COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP81 **Cir. Ct. No. 2010CV1888**

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

ASSOCIATED BANK, N.A.,

PLAINTIFF-APPELLANT,

V.

GARY T. BRADLEY, JACLYN R. BRADLEY, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND GSF MORTGAGE CORPORATION,

DEFENDANTS-RESPONDENTS,

WELLS FARGO BANK, NA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed and cause remanded with directions*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Associated Bank, N.A., a junior lienholder, filed this foreclosure action against Gary and Jaclyn Bradley, Mortgage Electronic Registration Systems, Inc. (MERS), GSF Mortgage Corporation, and Wells Fargo Bank, NA. The Bradleys purchased the property at issue following a sheriff's sale in an earlier foreclosure action initiated by the primary lienholder, Wells Fargo. Associated asserts it is entitled to a judgment of foreclosure against the Bradleys and the circuit court erred by limiting its remedy to its right of redemption. We affirm.

BACKGROUND

¶2 The property at issue in this appeal was owned by Charles and Karli Spahr. There were two mortgages on the property: a first lien in favor of Wells Fargo, and a second lien, subordinate to the Wells Fargo mortgage, in favor of Associated Bank.

¶3 Wells Fargo commenced a foreclosure action in Brown County case No. 2008-CV-2791. After entry of judgment, Wells Fargo filed an amended complaint naming MERS as a party. The amendment was based on an erroneous report from Chicago Title that Associated had assigned its mortgage interest to MERS. Associated was not made a party to the foreclosure and MERS did not respond to the complaint. An amended judgment was entered in May 2009 and the property was sold in a sheriff's sale. The Bradleys purchased the property from the successful bidder, Federal Home Loan Mortgage Company.

¶4 Associated initiated this foreclosure action in July 2010 against the Bradleys, Wells Fargo, and others. The Bradleys sought leave to file a

counterclaim, asserting that Associated's only option was to exercise its right of redemption or have its lien extinguished.[1] Associated contemporaneously sought summary judgment. The court concluded Associated's lien survived the Wells Fargo foreclosure, but was not converted into a primary lien simply because the earlier mortgage was extinguished. Instead, the court agreed with the Bradleys that Associated's sole remedy was its right of redemption. Accordingly, the court permitted the Bradleys' counterclaim and denied Associated's summary judgment motion.

¶5 Wells Fargo and the Bradleys then filed motions for summary judgment. Associated opposed the Bradleys' motion, arguing the Bradleys were attempting to reopen the original foreclosure judgment based on mistake. This could only be done within a year or by filing an "independent equitable action," which Associated argued had not been done. *See* WIS. STAT. § 806.07(2).[2] The circuit court determined WIS. STAT. § 806.07 was inapplicable because "this action does not amend or vacate a previous foreclosure judgment." It concluded Wells Fargo, though named in the complaint, had no role in the case and had not requested amendment or reopening of the foreclosure judgment.[3] The court restated its earlier conclusion that redemption was Associated's sole remedy, and granted the motions.

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[1] For a discussion of the parameters of the right of redemption as an equitable, nonstatutory remedy, *see infra*, note 5.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] Wells Fargo's inclusion in Associated's foreclosure suit was apparently based on the mistaken notion that Wells Fargo and Federal Home Loan Mortgage Company were the same entity. As the circuit court recognized, this assumption went largely unexplained and is not supported by the record.

DISCUSSION

¶6 We review a grant of summary judgment de novo, but apply the same methodology as the circuit court. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. We must examine the pleadings to determine whether claims have been stated, and then determine whether any material factual issues have been presented. ***Id.***, ¶41. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***, ¶42. "The purpose of summary judgment is to avoid trials when there is nothing to try." ***Id.***

¶7 Associated would like this case to be about reopening a judgment under WIS. STAT. § 806.07. It maintains that § 806.07 is the Bradleys' sole avenue of relief from the earlier foreclosure judgment. This statutory relief must be sought within one year of the entry of the judgment being attacked. *See* WIS. STAT. § 806.07(2). That subsection nonetheless reserves for the court the power to entertain an "independent equitable action" to relieve a party from a judgment. ***Id.***

¶8 Associated postulates that since more than a year had passed, the Bradleys were required to commence an independent equitable action to seek relief from the earlier judgment. The elements of an independent equitable action were set forth in ***Walker v. Tobin***, 209 Wis. 2d 72, 568 N.W.2d 303 (Ct. App. 1997). Among them is the absence of any remedy at law. ***Id.*** at 79. Associated contends the Bradleys have an available remedy against Chicago Title and, in any event, their counterclaim does not constitute an independent equitable action under ***Ennis v. Ennis***, 88 Wis. 2d 82, 89, 276 N.W.2d 341 (Ct. App. 1979) (phrase "independent equitable action" connotes the commencement of a new and separate proceeding by filing a summons and complaint).

¶9 WISCONSIN STAT. § 806.07, however, is inapplicable to the present action between Associated and the Bradleys. Only a "party or legal representative" may seek relief from a judgment under WIS. STAT. § 806.07(1). Neither Associated nor the Bradleys satisfy this criterion, as neither was a party to the earlier action. Wells Fargo, which had no place in this lawsuit in the first instance, never sought to reopen or amend the earlier judgment. The present litigation does not affect the rights of the parties in the earlier litigation. This is a wholly separate action that did not require the circuit court to disturb the resolution of the earlier suit.[4] The circuit court properly concluded that § 806.07 did not apply.

¶10 Associated responds that the Bradleys have thrown this court an "appellate curveball" by asserting that WIS. STAT. § 806.07 does not apply. Invoking the doctrines of forfeiture and judicial estoppel, Associated contends this argument was never raised in the circuit court and is inconsistent with the position that the Bradleys did take: namely, that their counterclaim constituted an "independent equitable action" under ***Walker***.

¶11 We decline to apply these doctrines here. The forfeiture rule, which states that we do not normally review an issue raised for the first time on appeal, is a rule of judicial administration from which we may depart. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Here, the purpose of the rule would not be furthered; even if the Bradleys failed to raise the issue, the

[4] Accordingly, this case does not require us to decide whether the Bradleys have an available remedy at law, or whether an otherwise sufficient counterclaim may constitute an "independent equitable action" under ***Walker v. Tobin***, 209 Wis. 2d 72, 568 N.W.2d 303 (Ct. App. 1997).

circuit court nonetheless concluded WIS. STAT. § 806.07 was inapplicable. Thus, the court had an opportunity to address the matter. As for judicial estoppel, that is a discretionary determination directed at clearly inconsistent legal positions. ***State v. Petty***, 201 Wis. 2d 337, 353, 548 N.W.2d 817 (1996). The Bradleys have not engaged in intentional manipulation of the judicial system, only smart appellate advocacy. *See* ***id.*** By adopting the circuit court's rationale and abandoning their earlier theory, the Bradleys have not only embraced a winning argument, but avoided having to make the awkward argument that the circuit court reached the correct result for the wrong reason.

¶12 Instead, we conclude the circuit court applied the appropriate framework for "cleaning up" a defective foreclosure, which was set forth in ***Buchner v. Gether Trust***, 241 Wis. 148, 5 N.W.2d 806 (1942), and ***Carolina Builders Corp. v. Dietzman***, 2007 WI App 201, 304 Wis. 2d 773, 739 N.W.2d 53. In both cases, a junior lienholder was left out of the foreclosure and the court was required to determine how this omission affected a subsequent bona fide purchaser.

¶13 In ***Buchner***, the mortgagee failed to properly serve Gether Trust, the junior creditor, in the foreclosure action. The subsequent purchasers sued, asserting Gether had the same rights it would have had if it had been properly served. ***Buchner***, 241 Wis. at 150. The circuit court concluded the foreclosure sale destroyed the mortgage as a lien and promoted Gether's lien to first position. ***Id.*** at 150-51. On appeal, our supreme court reversed, holding:

> [W]here a senior mortgage has been foreclosed without making the claimant of a subordinate lien a party, the proceedings are not null and void but leave the holder of the subordinate lien with the same rights that he would have had, had he been made a party to the foreclosure proceedings.

Id. at 151-52. The rights of the junior lienholder are not improved, and the lien does not advance. ***Id.*** at 152. A subsequent purchaser may "bring an action in equity to compel the junior claimant to exercise his right of redemption or have his redemption barred." ***Id.***

¶14 ***Carolina Builders*** applied the ***Buchner*** rule in circumstances that, though somewhat more convoluted, are also analogous to this case. There, a construction lienholder obtained a judgment in 2004 ordering a sheriff's sale but acknowledging that the construction lien was second to a recorded mortgage. ***Carolina Builders***, 304 Wis. 2d 773, ¶5. Before the property was sold to satisfy the construction lien, the mortgagee commenced a separate action, but failed to make the construction lienholder a party. ***Id.***, ¶6. A sheriff's sale was confirmed in the mortgagee's action in 2005. ***Id.*** The construction lienholder sought a second sheriff's sale in 2006 and the purchaser at the previous sale intervened. ***Id.***, ¶8. On appeal, we concluded the construction lien survived the earlier foreclosure and the ***Buchner*** remedy of redemption was appropriate. ***Id.***, ¶¶28-29, 35. The construction lienholder was not to be disadvantaged by its omission in the foreclosure action, but was not to gain an advantage from that omission either. ***Id.***, ¶41. The fact that ***Buchner*** was a quiet title action, and ***Carolina Builders*** a construction lien foreclosure, was of no significance to the court. ***Id.***, ¶42.

¶15 Here, the circuit court correctly determined that Associated's sole remedy was to redeem the property.[5] To transmute Associated's lien into a first lien would reward it "out of all proportion to any equities possessed by it and to penalize the purchaser upon the foreclosure sale … out of all proportion to the culpability involved in neglecting to make proper service" on Associated. *See* ***Buchner***, 241 Wis. at 153. The circuit court determined that, if Associated Bank

[5] By statute, the right of redemption vests in the mortgagor, who may avoid a judgment of foreclosure by paying the amount of the judgment, interests, and costs. *See* WIS. STAT. § 846.13. A junior lienholder made a party to the foreclosure proceedings has a similar right to pay the amount of the judgment and become subrogated to the rights of the primary lienholder. *See* WIS. STAT. § 846.15. This latter right, possessed by the junior lienholder, has apparently also become known as a "right to redeem." *See* ***JP Morgan Chase Bank, NA v. Green***, 2008 WI App 78, ¶¶12-20 & n.7, 311 Wis. 2d 715, 753 N.W.2d 536 .

Following a defective foreclosure, we have explained that a junior lienholder retains the lien and has the same rights that he or she would have had if properly joined in the earlier proceeding. ***Buchner v. Gether Trust***, 241 Wis. 148, 151-53, 5 N.W.2d 806 (1942). In ***Buchner***, the court labeled this equitable right, again, the "right of redemption." ***Id.*** at 152. Needless to say, use of the phrase in the case law appears to have become somewhat confused. At the very least, this latter species of the right to redeem is heavily influenced by equitable factors. *See* ***Carolina Builders Corp v. Dietzman***, 2007 WI App 201, ¶40, 301 Wis. 2d 773, 739 N.W.2d 53 ("a redemption-type remedy under ***Buchner***" includes giving the junior lienholder the opportunity to purchase the property at a price and within a time period set by the circuit court).

For their part, the Bradleys' counterclaim characterizes the right of redemption as follows:

> 3. That Associated Bank be ordered to exercise its right of redemption in the prior proceedings by paying into court, the amount which otherwise would have been paid to Wells Fargo Bank, N.A. to redeem the subject premises from the first mortgage lender's lien claim with interest from the date of the sheriff sale in the Wells Fargo proceeding.
>
> 4. That the amount paid into court be distributed to [the Bradleys] as assignee[s] of Federal Home Loan Mortgage Corporation.

Because a junior lienholder's right of redemption following a defective foreclosure is an equitable doctrine, we leave it for the circuit court to determine whether the Bradleys' proposed remedy is the remedy most consistent with the equities of the parties.

had been properly notified in the original foreclosure proceeding, it likely would not have "considered it provident to exercise its right of redemption because of the value of the property involved and the value of the first mortgage."

¶16 In sum, we conclude WIS. STAT. § 806.07 is inapplicable to the present action. Associated's only remedy is to redeem the property. We remand to the circuit court for it to determine the equities of the parties and for Associated to exercise its right of redemption if it wishes.

By the Court.—Judgment affirmed and cause remanded with directions.

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