COURT OF APPEALS DECISION DATED AND FILED

August 6, 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. 97-0737

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

FIRST NATIONAL BANK OF STOUGHTON,

PLAINTIFF-RESPONDENT,

V.

WAYNE L. AABERG, JR., D/B/A AABERG EXCAVATING & LANDSCAPING, AND KARA AABERG,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Wayne and Kara Aaberg appeal a summary judgment granted to the First National Bank of Stoughton in this action for a money judgment, replevin and foreclosure. The Aabergs claim there are disputed

issues of material fact which preclude a summary judgment. We disagree and affirm.

In October 1995, the Aabergs borrowed approximately $75,000 from the Bank as a business loan. The note was a three-year note, payable in monthly installments. The Aabergs made payments in November and January, but did not make a payment in December. Also in December, they borrowed $100,000 from the Bank to purchase a home and gave the Bank a mortgage on the home. In January 1996, they signed a restructured note for the money lent in October, together with an additional $3,300 which the Aabergs needed to close on the home they were selling. Aabergs also gave the Bank a second mortgage on their home. In March 1996, the Aabergs borrowed an additional $10,000 for their business and gave the Bank a general business security agreement in their business personal property.

The Aabergs defaulted on both the January note and the March note. Under the terms of the notes and security instruments, a default on one became a default on all of the obligations. The Bank brought an action in the circuit court to collect the notes and for foreclosure and replevin of the collateral. The circuit court granted summary judgment to the Bank.

This court employs the same summary judgment methodology as the circuit court. *See* ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App.), *review denied,* 215 Wis.2d 425, 576 N.W.2d 281 (1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it presents a material issue of fact or law. *See* ***id.*** If we conclude that the complaint and answer are sufficient to join issue, we then examine the moving party's affidavits to determine if they establish

a *prima facie* case for summary judgment. *See* ***id.*** If a *prima facie* case is established, we review the opposing party's affidavits to see if there are any genuine issues of material fact which would require a trial. *See* ***id.*** at 232-33, 568 N.W.2d at 34. Further, the factual dispute must be genuine. *See* ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (citation omitted).

The Aabergs claim that summary judgment is not appropriate because there are a number of disputed issues of fact. A review of the pleadings and the affidavits submitted for the motion, however, establish that summary judgment was properly granted. The Aabergs allege at various places in their brief that they did not default on the October 1995 note. At the same time, however, they admit that they missed a payment. Their argument appears to be that they did not default because the Bank did not send them a notice of default. The note itself provides, however, that if the Aabergs fail to make a payment, the Bank may declare the entire balance due immediately without notice or demand. The undisputed facts, therefore, establish that the Aabergs did default on this note.

The Aabergs also claim that there was no valid contract obligating them under the January 1996 note because they did not accept it.[1] In support of this claim, they argue that the Bank engaged in fraud, economic duress and bad faith in restructuring the October 1995 note in January 1996. However, the basis for this argument again appears to be that they were not in default on the October

[1] In the circuit court they argued that there was no contract because there was no consideration. The court, however, disagreed and the Aabergs have rephrased their argument.

1995 note. As we have discussed, the record, including their own affidavits, establish that they were in default on that note.

Moreover, the Aabergs' affidavits do not establish any other facts which would support these allegations. The Aabergs allege that they were told by the Bank that they had to restructure the note. Given the default, however, this was not an unreasonable position for the Bank to take. The undisputed facts also do not establish any economic duress imposed by the Bank. Finally, the Aabergs' allegations of bad faith are not supported by the record on summary judgment, particularly when the record shows that the Bank continued to loan the Aabergs money even after they defaulted on the October 1995 note. In short, the claims the Aabergs raise do not create genuine issues of fact.

The Aabergs' final argument is that the Bank violated the federal Truth-in Lending Act, 15 U.S.C. § 1635(a), because the Bank did not provide them with a copy of the notice of the right to rescind. As the Bank points out, however, it was under no obligation to give them this notice because the loan was primarily a commercial loan and not a consumer loan. *See* 15 U.S.C. § 1603(1). Further, the undisputed facts establish that the Aabergs signed a notice of right to cancel form and confirmed three days later that they were not canceling. There is no merit to the Aabergs' claims that the notes are invalid because the Bank did not provide them with notice of the right to rescind.

By the Court.—Judgment affirmed.

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