

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 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. 2015AP778-FT

Cir. Ct. No. 2014CV74

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEVEN L. SCHULTZ AND VERA J. SCHULTZ,

PLAINTIFFS-RESPONDENTS,

V.

MIDWEST PROPERTIES OF SHAWANO, LLC,

DEFENDANT-APPELLANT,

**ZIEN SERVICE, INC., FIRESIDE CONSTRUCTION & ELECTRICAL,
INC. AND JULIE A. KRUEGER,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County:
WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Midwest Properties of Shawano, LLC, appeals a judgment granting Steven and Verna Schultz strict foreclosure of real estate sold under a land contract.¹ Midwest argues the circuit court erred by entering judgment in the Schultzes' favor, as the Schultzes failed to prove: (1) that Midwest defaulted on its payment obligations under the contract; and (2) the amount allegedly owed under the contract at the time of trial. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In 1991, the Schultzes purchased a home in Shawano, financing the purchase with a mortgage loan from Chase Bank. In October 2004, the Schultzes, as vendors, entered into a land contract with Midwest for the purchase of the Shawano home. Under the terms of the land contract, Midwest was required to make monthly installment payments directly to Chase, to be applied to the Schultzes' mortgage loan.

¶3 In March 2014, the Schultzes filed the underlying action for strict foreclosure against Midwest, alleging Midwest had defaulted on the land contract by failing to make required payments to Chase. After a bench trial, the court entered an order for strict foreclosure, finding that \$156,069.03 remained unpaid on the land contract and giving Midwest a seven-day redemption period to pay the outstanding balance. When Midwest failed to pay, the court entered judgment granting strict foreclosure in favor of the Schultzes. This appeal follows.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

¶4 Midwest argues the Schultzes failed to prove Midwest defaulted on its payment obligations under the land contract and also failed to prove the amount allegedly owed at the time of trial. Midwest's arguments amount to a challenge to the sufficiency of the evidence to support the trial court's findings. When we review the findings of fact made by a court sitting as trier of fact, we accept those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). The credibility of witnesses and weight of the evidence, as well as the inferences to be drawn from the evidence, are to be made by the trial court, not this court. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We affirm the trial court's determination if, accepting the reasonable inferences from the evidence that are drawn by the fact finder, a reasonable fact finder could have come to the same conclusion. *Id.*

¶5 WISCONSIN STAT. § 846.30 provides:

If a court finds that the purchaser under a land contract is obligated to make certain payments under that land contract, that the purchaser has failed to make the required payments and that the vendor is entitled to a judgment of strict foreclosure, the court shall set a redemption period of at least 7 working days from the date of the judgment hearing or, if there is no hearing, from the date of the entry of the judgment order. No judgment of strict foreclosure is final until the court enters an order after the expiration of the redemption period confirming that no redemption has occurred and making the judgment of strict foreclosure absolute.

At trial, Midwest appeared by its attorney, but nobody from either Midwest or Chase testified. The only evidence at trial was provided by the Schultzes. Steven Schultz testified regarding the terms of the land contract, explaining that Midwest was required to make an installment payment to Chase on the first of each month;

after Chase would send the monthly statements regarding the mortgage loan to Steven, he would forward a copy of each statement to Midwest. Section 8 of the land contract governed default and provided:

If the Purchaser shall fail to perform any of the covenants or conditions contained in this contract on or before the date on which the performance is required, the Seller shall give Purchaser notice of default or performance, stating the Purchaser is allowed fourteen (14) days from the date of the Notice to cure the default or performance. In the event the default or failure of performance is not cured within the 14 day time period, then Seller shall give the Purchaser a written notice specifying the failure to cure the default and informing the Purchaser that if the default continues for a period of an additional fifteen (15) days after service of the notice of failure to cure, that without further notice, this contract shall stand canceled and Seller may regain possession of the property.

In the event of default and termination of the contract by Seller, Purchaser shall forfeit any and all payments made under the terms of this contract including taxes and assessments as liquidated damages which shall be Seller[’s] sole and exclusive remedy.

¶6 Steven testified that in January 2014, he received both a notice of overdue payment from Chase, as well as the monthly bank statement, indicating that the January 1 payment had not been made. Although Midwest objected to the admission of bank statements on hearsay grounds, they were admitted to the extent they showed that Steven received “notice” of nonpayment, and not as proof that Midwest failed to make payments. Steven testified he sent the bank statement and notice of default to Midwest stating:

I have received two phone calls and a written notice from Chase that Midwest Properties failed to make January payment which was due January 1, 2014. The payment amount is the same as it is every month, \$2,190.49 and the account number is the same too Because the time period has gone past the grace period, a late payment fee of \$68.88[,] has been added. As you can see on the statement

I sent ... the total amount due on February 1, 2014 is \$4,449.86.

I am serving this notice of default or service according to Section 8 of our land contract on this the thirtieth day of January, 2014. You have 14 days from this date to correct the default (make the January payment and late fee).

Steven further testified that the February 2014 bank statement showed both that the January payment had not been made and that the February payment was overdue. Steven added that he sent Midwest a second notice of default, as required under the land contract. Steven further testified that because he was concerned Chase would foreclose on the mortgage, he made the overdue payments to Chase in late February 2014, and he has made every payment since then, with the total amount of such payments reaching \$30,533.11 at the time of trial.

¶7 Midwest disputed neither the existence of the land contract nor that the Schultzes made payments to Chase on their mortgage during the period when Midwest was required to make such payments. Midwest nevertheless argues the Schultzes failed to offer evidence that would prove Midwest defaulted on its obligations under the land contract. Citing *Palisades Collection LLC v. Kalal*, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, Midwest contends Steven was not qualified to introduce bank statements as proof of the matter asserted—i.e., that Midwest defaulted on its payment obligation. Midwest further argues that Steven’s testimony alone could not prove that Midwest defaulted on its payment obligations under the land contract, and either a Chase representative or Midwest agent would have had to testify to prove nonpayment.

¶8 These arguments misapprehend both the scope of the *Palisades* holding and the issue in this case. That issue is whether Midwest defaulted on its obligations under the land contract, so as to permit the Schultzes to obtain a strict

foreclosure against Midwest. The issue is not whether Chase could prove it is entitled to foreclose on the Schultzes' mortgage. *Palisades* does not limit the type of admissible evidence a party to a land contract may introduce to prove a breach or default of *that* contract. In *Palisades*, this court merely held that the hearsay exception for business records, WIS. STAT. § 908.03(6), is not satisfied when the only affiant concerning the records in question lacks personal knowledge of how the records were made. *Id.*, ¶22.

¶9 Here, as noted above, the bank statements were admitted only to the extent they showed the Schultzes received “notice” of nonpayment and not as proof that Midwest actually failed to make payments. Furthermore, based on the record, the trial court, as fact finder, could reasonably infer if the Schultzes were making payments to Chase during the land contract's term, then Midwest was not making the payments. Midwest presented no evidence to rebut this reasonable inference. In the absence of evidence showing that Midwest either responded or objected to the Schultzes' notices of default, it was reasonable for the trial court to infer Midwest was in default under the land contract. While it may be that other fact finders would have viewed the evidence differently, that is not a basis for reversing this trial court's determination.

¶10 Midwest alternatively argues the Schultzes failed to prove the amount allegedly owed on the land contract, emphasizing that a party seeking relief bears the burden of not only proving the basic elements of its case, but also the amounts due. *See, e.g., Rao v. WMC Sec., Inc.*, 2008 WI 73, ¶64, 310 Wis. 2d 623, 752 N.W.2d 220. As noted above, Steven testified that he made over \$30,000 in payments to Chase from February 2014 until the March 2015 trial. Steven also presented a Chase bank statement showing the transaction history of payments on the mortgage loan. As with the bank statements, Midwest objected to admission

of the transaction history as proof of Midwest's default. It had no objection, however, to its introduction as proof of the Schultzes' payments to Chase, and it was admitted for that limited purpose. The transaction history reflected a principal balance of \$156,069.03 due as of February 2014, which included the late charge assessed for nonpayment in January 2014. The trial court could reasonably rely on this evidence, coupled with Steven's testimony, to determine the amount paid by the Schultzes and to support its inference as to the amount due by Midwest under the contract.

¶11 Because there was sufficient credible evidence to support the trial court's reasonable inferences as to both Midwest's default of its obligations under the land contract and the amount owed, we affirm the judgment.

By the Court.—Judgment affirmed.

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

