COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2200 **Cir. Ct. No. 2010CV1542**

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

BANK OF NEW YORK MELLON F/K/A BANK OF NEW YORK, AS TRUSTEE FOR CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2005-81 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-81,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. HARROP,

DEFENDANT-APPELLANT,

JANE DOE HARROP,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael Harrop appeals a foreclosure judgment granted in favor of Bank of New York Mellon, as trustee for the Certificate holders of CWALT, Inc., Alternative Loan Trust 2005-81, Mortgage Pass-Through Certificates, Series 2005-81 ("the Bank"). Harrop raises several challenges to the judgment. We reject Harrop's arguments and affirm the judgment.

BACKGROUND

¶2 In 2005, Harrop signed an adjustable rate note promising to repay Countrywide Bank, N.A. the principal sum of $217,600. The note was secured by a mortgage on rental property Harrop owned in Madison. Countrywide Bank subsequently endorsed the note to Countrywide Home Loans, Inc., which later endorsed the note in blank to the Bank. Mortgage Electronic Registration Systems, Inc. ("MERS") assigned the mortgage to the Bank on March 16, 2010.

¶3 On March 23, 2010, the Bank initiated the underlying foreclosure action, alleging that Harrop had defaulted on the note. In November 2011, the Bank moved for summary judgment. In his response opposing the Bank's motion, Harrop asked the court to grant summary judgment in his favor based on the absence of proof attached to the Bank's summary judgment motion. The trial court denied the Bank's summary judgment motion, noting that it had failed to attach a copy of the endorsed note. The court did not address Harrop's summary judgment request.

¶4 In March 2013, the Bank filed a second motion for summary judgment, this time submitting the endorsed note. The trial court again denied the motion, concluding the Bank had failed to make a prima facie case for summary judgment. The matter proceeded to trial. Although Harrop was subpoenaed to

testify, only his attorney appeared. There was no testimony taken at trial. Rather, the Bank presented its case by submitting documents and relying on Harrop's admissions in discovery.

¶5 The Bank submitted the note, which was accepted into evidence over Harrop's attorney's objection. Although a copy of the note was marked as a trial exhibit, the Bank presented the original note to the court.[1] The Bank also offered into evidence certified copies of the mortgage and assignment of mortgage, as well as Harrop's written discovery responses, including his admission of default. These documents were accepted without objection. To satisfy a requirement under the note that notice of default be given, the Bank offered, and the court accepted, a Notice of Intent to Accelerate, accompanied by a Certificate of BAC Home Loans Servicing, LP attesting that the notice of intent to accelerate was created and maintained in the ordinary course of business. The Bank also argued that Harrop waived the right to dispute the amount due on the note by failing to plead the affirmative defense of payment. Based on this evidence, the trial court granted judgment in the Bank's favor and denied Harrop's motion for reconsideration. This appeal follows.

DISCUSSION

¶6 Harrop raises a series of arguments and we address each in turn. First, Harrop appears to argue that if the Bank was unsuccessful at summary

[1] Pursuant to WIS. STAT. § 910.03 (2013-14), "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

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

judgment, he was entitled to summary judgment dismissal of the action. A trial court grants summary judgment if "there is no genuine issue as to any material fact" and a party "is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). That the Bank was unable to prevail on summary judgment meant only that it was required to prove its case at trial. It did not mean Harrop was automatically entitled to judgment on the merits. To the extent Harrop contends the trial court erred by failing to address his request for summary judgment, Harrop offers no developed argument that he was entitled to summary judgment.

¶7 Second, Harrop contends that the trial court erred "by not considering the absent witness rule." The United States Supreme Court described the rule as follows: "[I]f a party has it peculiarly within his [or her] power to produce witnesses whose testimony would elucidate the transaction, the fact that he [or she] does not do it creates the presumption that the testimony, if produced, would be unfavorable." ***Graves v. United States***, 150 U.S. 118, 121 (1893). Citing this rule, Harrop asserts that the Bank's failure to call a witness to testify at trial was fatal to its case. We are not persuaded. As noted above, the Bank offered into evidence the note, mortgage, assignment of mortgage, and Harrop's own admission during discovery to nonpayment on the note. Harrop fails to suggest who the "absent witness" would be or why the "absent witness" was necessary when the Bank's documentary evidence was sufficient to support the foreclosure judgment.

¶8 Harrop challenges the Bank's evidence, arguing that the trial court erred by failing to consider all relevant facts when concluding the Bank presented the original note at trial. Harrop is essentially challenging the trial court's finding that the document proffered was the original note. We will affirm a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). In

finding that the Bank presented the original note, the court stated "the original Note bears the stamp of the word 'original' in the color blue" and "the signature affixed which reads 'Michael J. Harrop' appears to me to be in original pen ink." Harrop does not establish that the finding was clearly erroneous.

¶9 Harrop challenges the original note's authenticity based on what he deems to be a "critical difference" between the original and the copy attached to the complaint—namely, the lack of "two-hole punches" at the top of the original note. The circuit court, however, found that the Bank possessed the original note after acknowledging that there were differences between the copy and the original. It is for the trial courts and not appellate courts to weigh the evidence. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). We will not usurp the circuit court's role as fact finder. Harrop nevertheless argues "[t]he two-hole punches are consistent with attaching a valuable document, for example a note worth over $200,000, to a file folder to ensure the document does not become lost." That the note was stored without utilizing a two-hole punch does not render the circuit court court's finding clearly erroneous.

¶10 Fourth, Harrop argues the circuit court erred by admitting the note into evidence without a witness to prove the authenticity of and authority for the signatures on the endorsements. We disagree. WISCONSIN STAT. § 909.02(9) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to … [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411," otherwise known as the Uniform Commercial Code. Because the note is a negotiable instrument under WIS. STAT. § 403.104, it is commercial paper that does not require extrinsic evidence of authenticity.

¶11 Fifth, Harrop argues that even if the court properly determined the note was original, the Bank failed to prove it is the holder of the note. Harrop asserts that witness testimony was necessary to establish possession. Harrop, however, provides no authority for this contention. The Bank presented the original note to the trial court through its attorney. As the circuit court acknowledged, it did not need to see a retainer agreement. The court ultimately found: "the fact that … counsel is representing the [Bank] in this case, has the note physically in his possession, is enough to establish that the note is in possession of the [Bank]." The record supports this finding.

¶12 Sixth, Harrop contends that the circuit court erred by determining that the amount Harrop owed was not in dispute. Our supreme court has held that when nonpayment on a note is pled, payment must be affirmatively alleged to raise an issue. ***Virkshus v. Virkshus***, 250 Wis. 90, 95, 26 N.W.2d 156 (1947). Here, the Bank pleaded that Harrop failed to make payments as required and that Harrop owed a sum certain on the note. In his Answer, Harrop asserted a general denial of the Bank's allegation, but failed to raise an affirmative defense of payment. Even were we to conclude Harrop preserved his defense at the pleadings stage, Harrop would have been required to prove payment at trial. Harrop, however, made no such offer of proof and, in response to the Bank's requests to admit, Harrop admitted that he failed to make all payments due and owing on the note. We therefore reject his challenge to the trial court's determination of the amount owed under the note.

¶13 Finally, Harrop contends that the circuit court erred by refusing to admit evidence of a second assignment of the mortgage from MERS to the Bank. As noted above, MERS assigned the mortgage to the Bank on March 16, 2010, and that assignment of mortgage was admitted at trial. Harrop sought to introduce

evidence of a second assignment of mortgage from MERS to the Bank, dated February 22, 2013. Harrop argues that the 2013 assignment was "relevant to show the loose control of processes by whomever is exercising control in this case." Harrop also questions how MERS could assign an interest in 2013 that it had already assigned in 2010. The trial court, however, excluded evidence of what it deemed to be a redundant assignment, concluding that Harrop had failed to establish its relevance. The court stated: "It's an assignment by the same party to the same party of the same mortgage executed at a later date. There's no … evidence before me to draw any conclusions about what that might mean for this case or for the issues I have to decide." We discern no error.

¶14 For the first time in his reply brief, Harrop asserts that the Bank's notice of default was not properly admitted into evidence. We decline to consider this argument. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (court of appeals generally does not address arguments raised for the first time in a reply brief).[2]

By the Court.—Judgment affirmed.

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

[2] As to any remaining arguments contained in Harrop's brief not specifically addressed in this opinion, we conclude they were not sufficiently developed to merit discussion. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n. 3, 258 Wis. 2d 915, 656 N.W.2d 56 (appellate courts generally do not consider conclusory assertions and undeveloped issues).