COURT OF APPEALS
DECISION
DATED AND FILED

March 5, 2013

Diane M. Fremgen
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. 2012AP872 **Cir. Ct. No. 2008CV529**

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

SOUTHWEST GUARANTY, LTD.,

PLAINTIFF-RESPONDENT,

V.

U.S. ACQUISITIONS & OIL, INC. AND DR. R.C. SAMANTA ROY INSTITUTE OF SCIENCE AND TECHNOLOGY, INC.,

DEFENDANTS-THIRD-PARTY

PLAINTIFFS-APPELLANTS,

V.

SOUTHWEST GUARANTY PARTNERS, LLC, GREEN MOUNTAIN FINANCE FUND, LLC, CARLYLE FINANCIAL, LLC, RUSSELL T. GAINES AND A. KELLY WILLIAMS,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

DOES 1 THROUGH 50 INCLUSIVE,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

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

¶1 PER CURIAM. U.S. Acquisitions & Oil, Inc., (USAO) and Dr. R.C. Samanta Roy Institute of Science and Technology, Inc., (SIST) appeal a foreclosure judgment entered in favor of Southwest Guaranty, Ltd. The circuit court concluded Southwest was entitled to summary judgment on its foreclosure claim. The court also dismissed USAO's and SIST's counterclaims against Southwest and their third-party claims against Southwest Guaranty Partners, LLC; Green Mountain Finance Fund, LLC; Carlyle Financial, LLC; Russell T. Gaines; and A. Kelly Williams. On appeal, USAO and SIST raise numerous challenges to the circuit court's judgment. We reject their arguments and affirm.

BACKGROUND

¶2 On April 28, 2006, USAO executed a promissory note in favor of Southwest in the amount of $2,222,000. The note was secured by a mortgage, which encumbered a race track and amusement park owned by USAO. The mortgage also granted Southwest a security interest in "all machinery, furnishings, equipment, fixtures … and other property of every kind and nature … owned by [USAO] or in which [USAO] has or shall have an interest, now or hereafter located upon the Premises[.]" As additional security, SIST guaranteed repayment of the loan.

¶3 Additional terms and conditions for the loan were set forth in a letter agreement. Under the letter agreement, USAO agreed to furnish certain

documents to Southwest at specified times. For instance, USAO agreed to submit a current financial statement to Southwest within thirty days of the end of each calendar quarter. USAO also agreed to provide Southwest with a current financial statement for SIST within ninety days of the end of each fiscal year. Additionally, USAO agreed to provide copies of its own tax returns and those of SIST within fifteen days of filing.

¶4 Southwest sued USAO and SIST on December 8, 2008, seeking to foreclose USAO's mortgage and enforce SIST's guaranty.[1] The complaint alleged that USAO had defaulted on its obligations under the letter agreement by failing to provide Southwest with the required financial documents. USAO and SIST filed for bankruptcy on March 16, 2009. Southwest's foreclosure suit was therefore stayed. On September 3, 2009, the circuit court dismissed Southwest's suit without prejudice, due to the bankruptcy filings. However, the dismissal order stated, "This case may be reopened upon notice that: … The bankruptcy proceedings have been terminated or the bankruptcy stay has been lifted."

¶5 USAO's and SIST's bankruptcy petitions were dismissed on September 22, 2009. Consequently, on October 8, 2009, Southwest filed an ex parte motion to reopen its foreclosure lawsuit. The circuit court granted Southwest's motion on May 28, 2010. At Southwest's request, the court appointed Southwest's attorney as receiver. USAO and SIST then answered Southwest's complaint and asserted a number of counterclaims, including breach

[1] Southwest's lawsuit also named as defendants three individuals who guaranteed repayment of USAO's loan. Southwest voluntarily dismissed its claims against those individuals in March 2009.

of contract, promissory estoppel, injurious falsehood, and violations of the Equal Credit Opportunity Act.

¶6 On June 14, 2010, USAO and SIST moved to rescind the court's order appointing Southwest's attorney as receiver. The court denied their motion, following a hearing. During the hearing, Southwest's counsel complained that certain items of personal property had been removed from the mortgaged premises. As a result, on July 9, 2010, the court entered an order directing USAO and SIST to return six go-carts, four motorcycles, a transponder system, and a radio system to the receiver. USAO and SIST objected to the court's July 9 order, arguing that the go-carts, motorcycles, transponder system, and radios were owned by third parties, not by USAO. Because the mortgage only gave Southwest a security interest in personal property "owned by [USAO] or in which [USAO] has or shall have an interest[,]" USAO and SIST argued the receiver had no right to demand the return of property owned by third parties. In support of their objection, USAO and SIST submitted affidavits of several individuals claiming to be the rightful owners of the disputed personal property.

¶7 In addition, USAO and SIST filed an "Emergency Motion for Return of Personal Property," which alleged the receiver had unlawfully taken possession of other personal property owned by third parties. These items included two Brinkmann grills, "miscellaneous tools and paint ball poles," a red lawn mower, fourteen portable buildings, a children's play center, tables, chairs, planters, and "underwater vacuum pool cleaning systems." Again, USAO and SIST submitted affidavits of various individuals who averred they were the actual owners of these items. The court scheduled a hearing on USAO's and SIST's emergency motion for July 21, 2010.

¶8 In the meantime, USAO and SIST filed an amended answer, which asserted additional counterclaims against Southwest. USAO and SIST also filed a third-party summons and complaint, asserting claims against a number of individuals and entities associated with Southwest. Then, on July 16, 2010, USAO and SIST removed the case to federal court, contending that their counterclaims and third-party claims involved federal questions.

¶9 Counsel for USAO and SIST subsequently informed the circuit court that, because the case had been removed to federal court, she would not participate in the July 21 hearing on USAO's and SIST's emergency motion. The court nevertheless conducted the hearing as scheduled. The court noted it was aware that USAO and SIST had filed a notice of removal, but it stated, "I haven't seen any stay from the feds, and I've got the other party here saying that they do not believe [filing a notice of removal] enters a stay[.]" The court then heard argument from Southwest's counsel on the personal property issue and concluded:

> I still continue to find that there's no reason to change the prior concept that the Receiver has entitlement to the personal property connected with the go-cart racing operation here. I haven't seen anything further in detail that would except out any particular piece of equipment, like evidence of ownership, for example.

¶10 The United States District Court for the Eastern District of Wisconsin remanded the case to the circuit court on October 13, 2010. The following week, Southwest filed a "Motion for Leave to File Motion for Summary Judgment," along with a summary judgment motion. As the basis for summary judgment, Southwest stated it had faxed requests for admissions to USAO and SIST on July 8, 2010, and USAO and SIST failed to respond within thirty days. As a result, Southwest argued the court should deem the requests admitted. Specifically, Southwest asked the court to deem admitted that: (1) Southwest

asked USAO to provide tax returns and financial statements for itself and SIST; and (2) USAO failed to do so. Southwest contended these admissions proved that USAO defaulted on its obligations under the letter agreement.

¶11 USAO and SIST responded to Southwest's requests for admissions on November 4, 2010. They subsequently responded to Southwest's summary judgment motion, arguing that Southwest's requests for admissions should not be deemed admitted. They pointed out that, shortly after they received the requests for admissions, the case was removed to federal court. They argued the thirty-day time limit for responding to the requests should therefore have been tolled until the case was remanded. They further contended that "once the matter was remanded to state court … [USAO and SIST] responded to discovery timely by answering within the 30 days that the matter had been pending in state court."

¶12 A hearing on Southwest's summary judgment motion was scheduled for December 23, 2010. However, on December 22, USAO filed a second bankruptcy petition. Consequently, the case was stayed as to USAO. The summary judgment hearing proceeded as planned with respect to SIST, but SIST's attorney failed to appear at the hearing. After a brief argument by Southwest's counsel, the court granted Southwest summary judgment against SIST. The court did not, however, adopt Southwest's argument that its requests for admissions should be deemed admitted because USAO and SIST failed to respond in a timely manner. Instead, the court considered the responses that USAO and SIST filed on November 4, 2010, and stated, "[W]hen I look[ed] at most of the requests for admission and the responses, I found a pattern of responses that were—that were truly not responsive, that did not deal with the topic." The court reasoned, "[I]f you don't produce something that's a logical response, then it's deemed admitted."

Because it deemed Southwest's requests admitted, the court determined there were no issues of material fact with respect to Southwest's claim against SIST.

¶13 USAO's bankruptcy petition was dismissed on August 16, 2011. The following month, Southwest and the third-party defendants moved for leave to file summary judgment motions and also moved for summary judgment against USAO. A hearing was held on November 22, 2011. USAO was represented by a new attorney at the November 22 hearing, and that attorney raised only one issue in opposition to the summary judgment motions. Specifically, he noted that Southwest had assigned the note and mortgage to Southwest Guaranty Partners, LLC, on April 29, 2006. Thus, he argued that Southwest did not have standing to enforce the note and mortgage. In response, counsel for Southwest asserted that Southwest Guaranty Partners had reassigned the note and mortgage to Southwest. The circuit court adjourned the summary judgment hearing and gave Southwest two weeks to provide evidence of the reassignment. The court indicated that, if Southwest provided that evidence, the court would grant Southwest summary judgment against USAO.

¶14 Thereafter, Southwest sent the court a document entitled "Transfer of Note and Lien," by which Southwest Guaranty Partners reassigned the note and mortgage to Southwest. The document was dated June 30, 2006 and was signed by Russell Gaines, the vice president of Southwest Guaranty Partners. USAO objected that the court could not consider the transfer document because Southwest had submitted it without an accompanying affidavit. Southwest therefore resubmitted the "Transfer of Note and Lien" to the court, along with an affidavit of Russell Gaines. Gaines averred that he is the president of Southwest and the vice president of Southwest Guaranty Partners. He also averred that he executed the "Transfer of Note and Lien" on June 30, 2006.

¶15 Based on these documents, the court concluded Southwest was the proper holder of the note and mortgage. It therefore granted Southwest summary judgment on its foreclosure claim against USAO. In addition to ordering a sheriff's sale of the real property, the foreclosure judgment stated that Southwest was entitled to "possession of all personal property located at the premises." The judgment directed Southwest to "sell said personal property in a commercially reasonable manner" and apply the proceeds to the amount due on the note. Additionally, the judgment dismissed USAO's and SIST's counterclaims and third-party claims. USAO and SIST now appeal.

DISCUSSION

¶16 We review summary judgment decisions independently, using the same methodology as the circuit court. ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

¶17 As a threshold matter, USAO and SIST argue the circuit court erred by granting Southwest leave to move for summary judgment after the eight-month deadline set forth in WIS. STAT. § 802.08(1) had expired. *See* WIS. STAT. § 802.08(1) (party may move for summary judgment "within 8 months of the filing of a summons and complaint or within the time set in a scheduling order"). USAO and SIST did not raise this argument in the circuit court. We therefore decline to address it on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144,

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

569 N.W.2d 577 (1997) (appellate court need not address issues raised for the first time on appeal).

¶18 USAO and SIST next argue Southwest was not entitled to summary judgment because it did not have standing to enforce the note and mortgage. "'Standing' is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done." ***Three T's Trucking v. Kost***, 2007 WI App 158, ¶16, 303 Wis. 2d 681, 736 N.W.2d 239. USAO and SIST argue Southwest has not suffered any injury because it transferred its interest in the note and mortgage to Southwest Guaranty Partners in April 2006. However, the undisputed evidence showed that Southwest Guaranty Partners reassigned the note and mortgage to Southwest in June 2006, long before Southwest filed this lawsuit. Consequently, Southwest had standing to enforce the note and mortgage.

¶19 USAO and SIST seem to suggest that the June 2006 assignment was invalid because it was never recorded. They do not, however, cite any legal authority for this proposition. We do not consider arguments that are undeveloped or unsupported by legal authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Moreover, by failing to raise this argument in the circuit court, USAO and SIST have forfeited their right to raise it on appeal. *See* ***Van Camp***, 213 Wis. 2d at 144.

¶20 USAO and SIST also argue that we should not consider the June 2006 assignment because it was not part of the original summary judgment record. They contend the circuit court erred by allowing Southwest to supplement the record. Again, though, USAO and SIST cite no authority for the proposition that a court cannot allow a party to supplement the summary judgment record.

Additionally, USAO and SIST did not raise this argument in the circuit court. Instead, when the court suggested giving Southwest additional time to prove that it owned the note and mortgage, USAO and SIST merely asked the court for five days to respond to any evidence Southwest submitted. The court granted their request. As a result, USAO and SIST cannot now argue that the court erred by allowing Southwest to supplement the summary judgment record. *See* ***id.***

¶21 Next, USAO and SIST contend the circuit court should have denied Southwest's summary judgment motions because "a summons and complaint should have been served on [USAO and SIST] in 2010 in order to commence this case for *in rem* foreclosure." They argue that a "[f]oreclosure judgment should not have been granted in an action that was simply re-opened *ex parte* after the original case had already been dismissed." However, USAO and SIST never argued in the circuit court that a new summons and complaint were required to reopen the case. They have therefore forfeited their right to raise this argument on appeal. *See* ***id.*** Furthermore, while USAO and SIST cite authority for the proposition that an in rem foreclosure action must be initiated by summons and complaint, they do not cite any authority for the proposition that a new summons and complaint must be filed to "reopen" an in rem foreclosure action. It is undisputed that Southwest initially commenced this lawsuit by serving a summons and complaint on USAO and SIST.

¶22 USAO and SIST next argue summary judgment was inappropriate because there were factual disputes about whether Southwest actually owned the note and mortgage and whether USAO committed a default. We have already addressed and rejected the argument that Southwest did not own the note and

mortgage. We therefore consider whether the undisputed facts establish that USAO defaulted on its obligations under the loan documents.[3]

¶23 It is undisputed that USAO and Southwest entered into a letter agreement, which set forth terms and conditions for USAO's loan. It is also undisputed that the letter agreement required USAO to provide Southwest with certain documents, including USAO's quarterly financial statements, SIST's annual financial statements, and both entities' tax returns. The mortgage, in turn, states that an "Event of Default" occurs if USAO "default[s] under any term, covenant, or condition of this Mortgage or any of the other Loan Documents[.]" To "default" means "to fail to fulfill a contract or agreement, to accept a responsibility, or to perform a duty[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 590 (unabr. 1993). Thus, USAO committed an "Event of Default" if it failed to fulfill any term, covenant, or condition of the loan documents. Accordingly, a default occurred if USAO failed to provide Southwest with the financial documents required by the letter agreement.

¶24 Southwest argues the undisputed facts show that USAO failed to provide the required documents. In support of this contention, Southwest renews its argument that Southwest's requests for admissions should be deemed admitted

[3] USAO and SIST also state, "The following includes a list of the documents presented by USAO that set out the genuine disputes existing in this case with respect to material facts that would affect the outcome of this case[.]" They then list eleven documents, without further elaboration as to how the information in those documents creates a genuine issue of material fact. They go on to state that "[d]ispute as to material fact exists with regard to … the terms of the loan, loan balance, interest rate, breach of contract, commission of waste by the receiver, pre-textual defaults, ownership of personal property on the real estate premises, along with all of USAO's counterclaims." In support of this assertion, they provide five citations to the record, but they do not explain how any of the cited documents create a factual dispute. These arguments about the existence of disputed facts are undeveloped, and we decline to address them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

because USAO and SIST failed to respond within thirty days. *See* WIS. STAT. § 804.11(1)(b) (requests for admissions deemed admitted if party fails to respond within thirty days). In response, USAO and SIST contend that their November 4, 2010 responses to Southwest's requests for admissions were timely because the thirty-day time limit for responding was tolled while the case was removed to federal court.

¶25 We need not resolve this dispute over the timeliness of USAO's and SIST's responses to Southwest's requests for admissions. Even assuming the November 4 responses were timely, USAO and SIST cannot establish a genuine issue of material fact regarding whether they provided the required financial documents. In its requests for admissions, Southwest asked USAO and SIST to admit that Southwest asked USAO to provide: (1) USAO's 2006 and 2007 tax returns; (2) SIST's 2006 and 2007 tax returns; (3) SIST's 2006 and 2007 financial statements; and (4) USAO's financial statements for the first and second quarters of 2008. In response to each of these requests to admit, USAO and SIST stated, "As a pretext to rob the property, despite the fact that [Southwest] knew the same were unavailable, they intentionally requested documents that they knew did not exist." Thus, USAO and SIST admitted that Southwest requested the required documents. They also admitted that the documents were "unavailable" and "did not exist," which is tantamount to an admission that USAO did not provide the documents.[4] USAO and SIST do not point to any evidence that USAO actually

[4] Admittedly, USAO and SIST refused to admit that "to this day none of these documents have been provided to [Southwest]." However, this response is clearly inconsistent with USAO's and SIST's admission that the documents Southwest requested were "unavailable" and "did not exist." USAO and SIST do not explain how USAO could possibly have provided Southwest with nonexistent documents.

supplied the required documents. The undisputed facts therefore show that USAO defaulted on its loan by failing to provide documents required by the letter agreement. Consequently, the circuit court properly granted Southwest summary judgment on its foreclosure claim.

¶26 Nonetheless, USAO and SIST argue that, even if Southwest was entitled to a foreclosure judgment, the circuit court erred by granting Southwest "possession of all personal property located at the [mortgaged] premises." USAO and SIST note that the circuit court considered the personal property issue at a hearing held on July 21, 2010. However, at that time, the case had been removed to federal court. USAO and SIST therefore argue the circuit court lacked jurisdiction to hold the July 21 hearing. We agree. After a case is removed to federal court, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). As a result, the circuit court erred by holding a hearing on the personal property issue while the case was pending in federal court.

¶27 USAO and SIST also assert that the circuit court could not award Southwest "all personal property located at the [mortgaged] premises" because there was a genuine dispute of material fact as to whether USAO owned certain items of property. Again, we agree. The mortgage granted Southwest a security interest in "all machinery, furnishings, equipment, fixtures … and other property of every kind and nature … *owned by [USAO], or in which [USAO] has or shall have an interest*, now or hereafter located upon the Premises[.]" (Emphasis added.) USAO and SIST presented evidence that third parties owned some of the personal property on the mortgaged premises. Thus, there was a factual dispute as to whether Southwest was entitled to possession of that property.

¶28 However, despite these errors, we nevertheless affirm the circuit court's decision to award Southwest possession of the personal property. *See* ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 (We may affirm if the circuit court reached the right result for the wrong reason.). We do so because USAO and SIST do not have standing to contest Southwest's possession of property owned by third parties. As previously discussed, to have standing to sue, a plaintiff must have "suffered some injury because of something that someone else has either done or not done." ***Three T's Trucking***, 303 Wis. 2d 681, ¶16; *see also* ***Village of Slinger v. City of Hartford***, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81 ("In order to have standing to sue, a party must have a personal stake in the outcome, and must be directly affected by the issues in controversy.") (citations omitted). Here, USAO and SIST have not been injured by Southwest's possession of personal property allegedly owned by third parties. Southwest's possession of that property does not directly affect them in any way. While the third parties may have standing to challenge Southwest's possession of the property, USAO and SIST do not. Accordingly, we affirm that portion of the foreclosure judgment awarding Southwest possession of all the personal property located on the mortgaged premises.

¶29 Finally, USAO and SIST contend the circuit court erred by dismissing their counterclaims and third-party claims. Again, though, their argument on this point is woefully undeveloped. They do not tell us what counterclaims and third-party claims they actually asserted, nor do they identify the elements of those claims or describe specific factual disputes that preclude summary judgment. Instead, their entire argument that the circuit court improperly dismissed their claims reads:

> Contrary to any assertions that USAO and SIST's counterclaims have no merit, USAO submitted substantial evidence of collusion between City officials and [Southwest's] principal officer such that summary judgment should have been denied to permit additional discovery and a trial on the merits. [Record citation.] It was obvious from the contradicting testimony of Russell Gaines and Lorna Marquardt that each tried to downplay their association in their depositions. [Record citations.] These contradictions alone establish that USAO's claim regarding the connection between the City of Shawano officials and [Southwest] was a legitimate material fact in dispute, which they should have been allowed time to conduct further discovery and present further evidence in order to get to the bottom of this issue.

We refuse to consider this undeveloped argument. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶30 Additionally, as Southwest points out, USAO and SIST essentially abandoned their counterclaims and third-party claims at the November 22, 2011 summary judgment hearing. During that hearing, the only argument their attorney raised in opposition to summary judgment was that Southwest was not the proper holder of the note and mortgage. With respect to the counterclaims, counsel stated:

> [A]s I understand it, the third[-]party defendants are also moving with regard to summary judgment as to the, like I said, the counter claims and third[-]party claims that my client brought.
>
> Again, you know, these are statements that are supported by affidavits that I have no intention of representing to the Court that I have any knowledge of them, or that I am going to support them.
>
> I understand that part of the sanctions that were imposed against co-counsel were, and I think there's a federal court order that essentially says that some of these things are so far out there that no reasonable counsel would … present them to the Court, and I'm certainly not going to do that this afternoon. I will let the affidavits speak for themselves in any rulings or decisions that you have on them.

Thus, counsel conceded that USAO's and SIST's counterclaims and third-party claims were based on assertions that no reasonable attorney would present to the court. He therefore refused to make any argument in support of the claims. He did not assert that any factual disputes prevented the court from granting summary judgment. As a result, we conclude USAO and SIST forfeited their right to challenge the dismissal of their counterclaims and third-party claims on appeal.

By the Court.—Judgment affirmed.

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