COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 Nos. 2012AP1610
2012AP1677

Cir. Ct. No. 2009CV9785

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

NO. 2012AP1610

IN RE DOC MILWAUKEE, LP

SJ PROPERTIES,

PETITIONER,

V.

DOC MILWAUKEE, LP,

DEBTOR,

2010-1 SFG VENTURE, LLC,

INTERVENOR-APPELLANT-CROSS-RESPONDENT,

UIHLEIN ELECTRIC CO., INC., VJS CONSTRUCTION SERVICES AND VJS ENVIRONMENTAL SERVICES,

CLAIMANTS-RESPONDENTS,

KLEIN-DICKERT MILWAUKEE, INC.,

CLAIMANT-RESPONDENT-CROSS-APPELLANT,

BUTTERS FETTING CO., INC., SJ PROPERTIES SUITE BUYCO, EHF, STJ PC, ECONOMOU PARTNERS CONSTRUCTION, INC., ROARING FORK, LLC, OTIS ELEVATOR CO., SB HOLDINGS MILWAUKEE, LLC, EP MILWAUKEE, LLC, JOHN W. ECONOMOU, STEVEN J. ECONOMOU, THOMAS V. ECONOMOU AND FIRST AMERICAN TITLE,

CREDITORS,

SETH E. DIZARD,

RECEIVER.

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APPEALS and CROSS-APPEAL from orders of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Reversed in part and cause remanded with directions.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 LUNDSTEN, J. The parties to these consolidated appeals dispute whether a note and mortgage relating to a failed construction project in downtown Milwaukee have priority over certain construction liens. In the context of this receivership action, SFG Venture, LLC contended that its mortgage had priority under WIS. STAT. § 706.11(1)(f).[1] The circuit court rejected that argument. We agree with SFG Venture and, therefore, reverse the circuit court. As explained below, our conclusion renders moot contractor Klein-Dickert's cross-appeal and contractor Butters Fetting's appeal.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Background

¶2 The developer of the failed construction project, DOC Milwaukee LP, acquired a mortgage loan from Specialty Finance Group LLC (SFG) after substantial construction had commenced. Butters Fetting was an HVAC contractor, and Klein-Dickert performed glass installation work. Construction had begun in 2007. At some point, DOC Milwaukee failed to make timely or full payments to contractors, and several of these, including Butters and Klein-Dickert, filed liens.

¶3 Prior to the receivership action here, SFG's parent company went into receivership in separate litigation. The parties tell us that the Federal Deposit Insurance Corporation, as receiver for SFG's parent in that separate proceeding, created SFG Venture and placed in its portfolio the SFG note and mortgage at issue here.

¶4 The receivership here, placing DOC Milwaukee into receivership, was initiated in June 2009. As it turned out, DOC Milwaukee's only significant asset by that point was the failed development property, which sold at public auction for an amount significantly less than the amount owed on the note and mortgage held by SFG Venture. In rough numbers, at the time of the auction, the balance on the note and mortgage was over $14 million, Butters was owed $400,000, Klein-Dickert was owed $600,000, and the proceeds of the sale of "substantially all assets" of DOC Milwaukee was $12 million.

¶5 Before moving on, we clarify some shorthand that we use in this opinion. First, the parties refer to the note and mortgage collectively as the "mortgage." We follow their lead. Second, so far as we can tell, Butters and Klein-Dickert do not differentiate between SFG and SFG Venture for purposes of

the parties' dispute over what we deem to be the dispositive issue in this case, namely, whether SFG or SFG Venture is a "mortgage banker" within the meaning of WIS. STAT. § 706.11(1)(f). Indeed, in that context, Butters and Klein-Dickert contend that "[SFG] Venture cannot divorce itself from the actions of SFG" because "[o]ne who takes an interest by assignment, stands in the shoes of the one from whom it was assigned the interest." Accordingly, although SFG alone originated the mortgage, we do not make that distinction in the remainder of this opinion. Rather, we refer to SFG and SFG Venture collectively as Venture.

¶6 We now briefly describe the two appeals and the cross-appeal that arise out of this receivership proceeding.

¶7 Venture appeals a circuit court determination that contractor liens, including, at least potentially, the liens of Butters and Klein-Dickert, have priority over Venture's mortgage. The circuit court ruled that Venture's mortgage does not have priority under WIS. STAT. § 706.11(1)(f) because Venture is not a "mortgage banker" as that term is used in the statute.[2]

¶8 Klein-Dickert cross-appeals. Klein-Dickert contends that the circuit court erred when it reduced Klein-Dickert's $625,810.70 lien by $295,811. According to Klein-Dickert, the circuit court wrongly determined that Klein-Dickert waived the $295,811 portion of its lien. Additionally, Klein-Dickert cross-appeals the circuit court's conclusion that interest on the lien was not

[2] The circuit court also rejected Venture's argument that its mortgage had priority because Venture's predecessor, SFG, is a "national bank" within the meaning of WIS. STAT. § 706.11(1)(d). Because we decide this case in favor of Venture on the basis of § 706.11(1)(f), we need not reach the subsection (d) issue. We note that the particular ruling we address in the discussion section of this opinion was issued by the Honorable Mel Flanagan, who presided over this action prior to the Honorable Jane V. Carroll.

"secured" and, therefore, "not lienable." Klein-Dickert requests that we reverse and remand with directions to increase its award to $625,810.70 and to determine "the appropriate amount of accrued interest."

¶9 Butters' appeal involves several decisions, initially made by a special master and later adopted or rejected by the circuit court. The result of the challenged circuit court rulings was that Butters' $318,636 lien claim, which Butters later amended upward to $401,282, was denied in its entirety. It is sufficient to say here that Butters contends that its full $401,282 lien should be reinstated and that, like Klein-Dickert, Butters is entitled to accrued interest.

¶10 As should be clear from the description of the two appeals and the cross-appeal, if Venture's mortgage has priority over Butters' and Klein-Dickert's liens, then Butters' appeal and Klein-Dickert's cross-appeal are moot. The appeal and cross-appeal both assume that Venture's mortgage does *not* have priority and, therefore, that there is money available from the proceeds of the public auction to satisfy their liens. Because we conclude that Venture's mortgage does have priority, and because the amount owed Venture exceeds the proceeds of the auction, there is no money left to satisfy either Butters' or Klein-Dickert's liens.[3]

[3] Venture asserts the following in its brief in response to Butters' appeal:

> As explained in Venture's Appeal Brief on the Issue of the Priority of Its Mortgage filed on June 24, 2013, if the Mortgage meets any of the provisions in Wis. Stat. § 706.11, then it is entitled to priority over construction liens, meaning that neither Butters nor Klein-Dickert would be entitled to recover from the sale proceeds as a matter of law, and Klein-Dickert would be obligated to return to Venture the non-waived portion of its lien claim.

Butters does not dispute this assertion in its reply brief, nor do we find any indication that Klein-Dickert takes a contrary view.

Discussion

¶11 If Venture is a "mortgage banker" as that term is used in WIS. STAT. § 706.11(1)(f), then Venture's mortgage has priority over the liens at issue in these consolidated appeals. We do not understand Butters and Klein-Dickert to be arguing otherwise. Rather, it is Butters' and Klein-Dickert's contention that Venture is not a "mortgage banker" within the meaning of § 706.11(1)(f). For the reasons that follow, we conclude that Venture satisfies the limited definition of "mortgage banker" that the legislature has imposed for purposes of mortgage priority.

¶12 The pertinent facts are not disputed. The only dispute is over statutory interpretation. The application of a statute to undisputed facts is a question of law that we decide without deference to the circuit court. ***Andersen v. DNR***, 2011 WI 19, ¶26, 332 Wis. 2d 41, 796 N.W.2d 1.

¶13 We give statutory language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of a statute is unambiguous, we apply that meaning, unless a plain meaning application produces an absurd result. *See* ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶62, 293 Wis. 2d 123, 717 N.W.2d 258 (court has a duty to "look beyond the plain meaning" when a statute's "plain meaning produces absurd results"). Of particular significance here, our supreme court has explained:

> Where a word or phrase is specifically defined in a statute, its meaning is as defined in the statute, and no other rule of statutory construction need be applied. It is only when a word or phrase is used and is not specifically defined therein that common and approved usage of such word or

> phrase and other accepted rules of statutory construction apply.

Beard v. Lee Enters., Inc., 225 Wis. 2d 1, 23, 591 N.W.2d 156 (1999) (citation omitted).

¶14 Venture argues that the statutory scheme set forth in WIS. STAT. §§ 224.71(3) and 706.11(1)(f) is plain and that a straightforward application of these statutes to the undisputed facts here leads to the conclusion that Venture's mortgage has priority. Butters and Klein-Dickert do not argue that Venture's interpretation of §§ 224.71(3) and 706.11(1)(f) is incorrect if those two statutes are viewed in isolation. Rather, Butters and Klein-Dickert contend that other closely related statutory provisions governing mortgage bankers reveal that Venture's proffered interpretation runs contrary to legislative intent and leads to an absurd result.

¶15 We agree with Venture's plain language argument. We begin by describing the statutes, and then apply them to the undisputed facts. We then address and reject Butters' and Klein-Dickert's contrary arguments.

¶16 Under WIS. STAT. § 706.11, certain mortgages are given priority over the types of liens at issue here. Section 706.11 provides, in relevant part:

> **Priority of certain mortgages, trust funds. (1)** Except as provided in sub. (4), when any of the following mortgages has been duly recorded, it shall have priority over all liens upon the mortgaged premises and the buildings and improvements thereon, except tax and special assessment liens filed after the recording of such mortgage and except liens under ss. 292.31(8)(i) and 292.81:
>
> ....
>
> (f) Any mortgage executed to a mortgage banker, as defined in s. 224.71(3).

WIS. STAT. § 706.11(1)(f). The parties do not dispute the meaning of subsection (1). As to subsection (1)(f), they do not dispute that Venture's mortgage was a "mortgage executed" to Venture. The narrow question is whether Venture is "a mortgage banker" within the meaning of § 706.11(1)(f).

¶17 WISCONSIN STAT. § 706.11(1)(f) is clear regarding what it takes to be a "mortgage banker" for purposes of mortgage priority. That statute specifies that the benefits conferred by the statute apply to mortgages executed to "a mortgage banker, as defined in s. 224.71(3)." Thus, under the plain language of the statute, we turn to the definition of "mortgage banker" in WIS. STAT. § 224.71(3).

¶18 Venture states, without disagreement from Butters and Klein-Dickert, that the relevant version of WIS. STAT. § 224.71(3) is the one that was in effect at the time Venture's mortgage was executed and recorded in January 2008, which the parties seemingly agree is the 2005-06 version. That statute reads, in pertinent part:

> **(3)**(a) "Mortgage banker" means a person who is not excluded by par. (b) and who does any of the following:
>
> 1. Originates loans for itself, as payee on the note evidencing the loan, or for another person.
>
> 2. Sells loans or interests in loans to another person.
>
> 3. Services loans or land contracts or provides escrow services.
>
> (b) "Mortgage banker" does not include any of the following:
>
> 1. A bank, trust company, savings bank, savings and loan association, insurance company, or a land mortgage or farm loan association organized under the laws of this state or of the United States, when engaged in the

> transaction of business within the scope of its corporate powers as provided by law.
>
> [Remaining exclusions omitted.]

WIS. STAT. § 224.71(3).

¶19 Venture's appellate brief-in-chief asserts that Venture is not excluded by paragraph (b) and that paragraph (a)1. is satisfied because Venture originated the loan for itself as payee.[4] Butters and Klein-Dickert do not dispute these assertions.[5]

¶20 We do not stop here, however, because Butters and Klein-Dickert contend that there is an additional requirement that must be inferred from the broader statutory scheme. More specifically, Butters and Klein-Dickert contend that WIS. STAT. §§ 224.71(3) and 706.11(1)(f) can only reasonably be read as referring to a *registered* mortgage banker because a related statute contains a mortgage banker registration requirement. Butters and Klein-Dickert point to WIS. STAT. § 224.72(1m), which contains prohibitions on "person[s]" who have not been issued a certificate of registration. That statute provides:

[4] In the text, we refer to Venture's assertion with respect to WIS. STAT. § 224.71(3)(a)1. We note that Venture also argues, without contradiction from Butters and Klein-Dickert, that § 224.71(3)(a)2. is also satisfied.

[5] Butters and Klein-Dickert concede that Venture is not excluded under WIS. STAT. § 224.71(3)(b). However, Butters and Klein-Dickert then go on to argue that this fact cuts against Venture because, so the argument goes, entities excluded under subsection (b) are "already regulated by other state agencies or the federal government" and, therefore, "there was no need to include them within this ... definition of mortgage banker." If Butters and Klein-Dickert make a valid point here, we fail to understand what it is. Accepting as true that *some* of the entities excluded by subsection (b) are regulated in a manner akin to registered Wisconsin mortgage bankers, other excluded entities and persons do not appear to be subject to similar regulation. For example, subsection (b) excludes "[a] person who originates, sells, or services loans only with the person's own funds for the person's own investment and the person has originated, sold or serviced no more than 4 loans during the previous 12 months." WIS. STAT. § 224.71(3)(b)6.

> A person may not act as a mortgage banker …, use the title "mortgage banker" …, or advertise or otherwise portray himself or herself as a mortgage banker … unless the person has been issued a certificate of registration from the division.

WIS. STAT. § 224.72(1m).

¶21 We agree that WIS. STAT. § 224.72(1m) imposes a registration requirement. And, we will assume for purposes of this opinion that Venture could not "act as a mortgage banker …, use the title 'mortgage banker' …, or advertise or otherwise portray himself or herself as a mortgage banker" because Venture was not issued a certificate of registration under § 224.72(1m). But it is not apparent why this means that Venture could not, under WIS. STAT. § 224.71(3)(a)1., "[o]riginate[] loans for itself, as payee on the note evidencing the loan." And, as applicable here, not being excluded by § 224.71(3)(b), and originating a loan for itself as payee on the note evidencing the loan, was all that was required for Venture to be a "mortgage banker" under §§ 224.71(3) and 706.11(1)(f) for purposes of mortgage priority.[6]

¶22 More to the point, if originating a mortgage loan is necessarily an "act" *of a mortgage banker* under WIS. STAT. §§ 224.71(3) and 706.11(1)(f), then

[6] Venture asserts in its brief-in-chief that "[t]he Wisconsin legislature set forth the penalties for failure to be licensed or registered in Wis. Stat. §§ 224.80 and 224.81, including fines, imprisonment, private lawsuits, and limitations on the ability to sue for unpaid commissions," but that "Chapter 224 does not provide for loss of super-priority status under Wis. Stat. § 706.11(1)(f) as a penalty for failure of a mortgage banker to be licensed or registered under Chapter 224." And, as Venture points out in its reply brief, Butters' and Klein-Dickert's responsive brief does not dispute this point. We do not weigh in on the matter because it is not necessary to our decision. Rather, we simply observe that, if it is true, as Venture asserts, that the larger statutory scheme does not impose a loss of priority as a penalty for the failure to comply with licensing or registration requirements, then it is hard to understand why giving Venture's mortgage priority status here is an unreasonable result.

the statutory definition of "mortgage banker" in § 224.71(3)(a)1. makes little sense. That is, it makes little sense to define "mortgage banker" in terms of an act that can be performed only by one who is already a "mortgage banker." Moreover, as Venture points out, Butters and Klein-Dickert seemingly concede that Venture did not need to be a registered mortgage banker to originate an enforceable mortgage loan. Butters and Klein-Dickert concede that "[w]hether [Venture] was required to register in order to provide the loan it did in this case is irrelevant for the separate purpose of the benefit conveyed by Wis. Stat. § 706.11."

¶23 Butters and Klein-Dickert contend that "it would be inequitable to allow [Venture] the protection afforded by a regulatory scheme in which it refused to participate." We agree that Venture is afforded a significant protection under the plain language of WIS. STAT. §§ 224.71(3) and 706.11(1)(f). But Butters and Klein-Dickert do not follow through and explain why according a specific protection—i.e., mortgage priority protection—to Venture is inequitable. Butters and Klein-Dickert merely make the assertion.

¶24 Similarly, Butters and Klein-Dickert assert that it is inconsistent for Venture to be treated as a "mortgage banker" for purposes of mortgage priority but not be regulated as a mortgage banker. However, as with their "inequitable" assertion above, Butters and Klein-Dickert make the assertion but do not go on to explain the inconsistency. They do not explain why the legislature could not have reasonably decided to give mortgages, like the one at issue here, priority, while simultaneously denying the mortgage originator the ability to otherwise act as a mortgage banker.

¶25 Butters and Klein-Dickert devote several pages to the discussion of legislative history. We agree with Venture, however, that the purpose of this

discussion is unclear. Furthermore, regardless of Butters' and Klein-Dickert's purpose, resorting to legislative history is unnecessary because they have failed to persuade us that there is statutory ambiguity. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 ("Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history.").

¶26 It follows from the discussion above that we must also reject Butters' and Klein-Dickert's argument that Venture's effort to seek priority status for its mortgage runs afoul of the principle that a party seeking equity must perform equitably. Venture did not seek an equitable ruling, but rather made the legal argument that its mortgage was entitled to priority under a correct reading of the applicable statutes. And, as we have explained, this is a purely legal issue.

¶27 In sum, a plain language application of WIS. STAT. §§ 224.71(3) and 706.11(1)(f) to the undisputed facts here leads to the conclusion that Venture's mortgage has priority over Butters' and Klein-Dickert's liens. And, Butters and Klein-Dickert have failed to persuade us that this is an unreasonable result.

Conclusion

¶28 For the reasons above, as to Venture's appeal, we reverse the circuit court and, therefore, dismiss Klein-Dickert's cross-appeal and Butters' appeal as moot. Regarding directions on remand, Venture requests that we "reverse the trial court's Decision on the Priority of the Mortgage Held by [Venture], and in so doing, affirm the denial of Butters' [lien] claim, affirm the denial of the waived $295,811.00 portion of Klein-Dickert's [lien] claim, and reverse the award of $329,999.70 to Klein-Dickert and remand to the trial court for entry of judgment requiring Klein-Dickert to return the $329,999.70, with interest and costs." Klein-Dickert does not address what should happen on remand if we agree with Venture

that Venture's mortgage has priority. Accordingly, we remand with directions that the judgment be amended to reduce the award to Klein-Dickert to zero and to enter an order requiring Klein-Dickert to return $329,999.70 to Venture. We leave to the circuit court the question of whether Venture is entitled to interest on that sum and whether Venture is entitled to statutory costs associated with the circuit court proceedings.

By the Court.—Orders reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.