COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0706

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

HOUSING PARTNERSHIP CORPORATION,
A WISCONSIN NON-PROFIT CORPORATION,

PLAINTIFF-RESPONDENT,

V.

MS. RENEE MILLER, MS. JOYCE DAVENPORT,
MS. DORIS WALTON, MR. ALBERT GRAHAM,
MS. ANITRA GOSA, MS. CINANDREA JACKSON,
MS. CHARLLITTA MILLER, MS. AGNES EISNER,
MS. RENAY GILLON, MS. PHYLLIS MITCHELL
AND MS. REVA GOINS,

APPELLANTS,

PARKSIDE HOUSING COOPERATIVE,
A WISCONSIN LIMITED EQUITY COOPERATIVE,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Ms. Renee Miller, Ms. Joyce Davenport, Ms. Doris Walton, Mr. Albert Graham, Ms. Anitra Gosa, Ms. Cinandrea Jackson, Ms. Charllitta Miller, Ms. Agnes Eisner, Ms. Renay Gillon, Ms. Phyllis Mitchell, and Ms. Reva Goins (collectively, "the Members"), members of the Parkside Housing Cooperative ("the Cooperative"), appeal from a trial court order denying their motion to intervene in a mortgage foreclosure action brought against the Cooperative by the Housing Partnership Corporation ("HPC"). The trial court denied the Members' motion to intervene because it found that the Members did not have ownership interests in the Cooperative's mortgaged property, and that their interests as tenants would not be impaired by the disposition of the foreclosure action. The Members claim that the trial court erred because the Members do have equity, including "sweat equity," in the Cooperative's property. We conclude that the trial court properly denied the Members' intervention motion, and we affirm the trial court's order.

I. BACKGROUND.

The Cooperative is a cooperative association formed under Chapter 185, STATS. HPC is a non-profit consortium of financing institutions organized for the purpose of providing funding for low and moderate income housing projects. In January 1994, the Cooperative granted HPC a mortgage to secure a note for repayment of a $858,248.42 loan from HPC.

On September 11, 1996, HPC filed a complaint against the Cooperative, alleging waste. In conjunction with the complaint, HPC filed an ex parte motion for an order appointing a temporary receiver. The trial court

granted HPC's ex parte motion, and appointed HPC as temporary receiver of the Cooperative's property.

On October 10, 1996, HPC filed an amended complaint amending its action for waste to a mortgage foreclosure action. As a result of HPC's appointment as temporary receiver of the Cooperative's property, the Cooperative was unable to hire an attorney to protect its interests. Consequently, the Members hired an attorney and made a motion to intervene in the action. On January 6, 1997, the trial court denied the Members' motion to intervene. The Members now appeal.

II. ANALYSIS.

Although the Members' motion to intervene did not specify whether it was seeking intervention as of right under § 803.09(1), STATS., or permissive intervention under § 803.09(2), the trial court concluded that the Members did not establish grounds for intervention on either theory. As HPC notes in its brief, however, the Members have only presented arguments on appeal related to intervention as of right under § 803.09(1). Therefore, we conclude that the Members have waived any claims concerning permissive intervention and that the only remaining issue on appeal is whether the Members are entitled to intervene as of right pursuant to § 803.09(1).

In order to intervene as of right under § 803.09(1), STATS., the Members must pass a four-part test by showing that: (1) their application for intervention was made timely; (2) they have an interest relating to the Cooperative's property; (3) the disposition of the mortgage foreclosure action may as a practical matter impair or impede their ability to protect that interest; and (4) their interest is not adequately represented by existing parties. Section

809.03(1); ***State ex rel. Bilder v. Township of Delavan***, 112 Wis.2d 539, 545, 334 N.W.2d 252, 256 (1983). Whether to allow or deny intervention under the statute is a question of law which this court reviews *de novo*. *See* ***id.*** at 549, 334 N.W.2d at 258. Neither party disputes the fact that the Members' application was made timely, and that there are no other existing parties defending the foreclosure action. Therefore, the first and fourth prongs of the test are not at issue. The dispute centers, instead, on what type of interest the Members have in the Cooperatives' property, and whether the Members' ability to protect that interest is impaired or impeded by the foreclosure action.

HPC argues, and the trial court found, that the Members' only interest in the Cooperative's property is the right to occupy the property as tenants. HPC also argues, and the trial court also found, that the Members' occupancy interest would not be impeded or impaired by the mortgage foreclosure action because the Members were not named as parties to the action, which is necessary to disturb the occupancy rights of a tenant in possession of mortgaged property. *See* ***Zimmermann v. Walgreen Co.***, 215 Wis. 491, 496, 255 N.W. 534, 537 (Ct. App. 1934) (whether a lease is terminated by a foreclosure action depends on "the joinder of the lessee as a party to a foreclosure action.").

The Members do not dispute HPC's claim that if the Members' interests are limited to the right of occupancy, their interests would not be impaired by the foreclosure action due to HPC's failure to name the Members as parties to the action. The Members, instead, argue that in addition to a right of occupancy, they have property rights in the Cooperative's property. The Members specifically claim that they individually have equity interests in the Cooperative, including "sweat equity," and that their equity may be impeded or impaired by the foreclosure action. We are not persuaded.

To begin, it is important to distinguish between the Cooperative's equity in its property, and the Members' alleged equity in that property. The Members argue, based on figures obtained from HPC's affidavits, that as of September 12, 1996, there was $697,997.08 remaining to be paid on the HPC's $858,248.42 loan to the Cooperative, and that the Cooperative had an equity surplus of $160,271.34. Although this may be true, the amount of the Cooperative's equity is not at issue. The only fact at issue is whether the Members, as individuals, have a right to the Cooperative's equity or any other interest in the Cooperative's property.

First, we note that pursuant to Chapter 185, STATS., a Wisconsin cooperative may be organized with capital stock and may issue shares of stock to its members, giving them corresponding equity interests in the cooperative's property. According to the Cooperative's by-laws, however, the Cooperative was not organized in this manner, i.e., it was not organized with capital stock and it has never issued shares of stock or any other securities to its members. Nevertheless, the Members claim that despite their failure to own stock or other securities expressly giving them equity interests in the Cooperative, they have property interests in the Cooperative for three reasons: (1) the Cooperative's "Phase II By-Laws" state that the Cooperative is a "limited equity" Wisconsin Cooperative; (2) the Cooperative's "Occupancy Agreement" states that the agreement "is and shall be subordinate to present and future mortgage debts secured by the property," which the Members believe specifically gives the Members a legal and equitable "junior interest" in the Cooperative's property; and (3) through the by-laws' "sweat participation" requirement, the Members have gained "sweat equity" in the Cooperative's property. We disagree with all these claims and conclude that

the Members have no interest in the Cooperative's property beyond the right of occupancy.

First, throughout their briefs, by repeatedly describing the Cooperative as a "limited equity" cooperative, with the words "limited equity" constantly emphasized, the Members appear to be arguing that they personally have equity in the Cooperative because the by-laws state that the Cooperative is a "limited equity" cooperative. This argument is unpersuasive. The mere fact that the Cooperative uses the words "limited equity" to describe itself does not create the legal effect of conferring upon the Members equitable interests in the property of the Cooperative. As will be discussed, no provision in the by-laws or the occupancy agreement, or any other documents related to the Cooperative give the Members property interests in the Cooperative, and therefore, the fact that the Cooperative chose to refer to itself as a "limited equity" cooperative does not, by itself, grant the Members such property interests.[1]

[1] The record, and particularly the "Phase-II By-Laws," indicate that the term "limited equity" refers to the provisions contained in Article III, §§ 4 and 7 of that document. According to Article III, § 4, Cooperative members are required to purchase a "Membership" in the amount of $1,000 measured in July 1, 1985 dollars, based upon the Bureau of Labor Statistics figures for the Milwaukee area for the statistical period preceding the date on which the Membership is approved. Article III, § 7 states that when a member's Membership is terminated, the Cooperative shall repurchase the Membership at its transfer value. The transfer value is determined as being the amount of the original deposit, plus the "equity accumulation" or minus the "equity loss," less certain amounts due the Cooperative. The "equity accumulation" or "equity loss" is "based on the change in the Bureau of Labor Statistics Consumer Price Index from the quarterly statistical period in which the Membership Deposit was paid in full, to the statistical period preceding the termination of Membership [sic]." Thus, the "limited equity," to which members of the Cooperative appear entitled, seems to amount merely to the return of their "Membership," i.e. $1,000 "1985" dollars, measured in "today's" dollars.

(continued)

Second, the Members argue that the Occupancy Agreement shows that they have an equity interest in the Cooperative because that document states that "this agreement is and shall be subordinate to present and future mortgage debts secured by the property." The Members argue that this language shows that they have "junior" equitable interests in the property. As HPC correctly argues, however, this argument begs the question since, while the language from the Occupancy Agreement may make whatever interests the Members have "junior" to "present and future mortgage debts," it fails to define the nature of the Members' interests. Therefore, the Occupancy Agreement language fails to prove that the Members have equity interests in the Cooperative.

Finally, the Members argue that they have gained "sweat equity" in the Cooperative's property by participating in "sweat participation." This argument is unpersuasive for two reasons. First, based on the Members' own definition of "sweat equity," taken from BLACK'S LAW DICTIONARY 1448 (6th ed. 1990), sweat equity is "[e]quity created in property through labor of *owner* in making improvements to property." (Emphasis added.) At issue, however, is whether or not the Members are "owners" of the Cooperative or merely "tenants." If the Members have equity or property interests in the Cooperative, then they are "owners," otherwise, they are merely tenants. The Members have failed to show that they have equity interests, and therefore, the Members are not "owners" and

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It is conceivable that the return of the Member's "Membership" might constitute a financial if not a property interest, which possibly could be impaired or impeded by the foreclosure action. It is not this court's responsibility, however, to construct arguments for a party, and therefore, because the Members have failed to adequately brief this issue, we decline to address it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments).

could not establish "sweat equity" in the Cooperative's property. Second, even if we concluded that the Members could, regardless of their status as non-owners, establish "sweat equity," the record does not establish the nature of the Members' sweat participation. Although the Members, in discussing their "sweat participation" argument, make reference to the Phase-II By-Laws, which in turn make reference to a "Sweat Participation Agreement," the latter document is not part of the record. Therefore, even if the Members, as non-owners, could gain "sweat equity" we would decline to address their claim since it is based on facts contained in a document which is not part of the record on appeal. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981) (assertions of fact which are not part of the record will not be considered).

Therefore, because the Members have not been issued shares of stock or other securities in the Cooperative, and the Members have failed to otherwise prove they have equitable or property interests in the Cooperative, we conclude, like the trial court, that the Members' sole interest in the Cooperative is a right of occupancy. We also agree with the trial court's conclusion, which is not disputed by the Members, that because the Members were not made parties to the foreclosure action, their rights of occupancy will not be impeded or impaired by the action. Thus, we affirm the trial court's order denying the Members' motion to intervene.

By the Court.—Order affirmed.

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