STATE OF MICHIGAN

COURT OF APPEALS

JPMORGAN CHASE BANK, N.A.,

Plaintiff-Appellee,

v

FIRST MICHIGAN BANK and PEOPLES STATE BANK,

Defendants-Appellees,

and

KAYS ZAIR and PATRICE ZAIR,

Defendants-Appellants.

UNPUBLISHED
June 27, 2013

No. 309857
Oakland Circuit Court
LC No. 2011-118087-CH

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendants Kays and Patrice Zair appeal as of right from a circuit court order that declared a March 30, 2010, sheriff's sale void ab initio, set aside a sheriff's deed, and restored title to the property involved (including liens), to the condition that existed immediately before the sheriff's sale, except for the priority of two mortgages. The order purported to be a stipulated consent order, but the Zairs did not agree to it. The trial court determined that the consent of the Zairs was not necessary because they were only "nominal" parties "named for notice purposes only." We vacate the consent order and remand for further proceedings.

The present case concerns two mortgages encumbering property in West Bloomfield, Michigan, that was owned by the Zairs. The lender of the first mortgage, Peoples State Bank (PSB), foreclosed on the mortgager and the property was sold at a sheriff's sale. The security interest of the second lender, JP Morgan Chase Bank, was extinguished. Chase thereafter brought this action and claimed that its lien had priority pursuant to a subordination agreement. The assignee of PSB's rights to the property, First Michigan Bank, contended that the subordination agreement was not effective and that any breach of the agreement by PSB did not entitle Chase to relief against First Michigan. After Chase moved for summary disposition and First Michigan responded, they agreed to set aside the sheriff's sale and deed, restore the liens on the property, and establish that Chase's security interest had priority. Chase and First Michigan

submitted a consent order that acknowledged that the Zairs had not consented but stated that their consent was not necessary "for the reason that they were named for notice purposes only and no claims were asserted by Chase against them in this matter." The trial court entered the order. The Zairs filed a motion for reconsideration in which they objected to entry of the order without their consent. The trial court denied the motion.

On appeal, the Zairs argue that entry of the consent order violated MCR 2.507(G) and their right to due process. Constitutional issues and the interpretation and application of the court rules present issues of law, which this Court reviews de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *White v State Farm Fire & Cas Co*, 293 Mich App 419, 429; 809 NW2d 637 (2011). Although the Zairs did not raise these specific arguments before the trial court, we will review this issue because it is adequately presented and briefed, it presents a question of law, and the facts necessary for resolution of the issue have been presented. *Duffy v Mich Dep't of Natural Resources*, 490 Mich 198, 209 n 3; 805 NW2d 399 (2011).

We agree with the Zairs that entry of the purported consent order was improper under MCR 2.507(G), which states:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

This rule may be viewed as a "'court rule version of a statute of frauds governing legal proceedings.'" *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 435; 546 NW2d 641 (1996), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 125. In the present case, there was no agreement made in open court and no writing that was subscribed by the Zairs or their attorney. Entry of a consent judgment premised on an agreement that did not comport with MCR 2.507(G) was improper. *Brunet*, 215 Mich App at 436.

This outcome under the court rule is consistent with the law governing consent judgments in general. "A consent judgment differs substantially from the usual litigated judgment because it is primarily an act of the parties rather than the considered judgment of the court." *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992). By definition, a consent judgment is the product of a voluntary agreement between the parties. *Id*. In *Swartz v Laurencelle*, 371 Mich 153, 164; 123 NW2d 244 (1963), the Michigan Supreme Court stated that "[a] judgment for the plaintiff, entered upon alleged consent of the parties, when neither the defendant nor anyone authorized by the defendant has appeared and consented and there is no stipulation or other writing of consent, is voidable if promptly attacked." A consent decree based on the consent of the plaintiff and some of the defendants is not binding if other defendants did not consent. See *Rockwood v Salem Twp*, 373 Mich 332, 336; 129 NW2d 380 (1964). The Zairs did not consent to the purported consent order, and for that reason, we vacate it.

Chase and First Michigan assert that the judgment actually benefited the Zairs. However, any beneficial effect of the judgment on the Zairs is not a matter for the Zairs' creditors to decide. Even if it could be established that from a pecuniary perspective, the Zairs gain from the

restoration of their property rights and accompanying liens, that evaluation does not eliminate the necessity of obtaining their consent to the purported consent order.

We reject the related arguments by Chase and First Michigan that the Zairs are not "aggrieved" by the order, and, therefore, this Court lacks jurisdiction over this appeal under MCR 7.203(A). To be aggrieved by a judgment, a party must have a legal right that was invaded, or some interest of a pecuniary nature in the outcome of the case, and not a mere possible interest arising from some unknown and future contingency. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). Here, the purported consent order voided the sheriff's sale. This restored the Zairs' interest in the property and also restored liens against the property that had been extinguished. The Zairs have a pecuniary interest related to the restoration of their property rights and the liens against the property. The banks' contention that this Court lacks jurisdiction is without merit.

Chase and First Michigan note that the Zairs failed to file a response to Chase's motion for summary disposition and contend that the Zairs should not now be heard to complain about the order that granted essentially the same relief sought in the motion and complaint. The banks also note that the Zairs did not appear at a show-cause hearing on January 26, 2012. The failure to file a response to a motion may affect the preservation of issues that one could raise in a challenge to an order that granted the motion. However, the order at issue here was not an order granting a motion for summary disposition. It purports to be a consent order. The Zairs' failure to file a response to the motion (which was opposed by co-defendant First Michigan) and their failure to appear at a show-cause hearing is not a substitute for their consent to a consent order. Inaction is not assent.

We vacate the February 17, 2012, consent order and remand for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio