COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 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. 2012AP2643 **Cir. Ct. No. 2012CV3457**

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

BANK OF AMERICA N.A.,

PLAINTIFF-RESPONDENT,

V.

GEORGE MINKOV,

DEFENDANT-APPELLANT,

HSBC MORTGAGE SERVICES INC., JENNIFER O. BERRY AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Reversed and cause remanded*.

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

¶1 KLOPPENBURG, J. This case arises out of a foreclosure action initiated by Bank of America, N.A. against George Minkov. The circuit court granted summary judgment in favor of Bank of America. Minkov appeals, arguing that Bank of America's submissions in support of summary judgment did not establish a prima facie case for summary judgment. We agree and conclude that (1) the copy of the promissory note attached to the foreclosure complaint was insufficient to establish a prima facie case that Bank of America possessed the original note, and (2) the affidavit of Bank of America employee Eileen Thiry did not demonstrate the personal knowledge necessary to render admissible documents attached to her affidavit under the hearsay exception for records of regularly conducted activity. Accordingly, we reverse and remand the case for further proceedings.

BACKGROUND

¶2 Bank of America filed this foreclosure action against Minkov. In the complaint, Bank of America alleges that "it is the loan servicer which collects and tracks payments ... and pursues legal action when necessary," for the Bank of New York which "is the current mortgagee of record."

¶3 Bank of America attached several documents to the complaint, including a copy of a promissory note. Bank of America subsequently submitted by letter a certified copy of a mortgage purporting to show Intervale Mortgage Corporation as the lender and Minkov as the borrower, and a certified copy of an assignment of mortgage, purporting to show an assignment of the Minkov mortgage from Intervale Mortgage Corporation to Bank of New York.

¶4 Shortly after Minkov filed his answer, Bank of America moved for summary judgment. In support of its motion, Bank of America submitted two

affidavits, one of Bank of America attorney Russell Karnes, with no documents attached, and one of Bank of America employee Eileen Thiry with three documents attached.

¶5 In his affidavit, Attorney Karnes averred that: on October 14, 2005, Minkov executed a promissory note to pay a principal balance of $112,000.00; "[a] copy of the note has been filed with the court" (an apparent reference to the copy of the note attached to the foreclosure complaint); "Bank of New York ... is the current mortgagee of record" (an apparent reference to the Minkov mortgage); Minkov was in default for failure to make his October 14, 2009 and subsequent payments; and the amounts due and owing to Bank of America as of October 15, 2012, totaled $158,440.27.

¶6 The note attached to the complaint purports to have been executed by Minkov on October 14, 2005, in favor of Intervale Mortgage Corporation. Three endorsement stamps appear on the last page of the note. One undated endorsement stamp states: "Pay to the Order of Decision One Mortgage Company, LLC Without Recourse" and was signed by "Melissa McDermott, Asst. Secretary, Decision One Mortgage Company, LLC for Intervale Mortgage Corporation." A second, undated endorsement stamp on the same page purports to transfer Decision One Mortgage's "rights, title and interest" and was endorsed in blank. "Melissa McDermott" also signed this endorsement stamp. A third endorsement stamp on the same page has been crossed out.

¶7 In her affidavit in support of summary judgment, Thiry averred as follows:

> 1. I am authorized to sign this affidavit on behalf of plaintiff, as an officer of Bank of America, N.A.

("BANA"), which is plaintiff's servicing agent for the subject loan ("the Loan").[1]

2. BANA maintains records for the Loan. As part of my job responsibilities for BANA, I am familiar with the type of records maintained by BANA in connection with the Loan.

3. The information in this affidavit is taken from BANA's business records. I have personal knowledge of BANA's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of BANA's regularly conducted business activities; and (c) it is the regular practice of BANA to make such records.

4. The business record attached as Exhibit E [the account information statement], which I have reviewed, is a true and correct copy that is part of the business records described above. It shows that George Minkov defaulted, the default has been accelerated, and the amount stated on the attached business record is owed on the Loan.

5. ... [Bank of New York] is the holder of the Note.... Bank of America, N.A. is the current servicer of the mortgaged loan, and has authorization to act on behalf of the note holder for the purpose of this foreclosure.

6. ... [A] Notice of Intent to Accelerate, dated November 30, 2009, was mailed to [Minkov]. A true and correct copy of said notice is attached hereto as Exhibit F.

7. ... [A] copy of the payment history that details payments made on this account from the date of origination of the loan through August 2012, is attached hereto as Exhibit G.

[1] Thiry avers that she is signing on behalf of plaintiff Bank of America, as an officer of Bank of America, which is Bank of America's servicing agent for the loan. We note this discrepancy but need not resolve it in this opinion.

¶8 Attached to the Thiry affidavit were: a copy of an account information statement, purporting to show Minkov's unpaid principal balance and total amount owed (Exhibit E); a copy of a notice of intent to accelerate, purporting to be a notice dated November 30, 2009, from BAC Home Loans Servicing, LP informing Minkov that he was in default (Exhibit F); and a copy of a loan history statement, purporting to show Minkov's payment history, with entries dating from December 2005 to March 2012 (Exhibit G).

¶9 In response to Bank of America's motion for summary judgment, Minkov argued that Bank of America had failed to establish a prima facie case for summary judgment. Specifically, Minkov contended that the copy of the note attached to the complaint was insufficient to show the bank's possession of the note, that Thiry's averments did not lay the proper foundation to render admissible the documents attached to her affidavit, and that Karnes lacked personal knowledge of the documents and events to which he averred.

¶10 The circuit court granted summary judgment in favor of Bank of America, determining that "[e]very single argument [Minkov] advanced in [his] response to the motion for summary judgment ha[d] been refuted and defeated in [Bank of America's] reply" and that Bank of America was "entitled to summary judgment because there is no issue of law or fact that stands in the way of it being granted." Minkov now appeals.

DISCUSSION

¶11 On appeal, Minkov maintains that Bank of America did not make a prima facie case for summary judgment. Specifically, Minkov argues that the copy of the note attached to the complaint is insufficient to make a prima facie case that Bank of America possesses the note and is entitled to enforce it. Second,

Minkov argues that Thiry does not aver the personal knowledge necessary to support admissibility of the documents attached to her affidavit, and without those documents, Bank of America has not made a prima facie case that Minkov is in default. We agree with Minkov's arguments and conclude that Bank of America failed to make a prima facie case for summary judgment. We address each argument in turn.

A. Standard of Review

¶12 It is well established that we review a grant of summary judgment de novo, employing the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. First, we examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Id.*** If they do, we then examine the opposing party's submissions to determine whether material facts are in dispute entitling the opposing party to a trial. ***Id.*** A party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2]

B. The Note

¶13 The first issue before us is whether Bank of America made a prima facie case that it possesses the note and is therefore entitled to enforce it. A person entitled to enforce a negotiable instrument includes the "holder" of the instrument

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

or "a nonholder in possession of the instrument who has the rights of a holder").[3] WIS. STAT. § 403.301. Generally speaking, a "holder" is the person in possession of the negotiable instrument, in this case the note. WIS. STAT. § 401.201(2)(km)1.

¶14 Before we proceed with our analysis, we first observe that there are discrepancies in Bank of America's supporting affidavits and its brief on appeal as to which entity purportedly possesses the note. Regardless of the entity allegedly in possession, our analysis does not change because, as we explain below, Bank of America has not submitted any admissible evidence of the note's possession by either Bank of America or Bank of New York. For ease of reference in the analysis that follows, we refer to the party allegedly in possession, whether that be Bank of America or Bank of New York, as "Bank of America."

¶15 Concerning its alleged possession of the note, Bank of America's submissions included: Thiry's averments that Bank of New York "is the holder of the Note" and that "Bank of America, N.A. is the current servicer of the mortgaged loan, and has authorization to act on behalf of the note holder for the purpose of this foreclosure"; Karnes's averments that "[a] copy of the note has been filed with the court" and that Bank of New York "is the current mortgagee of record"; and a copy of the note attached to the complaint. We conclude that these averments and the copy of the note do not establish a prima facie case that Bank of America possesses the note and is entitled to enforce it.

[3] An instrument may be enforced in other limited circumstances, neither of which Bank of America argues apply in this case. *See* WIS. STAT. § 403.309 (lost, destroyed or stolen instruments) *and* WIS. STAT. § 403.418(4) (payment or acceptance by mistake).

¶16 First, Thiry's averment that Bank of New York is the "holder" is inadmissible testimony because it is an irrelevant statement representing a legal conclusion. *See* WIS. STAT. § 904.01 (evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") "Holder" is a legal term that means, in the context of this case, "[t]he person in possession of a [note] that is payable either to bearer or to an identified person that is the person in possession." WIS. STAT. § 401.201(2)(km)1. Thiry's assertion that Bank of New York is the "holder" of the note represents merely her legal conclusion unsupported by relevant assertions of fact, and therefore we disregard it. *See* ***Bilda v. Milwaukee Cnty.***, 2006 WI App 159, ¶48, 295 Wis. 2d 673, 722 N.W.2d 116 ("Affidavits which contain assertions of 'ultimate fact' or conclusions of law must be disregarded") (quoted source omitted). Second, Karnes's averments are silent as to possession of the note. Consequently, neither affidavit establishes a prima facie case that Bank of America possesses the note.

¶17 Third, we turn to the remaining document that Bank of America points to as purporting to show that it possesses the original note, the copy of the note attached to the complaint. Bank of America argues that the copy of the note constitutes commercial paper and is therefore self-authenticating under WIS. STAT. § 909.02(9). However, Bank of America's authentication argument does not address what Bank of America seeks to prove – possession of the note. Assuming without deciding that a copy of a note attached to a complaint is self-authenticating under § 909.02(9), the copy of the note is self-authenticating only as to what the document purports to be. *See* WIS. STAT. § 909.02. Nothing in the document demonstrates that Bank of America has possession of the original note.

¶18 Bank of America argues that the note is "endorsed in blank," and that Bank of America, as "holder" of the note, has standing to foreclose. We acknowledge the legal principle that a note endorsed in blank is payable to the bearer and is negotiated by transfer of possession alone. *See* WIS. STAT. §§ 403.201(1), 403.205(2). Under this principle, because the note is endorsed in blank, Bank of America is entitled to enforce the note if indeed it possesses the note. However, as discussed above, Bank of America has failed to identify any evidence in the record that it possesses the original note. Therefore, it has not made a prima facie showing that it is entitled to summary judgment.

¶19 Bank of America also argues that it received the mortgage through a valid assignment from the original lender Intervale and thus is entitled to enforce the note. However, Bank of America's receipt of the *mortgage* does not resolve Bank of America's failure to make a prima facie case by proffering evidence of its possession of the *note*. *See* WIS. STAT. §§ 401.201(2)(km)1., 403.301 (requiring possession of a negotiable instrument, not the security, for enforcement); ***Carpenter v. Longan***, 83 U.S. 271, 274 (1872) (the transfer of a note carries the mortgage with it, while "an assignment of the latter alone is a nullity").

¶20 Bank of America's reliance on the principle of equitable assignment also misses the mark. The principle of equitable assignment provides that the transfer of a note carries the mortgage with it. *See* ***Tidioute Sav. Bank v. Libbey***, 101 Wis. 193, 196, 77 N.W. 182 (1898) ("The rule is that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter.") Bank of America argues that under this principle, "when [Bank of America], as servicer for [Bank of New York], received the Note endorsed in blank, the Mortgage securing the debt automatically followed with it, allowing [Bank of America] to foreclose on the Note and Mortgage on behalf of

[Bank of New York]." Assuming without deciding that this doctrine would apply with full force here if Bank of America possessed the note, this argument fails because Bank of America identifies no evidence in the record showing that it possesses the note.

¶21 In sum, neither the copy of the note attached to the complaint nor the affidavits of Thiry and Karnes give rise to a prima facie showing that Bank of America possesses the note and is therefore entitled to enforce it.

¶22 We could conclude this decision at this point. However, the parties have fully briefed the question of the sufficiency of the affidavits submitted by Bank of America in making out a prima facie case for Minkov's alleged default, and on remand, the circuit court may exercise its discretion to consider a new motion for summary judgment based on supplemental submissions. Therefore, in the interest of judicial economy, but without expressing any view as to whether the circuit court might exercise its discretion following remand to entertain further submissions or summary judgment motions, if any, in advance of trial, we elect to address the affidavits' sufficiency in making a prima facie case for Minkov's alleged default. We turn now to that issue.

C. Thiry's Affidavit and Attached Documents

¶23 The documents attached to Thiry's affidavit were the only documents offered by Bank of America purporting to show that Minkov is in default. Minkov primarily argues that the Thiry affidavit does not establish the proper foundation to render those documents admissible under the hearsay exception for records of regularly conducted activities. *See* WIS. STAT.

§ 908.03(6).[4] We conclude that Thiry's affidavit fails to make a prima facie showing of Minkov's default, because the affidavit does not lay the proper foundation for admitting the attached documents.

¶24 Affidavits in support of a motion for summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). "[T]he party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit [but rather] need only make a prima facie showing that the evidence would be admissible at trial." ***Palisades***, 324 Wis. 2d 180, ¶10.

¶25 Whether Thiry's affidavit makes a prima facie case that the attached documents were admissible requires examination of the hearsay exception for records of regularly conducted activity. To fall within this exception, the record must be:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of

[4] Minkov also argues on appeal that documents attached to Thiry's affidavit are not self-authenticating under WIS. STAT. § 909.02(12). While the rules governing authentication and hearsay are separate conditions precedent to the admissibility of evidence, *see* ***Nelson v. Zeimetz***, 150 Wis. 2d 785, 797, 442 N.W.2d 530 (Ct. App. 1989), this court has recognized that "in the particular context of hearsay consisting of records of a regularly conducted activity, self-authentication by certification for such records under WIS. STAT. § 909.02(12) and the hearsay exception in WIS. STAT. § 908.03(6) are co-extensive." ***Lyons Fin. Servs., Inc. v. Fernando***, No. 2011AP222, unpublished slip op. ¶13 (WI App Nov. 10, 2011).

> information or other circumstances indicate lack of trustworthiness.

WIS. STAT. § 908.03(6).

¶26 In other words, "a testifying custodian must be *qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Palisades***, 324 Wis. 2d 180, ¶20 (alteration in original). To be qualified, the witness must have personal knowledge of how the records were made and how they were prepared in the ordinary course of business. ***Id.***, ¶21.

¶27 In ***Palisades***, this court analyzed whether an affidavit made a prima facie showing that attached documents fell within the WIS. STAT. § 908.03(6) hearsay exception. *See* ***Palisades***, 324 Wis. 2d 180, ¶¶16-23. Palisades Collections, LLC, the alleged buyer of a credit card account, had moved for summary judgment in an action against a cardholder for a balance owed on a credit card originally opened with Chase Manhattan Bank. ***Id.***, ¶¶1, 3. In support of its motion for summary judgment, Palisades submitted an affidavit from a "duly authorized representative of [Palisades]," with account statements attached labeled "Chase ... Mastercard Account Summary." ***Id.***, ¶4. The representative averred:

> [I]n my capacity as authorized representative, I have control over and access to records regarding the account of the above referenced Defendant(s), further, the original owner maintained records pertaining to its business; that the records were prepared in the ordinary course of business, at or near the time of the transaction or event, by a person with knowledge of the event or transaction, that such records are kept in the ordinary course of the original creditor's business and that of [Palisades]; and that based upon my review of the business records of the original creditor, I have personally inspected said account and statements regarding the balance due on said account.

Id., ¶5.

¶28 The ***Palisades*** court explained that "WIS. STAT. § 908.03(6) does not require that the 'custodian or other qualified witness' be the original owner of the records." ***Id.***, ¶20. "However, under the plain language of this [hearsay] exception, being a present custodian of the records is not sufficient." ***Id.*** Rather, "a testifying custodian must be *qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Id.*** Applying these standards, the court concluded that the affidavit did not present any facts showing that the affiant, a Palisades employee, had personal knowledge of how the account statements were prepared and whether they were prepared in the ordinary course of Chase's business. ***Id.***, ¶23. Therefore, the affidavit failed to establish a prima facie case because it did not show that the affiant was a witness who was qualified, based on personal knowledge, to testify to the elements required for admissibility of the account statements under the hearsay exception for records of regularly conducted activity. ***Id.***, ¶1.

¶29 This court recently applied the ***Palisades*** standards in ***Bank of America NA v. Neis***, 2013 WI App 89, ___ Wis. 2d ___, ___ N.W.2d ___. In ***Neis***, a Bank of America employee submitted an affidavit in support of the Bank's motion for summary judgment, to which a payment history, notice of intent to

accelerate, and account information statement were attached.[5] ***Id.***, ¶7. The employee in ***Neis*** averred:

> I am employed by [Bank of America] as a[n] AVP [assistant vice president], Operations Team Lead. I am familiar with the record keeping practices of [Bank of America]. I have received training on the computer systems used by [Bank of America] to service borrowers' loans, understand the codes used in those systems, and have personal knowledge of [Bank of America]'s computer system, including how information is made and kept in that system.

Id., ¶25. In addition, and specifically with regard to the payment history, the notice of intent to accelerate, and the account information statement, the employee averred that she had "personal knowledge of [Bank of America]'s procedures for creating these records" and, for each document, recited the requirements of WIS. STAT. § 908.03(6). ***Neis***, 2013 WI App 89, ¶25.

¶30 The ***Neis*** court held that the employee's averments made a prima facie showing under WIS. STAT. § 908.03(6) that she had personal knowledge of how the three documents were prepared or created, and that they were prepared in the ordinary course of Bank of America's business activities. 2013 WI App 89, ¶32. Specifically, the requisite personal knowledge was shown by the employee's averments that "[the three documents] were each 'taken from [Bank of America's] business records,'" that "she has personal knowledge of Bank of America's '*procedures for creating*' those records," and that "'it is the regular practice of

[5] Copies of the note and mortgage were also attached to the affidavit, but the court ruled separately on the admissibility of those documents, concluding that they were not hearsay and their admissibility did not depend on WIS. STAT. § 908.03(6). ***Neis***, 2013 WI App 89, ¶49. In this section, we discuss the court's ruling in ***Neis*** only as to the documents attached to the affidavit which are similar to those attached in the present case, namely the documents related to payment and account history and information.

[Bank of America] to make such records.'" ***Id.***, ¶31 (alteration in original). Notably, the court found that these averments, "*in combination with [the employee's] more general averments in the preceding paragraphs of her affidavit*," were sufficient to make the prima facie showing. ***Id.*** (emphasis added). In response to the defendant's allegation that the affidavit merely "parroted" the hearsay exception's requirements, the court explained that the "affidavit would be insufficient for purposes of § 908.03(6) if it contained only legal conclusions of this nature." ***Id.***, ¶33. However, the affidavit did "more than merely parrot the statute's requirements or make legal conclusions" and contained "sufficient factual assertions to make a prima facie showing that those three documents are admissible under § 908.03(6)." ***Id.***

¶31 Returning to this case, Minkov contends that Thiry's affidavit does not establish that Thiry is a "custodian or other qualified witness" to testify regarding the business activities of Bank of America, and that the affidavit does not demonstrate Thiry's personal knowledge of the attached documents – an account information statement, a notice of intent to accelerate, and a loan history statement – or the regularly conducted activity by which the documents were maintained. Applying the standards set forth in ***Palisades***, we conclude that this case is distinguishable from ***Neis*** and that the affidavit here does not make a prima facie showing of the attached documents' admissibility.

¶32 Like the employee in ***Neis***, Thiry averred that Bank of America maintains records for the loan, that she is familiar with the type of records maintained in connection with the loan, and that she has personal knowledge of Bank of America's procedures for creating its business records. However, as explained below, and unlike the employee in ***Neis***, Thiry does not present any facts demonstrating how she is "qualified, based on personal knowledge, to testify

to the elements required for admissibility" of the documents attached to her affidavit under the hearsay exception. ***Palisades***, 324 Wis. 2d 180, ¶1.

¶33 Taking the specific attachments individually, we turn first to the loan history statement. As to this attachment, the affidavit does not establish how Thiry's position as an officer of Bank of America with personal knowledge as to Bank of America's procedures for the creation and maintenance of records qualifies her as having personal knowledge of the records dated prior to the assignment of mortgage to Bank of New York in April 2010. The loan history statement has entries dating back to 2005, with a majority of its entries dated between 2005 and 2009.

¶34 There is a similar problem with the account information statement. This document contains entries for dates pre-dating the assignment of mortgage from Intervale to Bank of New York, and the unpaid principal balance amount relies on the loan history of payments dating back to 2005.

¶35 As noted above, while WIS. STAT. § 908.03(6) does not require that the "custodian or other qualified witness" be the original owner of the records, it is also not sufficient to merely be the present custodian of the records. *See* ***Palisades***, 324 Wis. 2d 180, ¶20. Like the affiant in ***Palisades***, Thiry does not aver that she had personal knowledge as to the previous mortgagees' (Intervale and Decision One) record-keeping practices. *See* ***Palisades***, 324 Wis. 2d 180, ¶¶4-5. Nor would it likely be possible for Thiry to make such an averment, because she, at least as an employee of Bank of America, would be expected to be familiar with the records only since the time Bank of New York acquired the note and mortgage and Bank of America commenced its role as servicer for that loan.

Thus, the Thiry affidavit does not make a prima facie showing of admissibility as to the attached account information and loan history statements.

¶36 Finally, we turn to the notice of intent to accelerate. This attachment is dated November 30, 2009, which, like many of the entries on the loan history statement, pre-dates the mortgage assignment from Intervale to Bank of New York. Moreover, the notice is from BAC Home Loans Servicing, LP, not Bank of America, N.A. and specifically states: "BAC Home Loans Servicing, LP ... services the home loan described above on behalf of the holder of the promissory note." In her affidavit, Thiry avers that, "as an officer of Bank of America, N.A.," she is "familiar with the type of records maintained by [Bank of America] in connection with the Loan," and has "personal knowledge" of the procedures for creating the records. However, Thiry does not aver that she has personal knowledge as to the creation or maintenance of the records of BAC Home Loans Servicing, LP. Nor does Thiry aver that the two entities share records or otherwise demonstrate that, based on her position, she has some basis for personal knowledge as to how the notice was made and how it was prepared in the ordinary course of BAC Home Loans Servicing's business. *See* ***Palisades***, 324 Wis. 2d 180, ¶21.[6]

¶37 In its appellate brief, Bank of America argues that BAC Home Loans Servicing "is a subsidiary of [Bank of America] and as a result" the two companies "are, in effect, the same company" and that a "brief review of the

[6] Thiry also does not aver when Bank of America began servicing the loan, either itself or, upon proper foundation, through BAC Home Loans Servicing. As noted in the text, regardless of that date, she does not aver that she has personal knowledge of how at that point Bank of America processed or incorporated the records of entities that had previously held or collected on the note.

record shows that the two are operating under the same systems." Bank of America maintains that the Bank of America logo appears at the top of the notice of intent to accelerate "because the two corporations are so related." However, Bank of America has not proffered admissible evidence that the two entities operate under the same recordkeeping system. Moreover, Thiry fails to make any averments supporting the inference that, as an officer of Bank of America, she has personal knowledge of its alleged subsidiary's records, or that BAC Home Loan Servicing's records are part of Bank of America's records. Without this foundation, Thiry cannot properly lay the foundation for the admissibility of the notice of intent to accelerate under the records of regularly conducted activity exception to hearsay.

¶38 Rather, the remainder of Thiry's affidavit – besides the averments outlined in paragraph 32 – simply "parrots" the requirements of WIS. STAT. § 908.03(6). Such averments, as the ***Neis*** court explained, are merely legal conclusions that we disregard in affidavits in a motion for summary judgment. ***Neis***, 2013 WI App 89, ¶33. An "averment repeating the substance of WIS. STAT. § 908.03(6) does not suffice in the absence of an averment that she holds or has held a position from which one could reasonably infer that she has some basis for personal knowledge" as to how the documents were prepared. ***Palisades***, 324 Wis. 2d 180, ¶23.

¶39 We conclude that Thiry's affidavit fails to make a prima facie showing of Minkov's default, because the affidavit does not lay the proper foundation for admitting any of the three attached documents.

CONCLUSION

¶40 For the reasons stated, we reverse the circuit court's grant of summary judgment in favor of Bank of America, and remand the case for further proceedings.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.