COURT OF APPEALS
DECISION
DATED AND FILED

November 27, 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. 2013AP523 **Cir. Ct. No. 2012CV1312**

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

PARK BANK,

PLAINTIFF-RESPONDENT,

V.

WENTWORTH A. MILLAR, JR. A/K/A
WESTWORTH ALBURN MILLAR, JR.,

DEFENDANT-APPELLANT,

JANE DOE MILLAR AND DAVID E. SMITHSON,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

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

¶1 BLANCHARD, P.J. Wentworth A. Millar, Jr., appeals a decision of the circuit court in this foreclosure action granting summary judgment in favor of Park Bank.[1] On appeal, Millar argues that the circuit court erred by not dismissing the action because the Bank failed to sufficiently allege standing in its complaint for foreclosure. Millar also argues that the circuit court should not have granted summary judgment in favor of the Bank because (1) the Bank failed to establish a prima facie case that it was entitled to enforce the note against Millar and that Millar owed any particular amount to the Bank, and (2) Millar raised a genuine issue of material fact as to whether he had defaulted on the terms of his note and mortgage and whether the amount of principal alleged to be owed to the Bank was correct. Finally, Millar argues that the circuit court erred in dismissing one of Millar's counterclaims against the Bank.

¶2 We conclude that the circuit court properly determined that the Bank's complaint sufficiently alleged standing, granted summary judgment of foreclosure in favor of the Bank, and dismissed Millar's counterclaim. Accordingly, we affirm the decision of the circuit court.

BACKGROUND

¶3 While we strive to include only pertinent facts, the necessary background is extensive because of the large number of fact-specific arguments raised on appeal, and because the parties made many submissions to the circuit

[1] David Smithson was also a defendant in this action before the circuit court. The record reflects that Smithson had an interest in the property subject to foreclosure because Millar had executed a second mortgage on that property in favor of Smithson. However, Millar is the only appellant.

court in support of and in opposition to cross-motions for summary judgment that are now referenced on appeal.

¶4 On March 29, 2012, the Bank filed a foreclosure complaint against Millar, alleging that Millar had defaulted on his obligations under a note and mortgage held by the Bank, and that he owed the Bank a principal sum of $124,223.21, plus $9,575.46 in interest and $17,686.37 in taxes, totaling $151,485.04. The Bank sought a judgment of foreclosure against Millar and a deficiency judgment. Included in the Bank's attachments to its complaint were:

- *Note.* A copy of a note, dated January 18, 2008, and executed by Millar and Homeowners Financial Services, Inc. ("Homeowners"), obligating Millar to repay Homeowners $119,850 in principal plus interest, and providing for monthly payments of $1,232.79. This note bears no endorsements.

- *Mortgage.* An uncertified copy of the mortgage securing the note, also dated January 18, 2008, executed between Millar and Homeowners.

- *Modification agreement.* A copy of a modification agreement between Millar and Homeowners dated March 28, 2010, stating that Homeowners, as the holder of the note referenced above, agreed to modify Millar's note and mortgage, effective retroactively to November 24, 2009. Under this modification, Homeowners agreed to make Millar's loan "current in payment and past due charges" by adding any unpaid sums owed to the end of his loan term. The total amount of these sums was not specified in the modification agreement, but Millar contends that this amount included taxes past due as of November 24, 2009. Also under the modification, Homeowners lowered Millar's monthly payments from $1,232.79 to $700 per month until December 30, 2010, at which time Homeowners could, "at [its] sole discretion," extend the time period covering the loan and/or covering the modification.

¶5 On April 18, 2012, Millar filed an answer to the Bank's complaint, denying most of the Bank's allegations. Millar also raised a number of affirmative

defenses, including affirmatively alleging that the Bank did not hold the note referenced in the complaint, and that Millar was not in default. Millar contended that he was not in default because the Bank had agreed to continue the loan modification agreement that Millar previously entered into with Homeowners, described above, and because Millar had fulfilled the terms of the modification agreement. Millar also raised a number of counterclaims against the Bank, and requested that the court dismiss the Bank's action.

¶6 The Bank moved for summary judgment. In support of its motion, the Bank submitted two affidavits, one from the Bank's attorney, Brian Thill, and one from Linda Arkin, a loan servicing manager at the Bank.

¶7 The Thill affidavit attached documents purporting to show that Millar had defaulted on his 2007-09 taxes, which the Bank paid on Millar's behalf, and his 2010 taxes, which remained unpaid, and that failure to cure this default would result in the acceleration of Millar's note and foreclosure of his mortgage.

¶8 The Arkin affidavit incorporated by reference the documents attached to the Bank's complaint, and also attached a number of additional documents, including the following:

- *Sale of loan*. A letter from the Bank to Millar notifying him of the sale of Millar's "mortgage loan" by Homeowners to the Bank on February 7, 2011.

- *Payment history*. A copy of Millar's payment history with the Bank, showing payments of $700 to the Bank each month, February 2011-March 2012.

- *Loan payoff statement*. A copy of Millar's "loan payoff statement," purporting to show balances Millar owed to the Bank as of August 30, 2012, including: a principal of $124,223.21; interest of $14,765.41; and $17,686.37 in unpaid taxes from 2007-09, which the Bank had paid on Millar's behalf.

Additionally, Arkin averred in her affidavit that the modification agreement between Millar and Homeowners "was never mutually extended between Millar and [the Bank]."

¶9 Millar, acting pro se, responded in opposition to the Bank's motion for summary judgment and simultaneously filed a cross-motion for summary judgment against the Bank. In his brief in opposition to summary judgment, Millar argued in part that most of the Bank's summary judgment materials were inadmissible and therefore insufficient to establish a prima facie case for summary judgment. More specifically, Millar argued that there was a lack of admissible evidence showing that the Bank was entitled to enforce the note against Millar and showing the amounts Millar owed the Bank under the note and mortgage. Also in his brief, Millar renewed his argument that he had a modification agreement with the Bank and had fulfilled the terms of that agreement, precluding a finding of default. In support of this argument, Millar averred in his affidavit in opposition to summary judgment that a Bank representative had orally agreed to modify his note and mortgage.

¶10 On December 14, 2012, the Bank filed two additional affidavits in support of its motion for summary judgment, one from attorney Thill, and one from Wayne Peterson, the president of Homeowners at the time that Millar's loans were sold to the Bank.

¶11 Attached to the Thill affidavit were: (1) a copy of a letter dated July 8, 2011, from the Bank to Millar, providing terms and conditions for a proposed written modification of Millar's note and mortgage, (2) copies of a series of emails between the Bank and Millar regarding the Bank's proposed written modification agreement, and (3) a copy of a letter dated March 29, 2012, from the

Bank to Millar stating that Millar had failed to meet the conditions of the proposed written modification. Attached to the Peterson affidavit were documents that included the following: a payoff statement from Homeowners, dated February 5, 2011, indicating that Millar owed Homeowners $126,181.29 in principal as of the payoff date, February 7, 2011, the day Millar's loan was purportedly sold to Park Bank.

¶12 On December 18, 2012, the circuit court held the first of two hearings on the cross-motions for summary judgment. At the close of this hearing, the circuit court allowed both parties an opportunity to supplement their summary judgment submissions.

¶13 On January 4, 2013, the Bank filed a second affidavit of Homeowner's President Peterson, and a second affidavit of the Bank's Loan Servicing Manager Arkin. Attached to both the second Peterson affidavit and the second Arkin affidavit was a copy of an *endorsed* note, specifically the January 18, 2008 note executed by Millar and Homeowners with an allonge by Peterson endorsing the note to the Bank.

¶14 Millar filed a supplemental affidavit dated January 14, 2013, from himself in opposition to summary judgment. He attached to this affidavit numerous documents obtained from the Bank purporting to be copies of Millar's loan documents that were transferred by Homeowners to the Bank. On January 16, 2013, Millar filed a "reply brief" renewing his arguments against the Bank's motion for summary judgment and making additional arguments that the Bank's second Arkin and Peterson affidavits were inadmissible.

¶15 On February 1, 2013, the circuit court held a second hearing on the cross-motions for summary judgment. At this hearing, the court made an oral

ruling, determining that the Bank's complaint was sufficient, granting summary judgment in favor of the Bank, and dismissing all of Millar's counterclaims. On this same date, the court entered a written judgment granting summary judgment of foreclosure in favor of the Bank and determining that the total amount due to the Bank was $163,414.14, including $124,223.21 in principal, $14,765.41 in interest, and $17,686.37 in taxes, with the remaining amount due for attorneys' fees and costs.[2] Millar moved to reconsider, and the circuit court denied this motion. Millar now appeals.

DISCUSSION

¶16 Acting pro se on appeal, Millar makes four arguments. First, Millar argues that the circuit court should have dismissed this action because the Bank failed to sufficiently allege facts in the foreclosure complaint that would support standing to pursue this action. Second, Millar argues that the circuit court should not have granted summary judgment in favor of the Bank, because the affidavits the Bank submitted in support of summary judgment were insufficient to establish a prima facie case for summary judgment. Third, Millar argues that the circuit court erred in granting summary judgment because Millar raised genuine issues of material fact as to whether he had defaulted on his payments under the note and mortgage and as to the amount of principal that he owed the Bank. Fourth, Millar argues that the circuit court erred by dismissing one of his counterclaims. We address each argument in turn below.

[2] The judgment is dated February 1, 2012, but this is an obvious scrivener's error. From all record evidence it is clear that the correct date is February 1, 2013.

A. Sufficiency of the Complaint as to Standing

¶17 Millar first argues that the circuit court should have dismissed the Bank's action for lack of standing, because the Bank failed to demonstrate, through allegations contained within the four corners of the foreclosure complaint, that it was the holder of Millar's note. In particular, Millar argues that the Bank failed to sufficiently allege in the complaint that it had standing because the note attached to the complaint was not endorsed in blank or to the Bank and was not the original "wet ink" document. To clarify, Millar does not argue that the Bank failed to establish standing for purposes of summary judgment, but that the Bank did not make a sufficient allegation in its complaint.

¶18 Millar's argument fails because, as the Bank points out, Wisconsin is a notice pleading state. ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). Therefore, the Bank's initial complaint needed to contain only a "short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief" and a "demand for judgment for the relief." WIS. STAT. § 802.02(1)(a) and (b) (2011-12).[3] We conclude that, taking all of the facts that the Bank alleged in its complaint to be true, *see* ***McConkey v. Van Hollen***, 2010 WI 57, ¶14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855, the Bank fulfilled its burden by alleging that it is the current owner and holder of the note at issue. For this purpose, it did not matter that the note attached to the complaint was not the original note or endorsed to the Bank, because the circuit

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

court was obligated to accept the Bank's allegation as true for notice pleading purposes. If the Bank could prove its allegation that it is the current owner and holder of Millar's note, which it could do in a number of ways, the Bank would have standing to enforce the note against Millar. *See, e.g.*, WIS. STAT. § 403.301 (a "holder" of a note is entitled to enforce it); ***Mitchell Bank v. Shanke***, 2004 WI 13, ¶42, 268 Wis. 2d 571, 676 N.W.2d 849 (secondary evidence may be used to establish that a party is the holder of a debt where the note is lost).

¶19 Accordingly, we affirm the circuit court's decision determining that the Bank's complaint sufficiently alleged standing.

B. Summary Judgment

¶20 Millar next argues that the circuit court erred in granting summary judgment to the Bank because (1) the Bank's submissions failed to establish a prima facie case that the Bank was entitled to enforce the note against Millar and that Millar owed the Bank the amount that the Bank alleged under the note, and (2) Millar presented genuine issues of material fact as to whether he defaulted under the note and as to the amount of principal owed under the note. We first address the standard under which we review the circuit court's grant of summary judgment, and then address Millar's arguments regarding whether the Bank established a prima facie case and whether Millar raised genuine issues of material fact.

1. Standard of Review

¶21 Wisconsin's appellate courts have explained many times the methodology for reviewing a grant of summary judgment:

> We review de novo the grant of summary judgment, employing the same methodology as the circuit court. A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. We examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial.
>
> Affidavits in support of and in opposition to a motion for summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." On summary judgment, the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit. That party need only make a prima facie showing that the evidence would be admissible at trial. If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial.

Palisades Collection LLC v. Kalal, 2010 WI App 38, ¶¶9-10, 324 Wis. 2d 180, 781 N.W.2d 503 (citations omitted).

¶22 Where the circuit court has made a determination as to the admissibility of evidence at the summary judgment stage, we may review that decision for misuse of discretion. ***Id.***, ¶13. "However, not all evidentiary rulings are discretionary. For example, if an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented and our review is de novo." ***Id.***, ¶14. In this appeal, we need not decide whether to review the circuit court's evidentiary rulings for misuse of discretion or de novo because,

under either standard of review, we conclude that the circuit court's rulings are correct.

2. Prima Facie Case

¶23 Millar argues that the Bank failed to point to proof of two facts necessary to establish a prima facie case for summary judgment: that the Bank was the holder of his note, and that he owed any particular amount under the note. Although Millar presents his contentions regarding the lack of a prima facie case as four separate arguments, the common crux appears to be that the circuit court erred by determining that various of the Bank's evidentiary submissions were each admissible and, based on these submissions, concluding that the Bank had established a prima facie case for summary judgment. For the following reasons, we conclude that the Bank established a prima facie case that it was the holder of the note, and that Millar owed a particular amount under the note.

a. The Note

¶24 Millar argues that the second Arkin affidavit and the second Peterson affidavit are insufficient to establish a prima facie case that the Bank was the holder of Millar's note, and, thus, entitled to enforce it against Millar. Although Millar's arguments are difficult to follow, our best understanding is that he is making two arguments in this regard: (1) that the copy of the note attached to the Arkin and Peterson affidavits is inadmissible hearsay evidence, and (2) that even if the copy of the note is not hearsay, they are not admissible evidence

showing that the Bank is the holder of the note because the Bank failed to submit sufficient evidence that the note is authentic.[4]

¶25 Millar's first argument is without merit, because the note is not hearsay. "[C]ontracts, including promissory notes, are not hearsay when they are offered only for their legal effect, not to 'prove the truth of the matter asserted.'" ***Bank of America v. Neis***, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 835 N.W.2d 527 (citation omitted). The Bank did not submit the copy of the note to prove the truth of some fact asserted within that document, but rather to show the legal effect of the note, that is, the Bank's right to enforce it. Thus, its admissibility did not hinge on an exception to hearsay.

¶26 Millar next argues that the second Arkin affidavit failed to stand as sufficient proof of authentication of the attached copy of the note because Arkin "did not aver that [she] has compared [the copy] to the original" nor did her affidavit explain "how she obtained [the copy] and from whom and when." Millar argues that the second Peterson affidavit also failed to authenticate the attached copy of the note because Peterson "only avers that "true and correct copies of [what Peterson believes] to be [his] original signatures appear on the attached adjustable rate note," but does not aver that the attached document is a true and correct copy of the original note.

[4] Millar may also be arguing that the circuit court erred in relying on the second Peterson affidavit to make a prima facie case that the Bank was the holder of the note because this affidavit came too late. This argument is easily rejected. The circuit court had the discretion to permit the Bank additional time to file a supplemental affidavit, just as it exercised its discretion to provide additional time for Millar to file additional materials and respond to the Bank's supplemental filings. *See* ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, ¶32, 259 Wis. 2d 181, 655 N.W.2d 718 (the decision of whether to allow supplemental affidavits is committed to the circuit court's discretion).

¶27 As indicated above, summary judgment submissions must be "made on personal knowledge" and "set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3); *see also* ***Palisades***, 324 Wis. 2d 180, ¶10. Pursuant to WIS. STAT. § 909.01, a document must be authenticated in order to be admissible as evidence. Evidence may be authenticated through the testimony of a witness "with knowledge that a matter is what it is claimed to be." WIS. STAT. § 909.015(1).

¶28 We conclude that the second Arkin and Peterson affidavits provide sufficient proof of authentication of the copy of the note attached to their affidavits. In her second affidavit, Bank employee Arkin averred that she had "personally accessed and reviewed" the Bank's records in the course of the Bank's "regularly conducted business activity," and that she was "familiar with, and [has] found such Records to be accurate and reliable." Arkin also averred that she had "accessed and reviewed" the Bank's records at issue in this foreclosure and that, according to those records, the copy of the note attached to Arkin's affidavit is a "true and correct" copy of the "Original Adjustable Rate Note of January 18, 2008," executed from Millar to Homeowners and endorsed to the Bank. Arkin's affidavit explained that the copy of the note attached to her affidavit was a copy of the *original* note, which appears in the Bank's own records, and that Arkin had personally inspected it. These statements add up to the assertion that Arkin compared the copy of the note with the original and, based on her experience working directly with the Bank's records as a loan servicing officer for the Bank, found the copy to be a "true and correct" copy of the original. In addition, in Peterson's second affidavit, he avers that "[t]rue and correct copies of what [he] believe[s] to be [his] original signature[]" appear on the note attached to his affidavit. These averments are sufficient to establish a prima face case that the

copy of the note is an authentic copy of the original that Peterson signed, endorsing the note to the Bank.

¶29 These submissions, properly accepted as admissible evidence, establish a prima facie case that the Bank is the holder of Millar's note, and, thus, entitled to enforce it, because the Bank is currently in possession of the note and because the note was endorsed from Homeowners to the Bank. *See* WIS. STAT. § 403.301 (a "holder" of a negotiable instrument has the right to enforce it); WIS. STAT. § 401.201(2)(km)1. (a "holder" is, generally speaking, a person in possession of a negotiable instrument); *see also* WIS. STAT. § 403.205(1) (a specially endorsed instrument is payable to the person to whom it is endorsed). Accordingly, we agree with the circuit court that the Bank established that it is the holder of Millar's note and is entitled to enforce it against him.

b. Payment History and Loan Payoff

¶30 We understand Millar to be arguing that the payment history and loan payoff statements submitted by the Bank, attached to the first Arkin affidavit, are inadmissible hearsay, and for this reason the Bank failed to establish a prima facie case as to the amount Millar owed the Bank.[5] Millar argues that the payment history and loan payoff statement records are not admissible under the "business records" hearsay exception, WIS. STAT. § 908.03(6), because the affidavits to which the records are attached do not establish the foundational requirements

[5] We note that Millar does not argue that because the payment history and loan payoff statement records attached to the Arkin affidavit are inadmissible, the Bank has failed to make a prima facie case that Millar defaulted on his note and mortgage. Millar does, however, argue that he has raised a genuine issue of material fact as to default, as discussed in the next section of this opinion.

necessary under that statute. In particular, Millar argues that the first Arkin affidavit does not

> establish that Arkin had any personal knowledge of how Millar's alleged records and account statements were created at [Homeowners] nor does [it] … establish that Arkin is a qualified witness to testify that Millar's alleged records were made at or near the time by, or from information transmitted by a person with knowledge, and that this was done in the course of a regularly conducted activity.

¶31 A record may be admissible under WIS. STAT. § 908.03(6) if the record was "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 …." As this court explained in ***Palisades***:

> WIS. STAT. § 908.03(6) does not require that the "custodian or other qualified witness" be the original owner of the records. However, under the plain language of this exception, being a present custodian of the records is not sufficient. The language is "as shown by the testimony of the custodian *or other qualified* witness." The only reasonable reading of this language is that 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.
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> ….
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> … [A] custodian or other qualified witness does not need to be the author of the records or have personal knowledge of the events recorded in order to be qualified to testify to the requirements of WIS. STAT. § 908.03(6). However, the witness must have personal knowledge of how the records were made so that the witness is qualified to testify that they were made "at or near the time [of the event] by, or from information transmitted by, a person with knowledge" and "in the course of a regularly conducted activity."

Palisades, 324 Wis. 2d 180, ¶¶20, 22 (citations omitted).

¶32 The problem with Millar's argument that Arkin's averments insufficiently established her personal knowledge regarding Homeowners' records is that the payment history and loan payoff statement records attached to the first Arkin affidavit purporting to show the total amount owed on Millar's note appear to be the Bank's own records, not records of Homeowners. This is not a case in which an affidavit submitted by a mortgagee attempts to lay a foundation for records created by a separate institution. *See* ***Central Prairie Fin. LLC v. Doa Yang***, 2013 WI App 82, ¶9-13, 348 Wis. 2d 583, 833 N.W.2d 866 (requiring institution seeking to recover on debt, where default occurred while debt was previously owned by a different institution, to show that the custodian of its records had personal knowledge of how the records of the different institution were created and maintained).

¶33 We conclude that the Arkin affidavit lays a proper foundation for the attached records and, thus, is an appropriate element of the Bank's prima facie case for summary judgment. As stated above, in her first affidavit, Arkin averred that she is a loan servicing manager at the Bank and is familiar with the Bank's record keeping practices. Arkin also averred that, when Homeowners sold to the Bank mortgage loans that included Millar's, Arkin personally reviewed all of the Homeowners records being transferred, calculated and verified the transactions recorded in the records transferred from Homeowners, and transferred those records to Park Bank's own records. In addition, Arkin averred that she has "personally created, maintained, accessed, and reviewed" "files, histories, profiles, and ledgers for" the Bank's customer accounts. The reasonable inference from these averments is that Arkin has personal knowledge of how all of the Bank's records related to the Millar mortgage were made in the course of the Bank's

regularly conducted activity. Arkin's averments establish a prima facie case that she has personal knowledge (1) of how the payment history and loan payoff statement records were created and maintained by the Bank and (2) that they were prepared in the ordinary course of the Bank's business. *See* ***Neis***, 349 Wis. 2d 461, ¶32; ***Palisades***, 324 Wis. 2d 180, ¶¶20, 22.

¶34 To the extent that Millar may be arguing that the Arkin affidavit fails to lay a proper foundation because Arkin does not aver that she personally created the payment history and loan payoff statement records, he is wrong, as established in the quotation from ***Palisades*** given above. *See* ***Palisades***, 324 Wis. 2d 180, ¶22. Arkin's affidavit establishes that she has personal knowledge of how the Bank creates records such as the payment history and loan payoff statement, and, in fact, has created such records in the past, and is therefore qualified to testify that the Bank's records were created at or near the time a transaction occurred by a person with knowledge and in the course of the bank's regularly conducted activity.[6]

¶35 Based on the records attached to Arkin's affidavit, properly accepted as admissible evidence, the Bank established a prima facie case that Millar's principal balance under the note was $124,223.21, that Millar owed the Bank $17,686.37 for 2007, 2008, and 2009 taxes, and that the interest owed on Millar's

[6] Millar may also be arguing that Arkin's affidavit does not properly authenticate the payment history and loan payoff statement because Arkin does not provide "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result," pursuant to WIS. STAT. § 909.015(9), and, thus, these records are inadmissible. This argument fails because an alternative subsection of the general authentication statute applies, namely § 909.015(1). Based on the same averments discussed above at ¶33, we conclude that Arkin is a qualified witness with knowledge that the Bank's payment history and loan payoff statements are what the Bank asserts they are. *See* § 909.015(1).

note as of August 30, 2012, was $14,765.41. We address, below, whether Millar's summary judgment submissions raised a genuine issue of material fact as to this amount owed.

3. Genuine Issue of Material Fact

¶36 We understand Millar to argue that, even if the Bank established a prima facie case for summary judgment, the circuit court erred in granting it, because Millar raised genuine issues of material fact as to whether he had defaulted on the note and mortgage and as to the amount of principal he owed the Bank. For the following reasons, we conclude that Millar failed to raise a genuine issue of material fact on either of these points.

¶37 In determining whether the nonmoving party has raised a genuine issue of material fact, this court reviews summary judgment materials in the light most favorable to the nonmoving party. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. "[S]ummary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977).

a. Default

¶38 Millar appears to argue that the Bank orally agreed to continue the modification agreement that Millar had with Homeowners, and pursuant to this agreement, (1) Millar was permitted to pay the Bank only $700 per month, not $1,232.79, and (2) the Bank agreed to pay Millar's unpaid taxes, including those due from 2007-10, and fold that debt into the total amount to be reduced by the $700 monthly payments. According to Millar, because he followed the terms of

this alleged modification agreement with the Bank, he did not default on the note and mortgage.

¶39 As support for this argument that the Bank consented to a modification in an oral agreement, Millar points to: his own averments that a Bank representative orally agreed to modify his loan in August 2010, when Millar met with this representative to discuss the transition of his loan from Homeowners to the Bank; the fact that the Bank accepted payments of $700 a month from February 2011 to March 2012, after it purchased Millar's loan, and; the fact that the Bank paid Millar's 2007-09 real estate taxes. As to the first point, Millar averred that, in August 2010, as part of communications related to the sale of his note and mortgage to the Bank, Millar spoke with a Bank representative, who told him that the Bank "was going to pay all the property taxes and add those amounts to my loan balance and in the meantime instructed me to continue to follow my modification agreement …. [I]t was my understanding that [the] Bank would continue to follow my agreements with [Homeowners]."

¶40 The Bank contends, and the circuit court agreed, that Millar's allegation of an oral modification fails to raise a genuine issue of material fact for a legal reason. Under this view, an oral agreement could not have been sufficient to raise a genuine issue of material fact, because under the statute of frauds Millar was obligated to submit evidence that he and the Bank entered into a *written and signed agreement* for a loan modification. *See* WIS. STAT. § 706.001(1) (statute of frauds governs "every transaction by which any interest in land is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity"); WIS. STAT. § 706.02 (transactions under § 706.001(1)(e) are invalid if not "signed by or on behalf of all parties"). And, the Bank argues that Millar has failed to present

any summary judgment evidence rebutting the Bank's evidence that the Bank never signed a written modification agreement with Millar.

¶41 We disagree with the Bank's assertion that an oral modification agreement is necessarily unenforceable under the statute of frauds. Although the statute of frauds is generally a defense to the enforceability of contracts affecting land that are not written and signed by both parties, there are exceptions to this rule. Pursuant to WIS. STAT. § 706.04, "[a] transaction which does not satisfy one or more of the requirements of [the statute of frauds] may be enforceable in whole or in part under doctrines of equity." A real estate contract that fails to comply with the statute of frauds may be enforceable in equity where two conditions are met: (1) all of the elements of the contract are "clearly and satisfactorily proved," and (2) the contract falls within one of the exceptions enumerated in § 706.04. Sec. 706.04; *see also* ***Brevig v. Webster***, 88 Wis. 2d 165, 175, 277 N.W.2d 321 (Ct. App. 1979) ("The threshold question [in determining whether a party is entitled to equitable estoppel or reformation] is whether the terms of the oral contracts … were 'clearly and satisfactorily proved' under sec. 706.04."); ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 560, 287 N.W.2d 811 (1980).

¶42 Most pertinent here, our supreme court has held that, because an oral agreement to modify a contract may be enforceable, summary judgment is inappropriate where the nonmoving party has presented evidence that a written contract affecting land was orally modified. *See* ***Hilkert v. Zimmer***, 90 Wis. 2d 340, 342-44, 280 N.W.2d 116 (1979) (holding that the grant of summary judgment based on a statute of frauds defense was premature because material facts were in dispute regarding whether the written contract had been orally modified).

¶43 However, while an oral modification could, in some circumstances, be enforceable, we conclude that any equitable estoppel argument Millar might mean to make in this case fails for two reasons. First, although Millar argued before the circuit court and now on appeal that the alleged oral modification agreement with the Bank was controlling regarding his obligations to the Bank, he failed to make any developed legal arguments as to why the alleged oral modification agreement was enforceable despite its failure to comply with the statute of frauds. That is, Millar never raised WIS. STAT. § 706.04 before the circuit court or on appeal, and he did not cite to ***Hilkert*** until his reply brief on appeal. Millar did not give the circuit court an opportunity to evaluate the applicability of this equitable doctrine. We could reject Millar's argument on the grounds that it was not raised before the circuit court, not fully developed on appeal, and is now supported by a legal citation for the first time in his reply brief. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (arguments not raised before the circuit court are forfeited on appeal); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (this court need not address arguments that are not fully developed); ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n. 2, 302 N.W.2d 508 (Ct. App. 1981) ("We will not, as a general rule, consider issues raised by appellants for the first time in a reply brief.").

¶44 Moreover, assuming without deciding that Millar preserved an equitable estoppel argument, Millar's argument still fails on the merits. This is because Millar has failed to submit summary judgment evidence as to all of the elements of the alleged oral modification agreement with the Bank. As explained above, a party seeking to invoke equitable estoppel must be able to "clearly and satisfactorily" prove "all of the elements of the transaction." WIS. STAT. § 706.04.

"The elements that must be established to fulfill [this] requirement correspond to the formal requisites of a valid conveyance under sec. 706.02." ***Nelson***, 93 Wis. 2d at 560. One such requisite is that the contract must include "any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered." WIS. STAT. § 706.02(1)(c). Here, a "material term" of the alleged oral modification agreement would be the time period over which that agreement would run. Millar fails to point to evidence in any of the summary judgment materials that the Bank orally agreed to a particular time frame over which it would accept $700 per month payments and pay Millar's property taxes. In his affidavit, Millar avers that he told the Bank representative who allegedly agreed to the oral modification that Millar needed the modification "extended at least for the near future," which in itself suggests a failure to reach an agreement on a term. In a letter Millar wrote to the Bank dated June 10, 2011, submitted as summary judgment evidence, Millar wrote, "I believe I could remain current on my payments and taxes and work my way out of this problem if I could get a 3 year term for a modification." Neither of these statements creates a reasonable inference that the Bank agreed to a particular time frame as part of an oral modification agreement.[7]

[7] There may be a reasonable inference from Millar's August 2010 averment, referenced above in ¶39, that the Bank orally agreed to continue the modification until December 30, 2010, as set forth in the written agreement Millar had with Homeowners. However, this inference does not help Millar. Although the Bank began discussing the transition of Millar's loan from Homeowners to the Bank in August 2010, the Bank did not actually purchase Millar's loan, and Millar did not begin making payments to the Bank, until February 7, 2011. Thus, even assuming that Millar's averment created a reasonable inference in support of an oral modification with the Bank lasting until December 30, 2010, that inference could not support an argument that a modification agreement with the Bank was in place in February 2011.

¶45 In sum, even assuming that Millar preserved this argument for appeal, he has failed to provide evidence showing all of the material terms of the alleged oral modification agreement. Therefore, he has not raised a genuine issue of material fact as to whether that agreement would be enforceable in equity, and, thus, whether Millar defaulted on his loan. Accordingly, we affirm the circuit court's grant of summary judgment as to Millar's default, albeit on different grounds from those on which the circuit court based its decision. *See* ***International Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.***, 2007 WI App 187, ¶23, 304 Wis. 2d 732, 738 N.W.2d 159 (we may affirm a circuit court's grant of summary judgment on different grounds than those relied on by the circuit court).

b. Amount Owed

¶46 Turning to the amount-owed issue, Millar may mean to focus our attention on the contrast between the following: (1) records regarding the balance that he owed to Homeowners as of February 5, 2011, attached to the first Peterson affidavit and to Millar's second affidavit, reflecting a principal balance due of $126,181.29, and (2) the payment record attached to the first Arkin affidavit showing a principal balance owed to the Bank as of August 30, 2012, of $124,223.21. Millar argues from the difference in numbers that there is a genuine issue of material fact as to the amount he owes under the note, precluding summary judgment.

¶47 This argument fails because Millar does not explain why a different accounting of the principal loan balance due to Homeowners raises a genuine issue of material fact as to the principal balance owed to the Bank. That is, the fact that Homeowners may have calculated Millar's principal balance differently when

Homeowner's owned his loan does not create a material factual issue regarding the principal balance of his loan under the Bank's ownership and as presented in the Bank's own records at a later date. Millar does not point to any admissible evidence from the summary judgment materials that contradicts the Bank's records of his principal balance as of August 30, 2012. Because Millar has not raised a genuine issue of material fact as to the amount he owes the Bank under his note, we affirm that portion of the circuit court's decision.

C. Millar's Counterclaim

¶48 Millar pled a number of counterclaims against the Bank. On appeal, in regard to these counterclaims, Millar appears to argue only that the circuit court erred by dismissing his counterclaim regarding the Bank's alleged violation of the Federal Truth in Lending Act. *See* 15 U.S.C. §§ 1601-1693r (2012). Millar contends that the Bank violated the Act by failing to provide to Millar a required handbook. Millar fails to fully develop this argument. He cites no legal authority regarding the Act or the Bank's obligations under that act. We need not address arguments that are insufficiently developed. ***Pettit***, 171 Wis. 2d at 647.

D. Additional Arguments

¶49 In part because he proceeded pro se below and again now on appeal, we have made every effort to discern any argument that Millar might have preserved below and then even partially developed on appeal. However, to the extent that Millar makes additional arguments on appeal, we decline to attempt to address them, either because Millar did not raise them before the circuit court, *see* ***Ndina***, 315 Wis. 2d 653, ¶30, or because they are not fully developed based on materials in the record or supported by legal authority on appeal, *see* ***Pettit***, 171 Wis. 2d at 646-47, or both.

CONCLUSION

¶50 For these reasons, we affirm the decision of the circuit court granting summary judgment of foreclosure in favor of the Bank and dismissing Millar's counterclaim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.