COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 95-0488

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

STROMBECK PARTNERSHIP,

Plaintiff-Respondent,

v.

JOSEPH P. APOLLO and
ROSEMARY J. APOLLO,

Defendants-Appellants,

JOHN MAGLIO,

Defendant.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

BROWN, J. Joseph P. and Rosemary J. Apollo appeal from an order of summary judgment in favor of the Strombeck Partnership. The Apollos argue that the trial court erred when it interpreted the Apollos' failure

to pay late payment charges as an event triggering default under the mortgage note. They also seem to assert that either the doctrine of "clean hands" or equitable estoppel, or both, prevent the Strombecks from foreclosing because the Strombecks failed to turn over security deposits assigned as part of the real estate transaction.

We conclude that the mortgage and note unambiguously mandated that the Apollos pay a late charge in the event of an installment overdue by more than five days and that such late charge had to be paid along with the installment within fifteen days of the due date. Failure to include the late charge along with the installment constituted default. We further conclude that because no cause and effect relationship existed or could exist between the failure to pay late charges and the alleged failure of the Strombecks to turn over security deposits, the Apollos' equitable arguments fail. We affirm.

In November 1993, the Apollos offered to purchase commercial real property from the Strombecks. Their offer was accepted. As part of the deal, the Apollos gave a mortgage to the Strombecks in the amount of $91,700. The parties executed a note on December 28, 1993.

The first monthly installment was due on January 28, 1994. Although there is a dispute as to whether payment was made within fifteen days of the due date, it is undisputed that the Apollos failed to make the installment payment within five days of the due date. This triggered a late payment charge of five percent of the unpaid installment under the terms of the mortgage note, which charge was never paid.

The second installment was due on February 28, 1994, but was delivered on March 10, 1994, again triggering the late payment charge. Once again, the Apollos did not pay the late payment charge.

The Strombecks notified the Apollos in writing on March 7 that payments due under the mortgage note had not been received. On March 24, the Strombecks notified the Apollos that because they had not paid either of the late payment charges (and also because of the disputed late installment payment), they were accelerating the note and that the full amount was due.

In considering the propriety of an order for summary judgment, this court uses the same methodology as the trial court and our review is de novo. *See* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). We first consider the Apollos' contention that failure to pay late payment charges is not an event triggering default under the terms of the mortgage and mortgage note.

Two provisions of the mortgage note are pertinent. The first concerns late payment charges:

> In the event any installment payment (including, without limitation, the entire principal balance upon maturity) becomes more than 5 days past due, Borrower shall pay a late payment charge to Holder equal to 5% of the entire unpaid amount of the installment (including principal and interest).

The second provision permits acceleration:

> If Borrower fails to make any payment due under this Note or the Mortgage within 15 days after it becomes due, or

> upon any default (other than non-payment) under the Mortgage securing this Note which is not cured within 15 days following the date of mailing of written notice to Borrower, the Holder may accelerate the entire principal balance of this Note and declare the same immediately due and payable without notice or demand.

The Apollos contend that under these provisions, the late payment charge is not a "payment" and that the nonpayment of that charge cannot therefore justify acceleration. They argue that the mortgage note is ambiguous in that it seems to distinguish between "payments" and "charges." Implicit in the definition of a payment, they contend, is a requirement that it have a fixed due date in order to measure when default occurs. Since the note does not identify a date when the late payment charge becomes due, it is not a payment and cannot trigger default.

We agree with the Strombecks, however, that the language of the note is clear and unambiguous. The late charge *is* a "payment" and became due along with the installment payment as soon as the installment payment was not made within five days of its due date.

We arrive at this conclusion after having examined the mortgage and note in a manner consistent with our standard of review. In interpreting contractual language, the goal is to ascertain the parties' true intentions, as evidenced by the language they used. Where the language is clear and unambiguous, we construe it as it stands. Whether language is ambiguous is a question of law which we review de novo. *See* ***Bank of Barron v. Gieseke***,

169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). Mortgages and mortgage notes are to be read together as one instrument. ***Goebel v. First Fed. Savs. & Loan***, 83 Wis.2d 668, 679, 266 N.W.2d 352, 358 (1978).

In this case, the mortgage contains a provision, recognized by the Apollos, that "time is of the essence with respect to payment of principal and interest when due and in the performance of any of the covenants and promises of the Mortgagor contained herein or in the note(s) secured hereby." When a provision like this one is agreed upon, the obvious intent is to provide for prompt payment of installments and all charges under the note. A reasonable person would therefore construe an accompanying late payment charge provision as designed to encourage prompt payment by immediately penalizing the mortgagor if an installment is late. By having to pay more money in order to cure the lateness of the payment, the mortgagor is thereby encouraged to refrain from being late with future installments.

So it is with this transaction. The note clearly and unambiguously conveys that the Apollos trigger a late payment charge whenever an installment payment is more than five days past due. Any reasonable person would consider that this charge becomes part of the "payment" due and must be paid by the fifteenth day following the installment's due date.

The construction advanced by the Apollos would produce a nonsensical result in that a charge designed to encourage prompt payment of installments would not itself come due with the installment. This would defeat the very purpose for which the charge is created. Contractual language is to be

given a construction which will render the contract a rational business instrument. ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 657 (Ct. App. 1990) The only rational interpretation of a late payment charge is that it is due with the installment.

The Apollos further contend that the note should not be construed as written because to do so produces the absurd result that a $91,000 note is defaulted based upon the failure to pay $160.72 in late charges. This is indeed an unfortunate result from the Apollos' perspective, and one which this court would be reluctant to permit if this were a case where the mortgage note was drawn up by one party who was in a stronger position and attempted to exploit an unsophisticated buyer by hiding the crucial clauses in fine print. *See* ***Discount Fabric House, Inc. v. Wisconsin Tel. Co.***, 113 Wis.2d 258, 262, 334 N.W.2d 922, 924 (Ct. App. 1983), *rev'd on other grounds*, 117 Wis.2d 587, 345 N.W.2d 417 (1984). The record reveals, however, that the Apollos were represented by counsel at the closing and that their attorney prepared the mortgage and note, both of which are standard forms from the State Bar of Wisconsin. The fact that the amount of the default is relatively small is of no significance.

We now address the Apollos' second argument, that the doctrines of "clean hands" and equitable estoppel should be implemented to prevent this foreclosure because the Strombecks failed to transfer security deposits pursuant to the assignment of the property's leases. The trial court found that the Strombecks were under no obligation to turn over the deposits. We do not

address that issue here and will assume arguendo that the Apollos were entitled to the deposits. Nonetheless, we still affirm.

Parenthetically, we observe that it is unclear from the briefs whether the Apollos are asserting the "clean hands" doctrine or the distinct doctrine of equitable estoppel. In the interests of judicial repose, we will address the Apollos' argument from both perspectives. In either case, however, the answer is the same. Whether the Strombecks failed to hand over the security deposits had absolutely no bearing on the Apollos' duty to pay installments on time and the corresponding duty to pay the late charges with the due installments. Because there is no nexus between the Strombecks' failure to turn over the security deposits and the Apollos' failure to pay the late payment charges, neither doctrine applies.

Foreclosure is an equitable proceeding, and one of the maxims of equity is the doctrine of "clean hands"—that is, a plaintiff who seeks affirmative equitable relief must have clean hands before the court will entertain his or her plea. ***Westfair Corp. v. Kuelz***, 90 Wis.2d 631, 637, 280 N.W.2d 364, 367 (Ct. App. 1979). The Apollos apparently assert that the Strombecks do not have "clean hands" because they wrongfully withheld the security deposits. Nevertheless, before a court may apply the "clean hands" doctrine to preclude recovery, it must find that the plaintiff seeks relief from a harm *caused by* his or her own wrongful or unlawful course of conduct. ***S & M Rotrogravure Serv. v. Baer***, 77 Wis.2d 454, 467, 252 N.W.2d 913, 919 (1977). The failure to turn over the security deposits did not *cause* the Apollos to be late with their payments or fail

to pay the late charges. Indeed, the Apollos make no such claim and could not. Security deposits cannot be used by the Apollos to make the payments. The "clean hands" argument is rejected.

The doctrine of equitable estoppel also recognizes that a party may be precluded, because of his or her own conduct, from asserting rights he or she would otherwise have enjoyed. Unlike the "clean hands" doctrine, equitable estoppel does not require that the plaintiff has acted wrongfully. It does, however, require a showing of three elements: (1) action or inaction by one party, (2) which induces reasonable and justifiable reliance by another party and (3) to the latter party's detriment. ***State v. City of Green Bay***, 96 Wis.2d 195, 202-03, 291 N.W.2d 508, 511-12 (1980). Here, the Apollos do not argue, and indeed cannot argue, that the Strombecks' failure to turn over security deposits induced them not to pay the late charges. The equitable estoppel argument, if this be the Apollos' argument, is also rejected.

By the Court.—Judgment affirmed.

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