COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2777 **Cir. Ct. No. 2013CV76**

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

TOWN BANK,

PLAINTIFF-RESPONDENT,

V.

DAC MANAGEMENT COMPANY, DAVID A. COLLETTI AND PAMALA L. COLLETTI,

DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Waukesha County: J. MAC DAVIS and LEE S. DREYFUS, JR., Judges. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. DAC Management Company, a corporation owned by David A. Colletti, assumed two loans Town Bank made to another corporation

and took out a third loan from the bank. David signed personal guaranties; his and his wife Pamala's residence ("the property") secured the loans. The circuit court awarded the bank a joint and several $1,095,671.71 money judgment against DAC, which was obligated under business notes evidencing the loans, against David, due to his personal guaranties, and against Pamala, as a spousal obligation under WIS. STAT. § 766.55(1), as referenced in WIS. STAT. § 806.15(4) (2011-12).[1] It also granted the bank summary judgment on its mortgage foreclosure claim.

¶2 DAC and the Collettis (collectively, the Collettis) appeal the orders. They contend that the transactions were consumer loans subject to the Truth-in-Lending Act (TILA), 15 U.S.C. § 1601, *et seq.*, which their mortgage expressly does not secure. They also argue that the bank should be judicially estopped from arguing both that the loans were commercial loans, yet were incurred in the interest of David's marriage or family, as shown by the marital purpose statements he signed. We reject their contentions and affirm.

¶3 In 2008, the bank made a $200,000.00 loan, evidenced by a revolving term and credit agreement, and a $500,000.00 loan, evidenced by a business note, to AVA Marketing & Communications, LLC, a firm of which David is part owner. In connection with the loans, David executed a standard marital purpose statement indicating that the loans were incurred in the interest of his marriage or family. In 2011, at David's request, the bank allowed DAC to assume all of AVA's obligations to pay and perform the loans. DAC executed business notes made payable to the bank, which renewed the two loans. The loans subsequently were renewed several times under various business notes. All of the

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

renewals were without novation. In June 2012, the bank made a third loan to DAC evidenced by a business note made payable to the bank. David also signed marital purpose statements in connection with the 2011 and 2012 transactions.

¶4 David executed a Continuing Guaranty (Unlimited) on each loan by which he guarantied full payment of the loans—indeed, of all monies loaned to DAC previously, contemporaneously, or in the future. The Collettis also executed a real estate mortgage in favor of the bank that encumbered the property and, because of David's guaranties, secured full repayment of the loans.[2]

¶5 DAC defaulted under the loan notes, David defaulted under the continuing guaranties, and the Collettis defaulted under the mortgage. Accordingly, the bank accelerated full payment of the loans. As of June 6, 2013, the outstanding balance on the notes totaled $1,081,385.54 and the bank's collection costs were $9,432.57. The bank contended that, in addition to interest and collection costs accrued since June 6, 2013, DAC is liable under the notes, David is liable under the guaranty, and Pamala is liable as David's obligated spouse under WIS. STAT. §§ 766.55(1) and 806.15(4). The circuit court agreed. This appeal followed.

¶6 "We review summary judgments de novo, using the same methodology as the circuit court." *See* ***Cole v. Hubanks***, 2004 WI 74, ¶5, 272 Wis. 2d 539, 681 N.W.2d 147. In reviewing the grant or denial of a summary

[2] The Collettis first executed a mortgage in favor of the bank in 2009. In 2010 and 2011 they executed additional mortgages in the bank's favor, each of which also secured full loan repayment and encumbered the property. The bank sought foreclosure only on the 2009 mortgage. The provisions relevant to this decision are identical in all three mortgages.

judgment, we apply the same methodology as the circuit court, and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. WIS. STAT. § 802.08(2). Whether the mortgage defeats the foreclosure action and whether judicial estoppel applies present questions of law, which we review de novo. *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 627, 427 N.W.2d 437 (Ct. App. 1988) (mortgage contract); ***Riccitelli v. Broekhuizen***, 227 Wis. 2d 100, 112, 595 N.W.2d 392 (1999) (judicial estoppel).

¶7 The Collettis first argue that the plain language of the mortgage defeats the foreclosure action. Paragraph 5 of the mortgage provides: "This Mortgage does not secure and Lender disclaims this Mortgage as security for … any loan governed by the Federal Truth-in-Lending Act." They contend that the transactions secured by the mortgage were primarily for personal, family, or household purposes and therefore subject to TILA.

¶8 The Collettis are mistaken. TILA applies only to consumer loan transactions where "the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." *See* 15 U.S.C. § 1602(i). The first two loans originally were made to AVA and later were assumed by DAC, both limited liability corporations. The current evidence for the loans are business notes executed by DAC and made payable to the bank. TILA does not apply to "[b]usiness, commercial, agricultural, or organizational credit," "[a]n extension of credit primarily for a business, commercial or agricultural purpose," or "[a]n extension of credit to other than a natural person." 12 C.F.R. § 226.3(a)(1), (2).

¶9 The Collettis next argue that the bank should be judicially estopped from asserting both that the loans were made to further David's commercial interests and that Pamala is liable because David's obligations under the guaranty were incurred in the interest of their marriage.

¶10 The equitable doctrine of judicial estoppel precludes a party from asserting one position in a legal proceeding and later asserting an inconsistent one. ***Riccitelli***, 227 Wis. 2d at 111-12. The doctrine may be invoked if: (1) the earlier and the later positions are clearly inconsistent; (2) the facts at issue remain the same; and (3) the party to be estopped convinced the first court to adopt its position. ***Id.*** at 112.

¶11 The bank is not pressing inconsistent positions. The marital purpose statements David signed did not transform plainly commercial loans into consumer transactions. Rather, the statements serve as evidence that the obligations were incurred in the interest of the marriage or family for purposes of determining the sources available to satisfy them. *See* WIS. STAT. § 766.55(1), (2); *see also* ***Bank One, Appleton, NA v. Reynolds***, 176 Wis. 2d 218, 220-21, 500 N.W.2d 337 (Ct. App. 1993). Judicial estoppel does not apply.

By the Court.—Orders affirmed.

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