COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2013

Diane M. Fremgen
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. 2012AP790 **Cir. Ct. No. 2011CV10970**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BANK OF AMERICA, N.A.,

PLAINTIFF-RESPONDENT,

V.

MARGOT RAMIREZ AND EMILIO RAMIREZ, III,

DEFENDANTS-APPELLANTS,

MILWAUKEE CITY, FIRST RATE FINANCIAL, FROEDTERT MEMORIAL LUTHERAN HOSPITAL, AND UNKNOWN TENANTS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Margot and Emilio Ramirez, III, *pro se*, appeal a summary judgment of foreclosure entered in favor of Bank of America, N.A. (the Bank). The Ramirezes argue: (1) the Bank failed to make a *prima facie* case for summary judgment; (2) even if the Bank met its initial burden, they introduced evidence that created a genuine issue of material fact as to whether the Bank had the legal authority to pursue the underlying foreclosure action against them; and (3) entry of judgment in favor of the Bank is contrary to public policy because it has unclean hands. We affirm.

BACKGROUND

¶2 In 2006, the Ramirezes signed a note in the principal amount of $206,000, and as security, granted the original lender, Ameristar Mortgage Corporation, a mortgage against the property the loan was used to purchase. The mortgage named Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee and nominee for Ameristar and its successors and assigns.

¶3 Originally, the Ramirezes lived at the home located on the property. However, after falling behind on their payments, they moved and began renting the home out in an effort to save it from foreclosure.

¶4 In 2011, MERS assigned the mortgage and the note to BAC Home Loans Servicing L.P. (BAC). BAC subsequently initiated foreclosure proceedings and attached copies of the note, mortgage, and assignment of mortgage to its complaint. The Ramirezes, *pro se*, filed separate, but virtually identical, answers. Both admitted that they executed the note and that as of August 2010, the loan was in default and had been properly accelerated. No affirmative defenses were asserted.

¶5 While the circuit court proceedings were underway, the Bank became the successor by merger to BAC. It filed a motion for summary judgment of foreclosure with supporting affidavits. One of the affidavits was provided by Michael Labrum, an assistant vice president of the Bank.

¶6 Labrum averred that as part of his job responsibilities for the Bank, he was familiar with the type of records maintained by the Bank in connection with the Ramirezes' loan. Labrum's affidavit further provided:

> 3. The information in this affidavit is taken from [the Bank]'s business records. I have personal knowledge of [the Bank]'s procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of [the Bank]'s regularly conducted business activities; and (c) it is the regular practice of [the Bank] to make such records.
>
> 4. That [the Bank] is the holder of the Note.

Labrum averred that a true and correct copy of the notice to accelerate that was mailed to the Ramirezes was attached along with a copy of the payment history related to the loan.

¶7 Four days prior to the scheduled summary judgment hearing—and more than six months after the summons and complaint were filed—the Ramirezes submitted a motion for leave to file an amended answer and affirmative defenses. The filings did not set forth any specific facts showing that there was a genuine issue for trial as to the Bank's motion for summary judgment. Rather, in a supporting affidavit, Emilio Ramirez averred that he was denied loan modification and that he had submitted multiple offers for sale of the property to the Bank. He included supporting documentation with his affidavit.

¶8 At the summary judgment hearing, the Bank asked that the Ramirezes' motion be struck as untimely. The Bank further argued that the filing evidenced a desire by the Ramirezes to have a short sale but did not create a genuine issue of material fact under WIS. STAT. § 802.08 (2011-12).[1] The Ramirezes argued that there had been discussions with the Bank—through a negotiator—regarding the amount the Bank would accept for a short sale. In addition, they asserted that if they had previously known the defenses that were available to them, they would have argued that the Bank lacked standing to bring the foreclosure action. The basis for the Ramirezes' standing argument was that the assignment of mortgage from MERS, as nominee for Ameristar, to BAC was not properly notarized. As such, the Ramirezes asserted that the Bank had not properly established the chain of title for the assignment of the mortgage.

¶9 The circuit court concluded that the signature on the assignment of mortgage was properly authenticated, but withheld its ruling on the motion for summary judgment for thirty days so that a decision could be made on whether the Bank would accept one of the short sale offers to purchase. The circuit court set an adjourned hearing date for February 27, 2012. No discussions were had about granting leave to the parties for the filing of further responses or pleadings.

¶10 On February 24, 2012, three days prior to the adjourned hearing, the Ramirezes filed a response to the Bank's proposed findings of fact, a brief in opposition to the Bank's motion for summary judgment of foreclosure, and a supporting affidavit.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶11 At the February 27, 2012 hearing, the Bank requested that the February 24, 2012 submissions be struck as untimely and inadmissible. It further requested that its motion for summary judgment be granted and informed the court that it did not approve the short sale proposed by the Ramirezes. The circuit court—noting that findings of fact, conclusions of law and summary judgment were signed at the initial summary judgment hearing but not entered by the circuit court—ruled that the Ramirezes' submissions were untimely. The circuit court explained that the filings should have been filed prior to the initial summary judgment hearing. The circuit court stated that the only issue before it was whether the Bank would approve a short sale. Given that the Bank had refused, the circuit court ordered that summary judgment be entered.[2]

DISCUSSION

¶12 At the outset, we note our agreement with the circuit court's determination that the Ramirezes' February 24, 2012 submissions were untimely. *See* WIS. STAT. § 802.08(2) ("[T]he adverse party [to a motion for summary judgment] shall serve opposing affidavits … at least 5 days before the time fixed for the hearing."). In making this determination, the circuit court explained to the Ramirezes that if they had filed their February 24, 2012 submissions in advance of the initial summary judgment hearing that took place on January 30, 2012, "it would be a different situation."

[2] The Honorable Dennis P. Moroney presided over the initial summary judgment hearing. The Honorable Francis T. Wasielewski presided over the subsequent hearing and ordered that summary judgment be entered.

¶13 With this in mind, we consider whether the circuit court properly granted summary judgment based on the record before it. We review *de novo* the grant of summary judgment, using the same methodology as the circuit court. ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶13, ___ Wis. 2d ___, ___ N.W.2d ___. "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** Where a complaint states a claim for relief, "we begin by examining the moving party's affidavits to determine whether that party has made a prima facie case for summary judgment. If so, we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." ***Id.*** (citation omitted).

1. Prima Facie Case for Summary Judgment

¶14 "'[A] mortgage cannot exist without a debt.' As a result, in order to prevail on a foreclosure claim, a mortgagee must first prove it has the right to enforce the note." ***Id.***, ¶15 (citation omitted; brackets in ***Dow***).

¶15 In ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, 346 Wis. 2d 1, 827 N.W.2d 124 (Ct. App. 2012), an officer of the servicer of the Bierbrauers' loan averred that the servicer maintained the loan records and that, based on the officer's personal inspection of those records, the plaintiff bank was the current

holder of the note.[3] *See* ***id.***, ¶3. We held those facts established a prima facie case the bank was the note holder, which, in turn, established the right to enforce the note. ***Id.***, ¶10.

¶16 We are sufficiently persuaded that, given the particular facts of this case and considering the reasoning in ***Bierbrauer***, the Bank made a prima facie case that it was the note holder. By affidavit, Labrum averred that he is an officer of the Bank, that the Bank maintains records for the Ramirezes' loan, that he is familiar with the type of records maintained by the Bank in connection with the Ramirezes' loan, that he has personal knowledge of the Bank's procedures for creating the records, and that the Bank is the note holder. That the relevant loan documents—including the assignment of mortgage transferring the mortgage "together with the Note and indebtedness it secures"—were in fact attached to the Bank's complaint further supports Labrum's affidavit.

¶17 Because the Bank established that it held the note, it has the right to enforce the note and also the mortgage, which follows the note by operation of law, *see* ***Kornitz v. Commonwealth Land Title Ins. Co.***, 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1978) (when a note is transferred or assigned, the equitable interests

[3] In ***Bank of America N.A. v. Minkov***, No. 2012AP2643, unpublished slip op. (WI App Aug. 8, 2013), this court concluded that a "[bank employee]'s averment that Bank of New York is the 'holder' is inadmissible testimony because it is an irrelevant statement representing a legal conclusion." ***Id.***, ¶16. To the extent ***Minkov*** can be said to be at odds with ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, 346 Wis. 2d 1, 827 N.W.2d 124 (Ct. App. 2012), ***Bierbrauer*** controls. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals is bound by its own prior precedent and may not overrule, modify, or withdraw language from its prior published opinions); *see also* WIS. STAT. RULE 809.23(3)(b) ("[A]n unpublished opinion … authored by a member of a three-judge panel … may be cited for its persuasive value…. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state.").

in the mortgage follow), unless the Ramirezes' submissions created a genuine issue of material fact necessitating a trial, *see* ***Bierbrauer***, 346 Wis. 2d 1, ¶11.[4]

2. Genuine Issues of Material Fact

¶18 Here, the Ramirezes did not *timely* come forward with any arguments or objections, much less evidence contradicting the facts underlying the Bank's prima facie case that it is the holder of the original note. As a result, the Ramirezes failed to raise a genuine issue of material fact regarding the Bank's right to enforce the note, and the circuit court properly granted summary judgment in the Bank's favor.[5] *Cf.* ***id.***

3. Unclean Hands

¶19 Finally, we reject the Ramirezes' arguments that entry of judgment in favor of the Bank is contrary to public policy because the Bank has unclean hands for fraudulently withholding the true identity of the owner of the mortgage and that the Bank acted egregiously and in bad faith. These arguments were never raised in the circuit court and lack evidentiary support. As such, we do not consider them further. *See* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis.

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[4] In passing, we note that the circumstances before us are factually distinguishable from the circumstances presented in ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ___ Wis. 2d ___, ___ N.W.2d ___. Because, as previously noted, this court is bound by its own precedent, ***Bierbrauer*** remains good law. *See* ***Cook***, 208 Wis. 2d at 189-90. Insofar as ***Bierbrauer***'s facts are most akin to those before us, we rely on its reasoning.

[5] This is one example of how the case before us differs from the one before the court in ***Dow***. There, unlike here, a response to the summary judgment motion was filed and considered by the circuit court. *See* ***id.***, 2013 WI App 114, ¶¶11-12.

2d 320, 786 N.W.2d 810 ("Arguments raised for the first time on appeal are generally deemed forfeited.").[6]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] We do not address additional arguments made by the Ramirezes in their appellate brief because they were not timely raised below. *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980) (Appellate courts will not consider issues beyond those which were properly preserved before the court below.).