COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2015

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. 2014AP2155 **Cir. Ct. No. 2013FJ9**

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

ORLANDO RESIDENCE, LTD.,

CREDITOR-RESPONDENT,

V.

KENNETH E. NELSON,

DEBTOR,

SUSAN B. NELSON N/K/A SUSAN B. SOERENS,

DEBTOR-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH W. VOILAND, Judge. *Affirmed*.

Before Higginbotham, Sherman, and Blanchard JJ.

¶1 PER CURIAM. This case arises from Orlando Residence's efforts to collect on a federal court money judgment against Kenneth Nelson. As part of its collection efforts, Orlando Residence pursues garnishment against the employer of Kenneth's wife, Susan, for collection on the debt as marital property. Susan opposes garnishment, on the grounds that the predecessor creditor on the debt now collectable by Orlando Residence had notice, at the time the debt was created, of a marital property agreement between Kenneth and Susan that declared Susan's income and acquisitions to be her individual property, free from the claims of Kenneth's creditors. Susan appeals the order of the circuit court requiring the employer to comply with the garnishment. For the following reasons, we affirm.

BACKGROUND

¶2 The following facts are undisputed. In 1986, an Arkansas-based federal savings bank lent approximately $7 million to a Wisconsin limited partnership to fund a South Carolina hotel construction project. Kenneth was a partner in the Wisconsin limited partnership. Kenneth backed the loan by making an unconditional personal guaranty of payment.

¶3 In 1988, the Arkansas bank filed an action to foreclose on the hotel property and to obtain a judgment against guarantors, including Kenneth, in South Carolina state court. The action was removed to federal court.

¶4 In September 1990, a federal agency placed the Arkansas bank into receivership and appointed the Resolution Trust Corporation ("RTC") as receiver. The RTC succeeded to the bank's interests in the loan.

¶5 Kenneth and Susan were married at all pertinent times. In November 1990, they entered into a post-nuptial marital property agreement. Under the agreement, all property "owned by" Susan is her individual property.

¶6 In November 1994, the RTC entered into a settlement agreement with the partnership, including Kenneth. Terms of the 1994 settlement agreement included the following: the partners agreed to cooperate in the foreclosure sale of the hotel; the partners agreed to make certain payments of money to the RTC and to execute $4 million confessions of judgment suitable for recording, which would be recorded only if the payments were not made; and the RTC agreed to release, satisfy, and forever discharge the partners from all obligations and claims, apart from the obligations established in the 1994 settlement agreement.

¶7 Through a series of assignments and transfers, the RTC's interests in the 1994 settlement, including the $4 million confessions of judgment, were eventually transferred in 2011 to Orlando Residence.

¶8 In August 2012, relying on the confession of judgment, Orlando Residence obtained a $4 million judgment against Kenneth from the federal court in South Carolina. Based on this judgment, in September 2013 Orlando Residence filed in Wisconsin circuit court a notice of filing foreign judgment, the action from which this appeal arises, because the Nelsons lived in Wisconsin. The judgment was docketed in October 2013.

¶9 Orlando Residence pursued satisfaction on the 2012 judgment through methods that included garnishment of Susan's wages as marital property. In opposing garnishment, Susan pointed to the marital property agreement, which established that Susan's property was her own and not marital property. More specifically, Susan argued that Orlando Residence cannot collect on any of her

individual property because RTC had actual knowledge of the 1990 marital property agreement at the time it executed the 1994 settlement agreement, which gave rise to the judgment at issue.

¶10 The circuit court rejected Susan's argument and ordered Susan's employer to comply with garnishment, based on WIS. STAT. § 766.55(4m) (2013-14).[1] The court acknowledged that the marital property agreement would have cut off Orlando Residence's interest in Susan's wages if it were not for the effect of § 766.55(4m). However, the court concluded, applying the terms of § 766.55(4m) Susan's current obligation is a "renewal, extension, modification or use" of Kenneth's 1986 guaranty, which predated the marital property agreement. That is, the court concluded that the RTC "used" the 1986 guaranty to generate the 1994 settlement agreement, and therefore Orlando Residence could pursue Susan's

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[1] WISCONSIN STAT. § 766.55(4m) provides in pertinent part that

> no provision of a marital property agreement ... adversely affects the interest of a creditor unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred or, in the case of an open-end plan, as defined under s. 766.555(1)(a), when the plan was entered into.

The statute further states that

> [i]f a creditor obtains actual knowledge of a provision of a marital property agreement or decree after an obligation is incurred or an open-end plan is entered into, the provision does not adversely affect the interest of the creditor with respect to that obligation or plan, including any renewal, extension, modification or use of the obligation or plan. The effect of this subsection may not be varied by a marital property agreement or a decree.

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

marital property to satisfy the judgment arising from the 1994 settlement agreement, without regard to the marital settlement agreement. Susan appeals.

DISCUSSION

¶11 The parties agree that we are called on to interpret a statute as applied to undisputed facts, and therefore our review is de novo. *See* ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, ¶16, 316 Wis. 2d 640, 764 N.W.2d 904.

¶12 Susan does not contest either of the following propositions: (1) creditors may generally enforce a marital debt against the marital property of spouses, and (2) with exceptions not pertinent here, property acquired by either spouse during the marriage is generally deemed marital property. *See* WIS. STAT. §§ 766.55(2), 766.31.

¶13 Orlando Residence does not contest the following: (1) spouses may use marital property agreements to place potential creditors on notice that the spouses' respective incomes and acquisitions belong to the spouses as individuals, free from claims of the other spouse's creditors, *see* WIS. STAT. § 766.55(4m); (2) there was no inherent defect in the 1990 marital property agreement at issue rendering it void; and (3) one of Orlando Residence's predecessors in interest on the debt, RTC, had actual knowledge of the 1990 marital property agreement no later than 1992.

¶14 The parties part company regarding the application to this case of WIS. STAT. § 766.55(4m), which we quote above. In particular, they disagree about the meaning of the phrase "including any renewal, extension, modification or use of the obligation or plan" in referring to the obligations at issue.

¶15 Susan does not dispute that, under WIS. STAT. § 766.55(4m), a marital property agreement is effective against only those creditors who had actual notice of the agreement at the time the obligation "was incurred," nor does she dispute that a marital obligation retains its marital character through any "renewal, extension, modification or use" of the obligation. Susan's argument is that Kenneth incurred the obligation at issue in 1994, after the 1990 marital property agreement was executed.

¶16 Orlando Residence responds that the obligation at issue "had its ultimate genesis in 1986," when Kenneth unconditionally guaranteed payment on the bank's construction loan, and therefore the 1986 obligation was "used" to create the 1994 obligation at issue here. Orlando Residence argues that, since no creditor could have had notice of the 1990 marital property agreement in 1986, the marital property agreement has no effect here. Applying a plain meaning interpretation of the statute, we agree with Orlando Residence.

¶17 As our supreme court has explained:

> Statutory interpretation begins "with the language of the statute." Statutory language "is given its common, ordinary, and accepted meaning." If the statute's meaning is plain, there is no ambiguity, and the statute is applied according to its terms. However, if a statute "is capable of being understood by reasonably well-informed persons in two or more senses," the statute is ambiguous, and we may consult extrinsic sources, such as legislative history.

County of Dane v. LIRC, 2009 WI 9, ¶21, 315 Wis. 2d 293, 759 N.W.2d 571 (citation and quoted source omitted).

¶18 We conclude that the phrase "including any renewal, extension, modification or use of the obligation or plan" is expansive on its face, appearing to reach any obligation that arises from a prior obligation, including here the 1986

obligation. We now address and explain why we reject Susan's primary positions, which consist of one unsupported assertion regarding waiver of deficiency in foreclosure and one argument based on the concept of novation, including various subarguments regarding the term "use."

¶19 Susan's unsupported assertion is that in 1993 the RTC waived any right to a deficiency judgment against the Wisconsin partnership as part of the South Carolina foreclosure proceedings, and that as a result the RTC "let Mr. Nelson 'off the hook'" for his indebtedness in 1993. With Kenneth "off the hook" in 1993, Susan contends, all obligations arising from the 1994 settlement agreement were entirely new obligations subject to the marital property agreement.

¶20 We reject this unsupported assertion as an argument because Susan has failed to create an adequate record on this topic and also because she fails to present even the beginning of a developed legal argument on this topic in her principal brief on appeal. For factual support, Susan directs us to a May 2014 letter in the record from an attorney to the circuit court in this case, apparently for the letter's reference to a statement in the dissenting opinion of a federal appellate court judge in a separate proceeding. In her principal brief, Susan provides no explanation as to why we should consider this reference to be an adequate factual basis on which to decide the rights of the parties. Moreover, in the course of entirely conclusory assertions on this topic, Susan fails to cite to any Wisconsin law or to any South Carolina law on the question of whether waiver of a deficiency against a mortgagor in order to expedite a foreclosure operates to release a guarantor, nor does she suggest a position as to whether Wisconsin or South Carolina law applies on this question. We reject this waiver-of-deficiency concept as inadequately supported and undeveloped as a legal argument. *See*

State v. Pettit, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").[2]

¶21 Susan's primary developed legal argument is that "[a]ny 1986 'obligation' was extinguished by the 1994 settlement agreement." Susan's argument proceeds as follows. All obligations of Kenneth were "extinguished" by the 1994 settlement agreement, because the agreement was a novation, that is, a substitution of a new obligation with intent to extinguish an old obligation. Because the "obligation on the [1986] guaranty was dead," through this novation, the only obligation at issue going forward was Kenneth's confession of judgment, which was created in 1994, after RTC had notice of the 1990 marital property agreement.

¶22 In making this argument, Susan emphasizes the release language in the 1994 settlement agreement, which provided that the RTC and other parties did "remise, release, acquit, satisfy and forever discharge" parties that included Kenneth "from any and all manner of debts … promises … liabilities, obligations, … judgments …, demands and causes of action of any nature whatsoever arising out of the transaction which is the subject of the Mortgage Foreclosure Action other than their obligations under the terms of this Agreement."

[2] While protesting that the record on this issue is incomplete and that Susan's legal argument is inadequate, Orlando Residence attempts to address the merits of what Susan may mean to argue. And, in her reply brief Susan for the first time attempts to develop an argument. This comes too late. For many good reasons, an appellant may be deemed to have abandoned any argument not developed and supported in the principal brief. By the time of the reply brief, Susan purports to raise substantial legal arguments that Orlando Residence never had a chance to squarely address in its brief.

¶23 We conclude that this novation argument misses the mark, because Susan provides no reason for us to interpret the phrase "renewal, extension, modification, or use" in WIS. STAT. § 766.55(4m) differently based on whether the 1994 settlement agreement is deemed a novation. We agree with Orlando Residence that the only way to give effect to the expansive term "use" in this phrase is to interpret it to "encompass transformations and new agreements worked through the application of the existing obligation." As Orlando Residence aptly puts it, it cannot be disputed that the 1986 debt was "made an item of exchange in creating a new obligation on the same topic owed to the same creditor," or, as Orlando Residence alternatively puts it, the 1994 settlement agreement "is akin to the proceeds of the [1986] guaranty."

¶24 It adds nothing to Susan's argument that the 1994 settlement agreement unambiguously released Kenneth from his obligations as previously structured. She is correct that Kenneth was released from the obligations as previously structured, and that this appears to have represented a kind of novation. The problem for Susan is that she cannot reasonably contest that the previous obligations were a basis for creating—that is, that they were "used" to create—the obligations for Kenneth going forward.

¶25 Put differently, Susan's novation argument effectively assigns no meaning to the broad term "use." Her interpretation would have the effect of disregarding the obvious intent of the legislature to give creditors, in WIS. STAT. § 766.55(4m), wide opportunities to pursue debts after original obligations are used as consideration in transactions creating new obligations with different dimensions and features from the original debts.

¶26 Susan argues that our conclusion about the meaning of WIS. STAT. § 766.55(4m) in this context "would foster chaos," because it would cast doubt on the protection offered by marital property agreements. However, as we have already suggested, in using the expansive phrase "renewal, extension, modification, or use," the legislature has decided to give creditors a powerful tool to defeat the effect of marital property agreements in many circumstances. This is a policy choice that we are not free to alter. If Susan intends to argue that the result here is so absurd that it could not have been intended by the legislature, she does not develop an argument to that effect.[3]

¶27 In apparent further support of her novation argument, Susan suggests that we should conclude that the RTC executed the 1994 settlement agreement with knowledge that the marital property agreement would protect Susan's property going forward based on the fact the RTC did not "insist" that the 1994 settlement agreement explicitly state that "the release of [Kenneth] did not release Susan." There are multiple flaws in this argument, but we reject it on the ground that it is entirely speculative.

¶28 In an alternative argument, Susan contends that the word "use" in WIS. STAT. § 766.55(4m) refers not to a discharged obligation but to an open-end credit plan. We reject this argument as an obvious misreading of the statutory

[3] Either separately from, or as part of, this "foster chaos" argument, Susan makes a brief argument that our conclusion about the meaning of WIS. STAT. § 766.55(4m) in this context "would invite probing into the pre-settlement agreement negotiations in an attempt to offer extrinsic evidence to contradict the express statements of the settlement agreement." We do not understand what Susan intends to argue in this regard and discuss this topic no further.

language. "Use" is clearly modified by the term "obligation." This case does not involve an open-end credit plan and we address this topic no further.

¶29 In her reply brief, Susan argues that Orlando Residence seeks to assign an overly broad meaning to the term "use" in WIS. STAT. § 766.55(4m), but she fails to suggest a more limited but still meaningful definition aside from her open-end credit argument, which we conclude is not tenable.[4]

CONCLUSION

¶30 For these reasons, we affirm the circuit court order requiring Susan's employer to comply with the relief requested in Orlando Residence's garnishment notice.

[4] Both parties raise arguments that we do not address for reasons we now explain. First, given our conclusion involving the character of the 1986 debt to the RTC, we have no reason to reach the alternative argument made by Orlando Residence that the South Carolina judgment should retain the marital character of a foreign judgment that Orlando Residence obtained against Kenneth in Tennessee, a separate judgment from the one at issue here, which is discussed in prior opinions of this court. *See* ***Orlando Residence, Ltd. v. Nelson***, 2013 WI App 81, 348 Wis. 2d 565, 834 N.W.2d 416 and ***Orlando Residence Ltd. v. Nelson***, Nos. 2008AP2989 / 2009AP856, 2009 WL 5126598, unpublished slip op. (WI App Dec. 30, 2009).

Second, we need not address Susan's argument in her principal brief that, even if the marital property agreement is not a bar to garnishment, no more than 10 percent of Susan's earnings may be garnished. After Orlando Residence argues that this appeal raises no issue related to garnishment exemptions, Susan concedes the point and withdraws the argument.

Third, given our decision on the merits, we do not address Orlando Residence's alternative argument that Susan's appeal is barred by the preclusive effect of the circuit court's order of August 18, 2014, which Orlando Residence submits was final but not appealed from and therefore preclusive.

By the Court.—Order affirmed.

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