STATE OF VERMONT

SUPERIOR COURT
Windsor County

CIVIL DIVISION
Docket No. 49-1-09 Wrcv

Richard Daniels
Plaintiff

v.

The Elks Club of Hartford, Vermont, Inc.,
Vermont Human Rights Commission, Waltraud Kielly,
Marilyn McMillan, Jane Thibodeau, Mayleen E. Cameron,
Watts Law Firm PC, and Best Bingo Supplies, Inc.
Defendants

DECISION ON SECOND REMAND FROM VERMONT SUPREME COURT

Plaintiff Richard Daniels seeks to foreclose on property belonging to defendant Elks Club of Hartford, Vermont. He is the senior mortgagee, but the proposed foreclosure is opposed by a number of junior lienholders, namely defendants Vermont Human Rights Commission, Waltraud Kielly, Marilyn McMillan, Jane Thibodeau, Mayleen Cameron, and Watts Law Firm PC.

In September 2009, this court granted summary judgment to plaintiff on his request for foreclosure by sale, and on defendants' various affirmative defenses and counterclaims. On September 28, 2009, defendants filed a motion for permission to appeal from the judgment. This court denied the motion as prematurely filed, since the accounting remained and final judgment had not yet been entered.

After resolving various accounting issues, final judgment was entered on April 9, 2010. Eleven business days later, defendants filed a motion for permission to appeal from the final judgment. This court denied the motion as untimely filed, since it was filed one day beyond the ten-day limit established by Vermont Civil Procedure Rule 80.1(m).

On the first remand from the Vermont Supreme Court, this court interpreted the question on remand as whether the appeal period should be enlarged for excusable neglect. Citing the principle that a breakdown in communications between attorneys is not a sufficient basis to support a finding of excusable neglect, e.g., *Bergeron v. Boyle*, 2003 VT 89, ¶ 22, 176 Vt. 78, this court denied the motion for enlargement of time.

On the present remand from the Vermont Supreme Court, the question is whether the September 2009 motion for permission to appeal should have been "treated as filed after" the entry of judgment pursuant to V.R.A.P. 4(a).

V.R.A.P. 4(a) explains that "[a] notice of appeal filed after the announcement of a decision, sentence or order but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof." In other words, the rule permits the filing of premature notices of appeal so long as those notices are filed "after the announcement of a decision" that disposes of the issues on appeal. *State v. Kennison*, 135 Vt. 238, 239–40 (1977). The underlying policies are that premature notices of appeal do not prejudice the appellee so long as the appeal is treated as taken from the final appealable judgment, and that "technical defect[s] of prematurity . . . should not be allowed to extinguish an otherwise proper appeal." *FirstTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 273 (1991).

Here, defendants filed a premature motion for permission to appeal in September 2009. At the time, the court understood that the motion was an "attempt[] to ensure that the request for permission to appeal is not deemed untimely." As such, under V.R.A.P. 4(a), the proper course of action for the court should have been to defer the motion until the entry of final judgment, and consider it at that time. V.R.A.P. 4, Reporter's Notes—1985 Amendment.

Instead, the court denied the motion as premature. This was a mistake, because when final judgment was entered in April 2010, the premature motion for permission to appeal was no longer at the forefront of the court's consciousness. The court did not consider the premature motion when denying the April 2010 request for permission to appeal.

It is true, as plaintiff argues, that V.R.A.P. 4(a) is limited to appeals as of right, whereas any appeal here is by permission of the trial court under V.R.A.P. 6(a) and V.R.C.P. 80.1(m). Yet the underlying policies are equally applicable here. Plaintiff knew in September 2009 that defendants wanted to appeal from the final judgment, and there is no prejudice to plaintiff in giving effect to that premature motion. Any other result elevates a technicality of form over the fundamental principle of fairness.

Moreover, motions for permission to appeal are similar in nature to other post-judgment motions, such as renewed motions for judgment as a matter of law under V.R.C.P. 50(b) and motions for new trial under V.R.C.P. 59. See V.R.C.P. 80.1(m), Reporter's Notes—1985 Amendment (explaining similarity). Each of those post-judgment motions also must be filed within ten days after the entry of judgment, but in view of the narrowness of that timeframe, courts normally accept prematurely-filed motions. 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2812. There is not an obvious reason why motions for permission to appeal should be handled differently.

Plaintiff also argues that the motion for permission to appeal was filed too early even for purposes of the premature-filing rule. Obviously, it would not be acceptable for an attorney to file a notice of appeal before the court had taken any action on the merits of an issue. See *Kennison*, 135 Vt. at 239–40 (explaining that a notice of appeal filed before the announcement of a decision will not be recognized under V.R.A.P. 4). Here,

however, defendants filed their motion for permission to appeal after the announcement of the summary judgment decision, which disposed of all of the substantive claims, defenses, and counterclaims in the case. The only issue that remained for adjudication was the accounting. Under these circumstances, the court must conclude that the motion for permission to appeal was filed "after the announcement of [the] decision" for purposes of V.R.A.P. 4(a).

For these reasons, defendants' September 28, 2009 motion for permission to appeal should have been treated as timely filed after the entry of judgment. The court regrets both the mistake and the delay it caused.

The court therefore turns to the merits of the motion for permission to appeal. It is clear that the disposition of this motion is entrusted to the discretion of the superior court, *Vermont National Bank v. Clark*, 156 Vt. 143, 145 (1991), but the cases do not set forth clear guidelines for the court to use in determining whether permission to appeal should be granted or not. The cases seem to suggest that the role of the superior court should be to screen out those appeals that are taken for an improper purpose, such as to delay or harass, and to permit appeals that raise legitimate issues of law. *Nationwide Mut. Fire Ins. Co. v. Gamelin*, 173 Vt. 45, 49 (2001); *Citibank, N.A. v. Groshens*, 171 Vt. 639, 639 (2000) (mem.). At the very least, such a standard would strike an appropriate balance between the interests of the mortgagee in obtaining foreclosure by sale in a timely manner, and the interests of the appellants in seeking appellate review of issues legitimately raised by the facts of their case.

Here, plaintiff contends that an appeal is unwarranted because the summary-judgment decision is sound and defendants are not reasonably likely to prevail on appeal. In the court's view, this is not a good enough reason to deny permission to appeal from a judgment of foreclosure. It places this court in the uncomfortable position of reviewing the probable disposition of its own decision on appeal, and it places the Supreme Court in the position of having to review the merits of the entire case in order to determine whether permission to appeal was properly denied. At that point, the Supreme Court might as well decide the merits of the appeal. *Gamelin*, 173 Vt. at 49.

Nor are the issues raised by defendants clearly frivolous, or made for an improper purpose. At the very least, resolution of the issues at the summary-judgment stage required a fourteen-page decision from this court, and reliance upon persuasive authorities on matters not directly addressed by existing Vermont law. As the court explained in its decision on attorneys' fees, this was not a case in which the defense appeared to be solely a matter of delay, or an attempt to needlessly increase the cost of litigation.

For these reasons, permission to appeal from the judgment of foreclosure is granted.

The court will not condition the appeal upon the posting of a bond, as requested by plaintiff and intervenor Mascoma Savings Bank. None of the defendants who are

seeking an appeal are actually debtors of either plaintiff or intervenor. They are instead junior lienholders in the property that is the subject of the foreclosure decree. The court is not persuaded that it would be equitable to require them to post a bond in order to pursue an appeal designed to protect their secured interests.

ORDER

(1) Defendants' Motions for Permission to Appeal (MPR #18 and MPR #20), both filed September 28, 2009, are changed from denied to ***granted***;

(2) Plaintiff's Motion for Special Assignment (MPR #29), filed October 8, 2010, is ***granted*** for purposes of this decision only;

(3) Intervenor Mascoma Savings Bank's Motion for Special Assignment (MPR #31), filed October 15, 2010, is ***granted*** for purposes of this decision only.

(4) The clerk shall forward a copy of this decision to the Vermont Supreme Court in the manner provided by V.R.A.P. 6(a).

Dated at Chelsea, Vermont this 17 day of November, 2010.

Hon. Harold E. Eaton, Jr.
Superior Court Judge

FILED

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VERMONT SUPERIOR COURT
WINDSOR UNIT