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June 18, 2010

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

2010AP1291

Sean Dilweg v. Wells Fargo Bank (L.C. # 2010CV1576)

Before Lundsten, Higginbotham, and Sherman, JJ.

On May 27, 2010, the circuit court entered an order denying motions that sought, among other things, to enjoin the consummation of a settlement agreement between Ambac Assurance Corporation and a group of international bankers, known by the parties as the Bank Group, and to intervene. The motions were filed by Auerlius Capital Management, LP, Fir Tree, Inc., King Street Capital, L.P., King Street Capital Master Fund, Ltd., Monarch Alternative Capital LP, and Stonehill Capital Management LLC (the "RMBS Policyholders"), and Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management, and Stone Lion Capital Partners, L.P. (the "LVM Bondholders"). Federal Home Mortgage ("Freddie Mac") also joined in the motions before the circuit court.

The RMBS Policyholders, the LVM Bondholders, and Freddie Mac have each filed notices of appeal and petitions for leave to appeal from that order.¹ The Office of the Commissioner of Insurance of the State of Wisconsin and the Commissioner of Insurance of the State of Wisconsin (collectively OCI) and Ambac have moved to dismiss the appeals from the portion of the May 27 order that denied the injunction motions, and oppose the petitions for leave to appeal from that portion of the order.

OCI and Ambac do not dispute that the portion of the circuit court's order denying the motions to intervene was final and that the various appellants may appeal from that portion of the order. We agree. See MICHAEL HEFFERNAN, *Appellate Practice and Procedure in Wisconsin*, § 4.10 (4th ed. 2010); *Sewerage Comm'n of Milwaukee v. DNR*, 104 Wis. 2d 182, 311 N.W.2d 677 (Ct. App. 1981).

The issue remaining is whether the appellants may also appeal the circuit court's denial of their motions for injunctive relief as of right and, if not, whether this court should grant their petitions for leave to appeal. OCI and Ambac both argue that the portion of the order denying the two motions to enjoin the settlement agreement is not final and that the appeals from that portion of the order should be dismissed. OCI and Ambac also argue that we should deny the petitions for leave to appeal this portion of the circuit court's order. They argue that review of

¹ Although Freddie Mac is not mentioned specifically in the circuit court's order, Freddie Mac filed a motion joining the motions of the RMBS Policyholders and the LVM Bondholders to enjoin the consummation of the settlement agreement and to intervene. Freddie Mac filed the motion on May 24, 2010, prior to the hearing, and counsel appeared at the hearing on the motions on May 25, 2010. The circuit court noted that Freddie Mac had "filed" the day before. We conclude that the circuit court's order denying the motions also applied to Freddie Mac.

the motion denying injunctive relief is moot because the action sought to be enjoined has already occurred.

We conclude that the circuit court's May 27, 2010, order was final as to the three groups of appellants. An order is final if it "disposes of the entire matter in litigation as to one or more of the parties." WIS. STAT. § 808.03(1) (2007-08). This determination involves two questions: (1) whether the order is final "as a matter of substantive law insofar as it disposes of the entire matter in litigation as to one or more parties"; and (2) whether it is the final document in the litigation between these parties. *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶27, 299 Wis.2d 723, 728 N.W.2d 670. The circuit court's order disposed of the entire matter in litigation between these parties. The appellants were not allowed to intervene in the circuit court, and their motion for an injunction was denied. There is nothing left for the appellants to do in the circuit court, and no reason to parse the order. The litigation between these parties has ended. Consequently, the entire order is final and appealable as of right.

The respondents argue, however, that the portion of the order denying the injunction is not appealable because an order denying a motion is generally not appealable as of right. They also argue that if the appellants are successful on appeal from the denial of their motions to intervene, then the portion of the order denying the injunction would not be final as to them. First, the statement that an order denying a motion is *generally* not appealable is correct. In this case, however, the motion denying the injunction was part of an order denying a motion to intervene, which is final. Second, the question of whether an order is final now is not determined by the possibility that the appellants may succeed on their appeal of a different issue in the same case. See *Frederick v. City of Janesville*, 92 Wis. 2d 685, 688, 285 N.W.2d 655 (1979)

(subsequent events may not determine whether an order or judgment is final). Finality is determined by looking at the document itself. *Id.*

The respondents also argue that an appeal from the denial of the injunction is moot because the action sought to be enjoined has occurred. The action sought to be enjoined was, in essence, the transfer of money. When this court was deciding the appellants' request for an injunction, the respondents argued that the appellants would not be harmed if the injunction was denied because the Bank Group was "collectible" if the transfer was later overturned and, hence, the transfer was not irrevocable. It is disingenuous for them now to argue that the issue is moot. We conclude that even though the settlement agreement has been consummated, this court may still review whether the circuit court erred when it denied the injunction.

The circuit court's order disposes of the entire matter in litigation between these parties, and is final in all respects as to these parties. The appeal will proceed.

Therefore,

IT IS ORDERED that the motions to dismiss the appeal are denied.

IT IS FURTHER ORDERED that the petitions for leave to appeal from the circuit court's order dated May 27, 2010, are denied as unnecessary.

David R. Schanker
Clerk of Court of Appeals