COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2453 **Cir. Ct. No. 2012CV1008**

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

NATIONSTAR MORTGAGE LLC , ASSIGNEE OF MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FREMONT INVESTMENT AND LOAN,

PLAINTIFF-APPELLANT,

V.

MICHAEL P. KELLY, PHYLLIS J. KELLY AND PEOPLES BANK - SILVER LAKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. After a bench trial, the circuit court concluded that the original parties' mutual mistake in the conveyance of a mortgage caused the instrument to encumber more than what they intended. The court reformed the legal description to the benefit of the mortgagors, Michael and Phyllis Kelly ("Kelly" if referring only to Michael), by stripping two parcels of land from the mortgage lien. It also granted Nationstar Mortgage LLC a judgment of foreclosure on the Kellys' homestead property. Nationstar appeals. We affirm.

¶2 The Kellys own four contiguous parcels of land totaling roughly 155 acres. The parties refer to them as the northeast, southeast, northwest, and southwest parcels. Each has its own Parcel Identifier Number (PIN). The seventy-four-and-a-half-acre northeast parcel is the homestead parcel. The three smaller parcels are unimproved. The legal metes-and-bounds description describes "Parcel I" (the northeast, northwest, and southwest parcels) and "Parcel II" (the sixteen-acre southeast parcel).

¶3 In October 2006, the Kellys obtained a $790,500 loan from Fremont Investment & Loan. The note was secured by a mortgage on Parcel I. Fremont had the homestead parcel appraised in anticipation of the loan. The mortgage listed only the homestead's PIN.

¶4 In August 2009, Fremont assigned its mortgage loan to Nationstar. Unlike the mortgage, the assignment also included Parcel II in the description and listed all four parcels' PINs. The discrepancy apparently went unnoticed. The loan was modified in 2009 and 2010. No new mortgage was executed either time.

¶5 In August 2008, Peoples Bank-Silver Lake made the Kellys a $100,000 loan secured by all four parcels. The preliminary title report showed that Peoples Bank was in second position on the homestead parcel and in first

position on the other three. Peoples Bank destroyed the report upon receipt of the final title. The title company that prepared the report no longer exists.

¶6 In May 2012, Nationstar filed a complaint alleging claims for reformation of the mortgage and foreclosure. As to reformation, it alleged that the mortgage inadvertently omitted the description of Parcel II because both Nationstar, as Fremont's nominee, and the Kellys intended the legal description in the mortgage to mirror that in the assignment and that the defect could be cured by reforming the mortgage to include that parcel. As to foreclosure, it alleged that the Kellys defaulted on their mortgage loan and that any interest the Kellys or Peoples Bank held in the property was junior to its interest.

¶7 The Kellys denied that the omission of the Parcel II description was inadvertent. They affirmatively alleged that the legal description in the mortgage was inaccurate and ambiguous and did not clearly and fully describe the premises intended to be mortgaged and that the errors could not be cured by reformation as Nationstar claimed. In their answer to the foreclosure claim, the Kellys entered a limited denial to the default allegation, asserting that they made good faith, but fruitless, efforts to work out with Nationstar more affordable payments, alleged that Nationstar failed to properly establish the extent to which the mortgage given to it covered the property the Kellys owned, and denied that Peoples Bank's interest was subordinate.

¶8 For its part, Peoples Bank affirmatively alleged that the legal description in the mortgage was inaccurate and ambiguous, did not clearly and fully describe the premises intended to be mortgaged, and could not be cured. Peoples Bank's answer to the foreclosure claim likewise denied that its interest was subordinate superior to Nationstar's and affirmatively alleged that, as a result

of the inaccurate legal description, its mortgage was prior to and superior to Nationstar's.

¶9 Months after the deadline for filing summary judgment motions, Nationstar moved to amend the scheduling order to allow it to seek summary judgment on the foreclosure action and orally withdrew its reformation claim at the hearing on the motion. The court denied Nationstar's motion. The Kellys' and Peoples Bank's pretrial reports asked the court to reform the mortgage to describe only the homestead parcel.

¶10 The matter proceeded to trial. Nationstar contended that, having withdrawn the reformation claim, the defendants could not seek reformation of the mortgage because they had not pled it as an affirmative defense or counterclaim. The court disagreed, noting that resolving the foreclosure action necessarily turned the trial's focus to what property secured the note. It found that the single PIN vis-à-vis the property description in the mortgage made the mortgage intrinsically ambiguous and that the original parties, the Kellys and Fremont, never intended to secure the note with more than the homestead parcel, and concluded that, due to their mutual mistake, the mortgage should be equitably reformed pursuant to WIS. STAT. § 847.07 (2011-12).[1] It granted Nationstar a judgment of foreclosure on the

[1] WISCONSIN STAT. § 847.07 provides in relevant part:

> **Correction of description in conveyance. (1)** The circuit court of any county in which a conveyance of real estate has been recorded may make an order correcting the description in the conveyance on proof being made to the satisfaction of the court that any of the following applies:
>
> (a) The conveyance contains an erroneous description, not intended by the parties to the conveyance.

(continued)

note, secured only by the homestead parcel. After the court denied its motion for reconsideration, Nationstar filed this appeal.

¶11 A court in equity can reform written instruments that, by mutual mistake, do not express the true intentions of the parties, authority codified in WIS. STAT. § 847.07. ***Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.***, 2005 WI App 110, ¶18, 282 Wis. 2d 806, 699 N.W.2d 241. The party seeking reformation must prove by clear and convincing evidence that through inadvertence, accident, or mutual mistake, the written agreement does not set forth the parties' intentions. ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 233, 509 N.W.2d 294 (Ct. App. 1993). Whether mutual mistake occurred is a question of fact. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986). A circuit court acting as the finder of fact is the ultimate arbiter of the credibility of the witnesses and the weight to give each one's testimony. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We review the decision to grant equitable relief for an erroneous exercise of discretion. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109.

¶12 Nationstar contends the circuit court exceeded its authority by reforming the mortgage description once the reformation claim was withdrawn. We disagree. The Kellys' and Peoples Bank's answers to the foreclosure claim show how intertwined the two causes of action were. Evidence relevant to the

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(b) The description is ambiguous and does not clearly or fully describe the premises intended to be conveyed.

All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

reformation claim was essential to determining what property was at stake. Without it, the foreclosure claim against the Kellys and Peoples Bank's priority issue could not have been resolved.

¶13 Moreover, the Kellys' actual default was not truly in dispute. The real bone of contention was what property Nationstar could foreclose on. Nationstar cannot seriously contend it did not at least impliedly try to meet defendants' proofs at trial. Indeed, it presented a Nationstar representative to testify about the property description in the mortgage. More to the point, the Kellys' and Peoples Bank's affirmative claims that the description in the mortgage was inaccurate and that Peoples Bank's interest in the mortgaged property was superior to Nationstar's kept reformation on the table. Thus, whether or not Nationstar withdrew its reformation claim, "[i]f issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." WIS. STAT. § 802.09(2).

¶14 Nationstar also asserts it was prejudiced when, at trial, the court "advance[ed] a reformation claim on [the Kellys'] behalf" because that "late action" deprived it of the opportunity to offer testimony from anyone formerly employed by its assignor, Fremont, which also is defunct. This argument fails.

¶15 Nationstar's counsel averred in a posttrial affidavit that he first began searching for a Fremont contact on June 20, 2013, two-and-a-half weeks *after* trial. Upon locating a former senior vice president, Nationstar made an offer of proof as to how he would have testified. We are not convinced that his proposed testimony would have materially changed the outcome.

¶16 More importantly, Nationstar could have made that effort far sooner. It asserted its reformation claim in its May 2012 complaint. Ten months later, and

many weeks after the deadline, Nationstar filed its witness list and moved to amend the scheduling order to allow it to file a summary judgment motion. The untimeliness, it explained, was occasioned by putting "considerable thought" into determining whether to dismiss its reformation cause of action. Nationstar orally withdrew its reformation claim on March 18, a bare two weeks before all discovery was to be completed.[2]

¶17 Nationstar's reasons for its dilatoriness suggested it contemplated pursuing the reformation claim up until just about a month before the original trial date. Locating a Fremont contact strikes us a sensible part of evaluating whether or not to dismiss the claim. "A trial court may allow a variance between the pleadings and the proof provided the variance does not mislead the opposing party to [its] prejudice." ***Goldman v. Bloom***, 90 Wis. 2d 466, 480, 280 N.W.2d 170 (1979). Leaving reformation on the table did not blindside Nationstar.

¶18 Nationstar also challenges the court's conclusion that the mortgage was ambiguous or that, by mutual mistake, it did not reflect the parties' true intent. *See* WIS. STAT. § 847.07(1)(a), (b). Whether a deed or other instrument is ambiguous is a question of law we review independently. ***AKG Real Estate, LLC v. Kosterman***, 2006 WI 106, ¶14, 296 Wis. 2d 1, 717 N.W.2d 835. If it is not ambiguous, its construction is a question of law. ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). If it is ambiguous, the parties' intent is a question of fact, ***id.***, as is whether a mutual mistake occurred, ***Elsen***, 128 Wis. 2d at 517.

[2] Discovery was to be completed by twenty days before trial, originally set for April 22, 2013. On April 15, the court moved the trial to June 3 due to a calendaring conflict. Nationstar filed a petition to withdraw the reformation claim a week after the June 3 trial.

¶19 Kelly testified that he and his wife intended the mortgage to cover only the homestead, that he understood that to be the case from the mortgage broker, that it was the only parcel appraised, and that the mortgage bore only the homestead PIN. A Peoples Bank vice president testified that, when the bank made its loan to the Kellys, it believed that the mortgage covered only the homestead because the preliminary title report showed Peoples Bank in second position on that parcel and in first on the others, it would not have made the loan had it been in second place on all four, and the Kellys had a property tax escrow account for the three vacant parcels through the Peoples Bank loan and mortgage.

¶20 The court rejected Nationstar's explanations as to why a mortgage might bear just one PIN or an appraisal might be limited to an improved parcel, as "there's nothing to show these explanations were present or … that these were somehow conveyed to Mr. Kelly … to alter his understanding." With no Fremont representative to dispute Kelly's testimony, and with the explained absence of the preliminary title report, the court concluded that the original document was ambiguous and that mutual mistake existed due to what Kelly said they were told they pledged as collateral, what Fremont included in the original mortgage, and what the Peoples Bank representative testified as to Peoples Bank's position. The court's findings are not clearly erroneous.

¶21 Nationstar alternatively argues that it took its interest free of any mutual mistake between the original parties to the conveyance because there is no evidence that, as Fremont's assignee, it had actual notice or knowledge that the original parties intended to make a conveyance different than what was made. *See* ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶36, 297 Wis. 2d 458, 725 N.W.2d 944 ("No Wisconsin authority provides that notice of a prior claim is imputed to an assignee when the assignee lacks actual knowledge of the claim.").

¶22 ***Bank of New Glarus*** arose in the context of adverse claims when a mortgage has not been properly recorded under the recording statutes, WIS. STAT. §§ 706.08 and 706.09. This is not a chain-of-title case. Nationstar acknowledges that the mortgage, without the "Parcel II" paragraph, was properly recorded with the Kenosha county register of deeds on October 26, 2006. It thus had constructive knowledge that the description in the mortgage did not match that in the assignment. The mortgage, not the assignment, is the lien upon the land. ***Fallass v. Pierce***, 30 Wis. 443, 461 (1872). The circuit court concluded that Fremont, the assignor, intended to encumber only the homestead parcel. That finding is not clearly erroneous. An assignee "stands exactly in the shoes of [the] assignor. [The assignee] succeeds to all of [the assignor's] rights and privileges, but acquires no greater right than [the] assignor had in the thing assigned." ***Gould v. Jackson***, 257 Wis. 110, 113, 42 N.W.2d 489 (1950).

¶23 Finally, Nationstar offers a grab bag of evidentiary challenges. We dismiss them summarily. Phyllis Kelly did not need to testify to her intent, as only Michael signed the adjustable rate note secured by the mortgage. Nationstar concedes that he intended to mortgage only the homestead.

¶24 Further, it was not critical to the Kellys or Peoples Bank that a former Fremont employee testify because Kelly testified that Josh Disch, a mortgage broker, ordered an appraisal of the homestead for Fremont, who paid him, and that Disch said Fremont was interested only in the homestead. The court properly ruled that Disch was Fremont's agent, that Nationstar stands in Fremont's shoes, that Kelly could testify to his understanding at the time based on what he was told, and that neither what Disch said nor the appraisal was hearsay, but the admission of a party opponent. *See* WIS. STAT. § 908.01(4)(b).

¶25 By contrast, Nationstar's title insurance policy was properly ruled to be hearsay because Nationstar's witness was not qualified to testify to the requirements of WIS. STAT. § 908.03(6). *See* ***Bank of Am. NA v. Neis***, 2013 WI App 89, ¶18, 349 Wis. 2d 461, 835 N.W.2d 527.

¶26 We conclude that the record supports the circuit court's finding that clear and convincing evidence exists to establish ambiguity and a mutual mistake of fact. Accordingly, we conclude that the circuit court properly exercised its equitable powers in reforming the contract.

By the Court.—Judgment affirmed.

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