COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2014

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. 2012AP2398 **Cir. Ct. No. 2009CV3413**

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

NATIONSTAR MORTGAGE, LLC,

PLAINTIFF-RESPONDENT,

V.

CALVIN C. CALKINS,

DEFENDANT-APPELLANT,

SUMMIT CREDIT UNION P/K/A STATE CAPITOL CREDIT UNION, CAPITAL ONE BANK USA, N.A. AND MCKENNA ROWHOUSE CONDOMINIUM UNIT OWNER'S ASSOCIATION, INC.,

DEFENDANTS,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

DEFENDANT-RESPONDENT.

CALVIN C. CALKINS,

CROSS CLAIMANT-THIRD-PARTY

PLAINTIFF-APPELLANT,

V.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

CROSS CLAIMANT-DEFENDANT-THIRD-PARTY

DEFENDANT-RESPONDENT,

BANK OF AMERICA, N.A.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment and order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Higginbotham, Sherman, and Kloppenburg, JJ.

¶1 PER CURIAM. Calvin Calkins appeals a circuit court order and judgment of foreclosure entered against him and in favor of Nationstar Mortgage, LLC, after a trial. On appeal, Calkins makes a number of arguments challenging the judgment of foreclosure and the order dismissing Calkins' counterclaims alleging that Nationstar's predecessor in interest, Aurora Loan Services, LLC, breached a contractual obligation to enter into a permanent loan modification with Calkins. For the reasons set forth below, we affirm the judgment and order of the circuit court.

BACKGROUND

¶2 Calkins executed a promissory note on March 30, 2006, in favor of Nationwide Lending Corporation in the principal amount of $144,000. To secure

payment of the note, Calkins executed a mortgage on the same date, naming Nationwide as the lender and naming Mortgage Electronic Registration Systems, Inc. (MERS) as "nominee for Lender and Lender's successors and assigns." By letter dated April 14, 2006, Aurora informed Calkins that it would begin servicing his mortgage loan. Calkins then began to make his mortgage loan payments directly to Aurora.

¶3 The note was endorsed three times, with the final endorsement being an endorsement in blank by Lehman Brothers Holdings, Inc. On June 10, 2009, the note was transferred to Aurora Loan Services, LLC. Aurora requested delivery of the note in connection with pursuing this foreclosure action against Calkins, and received the original note. Aurora commenced the foreclosure action in July 2009.

¶4 Nationstar then acquired Aurora on July 1, 2012, at which point Nationstar obtained possession of the original note and Aurora's loan servicing rights. Aurora and Nationstar stipulated to substitute Nationstar as the plaintiff in the foreclosure action, and the circuit court signed an order confirming the substitution. Calkins did not object to the substitution.

¶5 Following a bench trial, the circuit court entered a judgment of foreclosure in favor of Nationstar and against Calkins on August 6, 2012. The circuit court found that Nationstar held the original promissory note executed by Calkins, and that the note was secured by a mortgage on Calkins' condominium property. The court concluded that the transfer of the note to Nationstar also transferred the mortgage and the right to enforce the mortgage to Nationstar. Calkins now appeals the foreclosure judgment.

¶6 In addition, Calkins also challenges a prior circuit court order, entered April 5, 2012, that dismissed his counterclaims alleging that Aurora had

breached a contractual obligation to enter into a permanent loan modification with him. The circuit court concluded that Aurora was not required to offer a permanent loan modification to Calkins and that Calkins had failed to comply with the conditions required for a permanent loan modification.

STANDARD OF REVIEW

¶7 Foreclosure proceedings are equitable in nature, and the circuit court has authority to exercise discretion throughout the proceedings. ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). We will sustain a circuit court's discretionary determination if the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Long v. Long***, 196 Wis. 2d 691, 695, 539 N.W.2d 462 (Ct. App. 1995).

¶8 As to Calkins' challenge to the dismissal of his counterclaims on the parties' cross-motions for summary judgment, whether the circuit court properly granted summary judgment is a question of law that we review *de novo*. ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶24, 323 Wis. 2d 682, 781 N.W.2d 88.

DISCUSSION

¶9 Calkins makes numerous arguments in his briefs, each with multiple subparts. However, as Nationstar points out in its brief, the arguments can be grouped into two main issues on appeal. First, Calkins argues that the judgment of foreclosure was entered in error because Nationstar lacked legal authority to foreclose the mortgaged property. Second, Calkins argues that Aurora unlawfully

failed to provide him with a permanent loan modification plan. We address each of these issues in turn.

Judgment of foreclosure

¶10 In arguing that the judgment of foreclosure was entered in error, Calkins does not dispute that Nationstar holds the note. Rather, he argues that the circuit court issued an erroneous "holding" that the separation of a note and mortgage is a legal impossibility. He relies upon this alleged holding in arguing that Nationstar did not have the authority to foreclose the mortgage on his property. Calkins then stretches this argument to encompass a variety of legal issues inapplicable to the record facts of this case, including the sufficiency of conveyances, the doctrine of unclean hands, and the statute of frauds. However, each of these subarguments rests on Calkins' theory, unsupported by a record citation, that the circuit court made a holding that the separation of a note and mortgage is a legal impossibility. As Nationstar points out, the transcript of the circuit court's oral decision contains no such ruling.[1]

¶11 The "separation" issue arose tangentially during closing arguments at trial, when Calkins argued that, even if Nationstar holds the original note endorsed in blank, it cannot enforce the note because the note and mortgage were separated at inception. However, Calkins did not present any evidence at trial that the note and mortgage were ever separated; nor did he present any evidence that the parties did not intend for the mortgage to serve as security for the note. Rather, the mortgage states specifically that it was granted to MERS "acting solely

[1] Calkins' counsel should take better care in ensuring that her arguments are properly supported by the record and the law.

as a nominee for Lender and Lender's successors and assigns" as security for the note.

¶12 Under the doctrine of equitable assignment, the transfer of a note carries the mortgage with it. *See* ***Tidioute Sav. Bank v. Libbey***, 101 Wis. 193, 196, 77 N.W. 182 (1898) ("The rule is that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter.") An exception to this rule is that a mortgagee may separate or strip the security from a note. RESTATEMENT (THIRD) OF PROPERTY § 5.4(a) (1997) states that "transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Calkins fails to cite to any evidence in the record that would indicate that the mortgage was stripped from the note or that the parties agreed to separate the two.

¶13 In a related matter, Calkins argues that the trial court failed to require Nationstar to prove that it was entitled to equitable relief. Calkins does not dispute that he is in default of his obligations under the note and mortgage. He admitted at trial that he has not made any payments since approximately April 2010. On appeal, he makes the unsupported, conclusory statement that, had the court required Nationstar to justify its request for equitable relief, "the court would have had to consider the fact that a statutorily sufficient assignment of mortgage was recorded with the register of deeds." Calkins fails to develop this argument to explain why the court should have considered the assignment of mortgage. "A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories." ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). This court need not consider arguments that either are unsupported by adequate factual and legal citations or are otherwise

undeveloped. *See* ***Dieck v. Unified Sch. Dist. of Antigo***, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990) (unsupported factual assertions); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped legal arguments). Consequently, we reject as underdeveloped Calkins' argument that the circuit court erred in failing to consider the assignment when it granted equitable relief to Nationstar.

Order dismissing Calkins' counterclaims

¶14 Calkins also argues that Aurora breached the terms of the Trial Period Plan (TPP) it entered into with him in August 2009. He asserts that, pursuant to government guidelines published in the handbook for the Home Affordable Modification Plan (HAMP) program, Aurora was required to determine his availability for a permanent modification program before offering him a TPP. In response, Nationstar argues that the guidelines Calkins references in his brief are from the 2011 HAMP handbook, and were not in existence at the time Calkins entered into the TPP in August 2009. Nationstar further argues that, even if the guidelines cited by Calkins had been in effect, Calkins did not submit all required financial documentation before Aurora offered him a TPP and, in any event, did not meet the gross income threshold requirement. Calkins does not refute these assertions in his reply brief and, therefore, they are deemed admitted, and we affirm the circuit court order on that basis. *See* ***Lake Bluff Hous. Partners v. City of S. Milwaukee***, 2001 WI App 150, ¶22 n.3, 246 Wis. 2d 785, 632 N.W.2d 485.

¶15 As to the remainder of the issues argued in Calkins' brief, including equitable lien waiver, equitable mortgage, and whether Article 9 of the Uniform Commercial Code applies to the loan transaction, we note that, by Calkins' own

admission, these issues were not addressed by the circuit court and are "relevant only if this Court searches the record for a reason to affirm the Circuit Court." We need not search the record for a reason to affirm because we affirm on the grounds stated above.

By the Court.—Judgment and order affirmed.

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