COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP2451 **Cir. Ct. No. 2014CV5906**

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

SEAWAY BANK AND TRUST COMPANY,

PLAINTIFF-RESPONDENT,

V.

DESSIE L. BRUMFIELD AND BRUMFIELD PROPERTIES, LLC,

DEFENDANTS-APPELLANTS.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DANIEL A. NOONAN and WILLIAM SOSNAY, Judges. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 BRENNAN, P.J. Dessie L. Brumfield appeals from judgments granting foreclosure and replevin to plaintiff Seaway Bank and Trust Company. Brumfield also appeals orders appointing a receiver and denying her motion for

post-judgment relief. She seeks discretionary reversal and a new trial pursuant to WIS. STAT. § 752.35 (2015-16)[1] on the grounds that the real controversy was not fully tried because her trial counsel did not object to the admission of insufficiently authenticated business records and failed to raise affirmative defenses and counterclaims on her behalf. We disagree and affirm.

BACKGROUND

¶2 Seaway brought foreclosure actions against Brumfield in 2014 with respect to three properties. Brumfield asserted no affirmative defenses or counterclaims. The case was tried to the court on August 20, 2015. Tracy Meeks, a Seaway employee, testified that Seaway assumed the assets and liabilities of Legacy on March 11, 2011, and that the three loan accounts in question then became Seaway accounts. Following Meeks' testimony, Seaway moved to admit into evidence loan record documents from Legacy and Seaway. The documents included three promissory notes showing Brumfield's signature in the amounts of $221,756, $55,500, and $20,000. The exhibits also included corresponding payment histories that showed payments dating to the origin of each loan and balances due on each of the three loans. One exhibit is an affidavit by Meeks showing the balance owed for each account as of the date of trial. Brumfield's counsel stated that he had no objection to the admission of the exhibits.

¶3 Brumfield testified. She admitted at least one signature looked like hers, but she denied knowingly signing any, said her signature must have been fraudulently obtained, and denied the repayment obligations. She acknowledged

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that she had extensive experience in purchasing, financing and selling properties. She acknowledged that she had made payments from 2010 through 2013 on the three loans at issue—first to Legacy, and later to Seaway—but claimed she just assumed that Seaway had the right to the payments made by automatic withdrawal from her account. She admitted that she could access her accounts online during that period. She testified that she stopped making payments in 2013 on the three loans because she became suspicious that she did not owe them. She testified that she did not owe Seaway money on any of the loans in question. She had no documents or other support of her claim. The trial court then had this exchange with Brumfield:

> THE COURT: You have nothing to show today about whether or not you have any -- that's what he's asking you -- any proof of payment of the amounts in question before this court today? Do you have any proof of payment?
>
> [Brumfield]: Not of those three that he's talking about because I don't owe those, and I wasn't aware. So the answer to that question is no.

The court also asked Brumfield's counsel the same question about documentation that would support her testimony, and he confirmed that there was none.

¶4 The trial court found that the greater weight of credible evidence supported the contention that Brumfield executed the three notes, that Seaway is the holder in due course, that Brumfield owed the money, and that the total amount due including the loan balances and associated costs was $324,709.49. Accordingly, the trial court granted the judgments of foreclosure, granted replevin, and granted the motion for appointment of a receiver. Brumfield moved for postconviction relief, which was denied. She now appeals.

DISCUSSION

I. Legal principles of a WIS. STAT. § 752.35 analysis.

¶5 This is a somewhat unusual civil appeal in that Brumfield seeks a new trial under WIS. STAT. § 752.35 despite her trial counsel's undisputed waiver of the claimed error. At trial, counsel stated that he had no objection to the admissibility of bank records on which Seaway's foreclosure action was based. Brumfield contends that these bank records were improperly admitted under WIS. STAT. § 908.03(6) and ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶20, 324 Wis. 2d 180, 781 N.W. 2d 503, and that as a result she is entitled to a new trial under WIS. STAT. § 752.35.

¶6 We note at the outset that WIS. STAT. § 752.35 does permit a reviewing court, in exceptional circumstances, to grant a new trial despite trial counsel's waiver of the issue appealed: "In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, … the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record[.]" WIS. STAT. § 752.35. In ***Vollmer v. Luety***, 156 Wis. 2d 1, 10-13, 456 N.W.2d 797 (1990), the supreme court declared that the appellate courts' power to grant a new trial in the interests of justice derived from the courts' broad *inherent power*s and that this was an exception to the well-established rule that only objected-to errors are appealable. ***Id.*** at 10-13. However, the court further noted that this inherent power is to be used "only in exceptional cases." ***Id.*** at 11.

¶7 When this court reviews claimed error under the discretionary reversal statute, we review to see: (1) whether the real controversy was tried, or (2) whether in the interests of justice, a new trial should be ordered. *See*

WIS. STAT. § 752.35. Only under the latter prong must appellant prove that a different result would be likely without the claimed error. ***Vollmer***, 156 Wis. 2d at 16 and 19. When a request for a new trial is made by an appellant who asserts the real controversy has not been tried, we review the record below, *de novo*, to determine the merits of that contention. ***State v. Johnson***, 149 Wis. 2d 418, 429, 439 N.W.2d 122 (1989).

¶8 Here appellant's claim is under the first prong—that the real controversy was not fully tried. "Generally, the real controversy is not fully tried when the fact finder did not hear all the relevant evidence." ***State v. Caban***, 210 Wis. 2d 597, 610, 563 N.W.2d 501 (1997). However, as we concluded in ***Vollmer***, the appellate courts have used their discretionary power to grant new trials under the first prong of the statute in a variety of fact situations, some where "important evidence was erroneously excluded" and some where the jury heard evidence that "should have been excluded." ***Vollmer***, 156 Wis. 2d at 19-20. In ***Vollmer***, the court determined that the real controversy was not fully tried because the verdict question and jury instruction failed to ask the jury the proper negligence question:

> Accordingly, it was proper for the court of appeals to reverse the judgment in this case because it concluded that the erroneous special verdict question led the jurors to focus their attention on the defendant's negligence in maintaining the premises, when the crux of plaintiff's case was that the defendant was negligent in his operation of the power mower. The court of appeals correctly concluded that the real controversy had not been fully tried.

Id. at 22.

¶9 Similarly, in a criminal case, our supreme court has held that the "exceptional cases" that are appropriate for discretionary reversal under that prong

of the statute are cases where the jury was wrongly prevented from hearing important testimony or considered improper evidence that "clouded a crucial issue," and cases where "an erroneous instruction prevented the real controversy in a case from being tried." ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted).

¶10 On the other hand, we note that it is well established that erroneously admitted evidence does not often warrant discretionary reversal. Even in a case where the prosecutor "chose to … induce numerous evidentiary errors" and defense counsel "failed to object to patently inadmissible evidence," the fact that evidence was improperly admitted did not *in itself* cause the need for discretionary reversal. *See* ***Virgil v. State***, 84 Wis. 2d 166, 193, 267 N.W.2d 852 (1978). Of the "numerous evidentiary errors" the appellate court recognized, only one necessitated reversal and a new trial: the single error that deprived the defendant of his constitutional confrontation clause rights. *See* ***id.***

II. Brumfield's claim that the real controversy was not fully tried.

¶11 With that legal background, we review Brumfield's claim that the real controversy was not fully tried because the documents entered as exhibits were not properly qualified under WIS. STAT. § 908.03(6) and ***Palisades***, 324 Wis. 2d 180, ¶20. She argues that the testimony of Seaway's employee in this case was inadequate to authenticate the loan documents that were admitted because the witness did not testify about the process of integrating the assignor bank's recordkeeping practice into the assignee bank's recordkeeping practice. *See* ***Central Prairie Fin. LLC v. Doa Yang***, 2013 WI App 82, ¶10, 348 Wis. 2d 583, 833 N.W.2d 866 (summary judgment affirmed where plaintiff creditor provided documentation of defendant's debt to original creditor and the "processes

by which … electronic account records are transmitted to … assignees"). She also argues that trial counsel failed to pursue possible affirmative defenses and counterclaims.

¶12 Brumfield cannot use a discretionary reversal appeal to relitigate a waived issue. *See* ***Caban***, 210 Wis. 2d at 610. And the fact that Brumfield's trial counsel did not pursue possible affirmative defenses and counterclaims is likewise outside the scope of a WIS. STAT. § 752.35 analysis. Discretionary reversal is not warranted merely because trial counsel errs in a way that significantly affects a party's interests. *See* ***Dorbritz v. American Family Mut. Ins. Co.***, 2005 WI App 154, ¶¶15-19, 284 Wis. 2d 442, 702 N.W.2d 406 (declining to grant a new trial under § 752.35 where party had opportunity to object in the trial court as to order of insurance and failed to do so).

¶13 Rather, the sole question we address is whether the real controversy was fully tried. The real controversy Brumfield identifies here on appeal is different from the one that she identified at trial. There she simply challenged whether she knowingly signed for the three loans. In her pretrial affidavit and trial testimony she acknowledged that the signatures looked like hers but contended that they must have been obtained fraudulently. Relatedly, she argued that she did not owe any money on the three loans because she never knowingly signed for them or received any consideration for them.

¶14 But on appeal she contends that Seaway's trial proof should have been kept out, and thus, *even if* she knowingly signed, the foreclosures should be reversed due to Seaway's failure of proof that it was a holder in due course and that she defaulted. Her post-judgment affidavit was entirely an attack on her trial

lawyer's poor performance and his failure to object to Seaway's bank records on the grounds of WIS. STAT. § 908.03(6) and ***Palisades***.

¶15 This appeal comes to us under WIS. STAT. § 752.35 and is not an appeal challenging the trial court's ruling admitting the bank records. We evaluate whether the real controversy was fully tried or was not, resulting in an injustice to Brumfield. We have carefully reviewed the circuit court record and conclude that it shows absolutely no merit to Brumfield's arguments, and we affirm the trial court's rulings. We examine the record in more detail below.

A. The record supports the trial court's credibility determination that Brumfield knowingly signed for the loans and obtained consideration for them.[2]

¶16 "[T]he law is clear that the determination of credibility is the sole province of the trial court sitting as the trier of fact[.]" ***Sensenbrenner v. Sensenbrenner***, 89 Wis. 2d 677, 700-01, 278 N.W.2d 887 (1979). Such a determination "will not be upset unless there is an abuse of discretion or an error of law." ***Id.***

¶17 In her pretrial affidavit, dated March, 20, 2015, Brumfield denied knowingly signing any of the notes, alleged they were procured by fraud, and denied receiving any consideration for them. In that affidavit she stated that Legacy had a practice of reviewing her loans with her (she had more loans than the three involved in this appeal) and that they required her to sign the reviews of

[2] Brumfield does not challenge the trial court's credibility determination against her, and this issue is therefore waived. However, because this appeal is made under WIS. STAT. § 908.03(6) and because we must determine whether the real controversy was fully tried, we address the issue.

her accounts. She avers that she trusted Legacy and signed accordingly, and she conjectures that: "Your affiant's signature was obtained in this way to the following exhibits to the complaint: Exhibit C, Exhibit D, Exhibit E, Exhibit F, Exhibit G, Exhibit H and Exhibit I." Exhibit C is Note A, executed on August 24, 2010, in the original amount of $221,756.44. Exhibit D is Note B executed August 24, 2010, in the original amount $20,000.00. And Exhibit E is Note C, executed May 2, 2008, in the original amount of $55,500.00.

¶18 At trial Brumfield continued in those denials. Brumfield testified that:

- She did not knowingly sign the three notes although she acknowledged that it looked like her signature on trial Exhibit 1, the May 2, 2008 note for $55,500.00.

- She believed the bank just put documents in front of her on her three-year reviews and she signed those documents without knowing what they were.

- She received no consideration for the notes.

- She denied owing Seaway any money for these three loans.

- She admitted owning nineteen properties since 1979, some of which she paid cash for and "six or seven" she financed with six banks.

- She paid on the three notes for three years, from 2010 to 2013, because payments were made by automatic withdrawal and she just assumed the bank took what it was entitled to.

- She stopped paying on the loans when she suspected that she did not owe on them.

- She admitted she had no documents or proof of payment regarding the three loans in question.

¶19 Interestingly, at trial, Brumfield was able to produce a box with files of documents regarding her other loans, but not a single document about these three loans. After some confusion, Brumfield admitted the documents she brought had nothing to do with the loans *at issue*. Brumfield then explained that what she brought to court was proof of payment of *other* loans: "So I had chronologically put my paperwork in order the last week to pull out everything and show him a history of my purchasing and selling houses. And I had it in order that I can see and understand it."

¶20 Seaway produced the original three notes, payment records, and default calculations, which were all received into evidence without objection. At the trial's conclusion, Brumfield's trial counsel argued that she had not knowingly signed and therefore had no repayment obligation.

¶21 In its findings at the conclusion of the trial, the court first addressed Brumfield's testimony that the signature on the three original notes was not hers. The court pointed to the evidence that called her credibility into question. First, the court noted that the evidence showed that payments were made for three years on the notes in question from Brumfield's accounts, saying: "So that tends to rebut the statement that gee I didn't know anything about these notes, and I never signed it. And that I didn't know anything about it." Then the court noted that Brumfield was not an unsophisticated buyer of real estate:

> The Court: Your client is not just a homeowner. An unsophisticated person. She's a real estate dealer having owned 16 investment properties. Are you here telling me that she had something paid off, that she wouldn't get a payoff statement, a proof of payment, a satisfaction of mortgage and all that? Are you telling me that these payments that were made directly from her account somehow that was all a big mistake and it was fraudulent in nature?
>
> [Counsel]: She testified--
>
> The Court: And Legacy Bank just committed a big fraud on her, tried to collect all this money from her, and she didn't owe a dime. And she got nothing in writing to support the contention.
>
> [Counsel]: She testified that from 2010 to 2013 they were taking the money out of her account and she was putting a lot of money into it and that a lot of money went out.
>
> The Court: And she just missed that all? Just didn't realize that this was happening for years?

Given her experience as a real estate buyer, the court also found it significant that she had no evidence of any kind, particularly written evidence, to support her denials.

¶22 Thus the trial court found at the conclusion of the court trial that Brumfield was incredible in her denials of knowingly signing the loans or receiving consideration.

> The Court: And I find that her statements, that her signature in part she didn't recognize on one, and that they simply weren't hers. I find those statements to be not credible and not supported by any other evidence other than her statements.

And in the absence of any proof that they were not her signatures or that there was some sort of fraud perpetrated on her, the court found no fraud and no forgery.

The court concluded that Seaway had proven that she was in default on the three loans.

¶23 We conclude that the record supports the fact-finding, credibility determinations, and legal conclusions of the trial court. As the court observed, Brumfield was an experienced, not unsophisticated, purchaser of real estate. By her own admission, she had purchased nineteen properties, six or seven through bank loans from six different banks. She had the skill and wherewithal to keep files of documents on her other loans, but none on these three, despite acknowledging that payments were made for three years from her own bank account. Seaway submitted the original notes, the payment records, and the default calculations. In fact, Brumfield admitted default when she said she simply stopped paying because she contested whether the loans were actually owed by her. Thus the trial court properly found her denial incredible. On the one issue she challenged at trial—the knowingness of her obligation—she lost on credibility.

¶24 We will not upset the trial court's credibility determination absent an abuse of discretion or error of law. *See* ***Sensenbrenner***, 89 Wis. 2d at 700-01. Because the trial court's credibility determination is supported by the record, comports with proper discretion, and comports with legal principles—and further because Brumfield does not challenge it—we accept the trial court's finding that Brumfield was not credible in denying knowingly incurring these loans. Thus the only remaining issue is whether Seaway's documents are admissible under WIS. STAT. § 908.03(6) and ***Palisades***, and whether they prove Brumfield's default, which we turn to next.

B. Seaway's evidence was properly admitted under WIS. STAT. § 908.03(6) and *Palisades*.

¶25 Brumfield argues on appeal that her trial counsel failed to lodge an evidentiary objection under WIS. STAT. § 908.03(6) and ***Palisades*** that resulted in the real controversy not being tried. She argues that under ***Palisades*** and ***Central Prairie***, Seaway failed to properly qualify the Legacy documents, the payment records, and default records. Brumfield's argument goes to the integration of Legacy records with Seaway's when Seaway took over Brumfield's loans. Brumfield argues that Seaway witness, Meeks, testified to personal knowledge of only Seaway's processing and not Legacy's: "Seaway's representative did not testify as to his personal knowledge of Seaway's policies and procedures for integrating Legacy's records, nor did [h]e testify as to the extent that Seaway relies on those records in its business practice."

¶26 Business records may be admissible over a hearsay objection if testified to by a "custodian or other qualified witness":

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness ….

WIS. STAT. § 908.03(6).

¶27 In ***Palisades***, 324 Wis. 2d 180, ¶20, this court held that the words, "custodian or other qualified witness" means that "a testifying custodian must be *qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Id.*** We concluded that the custodian's affidavit in that case presented no facts that showed she had personal

knowledge of how the account statements were prepared and whether they were prepared in the ordinary course of the creditor's business. ***Id.***, ¶23.

¶28 In this case, Brumfield does not claim Seaway's custodian testimony is deficient as to *Seaway's own records*, but *only as to those from Legacy*. In ***Central Prairie***, 348 Wis. 2d 583, ¶9, we addressed the requirements of a custodian when testifying about records integrated from a predecessor lender. This court in ***Central Prairie*** began by noting that ***Palisades*** addressed a narrow issue: "***Palisades*** stands for the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning the records in question lacks personal knowledge of how the records were made." ***Id.*** By contrast in ***Central Prairie*** we concluded that the lender produced sufficient documentation to validate the existence and amount of the indebtedness under a contract with the original creditor and transactions by which that indebtedness was assigned to ***Central Prairie***. The affidavit from the custodian at Central Prairie confirmed his *personal knowledge* of their *regular business practices* of purchasing defaulted Chase accounts and receiving payments, that the records are *regularly integrated* with Central Prairie's own, and that the lender provided the documentation to support the debts as well. ***Id.***, ¶10.

¶29 At trial Seaway called as a witness Meeks, Senior Vice-President, North Division Manager, who is in charge of running Seaway's Wisconsin deposits and lending operations. He testified that the system of retention and storage of loan documents, payment receipts and balances is a regularly conducted business of Seaway about which he has personal knowledge. He testified that Seaway became the holder of Brumfield's notes when it took over Legacy's business in 2011 and that it had the original notes. Admittedly he did not testify much about the processes of integration of the records from Legacy with Seaway's

own. But that is not required by ***Central Prairie***. Here Meeks satisfied the ***Central Prairie*** requirements through his testimony, as the VP of all Wisconsin operations, that he had personal knowledge that it was Seaway's regular business practice to integrate with its records the Legacy loan records, which they had documentation of in the form of the original documents, and the payment and indebtedness records. He testified that they did so here. *See* ***Central Prairie***, 348 Wis. 2d 583, ¶9.

¶30 Additionally, even if Meeks' testimony was somehow deemed inadequate to satisfy ***Central Prairie***, the record also shows ample support for admissibility in a summary judgment affidavit from Seaway Vice President April Wright. Wright averred that she had *personal knowledge of the documents attached* to the affidavit and brief and that they were *based on her review of the original records kept in the normal course of business at Seaway's offices*. She identified Brumfield as the maker of the three notes in question, which she attached. Note A was executed August 24, 2010, in the original amount of $221,756.44. Note B was executed August 24, 2010, in the original amount of $20,000.00. And Note C was executed May 2, 2008, in the original amount of $55,500.00. All were made with Legacy. She averred that Legacy was closed by the State of Wisconsin Department of Financial Institutions on March 22, 2011, and these three notes were acquired by Seaway that same day. But most significantly to the record integration point, she further averred that:

> 10. After Seaway acquired the Notes, it continued to use Legacy's loan accounting software system to account for all loan balances and activities.
>
> 11. During the time that Seaway has owned the Notes, Seaway has used a software system to track all activity on bank loans, including, but not limited to the outstanding principal, interest, late fees, and per diem charges, due dates, and maturity dates.

¶31 We consider Wright's affidavit even though it was not offered at trial because this is a request for discretionary reversal and we are directed to review the record and determine whether the controversy was fully tried. *See* WIS. STAT. § 908.03(6) ("if it appears *from the record* that the real controversy has not been fully tried") (emphasis added). *See also* ***Johnson***, 149 Wis. 2d at 429 (appellate court reviews the record *de novo* to determine the merits of a claim that the real controversy has not been fully tried). The issue here is whether Brumfield is entitled to the exceptional remedy of a new trial. We conclude she is not. Assuming her trial counsel had objected to the Seaway documents at trial, the parties and court would have had the opportunity to explore whether Seaway could meet its burden under WIS. STAT. § 908.03(6), ***Palisades***, and ***Central Prairie***. The record shows that Seaway could have easily met that burden through Meeks' testimony and the Wright affidavit. Therefore, we conclude the real controversy was fully tried and no injustice occurred.

¶32 For all of the foregoing reasons we conclude that Brumfield has failed to establish that she is entitled to a new trial, a remedy to be used only in the most extraordinary cases, and accordingly we affirm the trial court.

By the Court.—Judgments and orders affirmed.

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