

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 1, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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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. 2013AP833**

**Cir. Ct. No. 2011CV4104**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**WELLS FARGO BANK, N.A.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**EDWARD J. HORNBY AND LAURIE L. HORNBY,**

**DEFENDANTS-APPELLANTS,**

**MIDLAND FUNDING LLC,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Dane County:  
RICHARD G. NIESS, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Edward and Laurie Hornby appeal a summary judgment of foreclosure. They assert Wells Fargo failed to make a prima facie showing that it is entitled to enforce the note and mortgage. They also assert the circuit court erroneously rejected their unclean hands defense and dismissed their counterclaims, alleging they made all required payments under a trial period plan (TPP) and were therefore entitled to a permanent loan modification under the Home Affordable Modification Program (HAMP).<sup>1</sup>

¶2 We conclude the circuit court properly granted Wells Fargo's summary judgment motion and dismissed the Hornbys' counterclaims. No genuine issue of material fact exists concerning Wells Fargo's ability to enforce the note and mortgage. In addition, the Hornbys have not submitted any documentary evidence that they were entitled to a permanent loan modification, and their assertion of an oral promise from Wells Fargo officials was made for the first time on appeal—too late to save their counterclaims and affirmative defense.

## BACKGROUND

¶3 Wells Fargo commenced this foreclosure action in September 2011. The complaint alleged Wells Fargo is the owner and holder of the note and mortgage and the Hornbys defaulted by failing to make monthly payments as they became due. The note and mortgage attached to the complaint indicate Wells Fargo is the lender. The Hornbys answered the complaint in October 2011.

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<sup>1</sup> The Home Affordable Modification Program was implemented to help homeowners avoid foreclosure amidst the sharp decline in the nation's housing market in 2008. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 554 (7th Cir. 2012).

¶4 Wells Fargo moved for summary judgment. In response, the Hornbys filed a motion to amend their answer, supported by the affidavit of Edward Hornby. In the affidavit, Hornby averred he had signed a mortgage in July 2005 and remained current on his payments until 2009. The Hornbys then requested assistance via loan modification. Wells Fargo denied the initial modification application for lack of sufficient information, and the Hornbys tried again in 2010. This time, the Hornbys were enrolled in a TPP requiring three monthly payments of a designated amount. Although the Hornbys made these payments, Wells Fargo denied the Hornbys' request for a permanent modification. Wells Fargo again solicited the Hornbys for a HAMP modification in 2011 and 2012, but the Hornbys were ultimately denied both times.

¶5 Hornby further averred he received a letter from Wells Fargo on May 29, 2012, informing him the Hornbys did not qualify for a permanent HAMP loan. The letter states, in relevant part:

**Decision on the federal government's Home Affordable Modification Program (HAMP)[.]** We carefully reviewed the information you sent us. At this time, you do not meet the [HAMP] requirements ... because: We service your loan on behalf of an investor that has not given us the contractual authority to modify your loan.

The May 29 letter was the only historical document included with the Hornbys' motion.

¶6 The circuit court permitted amendment of the pleadings, and the Hornbys filed an amended answer in which they denied Wells Fargo was the holder of the note and mortgage. They also raised as an affirmative defense that Wells Fargo's claims were barred by the unclean hands doctrine. Finally, the Hornbys asserted counterclaims for breach of contract, false representation in

violation of WIS. STAT. § 100.18, fraudulent misrepresentation, and negligence, all arising out of Wells Fargo's refusal to permanently modify the loan.<sup>2</sup>

¶7 Wells Fargo answered the counterclaims and filed another motion for summary judgment. The motion was supported with the affidavit of Kimberly Mueggenberg, who stated she was "Vice President Loan Documentation" for Wells Fargo. Mueggenberg averred that she had been trained to use Wells Fargo's mortgage servicing platform, which contains all information relevant to a specific loan, and had personally reviewed all servicing records relating to the Hornbys' note and mortgage. Mueggenberg stated that when Wells Fargo received the Hornbys' original security instruments (the note and mortgage), a digital image was created and maintained in an imaging system. Mueggenberg averred that since origination, the note remained in Wells Fargo's possession and Wells Fargo has been the loan servicer. Mueggenberg also verified through the Wells Fargo system that Wells Fargo is the current note holder, as well as the owner and servicer. She attached a copy of the note, mortgage, and payment history ledger to her affidavit, asserting that each was a true and correct copy of the document contained in the mortgage service system.

¶8 The parties presented oral argument at a summary judgment motion hearing. The Hornbys argued Wells Fargo failed to prove it held or possessed the note. Although the Hornbys acknowledged that Wells Fargo was the issuer of the note and had "been the note holder this whole time," they theorized the May 29, 2012 letter's reference to an investor meant the note had been transferred to

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

someone other than Wells Fargo. The Hornbys conceded the letter did not indicate there had been a transfer, and they had no evidence the note had been transferred other than the letter's single reference to an investor.

¶9 The Hornbys also argued they had equitable defenses and counterclaims based on the failed 2010 modification attempt. These defenses and counterclaims were premised on the notion that the Hornbys were entitled to a permanent loan modification based on their three successful TPP payments. However, the Hornbys conceded they had not provided the relevant contracts to the court. The court remarked that in its experience, such permanent modifications included additional requirements, such as satisfaction of a formula gauging ability to pay, and it could not be sure the Hornbys were entitled to permanent modification without seeing the contracts.

¶10 Citing *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), the Hornbys responded that a loan modification offer followed by three TPP payments was sufficient. However, after further discussion with the court the Hornbys conceded that a standard HAMP document required more than just three temporary payments. The court then asked where in the record it could find evidence the Hornbys "satisfied the criteria for the permanent modification other than ... three temporary payments which under every other HAMP case I've seen is in and of itself insufficient to entitle them to a permanent modification?" The Hornbys' counsel responded, "There isn't any evidence of that in this record."

¶11 At the conclusion of the hearing, the court decided to reopen the record for the limited purpose of allowing the Hornbys to submit the actual HAMP application contract and any other relevant documentation. "In other words," the court stated, "I want you to have an affidavit saying these are the documents that

... formed the contract for the permanent modification and temporary payment plan between Wells Fargo Bank and your clients that you're relying on as the basis for your claim here." The court also determined there were no disputed material facts regarding whether Wells Fargo was the owner and holder of the note and mortgage.

¶12 The Hornbys responded to the court by letter, advising they could not supplement the record and alleging for the first time the existence of an oral contract. The letter read, in substantive part:

This modification was only explained to the defendants orally, and there was no written contract signed and executed by the parties. For this reason, there is no additional evidence that can be offered by the defendants in support of the breach of contract claim. Based on this, judgment can be entered pursuant to the Court's findings [at the summary judgment hearing].

The court then granted Wells Fargo's summary judgment motion and dismissed the Hornbys' counterclaims. The Hornbys appeal.

## DISCUSSION

¶13 The purpose of summary judgment is to avoid trial when there are no issues to be tried. *Ixonia State Bank v. Schuelke*, 171 Wis. 2d 89, 94, 491 N.W.2d 772 (Ct. App. 1992). A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶14 Our first task when reviewing a grant of summary judgment is to determine whether the plaintiffs have stated a claim for relief. *See Green Spring*

*Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987). Here, there is no dispute that Wells Fargo’s complaint adequately sets forth a claim for foreclosure.

¶15 Next, we must assess whether any factual issues exist. *Id.* at 315. We do this by examining the moving party’s affidavits to determine whether they establish a prima facie case for summary judgment. *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. If so, “we review the opposing party’s affidavits to determine whether there are any material facts in dispute, or inferences from undisputed material facts, that would entitle the opposing party to a trial.” *Id.*

¶16 On appeal, the Hornbys renew their argument that Wells Fargo failed to make a prima facie showing that it is entitled to enforce the note and mortgage. Under the Uniform Commercial Code, a person is entitled to enforce an instrument if he or she is “the holder of the instrument” or “a nonholder in possession of the instrument who has the rights of a holder ....” WIS. STAT. § 403.301. The Hornbys contend Mueggenberg’s affidavit is insufficient to establish that Wells Fargo holds or possesses the note and mortgage.

¶17 In essence, the Hornbys argue Mueggenberg’s affidavit that Wells Fargo is the holder and possessor of the note was made without personal knowledge. Affidavits in support of summary judgment must be “made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.” WIS. STAT. § 802.08(3). “Portions of affidavits which are made by persons who do not have personal knowledge or which contain allegations of ultimate facts, conclusions of law or anything other than evidentiary

facts do not meet the statutory requirements and will be disregarded.” *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977).

¶18 The Hornbys rely on a recent authored but unpublished case, *Bank of America, N.A. v. Minkov*, No. 2012AP2643, unpublished slip op. (WI App Aug. 8, 2013).<sup>3</sup> In *Minkov*, a Bank of America employee averred the Bank of New York was “the holder of the Note,” with Bank of America as servicer. *Id.*, ¶7. We found this insufficient, as the employee’s testimony would be inadmissible as “an irrelevant statement representing a legal conclusion.” *Id.*, ¶16. Further, we observed the employee’s affidavit was insufficient, as the assertion that the Bank of New York was the note holder represented a “legal conclusion unsupported by relevant assertions of fact.” *Id.*

¶19 We are not persuaded the affidavit in this case suffers from the same deficiencies as the one in *Minkov*. Mueggenberg’s affidavit establishes that she has been trained to use Wells Fargo’s mortgage servicing platform, in which all relevant information to a specific loan is kept. She further averred she had personally reviewed all the Hornbys’ servicing records, and that these records were created contemporaneously with each transaction’s occurrence, including the execution of the note and mortgage. Specifically, when Wells Fargo received the original note and mortgage, a digital image of the documents was created in its system. Mueggenberg also averred that Wells Fargo originated the note and has been in possession of the original note since then. We conclude this is sufficient evidence to support a finding that the copy of the note is what Wells Fargo

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<sup>3</sup> We remind the Hornbys’ counsel that unpublished, authored opinions issued after July 1, 2009, may be cited for their persuasive value, but are not binding on this court. *See* WIS. STAT. RULE 809.23(3)(b).

claims—namely, a true and correct copy of an original note in Wells Fargo’s possession. See *Dow Family, LLC v. PHH Mortgage Corp.*, 2013 WI App 114, ¶20, 350 Wis. 2d 411, 838 N.W.2d 119, review granted, 2014 WI 3, 352 Wis. 2d 351, 842 N.W.2d 359; see also *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶10, 346 Wis. 2d 1, 827 N.W.2d 124 (affidavit sufficiently based on personal knowledge if it alleges that affiant’s employer, the loan servicer, has possession of accurate accounting and mortgage loan records and the affiant personally inspected the records).

¶20 The Hornbys also appear to argue that there is a genuine issue of material fact concerning whether Wells Fargo is entitled to enforce the note and mortgage. They argue Wells Fargo’s May 29 letter establishes it was no longer the note holder, having transferred the note to a new investor. We agree with the circuit court’s resolution of this issue. The letter’s singular reference to an investor does not establish the note was in fact transferred. Indeed, the Hornbys conceded before the circuit court that the letter did not specifically indicate Wells Fargo had transferred the note. In fact, the letter does not refer to the note or the holdership thereof at all; it does not say that Wells Fargo no longer holds the note, nor does it indicate Wells Fargo is precluded from proceeding as servicer of the loan if it is no longer the note holder. See WIS. STAT. § 403.301 (nonholder in possession of the instrument who has the rights of a holder may enforce note). The letter, standing alone, was therefore insufficient to create a genuine issue of material fact. The Hornbys have submitted nothing suggesting a transfer has taken place, even viewing the facts and inferences in the light most favorable to the Hornbys. See *Premier Cmty. Bank v. Schuh*, 2010 WI App 111, ¶15, 329 Wis. 2d 146, 789 N.W.2d 388.

¶21 The Hornbys next argue the circuit court erroneously dismissed their counterclaims and equitable defense. They argue that, pursuant to *Wigod*, Wells Fargo’s offer of a TPP, which the Hornbys accepted, created a “new contract to modify the underlying note and mortgage by the lender.” Further, the Hornbys assert Wells Fargo has unclean hands because it enrolled them in the TPP but ultimately denied them a permanent loan modification.

¶22 There is no evidentiary support in the record for the Hornbys’ assertion that they were entitled to a permanent loan modification. The circuit court gave the Hornbys ample opportunity to supplement the record with contract documents demonstrating the TPP created a new, enforceable loan modification agreement. The Hornbys’ counsel conceded by letter they were unable to do so.

¶23 Instead, counsel’s letter for the first time raised the possibility of oral representations that purportedly bound Wells Fargo to offer a permanent modification if the Hornbys successfully completed the TPP. Counsel did not offer any further argument on the issue after submitting the letter, and in fact advised the court it could enter judgment for Wells Fargo. On appeal, the Hornbys appear to rely exclusively on these alleged oral representations. However, the circuit court was the proper place to present these arguments, and the Hornbys failed to submit any affidavit or other evidence of an oral promise. Accordingly, we conclude the Hornbys did not raise the issue of an oral contract in any meaningful way before the circuit court. Issues that are not preserved in the circuit court generally will not be considered on appeal. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190.

¶24 *Wigod* is of no help to the Hornbys. There, the TPP agreement “spelled out two conditions precedent to Wells Fargo’s obligation to offer a

permanent modification: Wigod had to comply with the requirements of the trial plan, and her financial information had to remain true and accurate.” *Wigod*, 673 F.3d at 562. Here, the Hornbys have not submitted any documentary evidence to support their counterclaims or unclean hands defense. Therefore, the circuit court properly granted summary judgment for Wells Fargo and dismissed the Hornbys’ counterclaims.

*By the Court.*—Judgment affirmed.

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

