Koziol to prevail and for the Court not to rule other than to dismiss it. Saying I mailed it without any other evidentiary support doesn't cut it." The argument by the City at the time of the hearing on the motion to dismiss was that there was no Affidavit of Mailing attached to the copy of the letter and appeal notices filed with the court. That, in itself, does not diminish the credibility of the

letter and notices mailed and provided to the Circuit Court. The legislature did not prescribe in § 800.14(1) that the written notice of an appeal of a municipal court judgment had to be delivered by hand, fax, or mail to the opposing party prior to being filed with the municipal court with an Affidavit of Mailing or service being required to be filed thereafter as proof of the service.

II. Issue 2: Did the Trial Court Err in denying Koziol's Motion for Reconsideration?

Koziol filed a Motion for Reconsideration on February 2, 2021, one day after the hearing and oral decision on the City's Motion to Dismiss. (R. 11, pp. 1-6, 20CV387, App. F.) With that filing was an Affidavit of Mailing signed by Ms. Plutowski, counsel's office staff who mailed the original letter and notices of appeals to the City. The Motion for Reconsideration was filed under § 806.07 Wis. Stats. for relief from the order to dismiss. § 806.07 Wis. Stats. covers a motion as was filed and, although subparagraph (h) was not specifically mentioned, the motion was filed as the decision to dismiss the appeal to the circuit court was not in the interest of justice as was pointed out in Koziol counsel's letter of March 1, 2021 to the Court, filed as additional information to the Motion

for Reconsideration. (R. 15, pp. 1-9, 20CV387. App. G.)

The Court in its oral ruling on the Motion for Reconsideration states that the Affidavit of Mailing filed with the Motion for Reconsideration would not be considered because it was not filed with the original letter and notices of appeals filed with the court in response to the City's Motion to Dismiss. However, the court also states that "So in this case it's not created at the time of mailing. It was, you know, I am not saying it's improper to do it after the fact. I think that's certainly feasible." (R. 35, p. 16, 20CV387, App. K.) Although not filed with the original submission of the letter to the City Attorney forwarding copies of the Notices of Appeals with the Circuit Court, counsel herein believes it should be considered as evidence of said mailing.

CONCLUSION

At the hearing on February 1, 2021, regarding the Motion to Dismiss, the City stated that it did not receive the letter and Notices of Appeals mailed to the City on December 16, 2020. At the time of the February 1, 2021 hearing, the City's only argument was that it didn't receive the notices and because an Affidavit of Mailing was

not submitted to the Trial Court, the Trial Court should just take his word for it and dismiss the case. The City, at the time of the hearing on February 1, 2021, did not bring up any other evidence as to why the case should be dismissed. Koziol's counsel informed the court that no mail was returned to Koziol's counsel's office and, therefore, there was no reason to believe that the City had not received the letter forwarding the Notices of Appeals to the City. As per the cases and statutes stated above under Issue I, there is no requirement at the time of mailing to send the letter and notices via certified mail, registered mail or otherwise with a proof of delivery. At the end of his oral decision on February 1, 2021, the Court states: "Well, it's not here. So I don't have that. And in the absence of that I have to dismiss the matter. So the matter is dismissed. That concludes this hearing." (R. 34, p.8, 20CV387, App. J.)

The statement made by the Circuit Court at the end of the Motion to Dismiss hearing on February 1, 2021, implies that had the Circuit Court received an Affidavit of Mailing it would not have dismissed the appeal. Koziol's counsel immediately filed an Affidavit of Mailing with its Motion to Reconsider the very next day in response to the Court's

comment.

Upon the arguments contained in this brief, Koziol moves the Court to reverse and remand this matter back to the trial court for entry of an Order that the circuit court had jurisdiction to hear the appeal taken directly from the municipal court.

Dated at Saukville, Wisconsin this 3rd day of May, 2021.

PERRY P. LIEUALLLEN, LLC
Attorneys for Plaintiff-Appellant

Perry P. Lieuallen
State Bar No. 1015094
200 E. Dekora Street
Saukville, Wisconsin 53080
Telephone: 262-284-6966

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c) as modified by this Court's order dated April 9, 2021, for a brief and appendix produced with a monospaced Courier New font. The length of the brief is 11 pages.

Dated: May 3, 2021.

Attorney Perry P. Lieuallen

State Bar No. 1015094

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed this 3rd day of May, 2021.

Attorney Perry P. Lieuallen
State Bar No. 1015094