COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP936 **Cir. Ct. No. 2014CV1988**

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

BANK OF AMERICA N.A.,

PLAINTIFF-RESPONDENT,

V.

JASSON K. YAHN AND SARAH R. YAHN,

DEFENDANTS-APPELLANTS,

UNITED STATES OF AMERICA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: AMY SMITH, Judge. *Reversed and cause remanded for further proceedings*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. This action arises out of a foreclosure action initiated by Bank of America against Jasson and Sarah Yahn. The circuit court

granted summary judgment in favor of Bank of America. The Yahns dispute whether documents that Bank of America submitted in support of its motion for summary judgment established that it has the right to enforce the note. For the reasons discussed below, we agree with the Yahns and reverse summary judgment in favor of Bank of America.

BACKGROUND

¶2 In July 2014, Bank of America filed this action seeking to foreclose on secured property pursuant to WIS. STAT. § 846.101 (2013-14).[1] Bank of America alleged in its complaint that it was the current holder of a promissory note executed by the Yahns, which was secured by a mortgage on certain residential property owned by the Yahns, and that the Yahns had defaulted on the mortgage and note. The complaint alleged that attached to it was a "true copy of the note" and a "true copy of the mortgage." The copy of the note attached to the complaint identifies Residential Finance Corporation as the lender, and it bears two updated endorsements: one specifically endorsed to Bank of America, and the second endorsed in blank. The Yahns denied all of the allegations in the complaint except an allegation that they owned the subject mortgaged property.

¶3 Bank of America and the Yahns moved for summary judgment. In support of its motion for summary judgment, Bank of America submitted the affidavit of Scott Johnson, an officer of Bank of America, who averred that "Bank of America, N.A. directly or through an agent, has possession of the promissory note. The promissory note has been duly [e]ndorsed." The Yahns argued, in part,

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

that Bank of America was not entitled to summary judgment, and that summary judgment should be granted to them, because Johnson's affidavit failed to establish that Bank of America is in possession of the original note.

¶4 Following a hearing on the motions for summary judgment, the circuit court determined that Bank of America had established a prima facie case for summary judgment and that the Yahns did not present any evidence that raised a genuine issue of material fact as to whether they owed a debt to Bank of America and were in default on that debt. The circuit court granted summary judgment in favor of the Bank on its foreclosure action. The Yahns appeal.

DISCUSSION

¶5 We review summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. We first examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Id.*** If they do, we next examine the opposing party's submissions to determine whether material facts are in dispute, entitling the opposing party to a trial. ***Id.*** A party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 In order to prevail on a foreclosure claim, a party must prove that it has the right to enforce the mortgage note. *See* ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, ¶ 10, 346 Wis. 2d 1, 827 N.W.2d 124. Where a mortgage note

is endorsed in blank, the note is payable to the bearer, who has the right to enforce the note. ***Id.,*** ¶12; *see also* WIS. STAT. § 403.205(2).

¶7 Bank of America argues that it submitted evidence to support the circuit court's determination that the note at issue in this case is payable to the bearer and that Bank of America is in possession of the note and, therefore, has the right to enforce it. Bank of America's summary judgment materials included the following submissions that are relevant to the issue of whether Bank of America has established that it has the right to enforce the note: (1) an uncertified copy of a note, which was attached to Bank of America's complaint; and (2) the affidavit of Johnson.[2] In Johnson's affidavit, Johnson averred that "[a]s part of [his] job responsibilities for [Bank of America], [he is] familiar with the type of records maintained by [Bank of America] in connection with the [Yahns'] [l]oan," that he has "personal knowledge of [Bank of America's] procedures for creating [such] records," and that "Bank of America, N.A. directly or through an agent, has possession of the promissory note," which "has been duly [e]ndorsed."

¶8 The Yahns contend that Bank of America's summary judgment submissions fail to establish that Bank of America is in possession of, and thus the holder of, the *original* note, and, therefore, failed to establish that it has the right to enforce the note. *See* WIS. STAT. §§ 401.201(2)(km)1. and 403.301 (a "[h]older" is a person in possession of the negotiable instrument, such as a note, and is entitled to enforce the negotiable instrument). We agree with the Yahns that considered together or separately, the copy of the note and Johnson's affidavit do

[2] Bank of America also submitted the affidavits of attorneys Michael Riley and Steven Zoblocki. Neither Riley's nor Zoblocki's affidavits contain any averments related to Bank of America's possession of the original note.

not establish that Bank of America possesses the original note and is thus entitled to enforce it.

¶9 We first turn to the copy of the note attached to Bank of America's complaint. Bank of America alleged in its complaint that it "is the current holder of [the attached] note," and it attached to the complaint an uncertified copy of a note. First, "holder" is a legal term that means, in the foreclosure context, "[t]he person in possession of a [note] that is payable either to bearer or to an identified person that is the person in possession." WIS. STAT. § 401.201(2)(km)1. Whether an individual is a holder is a legal conclusion, not a factual allegation. Second, the complaint alleges that attached is "a true copy of the note," but not that a true copy of the *original* note was attached. In addition, the Yahns denied that the attached copy of the note was a "true copy of the note."[3]

¶10 Third, even if the complaint had alleged that the attached note was a true copy of the *original* note, the attached copy was not sufficiently authenticated. In order to be admissible in evidence, a document must be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. The original note, or a certified copy of the original note, is self-authenticating. *See* WIS. STAT. § 909.02(9) and (12); *see also* WIS. STAT. § 889.08 (addressing certification of copies). However, an uncertified copy of a note, which may not be a copy of the original note, is not self-authenticating. *See* ***BAC Home Loan Servicing, L.P. v. Williams***,

[3] Bank of America incorrectly asserts in its brief on appeal that the Yahns' "answer does not specifically deny the authenticity of the note or the authority of the signatures on the note."

No. 2010AP2334, unpublished slip op. ¶11 (WI App. Sept. 29, 2011); *see generally* WIS. STAT. § 909.02.

¶11 Another means of authenticating a document is through testimony of a witness "with knowledge that a matter is what it is claimed to be." WIS. STAT. § 909.015(1). However, the copy of the note in this case was not authenticated by Johnson's affidavit, which makes no mention of the copy of the note attached to the complaint being a true and correct copy of the self-authenticating original note. Johnson avers in his affidavit that he has personal knowledge that the records in Bank of America's custody are prepared in the ordinary course of business at or near the time of the transaction or event by persons with knowledge of the underlying transaction. Johnson's affidavit does not, however, contain any specific averments that the copy of the note is a true and correct copy of the *original* note. The fact that Johnson may have been in position to authenticate the copy of the note does not, standing alone, mean that he has done so. Put another way, assuming without deciding that a clear statement that the uncertified copy attached to the complaint is a true and correct copy of the original note would be sufficient to do so, Johnson's affidavit makes no reference whatsoever to the copy attached to the complaint.

¶12 We next turn to Johnson's affidavit. Johnson avers that Bank of America or its agent "has possession of the promissory note." However, Johnson's averments are silent as to whether Bank of America is in possession of the *original* note. Bank of America argues that the uncertified copy of the note attached to the complaint is evidence that it possesses the *original* note. However, Johnson's affidavit is silent as to whether the copy of the note attached to the complaint is a true and correct copy of the original note, there are no admissions

on file that the note attached to the complaint is a true copy of the original, and the Yahns denied that the attached copy is "a true copy of the note."

¶13 Bank of America makes the additional argument on appeal that its invitation during discovery to the Yahns for them to inspect the original note and Bank of America's attorney's offer to bring the original note to court were sufficient, for purposes of summary judgment, to make a prima facie case that it possesses the original note. Summary judgment is based on the pleadings, depositions, answers to interrogatories, and admissions on file. *See* WIS. STAT. § 802.08(2). Summary judgment may not be based upon offers by the moving party to make something available for inspection. If Bank of America wanted to establish its possession of the note by bringing it into court, it should have done so, not just offered to do so.

¶14 In summary, neither the copy of the note attached to the complaint, nor the averments in the affidavits presented by Bank of America, establish that Bank of America was in possession of the original note. Bank of America has thus failed to establish that it has the right to enforce the note and to foreclose based upon any failure on the part of the Yahns to pay according to the terms of the promissory note.

CONCLUSION

¶15 Accordingly, for the reasons discussed above, we reverse the circuit court's summary judgment decision and remand for further proceedings.[4]

[4] The Yahns argue that summary judgment should be granted in their favor because the "record before [this court] is barren of any evidence of a note and mortgage." The Yahns are mistaken. Bank of America presented evidence of the existence of a note and mortgage. What (continued)

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

Bank of America failed to do on summary judgment is to establish that there is no genuine issue of material fact as to Bank of America's *possession* of the *original* note. Accordingly, we reject the Yahns' argument. The failure of a party to establish the right to summary judgment does not mean that the other party necessarily prevails on the ultimate issue, only that it is still an issue for decision by the trier of fact. That the other party may itself establish an entitlement to summary judgment is only one of the possible outcomes.