COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP477 **Cir. Ct. No. 2007CV242**

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

BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE-HOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES SERIES 2006-14, C/O BAC HOME LOANS SERVICING, L.P.,

PLAINTIFF-RESPONDENT,

V.

DIANE G. CANO AND UNKNOWN SPOUSE OF DIANE G. CANO [MARIO CANO],

DEFENDANTS-APPELLANTS,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR S&L INVESTMENT LENDING, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Reversed and cause remanded for proceedings consistent with this opinion.*

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Diane and Mario Cano appeal a foreclosure judgment. The Canos contend that (1) the circuit court erroneously exercised its discretion in granting the Bank of New York's motion to reopen its foreclosure action against the Canos; and (2) the court erred in granting summary judgment to the Bank. We conclude that the court properly reopened the foreclosure action, but that the Bank did not establish a prima facie case for summary judgment. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

¶2 The Bank filed this foreclosure action against the Canos in April 2007. The circuit court dismissed the action without prejudice in August 2008, but reopened the case on the Bank's motion in February 2009.

¶3 The Bank moved for summary judgment in October 2009, attaching affidavits by its attorney and a loan servicing agent stating that the Canos had not made the required payments on their mortgage. At the summary judgment hearing, the court granted the Canos additional time to respond to the summary judgment motion. In December 2009, the Canos submitted an answer to the motion for summary judgment. The answer included a statement by Diane Cano that she had made all of her necessary mortgage payments, but her statement was not notarized.

¶4 The circuit court initially denied the Bank's summary judgment motion. The bank moved for reconsideration on December 28, 2009, and the court granted the motion the next day, thereby granting summary judgment to the Bank. The Canos appeal.

DISCUSSION

¶5 The Canos contend that the circuit court erroneously exercised its discretion by reopening the Bank's foreclosure action under WIS. STAT. § 806.07(1)(h) (2007-08),[1] which authorizes relief from a judgment for "any … reasons justifying relief from the operation of the judgment." They contend that the court erred by failing to consider the following factors set forth in ***Allstate Insurance Co. v. Brunswick Corp.***, 2007 WI App 221, 305 Wis. 2d 400, 740 N.W.2d 888:

> 1. Whether the judgment was the result of the conscientious, deliberate, well-informed choice of the claimant;
>
> 2. Whether the claimant received the effective assistance of counsel;
>
> 3. Whether relief is sought from a judgment to which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments;
>
> 4. Whether there is a meritorious defense to the claim; and
>
> 5. Whether there are intervening circumstances making it inequitable to grant relief.

Id., ¶7 (citation omitted). The Canos contend that the circuit court erred by relying on the fact that the Canos did not oppose the reopening of the case at the motion hearing rather than analyzing these factors. Additionally, they contend that the court's finding that the Canos did not oppose the reopening of the case was erroneous because Mario Cano stated in court that he opposed the foreclosure

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

action on the merits, and Diane Cano subsequently wrote to the court stating that she objected to the reopening of the case.

¶6 The Bank responds that relief from the dismissal order is properly analyzed under WIS. STAT. § 805.03 rather than WIS. STAT. § 806.07(1)(h), because the court's order dismissing the foreclosure action was not on the merits. *See* § 805.03 (a dismissal for failure to prosecute or comply with rules or court orders that is not on the merits "may be set aside by the court for good cause shown and within a reasonable time"). The Bank argues that the court's dismissal was expressly not on the merits, and that the Bank moved to reopen the case for good cause within a reasonable time after the Canos did not cure their default as contemplated under the dismissal order.

¶7 We conclude that the circuit court's decision to reopen the foreclosure action is properly analyzed under WIS. STAT. § 806.07(1)(h). Section 806.07(1)(h) is a "catch-all provision" that "gives the [circuit] court broad discretionary authority and invokes the pure equity power of the court" to grant relief from judgments, orders, and stipulations. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶9, 282 Wis. 2d 46, 698 N.W.2d 610. In contrast, WIS. STAT. § 805.03 applies when dismissal was "[f]or failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of the court." Here, the court dismissed the foreclosure action based on the parties' agreement to work on repayment rather than for a failure to prosecute or to comply with rules or court orders. Accordingly, § 805.03 does not apply. Instead, the request for relief from judgment in this case falls within the catch-all provision of § 806.07(1)(h).

¶8 Next, we conclude that the record supports the circuit court's discretionary decision to reopen the foreclosure action under WIS. STAT. § 806.07(1)(h). *See* ***Sukala***, 282 Wis. 2d 46, ¶8 ("Whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a decision within the discretion of the circuit court."). While the Canos correctly point out that the court did not expressly consider the ***Allstate*** equitable factors before allowing relief from judgment, our review of the record reveals that the facts in the record support the court's decision. *See* ***State v. Kirschbaum***, 195 Wis. 2d 11, 21, 535 N.W.2d 462 (Ct. App. 1995) (We will uphold a circuit court's discretionary decision, even if the court did not explain its reasons on the record, if our review reveals that the facts support the court's decision as a proper exercise of discretion.).

¶9 The court originally dismissed the Bank's foreclosure action without addressing the merits based on the parties' agreement to work on repayment, stating: "The parties have worked out a payment agreement. If Defendant Diane G. Cano defaults on the agreement, Plaintiff may reopen this case to have judgment entered." The Bank later moved to reopen the case, asserting that the Canos were not meeting their payment obligations under their mortgage. At the hearing on the Bank's motion, the court asked Mario Cano whether he objected to the motion.[2] Mario Cano stated: "Well, I'm against the fact to put it in foreclosure because we didn't do anything wrong. They have not taken our payments because the other mortgage company had the payments." The court found there was "no active opposition" to the motion, and ordered the foreclosure action reopened.

[2] The transcript of the hearing indicates that only Mario Cano appeared at the hearing, although Diane Cano later implied in a letter to the court that she was present at the hearing, as well.

Diane Cano subsequently sent the court a letter objecting to the court reopening the case, stating that she had made all her payments and had previously provided that documentation to the court.[3] Thus, while the Canos asserted that the Bank was not entitled to foreclosure, they did not assert that there was insufficient reason that could justify relief from the operation of the judgment in the foreclosure action. Accordingly, we discern no erroneous exercise of the court's discretion to reopen the case.

¶10 Because we conclude that the court properly exercised its discretion in reopening the foreclosure action, we reject the Canos' corollary argument that the Bank was required to serve a new summons and complaint to commence new foreclosure proceedings. We turn, then, to the summary judgment proceedings.

¶11 We review summary judgment de novo, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). We first examine the pleadings to determine whether the plaintiff has stated a claim. ***Id.*** at 315. The Bank's complaint asserts that Diane Cano entered into a mortgage agreement with Mortgage Electronic Registration Systems, Inc., as a nominee for S&L Investment Lending, Inc., in July 2006. It asserts that the Bank is the current holder of the mortgage and Countrywide Home Loans, Inc., is the servicer of the mortgage. It states that the Canos failed to make their mortgage payments from January 2007 to the date of the complaint in April 2007. Thus, we conclude that the complaint

[3] In initially opposing the Bank's foreclosure complaint, the Canos submitted documents indicating the Canos made their mortgage payments to S&L Investment Lending, Inc., through April 2007. While those documents are in the record, they were not submitted to the court in response to the Bank's motion for summary judgment.

states a claim for foreclosure. Diane Cano answered, denying that she had failed to make the payments.

¶12 Our next step in the summary judgment methodology is to examine whether the summary judgment submissions establish that the moving party is entitled to judgment as a matter of law. *See* ***id.*** We begin by examining the Bank's summary judgment submissions to determine whether it has established a prima facie case for summary judgment. *See* ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citation omitted). Only if the Bank has made a prima facie case do we turn to the Canos' submissions to determine if there are any material facts in dispute. *See* ***id.***

¶13 The Bank submitted two affidavits to support its motion for summary judgment: one by an attorney for the Bank, and one by an agent for BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P.

¶14 The attorney averred that Diane Cano executed a note secured by a mortgage on her property in July 2006; that an assignment of the mortgage to the Bank was recorded in June 2007; and that the Canos had failed to make the January 2007 and subsequent mortgage payments, leading the Bank to file this foreclosure action in April 2007. The attorney attached the following documents to his affidavit: the mortgage assignment; a statement of the Canos' mortgage payment history for September 2006 to May 2009 generated by Bank of America Home Loans on June 2, 2009, and indicating that the Canos' last mortgage payment was for December 2006; and a notice of default and acceleration Countrywide sent to Diane Cano in February 2007.

¶15 The BAC agent averred that he had access to the financial records for the Canos' mortgage; that Diane Cano executed a mortgage to Mortgage

Electronic Registration Systems, Inc., acting as nominee for S&L Investment Lending, Inc.; and that the Canos had failed to make their January 2007 and subsequent mortgage payments. The agent did not attach any documents to his affidavit.

¶16 We conclude that the Bank's affidavits do not establish a prima facie case for summary judgment. Affidavits supporting a summary judgment motion must be based on personal knowledge and "set forth such evidentiary facts as would be admissible in evidence."[4] WIS. STAT. § 802.08(3). Nothing in the attorney's affidavit indicates that the attorney's averments as to the Canos' payment history are based on personal knowledge. To the extent that the affidavit relies on the attached payment history with Bank of America, we conclude that the affidavit does not set forth the facts necessary to establish a prima facie case that the bank's purported payment history would be admissible at trial.

¶17 As we explained in ***Palisades***, an affidavit must establish a prima facie case that attached payment statements are admissible evidence under an exception to the hearsay rule to support a motion for summary judgment. *See* ***Palisades***, 324 Wis. 2d 180, ¶11 & n.3; WIS. STAT. § 908.01(3) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") and § 908.02 (hearsay generally inadmissible). Here, the only arguably applicable exception to the hearsay rule is the exception for business records under WIS.

[4] In ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶¶12-15, 324 Wis. 2d 180, 781 N.W.2d 503, we declined to resolve the parties' dispute over whether our review of the circuit court's decision on the admissibility of the summary judgment material was de novo or discretionary, because no reasonable view of the affidavit established that the evidence was admissible. We reach the same conclusion here.

STAT. § 908.03(6) (records "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" are not excluded by hearsay rule). Thus, for the statement of the Canos' payments to support a motion for summary judgment, the affidavit must establish that the affiant "is qualified to testify that: (1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity." ***Palisades***, 324 Wis. 2d 180, ¶15. The attorney's affidavit contains no such averments.

¶18 The BAC agent's affidavit is similarly flawed. The agent avers that his knowledge of the Canos' default on their mortgage is based on his access to the financial records for the Canos' mortgage, yet no financial documents are attached to the affidavit. Even if we assume the BAC agent is referring to the statement attached to the attorney's affidavit, the agent's affidavit fails to set forth the necessary facts to establish a prima facie case for the admissibility of the statement. The agent's affidavit does not contain any facts to show that the agent is qualified to testify that the statement generated by Bank of America on June 2, 2009, was "made at or near the time by, or from information transmitted by, a person with knowledge," or that "this was done in the course of a regularly conducted activity."[5] ***Id.*** We conclude that the Bank has not established a prima

[5] In addition, the assignment attached to the Bank's counsel's affidavit shows that the alleged default from January to April 2007 occurred prior to the mortgage assignment to the Bank in May 2007. Thus, a reasonable inference is that the agent for the Bank's servicer, BAC, did not have personal knowledge of how the payment records for January to April 2007 were made.

facie case for summary judgment.[6] Accordingly, we reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for proceedings consistent with this opinion.

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

[6] Because we conclude that the Bank has not established a prima facie case for summary judgment, we need not examine the Canos' summary judgment submissions. Additionally, we need not address the Canos' argument that the circuit court erred by granting summary judgment upon the Bank's motion for reconsideration without providing the required twenty-day notice under WIS. STAT. § 802.08(2).