COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP788 **Cir. Ct. No. 2011CV013489**

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

THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR AMRESCO RESIDENTIAL SECURITIES CORPORATION LOAN TRUST 1997-2 C/O OCWEN LOAN SERVICING, LLC,

PLAINTIFFS-RESPONDENTS,

V.

LOUEVINA L. DAVIES,

DEFENDANT-APPELLANT,

CURAHEE FINANCIAL, LLC,

DEFENDANT.

APPEAL from judgments of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Affirmed*.

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Louevina L. Davies appeals a judgment of foreclosure and a judgment dismissing her counterclaims against The Bank of New York Mellon, as Trustee for Amresco Residential Securities Corporation Loan Trust 1997-2 and Ocwen Loan Processing, LLC (hereafter, "the bank").[1] She argues that the bank had no standing to foreclose on her property because it lacked evidentiary support for the foreclosure and because it failed to show that it holds the note and mortgage.[2] We affirm.

BACKGROUND

¶2 The procedural history of this case is lengthy. For purposes of deciding this appeal, we summarize only the most relevant background facts. In 1997, Davies executed a $44,200 note and mortgage on her single family home. The mortgage was executed with Amresco Residential Mortgage Corporation. Davies failed to make some of her loan payments and in 2008, she was offered and entered a loan modification agreement. In April 2011, she defaulted on the note by failing to make payments.

¶3 The bank filed this foreclosure action in August 2011. Ultimately, the bank was permitted to file a third amended complaint alleging that the bank, as trustee for Amresco Residential Securities Corporation Loan Trust 1997-2, was

[1] Some references to Amresco state the name in all capital letters. For consistency, we will use the name Amresco.

[2] Although the docketing statement Davies filed with this court indicated that she intended to challenge the dismissal of her counterclaims, she ultimately did not brief that issue. We therefore do not discuss or consider Davies's counterclaims against the bank. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

"the current mortgagee of record and holder of the Note and Mortgage." The bank sought foreclosure, the balance due on the loan, and other charges and fees.

¶4 The bank moved for summary judgment. The trial court granted summary judgment in the bank's favor in a lengthy oral ruling. The trial court determined that it was undisputed Davies had defaulted on the terms of the note by failing to make the April 2011 payment and subsequent payments. The trial court found that it was not "genuinely disputed" that "[i]ncluding the principal balance, interest, advance escrow funds and fees recoverable under the note and mortgage, she currently owes nearly $100,000."

¶5 The trial court addressed Davies's argument that the bank lacked standing to enforce the note. The trial court stated: "In a foreclosure action the standing question is whether the party can enforce the note and mortgage.… The record clearly establishes that [the bank] owns the note. They, therefore, have standing to enforce it." The trial court also concluded that the bank "is the real party in interest." It noted that the bank "can enforce the note because it is specially endorsed to [the bank] and in [the bank's] possession." The trial court added that the bank had "produced the original note in court, ha[d] allowed Davies[']s c]ounsel to inspect the note and ha[d] offered more than once to allow Davies[']s c]ounsel to inspect the note again." The trial court said: "Davies has not and cannot provide any evidence to dispute [the bank's] possession of the specially endorsed note." The trial court also observed that "the original payee endorsed the note in blank and … [the bank] subsequently wrote in its own name," which the trial court said was permissible.

¶6 Finally, the trial court addressed Davies's concerns with the adequacy of the affidavit the bank submitted in support of the foreclosure. The

trial court said that the affidavit was consistent with ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, a case that discusses what an affidavit submitted in support of a motion for summary judgment must contain in order to "make[] a prima facie case that the attached account statements are admissible under the hearsay exception in WIS. STAT. § 908.03(6) for records of regularly conducted activity." ***Palisades***, 324 Wis. 2d 180, ¶11.

LEGAL STANDARDS

¶7 On appeal, we review a grant of summary judgment *de novo*, using the same methodology as the trial court. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶17, 311 Wis. 2d 548, 751 N.W.2d 845. "Summary judgment is proper when the record demonstrates that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." ***Phillips v. Parmelee***, 2013 WI 105, ¶16, 351 Wis. 2d 758, 840 N.W.2d 713; *see also* WIS. STAT. § 802.08(2) (2013-14).[3]

¶8 In this case, Davies argues that the bank lacked standing to proceed with the foreclosure. "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." ***Krier v. Vilione***, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517 (citation omitted). On appeal, we review independently whether a party has standing. ***Park Bank v. Westburg***, 2013 WI 57, ¶37, 348 Wis. 2d 409, 832 N.W.2d 539.

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

¶9 Davies presents two main arguments on appeal, both of which she claims relate to standing.[4] First, she argues that the bank "had no evidentiary support by affidavit to establish the requisite admissibility of exceptions to hearsay under [WIS. STAT. §] 980.03(6) to show prima facie grounds to foreclose and thus provided no standing" to foreclose. (Capitalization omitted.) Second, she argues that the bank "also has no standing to foreclose against Mrs. Davies for lack of showing that the Plaintiff trust has the note and mortgage." (Capitalization omitted.) We consider each argument in turn.

¶10 Davies's first argument is based on ***Palisades***. Davies asserts that the affidavit submitted by loan servicer Ocwen Financial Corporation's loan analyst, Rashad Blanchard, in support of the foreclosure "falls far short of meeting the criteria specified" in ***Palisades***. She explains:

> Blanchard has not shown competence and knowledge to swear to the truth and correctness of [the prior loan servicer's] loan records and neither does he even venture to swear to such correctness from his own knowledge or from reports to him from persons with first hand knowledge who had the responsibility to know and request the information those records try to provide.

Davies further asserts that Blanchard's affidavit should have discussed "how the loan operations were done" by the prior loan servicer. Finally, she argues that

[4] Davies also presents a number of subarguments, many of which are simply assertions, rather than fully developed arguments. To the extent we do not address a particular argument, it is denied because it is undeveloped or inadequately briefed. *See* ***League of Women Voters v. Madison Community Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).

Blanchard failed to "authenticate the note" because although "he said it was a true and correct copy of the note, he did not swear that he ever saw the actual note itself … so that he could testify that there was a correct or true copy to use to make the comparison."

¶11 Davies's arguments are not persuasive. First, we agree with the trial court that the affidavit the bank submitted in support of the foreclosure complies with ***Palisades***, a case that interpreted WIS. STAT. § 802.08(3), which states that affidavits in support of a motion for summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." *See* § 802.08(3). ***Palisades*** explained that "the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit" but rather "need only make a prima facie showing that the evidence would be admissible at trial." ***Id.***, 324 Wis. 2d 180, ¶10.

¶12 ***Palisades*** also concluded that when a party seeks to admit business records under the hearsay exception found in WIS. STAT. § 908.03(6), the testifying custodian need not be "the original owner of the records," but "must be qualified to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Palisades***, 324 Wis. 2d 180, ¶20 (emphasis omitted). To be qualified to offer that testimony, "the witness must have personal knowledge of how the records were made." ***Id.***, ¶22.

¶13 Davies's challenge to Blanchard's competence appears to center on the fact that the affidavit did not allege familiarity with the prior loan servicer's record keeping. In response, the bank states:

> Although this line of attack presumably would go towards a challenge of the amount of money Davies owes on the loan, Davies admitted that she is in default. And she has never submitted any evidence that contradicts the amount she owes, so there is no genuine dispute about how much she owes. So this line of attack is wholly irrelevant to her arguments. Even if it were relevant, it would still fail for at least two additional reasons.
>
> First, Blanchard's affidavit contains no statements based on the records of the prior servicer. Because the statements in the affidavit are not predicated on the correctness of the prior servicer's records, Blanchard's alleged unfamiliarity with the prior servicer's records is completely irrelevant.
>
> Second, the prior servicer's records are absolutely irrelevant because the loan was modified in 2008 while Ocwen serviced it, as Mr. Blanchard states based on his review of Ocwen's servicing records, which include the 2008 modification. At that time, all fees, delinquent payments, and other outstanding arrearages were wiped out, and a new principal balance was created. So the accounting of how much Davies owes goes back to that modification, and need not consider any accounting by prior servicers because the records of the payments and amounts due and owing from that point forward are entirely Ocwen's.

(Record citations omitted.)

¶14 We agree with the bank's analysis. It is especially compelling that Davies modified her loan in 2008, when it was being serviced by Ocwen. When the loan was modified, Davies agreed to a modified note and mortgage and a new principal balance. Blanchard's affidavit alleged that Davies failed to make mortgage payments starting in April 2011, and that was the basis for the foreclosure. Davies has not contested the records concerning the amounts due. We reject Davies's argument that the affidavit was insufficient.

¶15 Davies also challenges whether Blanchard was familiar with the note. His affidavit sufficiently alleges familiarity with the note. Further, it is

undisputed that the bank produced the actual note and mortgage in court. We are not persuaded by Davies's argument that the bank failed to "authenticate" the note.

¶16 Davies's second main argument is that the bank lacked standing because it has not shown it "has the note and mortgage." As noted, the bank produced the actual note and mortgage in court. Davies's challenge to the note and mortgage that were produced in court appears to be based on the fact that there were several versions of the allonge attached to the note. However, as the bank points out, once the allonge was specially endorsed, it indicated that it was payable to the bank as trustee for Amresco.

¶17 Davies also challenges the note and mortgage on grounds that the name of the trust on whose behalf the bank is acting is not stated consistently in the affidavit, the allonge, and in records from the Securities and Exchange Commission.[5] For instance, the specially endorsed allonge states that the note is payable to the bank "as trustee for Amresco Residential Residential [sic] Securities Corporation Loan Trust 1997-2." Davies implies that the erroneous repetition of the word "Residential" on the allonge means that the bank lacks standing to proceed. Davies also argues that the title of the trust listed in records from the Securities and Exchange Commission is "AMRESCO RESIDENTIAL SECURITIES CORPORATION MORTGAGE LOAN TRUST 1997-2," and that

[5] It is not apparent whether the discrepancies in the name of the trust were raised at the trial court in response to the bank's motion for summary judgment. The trial court filings were voluminous and neither party provides record citations to arguments made concerning the alleged errors in the name of the trust. The trial court did not address the issue in its oral decision. This court generally does not review issues raised for the first time on appeal, *see* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495, but we will briefly address the issue in light of our *de novo* standard of review.

the bank's failure to include the word "MORTGAGE" in Blanchard's affidavit means that the wrong trust has been identified.

¶18 In response, the bank contends that WIS. STAT. § 403.110(3), which governs negotiable instruments, permits a payee to "be identified in any way." *See* ***id.*** The bank argues that a clerical error on the allonge does not defeat its ownership of the note. It explains: "Here, the Note is payable to the Bank of New York Mellon as trustee. As a matter of law, it is irrelevant that the beneficiary of the trust is named, much less whether there is a clerical error in the trust name in the Note endorsement." Similarly, the bank argues that because the name of the bank is correct, "the name of the trust is surplusage."

¶19 We agree that the clerical error on the allonge does not defeat the bank's right to enforce the note and mortgage. The Bank of New York Mellon is clearly identified. We are also not convinced that the lack of the word "MORTGAGE" in some of the documents defeats the bank's standing. The bank was clearly identified as the payee, regardless of the trust for which it is acting. *See* WIS. STAT. § 403.110(3). Further, as the bank points out, "[t]here is no genuine dispute that [the bank] is the holder of the Note and therefore entitled to enforce any security interest assuring repayment of the Note." Finally, the fact that the bank has actual possession of the note and mortgage supports the trial court's grant of summary judgment.

By the Court.—Judgments affirmed.

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