

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2008

David R. Schanker
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.

Appeal No. 2008AP1187

Cir. Ct. No. 2001CV21

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE CONTEMPT IN ALVIN L. KLAWITTER
V. RONALD J. HOWE:**

RONALD J. HOWE,

APPELLANT,

V.

ALVIN L. KLAWITTER AND H2O LTD.,

RESPONDENTS.

APPEAL from an order of the circuit court for Marquette County:
DANIEL GEORGE, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Ronald Howe appeals from an order denying his motion to hold Alvin Klawitter in contempt of court for failing to execute a satisfaction of mortgage to Howe. Howe argues that Klawitter's recovery of a money judgment against Wisconsin Glacier Springs satisfies the mortgage Howe gave to Klawitter and thus Klawitter is required to execute a satisfaction of mortgage to Howe according to the trial court order in this case. We conclude that the trial court order does not require Klawitter to execute a satisfaction of mortgage to Howe under the facts of this case, and therefore affirm.

Background

¶2 The following facts are taken from the record. In 1994, Klawitter and Howe entered into a contract with Wisconsin Glacier Springs Bottling, LLC (WGS) allowing Klawitter to withdraw water from a well on Howe's property and sell the water to WGS. In 1996, Klawitter and Howe entered into a commercial lease agreement allowing Klawitter to obtain the water from Howe's well to sell to WGS. Under the lease, Klawitter agreed to transfer to Howe, Klawitter's shares in Neenah Springs, Inc. In exchange, Howe guaranteed 25,000,000 gallons of drinking water from his well, and gave Klawitter a lien on the Neenah Springs stock as collateral. The lease states that if the well could not produce the required amount of water, Klawitter was entitled to reclaim the stock.

¶3 Klawitter brought this action against Howe for conversion and breach of contract for selling the stock while the lien was outstanding. The trial court ordered Howe to give Klawitter a real estate mortgage lien on his property to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

replace the security Klawitter lost when Howe sold the stock, and Howe did so. The trial court ordered Klawitter to execute a satisfaction of the mortgage if and when Howe fulfilled his obligation of providing the water required under the lease.

¶4 WGS then sued Klawitter and Howe for breaching the sales contract by failing to provide the required amount of water. Howe defaulted, and Klawitter counterclaimed for WGS's breach. Klawitter established that he could have fulfilled his obligation under the contract by obtaining water from a source other than Howe's well, and that therefore WGS had breached the contract by obtaining water from a seller other than Klawitter. As damages for WGS's breach, Klawitter obtained a judgment against WGS for \$525,000.

¶5 Klawitter then brought another action against Howe, this time to foreclose the mortgage Howe had given Klawitter as a result of the first action. Howe defended, alleging that Klawitter had been paid under the lease by the judgment he obtained from WGS, and that therefore the mortgage was paid. The trial court granted summary judgment to Klawitter.

¶6 Howe brought this motion for contempt under Klawitter's first action against him for selling the encumbered stock, arguing that Klawitter was in contempt of court for failing to execute a satisfaction of mortgage according to the court's order following Klawitter's judgment against WGS. Howe argued that Klawitter was paid under the lease between Klawitter and Howe based on his judgment against WGS. The trial court held a hearing on the motion. Klawitter was granted permission to appear telephonically. Howe did not appear. The trial court denied Howe's motion on two grounds: first, that Howe had defaulted by failing to appear; second, that the bases for Howe's motion were identical to the

defenses he raised in Klawitter's foreclosure action against him, and thus were barred by issue preclusion.² Howe appeals.

Standard of Review

¶7 Although the trial court resolved Howe's motion on procedural grounds, we will reach the merits because we agree with the court's decision. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (“[W]e may affirm on grounds different than those relied on by the trial court.”).

Discussion

¶8 Howe's motion for contempt is premised on his assertion that Klawitter was required to execute a satisfaction of mortgage to Howe when Klawitter received a money judgment against WGS. Howe asserts that Klawitter was required to execute the satisfaction of mortgage based on the court order in this case stating that Howe was to grant Klawitter a mortgage to replace the security Klawitter lost when Howe sold the encumbered Neenah Springs stock, and that Klawitter was to execute a satisfaction of mortgage when Howe met his requirement to provide water from his well as stated in the commercial lease agreement. Howe is wrong. Howe did not provide the required water.

² Under the doctrine of issue preclusion, “[w]hen an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank, G.A.P., Inc.*, 224 Wis. 2d 288, 301, 592 N.W.2d 5 (Ct. App. 1998).

¶9 The trial court order in this case states that Klawitter must execute a satisfaction of mortgage “if and when [Howe] deliver[s] to [Klawitter] for sale to third parties bulk water in sufficient quantity to satisfy [Howe’s] guaranteed obligation under the Commercial Lease Agreement dated September 17, 1996.” It is undisputed that this has not happened. Howe failed to provide the amount of water required by the contract. Moreover, we disagree with Howe’s argument that he is entitled to half the judgment that Klawitter recovered from WGS and that his half of the judgment satisfies the mortgage. It appears from the record that Howe defaulted in that action, and that Klawitter alone recovered against WGS. Moreover, the basis for Klawitter’s recovery was that he, as the seller, could have obtained water from a source other than Howe to sell to WGS. Under those facts, we fail to see how Howe would be entitled to any of the money Klawitter recovered on his judgment against WGS. Regardless, whether Howe is entitled to any of that judgment recovery is not before us. We are reviewing only the order on the motion for contempt. Similarly, Howe’s challenge to the trial court’s order directing him to grant a mortgage to Klawitter following his sale of the Neenah Springs stock is beyond the scope of this appeal, as it pertains to the original order in this action and not to the contempt order Howe has appealed from. On the facts before us, we cannot overturn the court’s decision to dismiss Howe’s motion for contempt. We affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

