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DISTRICT I/II

October 26, 2016

To:

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1281

U.S. Bank National Association v. Daniel J. Bohringer
(L.C. # 2011CV13210)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Daniel J. Bohringer and Victoria J. Bohringer appeal from a judgment of foreclosure entered in favor of U.S. Bank National Association. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm the judgment of the circuit court.

In March 2007, the Bohringers executed a note evidencing a loan for \$125,000 from First Franklin Financial Corporation. The note was secured by a mortgage on property located in Milwaukee. The Bohringers stopped making payments on the loan in October 2010.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

In August 2011, U.S. Bank filed a foreclosure action against the Bohringers. U.S. Bank alleged that it was the current holder of the 2007 note, which was endorsed in blank. The Bohringers disputed this allegation, and the matter proceeded to a bench trial.

At trial, U.S. Bank produced the note in question. It called as a witness Kendra Joseph, the First Franklin employee who endorsed the note in 2007. Joseph confirmed that her original signature appears on the note's endorsements. She further testified that she would not have endorsed the note if the Bohringers' original signatures were not on it.

U.S. Bank also called several witnesses to establish the note's chain of custody. The witnesses explained how the note came to be in U.S. Bank's possession shortly before it filed its foreclosure action. One of those witnesses testified about a statement sent to the Bohringers in September 2010 that notified them of a change of servicer for their loan. U.S. Bank also introduced into evidence a second statement sent to the Bohringers indicating the same.

The Bohringers, meanwhile, testified in their own defense. They questioned whether the produced note was original, as the signatures on it appeared in light ink and there were no indentations on the back of the paper. They also complained that they were not properly notified of a change of servicer by First Franklin.

Ultimately, the circuit court found that U.S. Bank was in possession of the original note, with authentic signatures and endorsements, when it commenced its foreclosure action. The court further found that the Bohringers had received the required notice of a change of servicer. It then entered judgment in favor of U.S. Bank. This appeal follows.

On appeal, the Bohringers challenge the circuit court's factual findings. Specifically, they assert that the purported original note was not authentic, that the court erred in accepting U.S. Bank's chain of custody evidence, and that they were not properly notified of a change of servicer by First Franklin.

We review a circuit court's factual determinations at a bench trial under the clearly erroneous standard. *See* WIS. STAT. § 805.17(2). Thus, we will not upset a circuit court's "findings of fact unless they are clearly erroneous, nor will we reweigh evidence or assess witness credibility." *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶12, 331 Wis. 2d 740, 796 N.W.2d 806.

Here, we are satisfied that the circuit court's findings of fact regarding the note were not clearly erroneous. As explained by the court, signatures on a note enjoy a presumption of authenticity. *See* WIS. STAT. § 403.308(1). U.S. Bank buttressed that presumption through the testimony of Joseph and the various witnesses explaining the note's history. By contrast, the Bohringers did little to rebut the presumption, relying primarily on their own self-serving testimony. On this record, the court could reasonably reject such testimony and find that U.S. Bank was in possession of the original note, with authentic signatures and endorsements, when it commenced its foreclosure action.

Likewise, we are satisfied that the circuit court's finding regarding the notice of a change of servicer was not clearly erroneous. At the time of the servicing transfer at issue here, 24 C.F.R. § 3500.21 was in effect, which permitted transferor and transferee servicers to combine their notices into one notice. Thus, there was no need for a separate notice from First Franklin so long as the necessary information was provided to the Bohringers. Given the evidence presented

by U.S. Bank, the court could reasonably find that the Bohringers received the required notice of a change of servicer.

As a final matter, the Bohringers complain that the circuit court erred in excluding certain evidence at trial. The Bohringers had sought to introduce enclosures to a letter they had received in response to a qualified written request. The enclosures included a copy of the note without any endorsements.

A circuit court's decision to admit or exclude evidence is reviewed for an erroneous exercise of discretion. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52. A court has the discretion to exclude evidence as a sanction for a party's failure to disclose it. *See Jenzake v. City of Brookfield*, 108 Wis. 2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982).

Here, the court reasonably exercised its discretion to exclude the enclosures because (1) they were not disclosed in discovery and (2) they were presented for the first time on the sixth day of a seven-day trial. As the court appropriately remarked, "we want to ensure that this is not trial by ambush...."

For these reasons, we affirm.²

² To the extent we have not addressed an argument raised by the Bohringers on appeal, the argument is deemed rejected. *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.").

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals