COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2016

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. 2015AP651 **Cir. Ct. No. 2010CV12082**

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

GMAC MORTGAGE LLC AND OCWEN LOAN SERVICING,

PLAINTIFFS-RESPONDENTS,

V.

WILLIAM A. KOPS,

DEFENDANT-APPELLANT,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS AND USA FUNDING CORP A WISCONSIN CORPORATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. William A. Kops appeals a judgment of foreclosure entered in favor of Ocwen Loan Servicing ("Ocwen"), the successor to GMAC Mortgage, LLC ("GMAC"), which was the entity that filed this foreclosure action against Kops.[1] Kops argues that the circuit court erred by granting summary judgment because there are disputed issues of material fact as to whether GMAC had the right to enforce the note.[2] We affirm.

BACKGROUND

¶2 The record and the appellate briefs are voluminous. In this background section we will summarize the most relevant background facts and court proceedings; additional facts are addressed in the discussion section.[3]

¶3 It is undisputed that in January 2009, Kops borrowed $319,725 from USA Funding Corp. ("USA Funding") to purchase a home. The note was payable to USA Funding and was secured by a mortgage. Kops defaulted on the note as of January 2010 and has not made a payment on the note since April 2010.

¶4 In July 2010, GMAC filed this foreclosure action, alleging that it was the current holder of the note. GMAC attached to its complaint a copy of the note with an attached allonge, signed by USA Funding Assistant Vice President Janet Leonardson, stating that the note was payable to GMAC Bank "WITHOUT

[1] Kops does not dispute Ocwen's rights as a successor to GMAC. Instead, the issue is whether GMAC was entitled to enforce the note.

[2] Although Kops's notice of appeal indicated that he would also challenge the circuit court's ruling concerning attorney fees, Kops stated in his appellate brief that "he has decided not to pursue that argument further." Therefore, we do not discuss the award of attorney fees.

[3] We do not discuss Kops's counterclaims, which were dismissed and are not at issue on appeal.

RECOURSE" and dated January 23, 2009.[4] Kops filed an answer and the parties subsequently pursued mediation, which was unsuccessful.

¶5 In March 2011, GMAC moved for summary judgment. Kops opposed the motion and moved for summary judgment on the grounds that GMAC was not the owner of the note. This argument was based in part on two letters Kops received in response to two "Qualified Written Requests" he sent to GMAC in April 2011 and May 2011. In the first response, GMAC stated: "The current master servicer is GNMA [Government National Mortgage Association, a/k/a "Ginnie Mae"]. The current owner of the loan is GNMA, US Department of Housing and Urban Development…. However, GMAC Mortgage, LLC is currently servicing the account, and all inquiries should be directed to our office." GMAC reiterated this information in its second response.

¶6 The circuit court denied both parties' motions for summary judgment and gave GMAC an opportunity to amend its complaint and file affidavits.[5] GMAC subsequently filed an affidavit from its attorney, Steven E. Zablocki, attaching a copy of the note that was different from the copy of the note that was originally filed with the complaint. Specifically, the signature page of the note Zablocki attached to his affidavit contained two stamped endorsements. The first stated: "PAY TO THE ORDER OF GMAC MORTGAGE, LLC WITHOUT RECOURSE" and contained the rubber-stamped signature of "J. Gray[,] ASSISTANT SECRETARY GMAC BANK." The second stated: "PAY TO THE

[4] GMAC is a different entity than GMAC Bank.

[5] The Honorable Maxine A. White denied the 2011 motions for summary judgment in a written order.

ORDER OF" followed by a blank space and the words "WITHOUT RECOURSE." Below that statement was the rubber-stamped signature of "D. Harkness[,] LIMITED SIGNING OFFICER[,] GMAC MORTGAGE, LLC f/k/a GMAC MORTGAGE CORPORATION." The words "SEE ATTACHED ALLONGE" appeared at the bottom of the page, and the allonge signed by Leonardson was attached.

¶7 Zablocki's cover letter accompanying his affidavit and the copy of the note explained that "the [n]ote previously provided in an earlier affidavit was a copy [but] not a *specific* copy of the original. The specific copy of the original does in fact contain all of the endorsements and full indicia of [GMAC's] standing."

¶8 After a number of delays caused in part by the replacement of counsel for both parties and the reassignment of the case due to judicial rotation, both GMAC and Kops again filed motions for summary judgment in August 2012.[6] Kops's brief in opposition to GMAC's motion for summary judgment raised two concerns that are pertinent to this appeal. First, he referenced GMAC's 2011 answers to Kops's written requests, in which GMAC advised Kops that GNMA (and therefore not GMAC) owned the loan. Second, Kops pointed out that the copy of the note attached to the original complaint did not contain the endorsements by J. Gray and D. Harkess, which appeared on the copy of the note

[6] At various times during the five years this case was pending in the circuit court, Kops appeared *pro se*. His August 2012 motion for summary judgment was filed *pro se*, but Kops subsequently retained counsel, who filed a brief opposing GMAC's motion for summary judgment.

that GMAC filed in 2012. Kops alleged that "all of these stamps on its current version of the [n]ote were added sometime ***after*** the lawsuit."

¶9 In response, GMAC asserted that its 2011 responses to Kops's written requests had "mistakenly referenced [GNMA] as the *owner* of the [n]ote," rather than the insurer of the note. GMAC stated that GNMA "does not, and never did, *own* the [n]ote." GMAC added: "[T]he error was harmless because [GNMA] never attempted to collect on the [n]ote, and Kops never attempted to pay [GNMA]." As for Kops's concern that the original complaint did not contain a copy of the note with all of the endorsements, GMAC explained that an "imaged cop[y]" of the original note and allonge was filed with the 2010 foreclosure action, even though the endorsements were applied in March 2009. The note with the endorsements and the allonge was provided to GMAC's counsel in July 2011. GMAC submitted affidavits in support of these assertions.

¶10 On November 2, 2012, the parties appeared before the circuit court for a hearing on their respective motions for summary judgment.[7] At the outset, the circuit court engaged Kops's trial counsel in a discussion about whether the original note—which GMAC had brought to court that day—was sufficient proof of ownership. The circuit court asked whether the original note was bearer paper that would be "admissible without an affidavit or certified copy." Kops's trial counsel replied:

> Once it is proven to be authenticated, once there is some proper person speaking with knowledge to say that that is what it is, that those purported stamps are what they are, then absolutely it's a bearer [sic] and absolutely it is, under

[7] The Honorable Richard J. Sankovitz presided over that hearing and subsequent hearings in this case.

> the [Uniform Commercial Code], payable on demand to the person in possession.

¶11 The circuit court and the parties discussed several other issues in dispute. Ultimately, the circuit court denied both parties' motions for summary judgment so that Kops could file an amended pleading and the parties could file additional materials. The circuit court also established a date by which GMAC could renew its motion for summary judgment.

¶12 The circuit court's written order denying the motions for summary judgment identified the potential factual disputes that needed resolution "before the court may conclude that the promissory note presented in court today constitutes bearer paper that may be admitted in evidence without any other evidence of authenticity." As relevant to this appeal, those disputes included: (1) "Whether Janet Leonardson was authorized to sign the allonge;" (2) "Whether any reasonable juror could conclude that [GNMA] could ever have owned Mr. Kops'[s] note or mortgage or otherwise undermined GMAC's authority to place a blank endorsement on the note;" and (3) "Whether GMAC's affidavits filed at earlier junctures in these proceedings constitute impeachment evidence which raise a dispute of fact about the authenticity of the blank endorsement on the note."

¶13 In February 2013, Kops filed his amended answer to the second amended complaint. In March 2013, GMAC filed a renewed motion for summary judgment, but consideration of that motion was delayed for over a year by continued discovery disputes, other motions, and a change of counsel for both parties. During that time, Ocwen was substituted for GMAC. In May 2014, both parties again moved for summary judgment and provided extensive briefing in support of their positions.

¶14 On July 1, 2014, the circuit court heard oral arguments on the summary judgment motions. No transcript of the hearing has been provided, but the parties submitted written arguments prior to the hearing. The circuit court's subsequent oral decision summarized Kops's primary arguments, which it said were: (1) "USA Funding never validly negotiated the note to GMAC," because Leonardson was not authorized to sign the allonge; (2) "GMAC Bank never validly negotiated the note to GMAC," because the fact that two different copies of the note were filed with the circuit court raises factual questions, and because "J. Gray" may not have had authority to endorse the note; (3) "GMAC never validly endorsed the note in blank" because "D. Harkness" did not have authority to do so and someone may have used Harkness's rubber stamp; and (4) GMAC could not have validly transferred the note to Ocwen because GMAC never owned the note, as evidenced by GMAC's own statements that GNMA owned it. The circuit court was not persuaded by Kops's arguments, for reasons discussed below. It concluded that there were no issues of material fact in dispute and that Ocwen had "demonstrated a right to a foreclosure judgment." This appeal follows.

STANDARD OF REVIEW

¶15 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where 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) (2013-14).[8] "We examine the moving party's submissions to determine whether they constitute a prima facie case for

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

summary judgment. If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citations omitted).

DISCUSSION

¶16 Kops's overarching argument against the foreclosure is that GMAC, and its successor Ocwen, failed to demonstrate that they own the note. Kops acknowledges that GMAC "produced a note that appeared to entitle it to judgment," but he argues that errors made by GMAC—including the initial submission of a copy of the note without endorsements and GMAC's written statements that GNMA owned the note—created factual disputes that must be resolved by a trial. Kops asserts that he has been "fighting … not just to try to preserve his house" but also "to force courts to treat foreclosure cases the same way they treat every other civil case." He concludes: "If GMAC is allowed to simply claim it made mistakes, and have this case decided on paper, then this [c]ourt will be doing a grave disservice to Mr. Kops, and to homeowner[s] around Wisconsin."

¶17 Kops advances three specific arguments, as well as numerous sub-arguments.[9] He argues: (1) GMAC's two statements that GNMA owned the note—which it later said were erroneous—created a material issue of fact over the note's ownership; (2) GMAC's filing of two "different versions of 'the' note

[9] We will not address every sub-argument, some of which are only a paragraph long. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal…. [Some issues] can be deemed to lack sufficient merit or importance to warrant individual attention.").

prohibit the entry of summary judgment"; and (3) it was inappropriate to decide on summary judgment whether Leonardson's signature was authorized and subsequently ratified. (Bolding omitted.) We consider each issue in turn.[10]

I. GMAC's answers to Kops's qualified written requests.

¶18 As explained above, early in the lawsuit Kops presented two qualified written requests to GMAC to help determine the note's ownership. In response, GMAC twice said that GNMA was the owner of the note. GMAC subsequently indicated that it had mistakenly listed GNMA as the owner in its responses, and it submitted affidavits refuting its earlier responses. First, it offered an affidavit from Rebecka Wagner, a supervisor at GMAC. She said that her department was responsible for responding to "Qualified Written Requests" like those Kops sent to GMAC in 2011. Wagner's affidavit indicated that one of her department's representatives would have reviewed the company's loan information system to answer Kops's questions. She said that the system identified GNMA as the "investor," which Wagner "and those I supervise in my department should interpret … to mean that [GNMA] is an insurer of Mr. Kops[']s loan." Wagner acknowledged that "it was an error to identify [GNMA] as an 'owner.'" Her affidavit concluded that GMAC "is the current servicer and holder of the note and beneficiary of record of the mortgage."

¶19 GMAC also offered an affidavit from GNMA. That affidavit from Paul St. Laurent, a Lead Mortgage Banking Analyst at GNMA, stated that GNMA "does not buy or sell home mortgages." St. Laurent also stated that he had

[10] Kops has abandoned his arguments that J. Gray and D. Harkness lacked authority to endorse the note.

reviewed Kops's note and mortgage and "can confirm that GMAC Mortgage, LLC has custody of the [n]ote, legal title to the Mortgage, and has sole authority and responsibility for servicing the loan."

¶20 In short, GMAC acknowledged its earlier error in Wagner's affidavit and GNMA indicated that it does not own the note. The circuit court determined that the statements in GMAC's 2011 responses to Kops's qualified written requests were "flatly refuted" by St. Laurent's affidavit.

¶21 On appeal, Kops continues to assert that GMAC's 2011 answers constituted "admissions by GMAC that could allow a factfinder to conclude that a government entity owned the note." (Bolding omitted.) Kops argues that the affidavit from Wagner does not resolve the issue because she "did not explain how it came to be that someone would *misinterpret* that, let alone how that would happen *twice*, and by (apparently) two different people: "KB" initialed the first letter, while "TN" initialed the second." Kops also complains that Wagner "did not explain why GMAC used the abbreviation 'inv' for 'insurer.'" (Bolding omitted.) In addition, Kops attacks St. Laurent's affidavit, suggesting that it "created further questions" because it simply says that GNMA does not insure individual loans and because, Kops argues, St. Laurent lacked the foundation to state his opinion that GMAC owns the note. Kops concludes that because GMAC has provided "an affidavit contradicting its earlier testimony," an "issue of fact is raised" and a trial is required.

¶22 We are not persuaded by Kops's arguments. At issue is whether GMAC was the holder of the note. GMAC retracted its erroneous statements that GNMA owned the note, and GNMA has indicated that it does not own the note. Further, Kops has no affirmative proof that GNMA owns the note. He suggests a

hypothetical situation where GMAC could have sold the note to GNMA, but there is no proof that occurred, and GNMA has explicitly said that it does not own the note. We reject Kops's suggestion that a trial must be conducted to determine whether GNMA owns the note simply because GMAC erroneously stated that GNMA owned it, where GMAC later corrected that information and there is no affirmative evidence that GNMA owns the note. *See* ***Bank of America NA v. Neis***, 2013 WI App 89, ¶56, 349 Wis. 2d 461, 835 N.W.2d 527 (homeowner failed to present persuasive reason why a trial was necessary where bank "mistakenly attached an incorrect document to its complaint" and later corrected the error).

II. Differences in the copies of the note filed by GMAC.

¶23 Kops's second argument also concerns another mistake GMAC made. As noted above, when GMAC filed its initial complaint, it attached a copy of the note that did not include the endorsements from GMAC Bank to GMAC or the blank endorsement by GMAC.[11] GMAC, through an affidavit from its trial counsel, Zablocki, subsequently submitted another copy of the note that contained the endorsements. GMAC also provided affidavits from two GMAC Bank employees explaining why there were different copies of the note.

¶24 One of those affidavits, from Janet Vollmer, explained that an image of the note was made when GMAC Bank received the note, which in this case occurred on February 4, 2009. She said the endorsements were placed on the note

[11] Kops argues that the copy of the note attached to the original complaint was a "judicial admission" that is binding on GMAC. Ocwen asserts that this argument was raised for the first time on appeal, and Kops does not dispute that in his reply brief. Unrefuted arguments are deemed admitted, *see* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979), and we do not consider issues raised for the first time on appeal, *see* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495.

"on or before March 2, 2009," as evidenced by computer printouts Vollmer included with her affidavit. The note was then placed in a vault until it was sent to GMAC's trial counsel for use in the foreclosure action on July 14, 2011, which was a year after the foreclosure action was filed. Vollmer said that the copy of the note attached to the initial complaint was the copy made when GMAC Bank first received the note in February 2009.

¶25 The circuit court discussed the note in its oral decision, stating: "[E]ach of the copies are copies of the original note, but they are copies of the note as it existed at different points in time." The circuit court also observed that "the statements in each of … Zablocki's affidavits are true and are not necessarily inconsistent." The circuit court explained:

> Zablocki said that the photocopy attached to … each of [the affidavits] was a copy of "the original [n]ote." It's just that one copy is a copy of the original note as it existed after USA Funding endorsed it to GMAC Bank, but before GMAC [Bank] endorsed it to GMAC, and before GMAC endorsed it in blank.

¶26 On appeal, Kops complains that "a factfinder should have determined which note was the authentic one." He also suggests that the court was weighing the evidence when it accepted GMAC's assertions that the second copy of the note was the final version of the note. He further argues that "the production of later notes simply created an issue of fact over which note was genuine." (Bolding omitted.)

¶27 We are not persuaded by Kops's arguments. A note endorsed in blank is payable to the bearer and is negotiated by transfer of possession alone. *See* WIS. STAT. §§ 403.201(1), 403.205(2). Under this principle, because the note is endorsed in blank, GMAC (and now Ocwen) is entitled to enforce the note if it

possesses the note. This is not a situation where it is alleged that there are multiple original notes. The original note was presented in court for everyone to examine on at least two occasions, and the trial court noted that it contained an original signature from Kops, the allonge, and the two endorsements.[12] Kops continues to complain that the explanation of how the endorsements were applied was inadequate, but he has not submitted any affirmative evidence that creates an issue of material fact as to whether GMAC possessed the original note and whether it was endorsed.

III. Leonardson's authority to sign the allonge.

¶28 Kops's final argument is that Leonardson—the woman who signed the allonge transferring the note to GMAC Bank from USA Funding—was not authorized to sign the allonge. Kops asserted early in the case that Leonardson "as an *assistant* vice president, was not authorized to sign contracts for USA Funding." In support of that proposition, Kops submitted a corporate resolution from a 2006 meeting of the stockholders and directors of USA Funding that stated that "executing contracts on behalf of [USA Funding] requires the signature of a vice president or higher." Kops asserted that because Leonardson was not a vice president, she lacked authority to sign the allonge.

[12] Kops suggests the original note should have been made part of the court file or that the parties should have stipulated that the original note was "in evidence." We decline to address the merits of this argument. Kops has not adequately explained, with citations to the transcripts, when and how he objected to the circuit court's consideration of the original note. *See* ***Lechner v. Scharrer***, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988) (court need not consider arguments unsupported by references to the record). Indeed, he has not provided a transcript for the final summary judgment hearing, so this court cannot determine if Kops asked that the original note be made part of the record or if Kops offered legal authority to support his assertion that an original note should be placed in the record.

¶29 The circuit court rejected this argument, concluding that "what Ms. Leonardson was signing was not a contract, and therefore, she did not need to be a vice president in order to be authorized to sign it." The circuit court also noted that Kops had not provided evidence to dispute an affidavit from "Patrick Walters, the former president of the company, that Janet Leonardson was in charge of the closing department at the time and routinely signed negotiable instruments including allonges, including those allonges necessary to effectuate transfer of ownership of the notes." The circuit court explained: "If there is any doubt about whether Ms. Leonardson was authorized to sign the allonge, the doubt is sealed by evidence of the fact that she routinely exercised this authority, and with the knowledge of the company president."

¶30 On appeal, Kops argues first that the circuit court should have considered whether the allonge was an "instrument" rather than a "contract." He argues that "[t]he rules for signing 'instruments' apply to allonges." It is not clear to this court what Kops is asserting, whether he raised this issue in the circuit court, or how it relates to the 2006 corporate resolution discussing authority to execute contracts that Kops submitted in opposition to GMAC's motion for summary judgment. Kops also argues that the circuit court "implicitly found that Leonardson's signature was ratified by USA Funding" and that this was improper.

¶31 Ocwen argues that Kops failed to demonstrate that the USA Funding endorsement was invalid. Ocwen cites WIS. STAT. § 403.308(1) for the proposition that "the signatures on instruments are presumed authentic and made with authority." Ocwen contends that Kops "has not presented any evidence to rebut the presumption that Leonardson's signature on the [a]llonge was authentic and authorized." Ocwen acknowledges that Kops submitted a USA Funding corporate resolution from 2006, but it argues this does not cast doubt on

Leonardson's authority for two reasons: it is not clear whether that resolution was in effect when Leonardson signed the allonge and, in any event, "executing an endorsement is not executing a contract."

¶32 Kops does not directly respond to Ocwen's argument in his reply brief. Instead, he argues that "the timing of the production of the blank-endorsed note and the unendorsed note *together* raise an issue of fact about whether Leonardson could have endorsed *this* note." Once again, it is not clear to this court what Kops is attempting to argue. It is clear that he has not rebutted Ocwen's argument concerning WIS. STAT. § 403.308(1). Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979).

¶33 This court is persuaded by Ocwen's arguments and the circuit court's analysis. Kops's submission of a corporate resolution from 2006 indicating that one must be a vice president to sign a contract did not establish material facts that defeat the presumption that Leonardson was authorized to sign the allonge. The affidavit from Walters further supports Ocwen's position. There is not an issue of material fact as to Leonard's authorization to sign the allonge that precludes summary judgment.

CONCLUSION

¶34 It is undisputed that Kops has defaulted on his home loan. At issue is whether a trial is necessary to demonstrate that Ocwen is the current holder of the note. The original note with its endorsements, as well as the affidavits submitted by GMAC and Ocwen, establish the chain of ownership. Further, Kops has not identified any other potential owners who claim to own the note. We agree with the circuit court that Kops has not identified genuine issues of material

fact that necessitate a trial. Summary judgment was properly granted. Therefore, we affirm.

By the Court.—Judgment affirmed.

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