

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2011

A. John Voelker
Acting 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. 2010AP2263

Cir. Ct. No. 2008CV2228

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FIRST BANK FINANCIAL CENTRE,

PLAINTIFF-RESPONDENT,

V.

**THOMAS A. MILLER, JANE DOE MILLER , UNKNOWN SPOUSE OF
THOMAS A. MILLER, DONALD GRIFFIN, MARK F. BERES, JOHN
BERES BUILDERS, INC., DOMNITZ, MAWICKE & GOISMAN, S.C. ,
N/K/A MAWICKE & GOISMAN, S.C., WALGREEN CO., JOSEPH
LALICATA, DAN BELONGIA, STATE OF WISCONSIN DEPARTMENT OF
REVENUE, STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT, UNITED STATES OF AMERICA AND WISCONSIN
ELECTRIC POWER COMPANY,**

DEFENDANTS,

DAGMAR GRIFFIN,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

JOHN T. LYNCH,

THIRD-PARTY DEFENDANT-RESPONDENT,

**LOUIS D. KAISER, TERRY E. MITCHELL AND CNA INSURANCE
COMPANY,**

THIRD-PARTY DEFENDANTS,

165 MAIN STREET LLC,

INTERESTED PARTY.

APPEAL from judgments and orders of the circuit court for
Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve
Judge.

¶1 PER CURIAM. This case involves competing mortgages on a piece
of commercial property. First Bank Financial Centre prevailed on its motion for
summary judgment in a foreclosure action against Dagmar Griffin and others.
First Bank and one of its officers, John T. Lynch, also prevailed on a motion for
summary judgment on Griffin’s counterclaims alleging slander of title, false
authentication and intentional interference with contract. Griffin appeals those
rulings. We agree that summary judgment was proper.¹ We affirm.

¹ Because we resolve this case on summary judgment grounds, we do not reach the issue,
raised later in this opinion, of whether the “liens” mentioned in WIS. STAT. § 706.11(1) (2009-10)
applies to mortgages. All references to the Wisconsin Statutes are to the 2009-10 version unless
noted.

¶2 The history is fact intensive, but the material facts ultimately are undisputed. Griffin's former son-in-law, Thomas Miller, co-owned a restaurant at 10725 West Greenfield Avenue in West Allis. In 1993, Griffin and her husband, Donald, made a \$234,000 business loan to Miller and his wife, the Griffins' daughter, Lynn. As security, the Millers agreed to execute a mortgage on the restaurant property to the Griffins.

¶3 On June 20, 1997, First Bank loaned Miller \$800,000 to purchase and renovate a restaurant on Silver Lake in Waukesha county and to buy the adjacent lot and residence. The mortgages were secured in part by an additional mortgage on 10725 West Greenfield.²

¶4 Miller and Lynn divorced in 1996. Miller assumed full liability for 10725 West Greenfield and in May 1998 negotiated a deal to develop and build a Walgreen's on the property. The arrangement involved borrowing money from Park Bank, the bank that held a mortgage both on 10725 West Greenfield and on the adjacent parcel, 10635 West Greenfield. To give Park Bank a first mortgage, Miller had to satisfy the Griffins' mortgage. He executed a new mortgage granting the Griffins a mortgage on 10635 West Greenfield, subject only to the Park Bank mortgage, essentially transferring the Griffins' security interest from one Greenfield Avenue parcel to the other. The new mortgage was executed on July 31, 1998. Miller's attorney did not record it until January 2000.

¶5 Beginning on September 20, 1998, Miller signed twenty-one renewal notes on his indebtedness to First Bank. Each renewal bore a typed

² The loan amount later was increased to \$850,000 and extended the mortgage to include a security interest on another property not at issue here.

statement directly above the signature line stating that the note was secured by various mortgages, including the “MTG dated 6-20-97 on property located at 10635 W. Greenfield Ave. West Allis” (“the Greenfield property”).

¶6 Miller defaulted on the Silver Lake property loan and in June 2008 First Bank filed a foreclosure action involving all the Miller mortgages it held. First Bank attached to the complaint “Exhibit E,” a purported second mortgage from Miller in favor of First Bank on the Greenfield property, the same property on which the Griffins held a mortgage, and second to the Park Bank mortgage executed on July 31, 1998. Central to the parties’ claims throughout these proceedings is that, per Exhibit E, the First Bank mortgage was executed and authenticated on June 20, 1997, and recorded on August 31, 1998. As noted, the Griffin mortgage was executed a month *before* First Bank’s was recorded, but not recorded until much later.

¶7 First Bank moved for summary judgment. Griffin³ responded that the Exhibit E mortgage was fraudulent on its face and created an issue of material fact because Exhibit E—stating it was executed and authenticated on June 20, 1997—purported to be a second mortgage to the Park Bank mortgage, which did not even exist until 1998. Griffin also argued that the Exhibit E mortgage recited no consideration. First Bank conceded the date was incorrect but argued that Miller ratified it without objection by signing twenty-one renewal notes after the mortgage was recorded. Just before the summary judgment hearing, Griffin filed a counterclaim against First Bank for slander of title, false

³ Donald Griffin died in April 2008.

authentication and intentional interference with contract and a cross-claim against Miller for a foreclosure on the Greenfield property.

¶8 The circuit court was persuaded that, despite the disagreement on when Miller and First Bank actually executed the mortgages, Miller's conduct over time substantively ratified the document as a mortgage to the bank, thus eliminating the date as a material fact. The court granted summary judgment in favor of First Bank and a judgment of foreclosure on the Greenfield property.

¶9 Griffin moved for reconsideration. She argued that ratification does not apply to fraudulent transfers, that a question of fact remained as to whether the mortgage was procured by fraud, that a jury question existed as to whether the mortgage was without consideration and that equity principles barred relief because First Bank did not come to the court with clean hands and ratification cannot be used to defeat the interests of third parties.

¶10 The court looked to the affidavits of Miller and Lynch, the First Bank loan officer responsible for Miller's loans and mortgages. The court found that the affidavits agreed that Miller and Lynch signed and authenticated the mortgage in each other's presence on June 20, 1997, but that the address of the Greenfield property was filled in later. The court acknowledged that the factual issues were of the type that "normally" would be material questions for resolution at trial, but Miller's repeated ratification made summary judgment appropriate.

¶11 Griffin pursued further discovery. Lynch testified at deposition that Exhibit E was not executed and authenticated on June 20, 1997, after all but sometime in August 1998 instead. He explained that because it was not a "typical note/mortgage type transaction" but was "just adding collateral," First Bank's

computer picked up the earlier date from Miller's existing loan file and printed it on the Greenfield mortgage without anyone noticing the discrepancy.

¶12 Armed with this new fact, Griffin filed a second motion for reconsideration. She argued that summary judgment was improvidently granted because Lynch's deposition testimony raised a reasonable inference that First Bank had actual knowledge of the Griffin mortgage when it executed and recorded First Bank's mortgage and that Lynch colluded with Miller to deliberately backdate the document and delay its recording to defeat Griffin's interest. First Bank responded that the record did not bear out the allegations of prior knowledge or collusion and that WIS. STAT. § 706.11(1)(d), stating that a duly recorded mortgage executed to a state or national bank has priority over all liens, abrogates the "race-notice" rule of WIS. STAT. § 706.08(1)(a), providing that unrecorded conveyances are void as to subsequent good-faith purchasers.

¶13 After a hearing on the motion and additional briefing, the circuit court concluded that the Lynch testimony, although new, did not constitute a material fact. Rather, it was "the mortgage relationship with the bank [that] is the material fact," and Miller ratified that relationship with the bank over and again. Further, even if the bank had actual knowledge of the Griffin mortgage, WIS. STAT. § 706.11(1)(d) overrode the "good-faith purchaser" requirement of WIS. STAT. § 706.08(1)(a), giving the First Bank mortgage priority as a matter of law. The court also declined to draw an inference of collusion because the record contained only conjecture as to whether the bank both knew of the Griffin mortgage and acted to defeat it. First Bank then successfully moved for summary judgment on Griffin's counterclaims under a theory of issue preclusion.

¶14 On appeal, Griffin first contends that the circuit court improvidently granted summary judgment because it found facts, disregarded disputed issues of fact and misapplied the law. We disagree.

¶15 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). We need not repeat that oft-cited methodology except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97; *see also* WIS. STAT. § 802.08(2). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted). An issue is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* (citation omitted). A fact is material if it is “of consequence to the merits of the litigation.” *Michael R.B. v. State*, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993).

¶16 It is undisputed that both Griffin and First Bank held mortgages on the Greenfield property and that First Bank’s was recorded first. Griffin asserts that her mortgage nonetheless takes priority, crafting an argument built on the implausibility of the June 20, 1997 date of First Bank’s mortgage. We agree with the circuit court that, in the face of Miller’s repeated ratifications of the loan documents, the suspect date is not material to Griffin’s claim. Whether it was June 1997 or August 1998, the fact remains that Griffin’s mortgage was not recorded until January 2000. The title search Lynch testified to having undertaken would not have revealed the existence of her mortgage before then.

¶17 That leaves, of course, Griffin’s assertion that Lynch/First Bank, in collusion with Miller, acted fraudulently to defeat her mortgage by backdating First Bank’s mortgage and delaying the recording of hers. Her argument, however compelling, nonetheless is conjectural. Miller’s averment that he “believe[d]” First Bank used a blank mortgage document he signed to later complete and record the Greenfield mortgage without his consent likewise is speculative. There is no credible evidence—that which excludes speculation or conjecture, *see Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980)—to support the inferences Griffin asks us to draw that First Bank’s Greenfield mortgage was created or dated with the intent to defraud or deceive, that Lynch knew about Griffin’s mortgage before First Bank’s Greenfield mortgage was recorded or that Lynch colluded to delay the recording of Griffin’s mortgage. Conjecture is insufficient to avoid summary judgment. *See Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2001 WI App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59, *aff’d*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777.

¶18 Lynch’s affidavit, by contrast, attached the twenty-one renewal notes Miller signed, as well as correspondence from Miller’s attorneys expressly referencing the Greenfield mortgage. None of the parties, particularly Griffin, disputes Miller’s ratification—i.e., that he repeatedly signed these renewal notes in favor of the bank and accepted the benefit, however temporary, of being protected from foreclosure. We agree that the doctrine of ratification controls and conclude that no reasonable jury could return a verdict in Griffin’s favor based on this evidence.

¶19 Lastly, Griffin contends that the circuit court erred in granting summary judgment against her on her counterclaims and third-party complaint. Her counterclaims were for slander of title against First Bank and false

authentication and intentional interference with contract against First Bank and Lynch. Her cross-complaint against Miller sought to foreclose on the Griffin mortgage on the Greenfield property.

¶20 By this point, the court already had decided that First Bank's mortgage had priority and that there was insufficient evidence of fraud, deceit or collusion. Relitigation of these matters was foreclosed by the doctrine of issue preclusion. *See Reuter v. Murphy*, 2000 WI App 276, ¶7, 240 Wis. 2d 110, 622 N.W.2d 464.

¶21 Seeing no error in the grants of summary judgment, we also affirm the orders denying Griffin's motions for reconsideration.

By the Court.—Judgments and orders affirmed.

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

