COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2540 **Cir. Ct. No. 2010CV6249**

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

U.S. BANK NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

KUEN M. WONG,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kuen Wong appeals an order granting U.S. Bank National Association's motion for reconsideration. The reconsideration order modified an order dismissing U.S. Bank's foreclosure action with prejudice, to a dismissal without prejudice. We affirm.

BACKGROUND

¶2 Wong executed an adjustable rate note and mortgage with Wells Fargo Bank, N.A. in September 2005. Wong fell behind on payments in 2009 and, following a forbearance agreement, applied for a loan modification under the Home Affordable Modification Program (HAMP). She received a loan trial period plan in September 2009 that instructed her to make three trial payments of $743.86 while her application for a HAMP modification was pending.

¶3 According to Wong, after three months, she contacted Wells Fargo and was told to continue making the trial payments until the modification was finalized. Wong inquired monthly and made seven trial payments. In early 2010, she was informed her request for a HAMP modification was denied and she would be required to bring her loan current. By that time, Wong was over $8,000 behind on her regular payments.

¶4 U.S. Bank filed a mortgage foreclosure action in April 2010, alleging it was the "current owner and holder" of the note and that "a true copy of the note" was attached. However, the attached note—between Wong and Wells Fargo—was not endorsed. U.S. Bank subsequently filed two amended complaints, each attaching the same copy of the note with no endorsement.

¶5 Wong's answer denied she was in default and alleged as affirmative defenses equitable estoppel and that U.S. Bank was not a real party in interest because it "failed to demonstrate that it was the holder and owner of the Note and Mortgage at issue herein as of the date the Complaint was filed." Both parties moved for summary judgment. The court denied Wong's motion, holding her equitable estoppel defense would be an issue at trial. U.S. Bank produced and attached to its attorney's affidavit a copy of the note endorsed in blank, and signed

by a vice president at Wells Fargo. The court denied U.S. Bank's motion, and the case ultimately proceeded to a bench trial.

¶6 The trial began on June 12, 2012, with Judge John Siefert presiding, and continued through the next day. U.S. Bank called a vice president of loan documents at Wells Fargo, but she was unable to testify regarding when or how the note was endorsed or transferred to U.S. Bank.[1] U.S. Bank also unsuccessfully attempted to admit the endorsement under the business records exception to the hearsay rule. On the second day of the trial, U.S. Bank moved to admit the endorsement as a self-authenticating commercial paper under WIS. STAT. § 909.02(9) and WIS. STAT. § 403.308(1).[2] The latter provides, in part:

> **Proof of signatures and status as holder in due course. (1)** In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized ….

WIS. STAT. § 403.308(1).

¶7 The court ruled the endorsed note could not self-authenticate because U.S. Bank had prevented compliance with WIS. STAT. § 403.308(1) by failing to file an endorsed version of the note with the complaint. To allow U.S. Bank an opportunity to present evidence to authenticate the endorsement, the court announced the trial would recess for approximately forty days.

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[1] The witness was not the same person whose signature appeared on the endorsed note.

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

¶8 When the trial reconvened on July 23, U.S. Bank presented no new witnesses or evidence. Wong testified about the forbearance plan and HAMP payments.

¶9 The circuit court first discussed the issues surrounding the HAMP application, but then explained, "But we're not going to reach that issue in deciding this case. … I can decide the issue on more narrow grounds … and that's what I will do." The court then ruled as follows:

> [F]irst, it does not seem to me that the note was endorsed to [U.S. Bank] prior to litigation being brought.
>
> And they cannot admit that writing as a self-authenticating commercial paper because they failed to plead that fact … in their first, second or third pleadings.
>
> That, in turn, denies [Wong] a chance to challenge the signature's validity because it wasn't pled in any of them.
>
> So her basic due process rights to try to have discovery on and to challenge the signature's validity were denied because they didn't plead it ….
>
> [And U.S. Bank's] witness … was, in this Court's view, a very, very weak witness.
>
> She testified at length to what she didn't know about the endorsement. …
>
> She just didn't know. And it's not self-authenticating, and it wasn't pled. And the key thing is it wasn't pled. And by not pleading it, they denied the defendant due process rights in my view to challenge its authenticity and validity.
>
> Therefore, the case is going to be dismissed. And it's dismissed— Since it's being dismissed after the first witness was sworn, the dismissal is with prejudice.

¶10 The judge concluded by noting the judicial rotation only allowed him two more days in his courtroom, so the decision would be an oral decision. Judge Daniel Noonan succeeded Judge Siefert as the presiding judge in the case.

U.S. Bank subsequently moved for reconsideration. Judge Noonan granted the motion for reconsideration and amended the judgment to a dismissal without prejudice. Wong appeals.

DISCUSSION

¶11 Wong argues the circuit court erred when it granted U.S. Bank's motion to reconsider and amended the dismissal to be without prejudice. We review a decision on a motion for reconsideration under the erroneous exercise of discretion standard.[3] ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. A motion for reconsideration may not be based on mere "umbrage with the court's ruling" but must be based on either newly discovered evidence or a manifest error of law or fact. ***Id.***, ¶44. Successor judges are afforded the same discretion, as long as reconsideration does not require the successor judge to reweigh the credibility of the evidence. *See* ***Starke v. Village of Pewaukee***, 85 Wis. 2d 272, 270 N.W.2d 219 (1978). Review of a decision to dismiss a case with prejudice is likewise subject to the erroneous exercise of discretion standard. ***Haselow v. Gauthier***, 212 Wis. 2d 580, 591, 569 N.W.2d 97 (Ct. App. 1997). We will uphold a discretionary decision if the court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Id.***

[3] U.S. Bank asserts we apply an abuse of discretion standard. Wisconsin abandoned that terminology decades ago. *See* ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

¶12 Wong first argues the circuit court lacked competency to decide the reconsideration motion because the motion was already deemed denied when it was not decided within ninety days of the judgment. *See* WIS. STAT. § 805.17(3). U.S. Bank, however, responds that Wong assented to the briefing schedule set by the circuit court and failed to object or otherwise raise § 805.17(3) below. U.S. Bank cites the rule that "a challenge to the court's competency will be deemed waived if not raised in the circuit court." ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶27, 273 Wis. 2d 76, 681 N.W.2d 190. Wong does not reply to this argument and therefore concedes the issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶13 Wong next argues the circuit court failed to apply the manifest-error standard. She relies heavily on the court's statement: "Well, do I have to find a manifest error of the law to dismiss without prejudice? I don't think I have to do that. It's still a dismissal." Further, Wong asserts the initial dismissal was on the merits because U.S. Bank's inability to admit an endorsed copy of the note into evidence constituted a failure of proof on its claim.

¶14 We agree with U.S. Bank that Judge Siefert's dismissal was not on the merits. The crux of the court's ruling was this:

> And it's not self-authenticating, and it wasn't pled. And the key thing is it wasn't pled. And by not pleading it, they denied the defendant due process rights in my view to challenge its authenticity and validity.
>
> Therefore, the case is going to be dismissed. And it's dismissed— Since it's being dismissed after the first witness was sworn, the dismissal is with prejudice.

The only reason given for dismissing with prejudice was that the dismissal occurred after the first witness was sworn. The dismissal itself was based on U.S. Bank's failure to comply with the self-authentication statute in its pleadings. Judge Seifert did not decide that U.S. Bank lacked standing to enforce the note, that the note or mortgage was void or otherwise unenforceable, that Wong was not in default, or that any of Wong's affirmative defenses prevented enforcement of the note or foreclosure of the mortgage.

¶15 Judge Noonan did not disturb Judge Siefert's conclusion that U.S. Bank committed a pleading error. Despite questioning whether he had to find a manifest error of law, Judge Noonan explained, "it is the type of dismissal that goes to a pleading, and to me there would be an injustice here if I did not allow the plaintiff to essentially re-plead and dismiss without prejudice." The court then discussed the harsh consequences of a dismissal with prejudice.

¶16 When a plaintiff's claim is dismissed for failing to satisfy a curable condition that is unrelated to the merits of the dispute, the proper remedy is to dismiss the plaintiff's complaint without prejudice to permit the plaintiff to refile its claims. *See* ***Patterman v. City of Whitewater***, 32 Wis. 2d 350, 360, 145 N.W.2d 705 (1966). Because dismissal with prejudice is a drastic sanction, a court should do so only on finding egregious conduct or bad faith. ***Haselow***, 212 Wis. 2d at 591.

¶17 Judge Siefert dismissed the case for a failure to satisfy a curable condition and did not find U.S. Bank engaged in egregious conduct or bad faith. Consequently, the court made a manifest error of law by ordering that the dismissal be with prejudice. Judge Noonan therefore properly granted U.S.

Bank's reconsideration motion and modified the dismissal to be without prejudice.[4]

By the Court.—Order affirmed.

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

[4] U.S. Bank makes additional arguments that we need not reach. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).