COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-3468-FT

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

THOMAS J. BORON,

PLAINTIFF-RESPONDENT,

V.

ELIZABETH J. BART, F/K/A ELIZABETH J. BORON,

DEFENDANT-APPELLANT,

FIRST NATIONAL BANK OF HUDSON,

DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Elizabeth Bart appeals a foreclosure judgment entered in favor of her former husband, Thomas Boron.[1] Bart argues that the trial court erroneously determined the date of her payment on the note and mortgage and that foreclosure proceedings are not available to enforce a property division. We reject her arguments and affirm the judgment.

The parties were divorced in August 1991. As part of the property division, Bart was awarded the family home. Boron was ordered to deed his interest in the home to Bart. To equalize the property division, Bart was to pay $9,000 to Boron on or before March 11, 1993. Bart signed a promissory note and mortgage against the home to secure the obligation.

The promissory note stated that no interest would accrue if the note was paid in full by March 11, 1993. If Bart failed to pay the note when due, Boron would receive $11,000, with interest accruing retroactively from September 11, 1991, at eight percent per annum.

In March 1993, Bart claimed that Boron owed her $537.95, representing one half of a hospital bill for one of their children, $500 in court-ordered attorney fees, $670 for insurance premiums, and other miscellaneous items. On March 17, 1993, Bart tendered Boron a check in the amount of $7,211, which represented the amount initially owed on the promissory note minus the offsets. Boron refused to accept the check. Shortly afterward, Bart offered Boron a check for $7,731.10, which also was not accepted. In February 1997 Bart made a $9,000 payment to Boron. In November 1997, Boron brought this foreclosure action.

[1] This is an expedited appeal under RULE 809.17, STATS.

After a bench trial, the court concluded that Bart failed to make any payment prior to March 11, 1993, and was in default. The court further determined that the $9,000 payment in February 1997 did not cure the default. The court concluded that Boron was entitled to a judgment of foreclosure by terms of the note and mortgage Bart executed.

Bart argues that the trial court erroneously determined that she failed to make any payment until February 1997. She argues that she fulfilled her obligation when she tendered her checks in March of 1993, because Boron had owed her money that she was entitled to offset. She asks this court to apply the contractual doctrine of substantial performance, citing ***Tri-State Home Imp. Co. v. Mansavage***, 77 Wis.2d 648, 656, 253 N.W.2d 474, 477 (1977). She also maintains that Boron had a duty to mitigate his damages and is estopped from claiming untimely payment because he owed her money.

We are unpersuaded. Bart tendered the $7,211 after the March 11 due date, even if it were in an adequate amount. As a result, we conclude that the trial court's finding that her payment was not timely under the terms of the note was not clearly erroneous. *See* § 805.17(2), STATS.

Next, Bart argues that Boron is not entitled to the remedy of foreclosure but is limited to family court contempt proceedings when he claimed that Bart failed to comply with the court-ordered property division. We disagree. In this case, under the terms of the divorce judgment, Bart executed a note and mortgage. The mortgage expressly allows for foreclosure in the event of default. Nothing in the divorce judgment or the mortgage requires Boron to return to family court to pursue his remedy.

Finally, Boron seeks a declaration that Bart filed a frivolous appeal. While we agree that it approaches the standard set forth in § 809.23, STATS., we are not convinced that the appeal is utterly frivolous within the meaning of the statute.

By the Court.—Judgment affirmed.

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