COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 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. 2013AP1898

Cir. Ct. Nos. 2009CV856
2011CV2319

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

US BANK NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

THOMAS BIEHN AND SHERRY BIEHN,

DEFENDANTS-APPELLANTS,

CASTLE MORTGAGE OF AMERICA, INC.,

THIRD-PARTY DEFENDANT,

VELOCITY INVESTMENTS LLC, HERMITAGE ELECTRIC SUPPLY CO., CITIBANK (SOUTH DAKOTA) NA, R H SEIFERT COMPANY, INC., PRAIRIE MATERIAL SALES, INC., BRODERSEN PROPERTIES LLC, DISCOVER BANK AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

DEFENDANTS.

TALMER BANK AND TRUST,

PLAINTIFF-RESPONDENT,

V.

THOMAS BIEHN AND SHERRY BIEHN,

DEFENDANTS-APPELLANTS,

US BANK NA, VELOCITY INVESTMENTS LLC, HERMITAGE ELECTRIC SUPPLY CO., BRODERSON PROPERTIES LLC, CITIBANK (SOUTH DAKOTA) NA, R H SEIFERT COMPANY, INC., PRAIRIE MATERIAL SALES, INC., OTTER CREEK CONSTRUCTION LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., UNION PLANTERS BANK NA AND UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Thomas Biehn and Sherry Biehn appeal from a judgment of foreclosure entered in favor of U.S. Bank National Association on the Biehns' residential mortgage and note. The Biehns argue that (1) summary judgment was inappropriate for several reasons, including that the Bank failed to establish a prima facie case, (2) the trial court erred by prioritizing U.S. Bank's interest over that of another lienholder, Talmer Bank, LLC, (3) U.S. Bank was not entitled to seek judgment for the full amount due and owing on the note, and (4) this court should exercise its discretionary reversal authority to grant a new trial. We conclude that the trial court properly entered summary judgment

because the Bank established a prima facie case for summary judgment based on admissible evidence, the Biehns failed to identify a genuine issue of material fact, and the trial court's written judgment constituted an appropriate exercise of discretion. We further determine that the Biehns lack standing to raise the lien priority issue and that their arguments concerning the judgment amount are baseless. Given that we find no error, we decline to grant a new trial in the interest of justice. We affirm.

¶2 In 2005, Thomas Biehn executed a note payable to Ownit Mortgage Solutions, Inc., in the original principal amount of $344,000.00.[1] The note was endorsed in blank and negotiated to U.S. Bank. The Biehns defaulted on the loan and Wells Fargo, as servicer, sent a notice of default. In 2009, U.S. Bank filed a foreclosure complaint and the trial court granted its motion for summary judgment. U.S. Bank submitted the high bid at the 2010 sheriff's sale. Prior to confirmation, on the Biehns' motion, the trial court vacated the foreclosure judgment and voided the sheriff's sale based on Talmer Bank and Trust's competing lien claim[2] and the insufficiency of U.S. Bank's summary judgment affidavits.

¶3 In April 2013, U.S. Bank filed a new summary judgment motion along with a supporting affidavit from Robert Bateman, an employee of servicer

[1] The original mortgage on the Biehns' property was held by Union Planters Bank as recorded in 2003. Mr. Biehn applied for the Ownit loan to refinance and pay off the home loan secured by the 2003 mortgage. In accordance with a settlement statement, a portion of the Ownit loan was disbursed to pay off the Union Planters' loan, thus satisfying the 2003 mortgage.

[2] Talmer Bank's interest is as the holder of a 2004 mortgage taken as security for a loan extended by First Banking Center (FBC) as part of a real estate security agreement on the Biehns' property. The FBC mortgage was secondary security for a business line of credit.

Wells Fargo. The Bateman affidavit averred that U.S. Bank held the original note as endorsed in blank by Ownit and negotiated to U.S. Bank, and additionally that an assignment of the $344,000.00 mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) to U.S. Bank was duly recorded in June 2010. Copies of the original note and the docketed assignment of mortgage were attached to the pleadings. Bateman further averred that the Biehns had defaulted by failing to make the required monthly payments and set forth the amount due and owing under the note. The Biehns' payment history and default notice were attached. Acknowledging that a foreclosure judgment was previously entered in favor of Talmer Bank, U.S. Bank requested that its lien be given priority.[3]

¶4 The Biehns opposed summary judgment, arguing that U.S. Bank's pleadings failed to establish the authenticity of the note or the validity of the mortgage assignment. The trial court rejected the Biehns' arguments and determined that U.S. Bank had established its right to enforce the note and mortgage, the Biehns' default, and the amount due. The trial court granted summary judgment to U.S. Bank and ruled that under the doctrine of equitable subrogation, U.S. Bank was entitled to priority over the earlier-recorded mortgage held by Talmer Bank up to the amount of $258,398.04. After considering the parties' objections, the trial court modified, signed and entered U.S. Bank's proposed order and foreclosure judgment.

[3] In 2012, Talmer Bank filed a foreclosure complaint which was consolidated with U.S. Bank's pending foreclosure action. The trial court entered a foreclosure judgment in Talmer's favor in the amount of $291,605.74. The issue of which bank's lien had priority was left unresolved.

The trial court properly granted summary judgment in favor of U.S. Bank.

¶5 According to the Biehns, U.S. Bank's summary judgment motion fails to establish either that it holds the note and mortgage or the Biehns' default and remaining note balance. They argue that (1) the note and mortgage assignment papers are not self-authenticating, (2) the Bateman affidavit is insufficient to establish that the Bank's documents are admissible under the WIS. STAT. § 908.03(6)[4] hearsay exception for records of regularly conducted activity, (3) the Bank's affidavits are contradictory and permit an inference that the mortgage assignment was invalid or fraudulent, thus creating a disputed question of fact, and (4) the trial court's written foreclosure judgment constitutes an erroneous exercise of discretion.

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶ 6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. ***Id.*** If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether the opposing party's affidavits establish a disputed material fact that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2).

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

¶7 We first conclude that U.S. Bank established itself as the holder of the original note and therefore its entitlement to enforce the note and mortgage.[5] A copy of the original note, which is endorsed in blank by Ownit and payable to the bearer, was submitted as part of the Bank's summary judgment motion, along with two affidavits establishing its authenticity. *See* WIS. STAT. §§ 909.01 and 909.015. The Bateman affidavit averred that "Counsel for U.S. Bank currently has physical possession of the original Note endorsed in blank." The affidavit of Andrew J. Barragry, the Bank's attorney, averred that he was "currently in possession of the original Note endorsed in blank," the attached copy was a copy of the original note in his possession, and that he would "make the original endorsed Note available for inspection." These averments, along with the attached copy and offer to permit inspection of the original note, provided sufficient authentication to establish the note's admissibility and that U.S. Bank possessed the note.[6] A note endorsed in blank is payable to the bearer, here, U.S. Bank. WIS. STAT. § 403.205(2). As the note's holder, U.S. Bank also holds the mortgage. ***Dow Family, LLC v. PHH Mortg. Corp***., 2014 WI 56, ¶¶5-7, 30, 33, 47, 354 Wis. 2d 796, 848 N.W.2d 728, *aff'g* 2013 WI App 114, 350 Wis. 2d 411, 838 N.W.2d 119 (pursuant to WIS. STAT. § 409.203(7), when a note is transferred or assigned, the equitable interests in the mortgage follow). U.S. Bank established

[5] U.S. Bank argues that the note and mortgage are self-authenticating. While the Bank's arguments are persuasive, we decide the note's admissibility on a separate ground in light of the Wisconsin Supreme Court's recent discussion in ***Dow Family, LLC v. PHH Mortg. Corp.***, 2014 WI 56, ¶¶10, 13 n.7, 17, 47, 354 Wis. 2d 796, 848 N.W.2d 728, *aff'g* 2013 WI App 114, 350 Wis. 2d 411, 838 N.W.2d 119.

[6] Because the note is offered as evidence of a legal act, it does not constitute hearsay and its admissibility "does not depend on WIS. STAT. § 908.03(6)." ***Bank of Am. NA v. Neis***, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 835 N.W.2d 527.

its right to enforce the note and, under the doctrine of equitable assignment, the mortgage.[7]

¶8 The Biehns next argue that the Bank's submissions failed to prove the existence of their loan default and the amount due on the note because Bateman's averments were insufficient to show that the attached loan payment history and default notice were admissible under WIS. STAT. § 908.03(6), the hearsay exception for records of regularly conducted activity.[8] Relying on ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶23, 324 Wis. 2d 180, 781 N.W.2d 503, the Biehns contend that "US Bank's affidavits and the deposition testimony of Robert Bateman are inadmissible" because "Mr. Bateman had no personal knowledge of who or where the documents [attached to his affidavit] were scanned" and because "[i]t is undisputed from his deposition testimony that he has no 'first hand' knowledge regarding the documents he attests to."

¶9 This is not a ***Palisades*** case. In ***Palisades***, payment records created by a third party, Chase Bank, were introduced through the affidavit of a Palisades employee without any explanation of how the witness obtained sufficient personal knowledge to offer that testimony. ***Id.***, ¶¶4, 23. The ***Palisades*** court determined

[7] We have determined that because U.S. Bank is entitled to enforce the note under the doctrine of equitable assignment it need not prove a valid written assignment of mortgage. Thus, we do not address the Biehns' assertions that widespread "servicing abuses" and the "Robo-signing controversy which the court was requested to take judicial notice of" place the "veracity" of the mortgage assignment in dispute.

[8] WISCONSIN STAT. § 908.03(6) provides that a document is not excluded by the hearsay rule if it is "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [WIS. STAT.] s.909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness."

that Palisades' affiant was incompetent to testify with respect to Chase's account statements. ***Id***. Here, Bateman is a Wells Fargo employee who testified about records created and maintained as business records by his employer. Bateman averred that he had reviewed the records and that as vice-president of loan documentation for Wells Fargo, he had personal knowledge that the records were "made at or near the time by, or from information provided by, persons with knowledge of the activity and the transaction reflected in such records," and were "kept in the course of business activity conducted regularly by Wells Fargo."

¶10 Though the Biehns suggest that the affiant must have "first hand" knowledge of the records preparation, this is not what the law requires. ***Palisades*** specifically acknowledged that the affiant "does not need to be the author of the records or have personal knowledge of the events recorded in order to be qualified." ***Id.***, ¶22. A witness may acquire personal knowledge through his employment, and examining records is sufficient where the affiant has a position with the entity that created and maintains those records such that the witness understands the process of their creation. *See* ***id.***, ¶23. As an employee of Wells Fargo, Bateman's averments demonstrate that he had the requisite personal knowledge sufficient to testify that "(1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity." ***Id.***, ¶15. *See also* ***Bank of Am. NA v. Neis***, 2013 WI App 89, ¶¶31-32, 349 Wis. 2d 461, 835 N.W.2d 527 (affidavit sufficiently established personal knowledge where the affiant averred that she was an employee of the bank, was "familiar with [the bank's] record keeping practices," the documents attached to her affidavit were taken from those records, she had personal knowledge of the bank's procedures for creating those

records, and "it is the regular practice of [Bank of America] to make such records.") (second alteration in original).

¶11 We also reject the Biehns' argument that the Bank's pleadings contained inconsistencies which created a materially disputed fact. Here, the Biehns allege that the U.S. Bank affidavits contradict themselves and create "a material variance between pleading and proof" which gives rise to a competing inference that the mortgage assignment was improper or fraudulent. The Biehns cite to: (1) a variance between the note attached to the complaint and the note attached to Bateman's affidavit; (2) U.S. Bank's claim that it holds a $344,000.00 first mortgage while also acknowledging "in its own 2nd amended complaint …, that its $344,000 mortgage … was recorded behind an $86,000 Ownit Mortgage"; and (3) the notion that Ownit filed for bankruptcy in Federal Court.

¶12 As to the "variance" between the two notes, the record demonstrates that the version attached to the complaint erroneously failed to copy and include the endorsement page, while Bateman's affidavit attached a complete copy of the note, including the endorsement. The "variance" arose from a mistake which was later corrected, and does not prevent summary judgment. *See* ***Neis***, 349 Wis. 2d 461, ¶5 n.4. Nor is the existence of a separate Ownit lien relevant to the propriety of summary judgment in this matter where the only issue is whether U.S. Bank was entitled to a judgment of foreclosure against the Biehns. Finally, we fail to see how Ownit's alleged bankruptcy filing thwarts summary judgment in favor of U.S. Bank, the holder of the Biehns' note. We decline to further address this undeveloped argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶13 As their final challenge to summary judgment, the Biehns argue that the trial court's written findings of fact, conclusions of law, and foreclosure judgment failed "to make specific findings and conclusions to support [its] summary judgment rulings," and that its findings were "generalized" and "insufficient." The written judgment, which is fifteen pages long and contains forty-one separate findings of fact and ten separate conclusions of law, provides ample explanation of the trial court's decision. The Biehns argument appears to be that the trial court erroneously exercised its discretion by not granting their request to include additional findings. The trial court considered but rejected the Biehns' proposed revisions. Having reviewed the omitted proposed findings, we determine that the trial court properly exercised its discretion. The Biehns' requested revisions were neither relevant nor crucial to the trial court's decision, and the trial court properly declined to further modify the written judgment. ***Cf. Dodge v. Carauna***, 127 Wis. 2d 62, 67, 377 N.W.2d 208 (Ct. App. 1985) (where the trial court fails to make findings of facts as to excluded evidence that is "relevant and crucial" to its order, we may remand for additional findings and conclusions).

The Biehns cannot appeal the trial court's decision prioritizing U.S. Bank's lien.

¶14 Talmer Bank argued in the trial court that its mortgage had priority. The trial court disagreed and ruled that under the doctrine of equitable subrogation, U.S. Bank had priority because the Ownit loan it assumed was used to satisfy the then-existing first mortgage. Though Talmer Bank has not appealed the judgment, the Biehns argue that Talmer should have first priority because Ownit did not have a justifiable expectation of a first mortgage. We do not reach the merits of this claimed error because the Biehns are not aggrieved by the trial

court's decision and lack standing to raise this issue. *See* ***Kiser v. Jungbacker***, 2008 WI App 88, ¶11, 312 Wis. 2d 621, 754 N.W.2d 180.

U.S. Bank was entitled to seek judgment for the amount due and owing.

¶15 Prior to the trial court's order vacating its first foreclosure judgment, U.S. Bank submitted the high bid of $107,015.00 at the subsequently voided sheriff's sale. Because the Biehns successfully moved to vacate the underlying foreclosure, that sale was never confirmed. The Biehns argue that the trial court erred in entering the current judgment in the amount of $508,042.50 because "U.S. Bank previously waived their claim to this sum by bidding $107,015 [at the voided sale] and seeking confirmation of the sale for this amount." Citing to WIS. STAT. § 846.02, the Biehns contend that they were entitled to purchase the note and mortgage or the outstanding indebtedness for the 2010 bid amount. Alternatively, the Biehns assert that by bidding a lower amount at the voided sale, U.S. Bank waived its right to later seek judgment for the amount due and owing.

¶16 The Biehns' arguments have no basis in law. In pertinent part, WIS. STAT. § 846.02(1) provides that "[i]n a mortgage foreclosure action, any defendant may upon payment to the plaintiff or plaintiff's attorney, of the amount then owing thereon for principal, together with interest and all costs up to such time, demand the assignment of such mortgage to the defendant." The "amount then owing" means the total amount due and owing on the mortgage loan, here, $508,042.50. *See* ***JP Morgan Chase Bank, NA v. Green***, 2008 WI App 78, ¶20 n.10, 311 Wis. 2d 715, 753 N.W.2d 536. Nothing in the statute provides the defendants a right to demand assignment of a mortgage upon payment of the amount bid at a sheriff's sale, much less a voided, unconfirmed sale.

¶17 Similarly, U.S. Bank did not waive its right to judgment for the amount due and owing by previously bidding a lower amount. Aside from the fact that the sale was never confirmed, the amount a mortgagee bids at a sheriff's sale and the amount of the indebtedness due and owing on the mortgage are two separate things. *Compare* WIS. STAT. § 846.02 *with* WIS. STAT. § 846.165(2).[9] A lender may opt to retain its right to a deficiency judgment, bid less than the judgment amount and, so long as the bid satisfies the fair value test, pursue and enforce a deficiency judgment. A bid for less than the amount due and owing does not waive the lender's right to enforce the judgment.

The interest of justice does not warrant discretionary reversal.

¶18 The Biehns seek discretionary reversal under WIS. STAT. § 752.35, claiming that "the real controversies between the parties were not fully tried." In order to establish that the real controversy has not been fully tried, a party must show "that the jury was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citation omitted). We will exercise our discretionary reversal power sparingly, and only in the most exceptional cases. ***State v. Schutte***, 2006 WI App 135, ¶62, 295 Wis. 2d 256, 720 N.W.2d 469.

¶19 In support of their request for discretionary reversal, the Biehns simply reallege their now-rejected claims of error. Because we have determined

[9] Mortgagees need not bid the entire judgment amount at a sheriff's sale. Confirmation requires only that "the fair value of the premises sold has been credited on the mortgage debt, interest and costs." WIS. STAT. § 846.165(2).

that summary judgment was appropriate, the Biehns lack standing to appeal Talmer Bank's interest and U.S. Bank was entitled to seek judgment for the amount actually due and owing, we decline to reverse the judgment in the interest of justice.

By the Court.—Judgment affirmed.

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