COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 98-2712

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

ALVIN J. HERLACHE AND DOROTHY R. HERLACHE,

PLAINTIFFS-RESPONDENTS,

V.

ROBIN ZAHRAN AND KAREN ZAHRAN,

DEFENDANTS-APPELLANTS,

DENMARK STATE BANK, JAMES F. PRESSENTIN, AL BARAKA BANCORP (CHICAGO), INC., AND MARJAN KMIEC,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Robin and Karen Zahran appeal pro se from a judgment of foreclosure in favor of Alvin and Dorothy Herlache. We reverse the calculation of the Zahrans' indebtedness due to the presence of a factual issue which precludes summary judgment. All other aspects of the judgment are affirmed. Accordingly, we affirm in part, reverse in part and remand for proceedings to determine the amount owed by the Zahrans.

¶2 On March 30, 1983, the Herlaches sold their farm to the Zahrans. The Zahrans gave a note and mortgage on the farm to the Herlaches. The note had a ten-year term with interest at ten percent during the last five years of the note. The Zahrans did not make complete and timely payments during the term of the note. The Herlaches continued to accept sporadic payments from the Zahrans after the note came due. In February 1998, the Herlaches sued the Zahrans for foreclosure due to their default.

¶3 The Zahrans counterclaimed for an offset against the balance due under the note because the Herlaches failed to correct two title problems of which the parties were aware at the time the Zahrans purchased the property. The circuit court granted the Herlaches' motion to dismiss the counterclaim on statute of limitations grounds. The Zahrans moved to dismiss the Herlaches' foreclosure action because the Herlaches did not give them a thirty-day notice of default and right to cure. The court found that because the Herlaches commenced their foreclosure action after the term of the note expired, they were not required to give the notice. The court then granted summary judgment to the Herlaches on their foreclosure action and the balance owed by the Zahrans. The Zahrans appeal and raise numerous issues.

¶4 We will address the Zahrans' notice issue first. In claiming that they were entitled to a thirty-day notice and right to cure, the Zahrans rely upon the following provision in the mortgage:[1]

> In the event of default, mortgagee may, at his option and subject to the notice provisions of this Mortgage, declare the whole amount of the unpaid principal and accrued interest due and payable and collect it in a suit at law or by foreclosure of this Mortgage by action or advertisement or by exercise of any other remedy available at law or equity, and Mortgagee may sell the Property at public sale and give deeds of conveyance to the purchasers pursuant to the statutes.
>
> Unless otherwise provided in the note(s) secured by this Mortgage prior to any acceleration (other than under the last paragraph of this Mortgage), Mortgagee shall mail notice to Mortgagor specifying: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is mailed to Mortgagor by which date the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration.

¶5 The Herlaches counter that because the note had long since expired, there was no need to give notice that the debt was being accelerated due to the Zahrans' default. The circuit court agreed with the Herlaches.

¶6 The construction of contracts presents a question of law which we decide independently. *See* ***Ondrasek v. Tenneson***, 158 Wis. 2d 690, 694, 462 N.W.2d 915 (Ct. App. 1990). We conclude that the mortgage language unambiguously contemplates giving notice in a situation where the debt may be accelerated due to a default. Here, the note had long since come due and acceleration was no longer necessary in order to collect upon the note.

[1] The note incorporates the default notice provisions of the mortgage.

¶7 The Zahrans next argue that the Herlaches agreed to renew the note on March 3, 1993, at five percent interest. It is undisputed that the Herlaches accepted payments after the term of the note ended. However, the Zahrans do not cite any authority for the proposition that the note could be renewed other than in writing or that the acceptance of payments subsequent to the note term revived the note. We do not consider arguments unsupported by citation to legal authority. *See* ***Riley v. Town of Hamilton***, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989). Moreover, the note itself states that the Herlaches may accept payments after default without modifying or limiting the Zahrans' liability under the note.

¶8 The Zahrans next argue that the circuit court erroneously (1) dismissed their counterclaim for an offset relating to title problems with the property and (2) rejected their claim that the Herlaches breached an agreement to rectify the title problems. At the time the Herlaches sold the farm to the Zahrans, the parties entered into a separate agreement which acknowledged two title defects. The agreement provides:

> In order to hold the real estate closing as planned, the Herlaches guarantee and promise to obtain the following:
>
> 1. A patent from the Federal Government for each of the above missing patents. These will be obtained within a reasonable time, but no later than six (6) months.
> 2. Obtain merchantable title evidence for the … excepted triangle. This will be obtained as soon as reasonably possible, but in no event no later than five (5) years.
>
> In the event the Herlaches do not perform as herein promised, the Zahrans may fulfill said performance and the entire cost and expense for said performance shall be an immediate set-off against any sums remaining unpaid obligation on a mortgage and note concerning said real estate between said parties.
>
> Further, the Herlaches agree to pay all of the Zahrans' costs and expenses to enforce this agreement, including attorneys' fees.

¶9 The circuit court found that the Herlaches did not perform under the agreement. Therefore, the Zahrans' claim accrued at that point, which was more than six years before they asserted it in their counterclaim. Because the six-year limitation period, *see* WIS. STAT. § 893.43 (1997-98),[2] had expired, the court dismissed on statute of limitations grounds.

¶10 We may affirm the circuit court if it reached the right result for the wrong reason. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995). Construction of the agreement presents a question of law which we decide independently. *See* ***Ondrasek***, 158 Wis. 2d at 694. We construe the agreement as granting to both buyer and seller the opportunity to correct the title problems.[3] The Herlaches did not do so; the Zahrans had the opportunity to do so and recover their related expenses from the Herlaches. The Zahrans would only have a claim under the agreement had they gone to the expense of rectifying the title problems. It is undisputed that they have not done so. Therefore, any claim under the agreement is premature. Accordingly, we affirm the circuit court's decision to dismiss the Zahrans' counterclaim.

¶11 The circuit court determined on summary judgment the amount owed by the Zahrans on their note. The Zahrans contend that there were factual issues which should have precluded summary judgment.

¶12 An appeal from a grant of summary judgment raises an issue of law which we review de novo by applying the same standards employed by the circuit

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[2] All references to the Wisconsin Statutes are to the 1997-98 version.

[3] Therefore, we reject the Zahrans' analysis that the Herlaches breached the agreement by failing to rectify the title problems.

court. *See* ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See* ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶13 At a hearing prior to the final summary judgment hearing, the circuit court ruled on the manner in which evidence in the case would be developed. Before we address the Zahrans' challenge to the grant of summary judgment on the amount due the Herlaches, we must address their challenge to this ruling.

¶14 Both parties conceded that they had not kept complete records of the note's payment history. This concession highlighted the potential proof problems for the circuit court. The court noted that a foreclosure case is generally "on a fast track because the water is fairly clear, payments haven't been made, according to the note and mortgage the defendant is in default, and that's the end of it. Here, there has been an issue as to whether appropriate credits have been given." The court then gave the Zahrans two weeks to produce documentation that the Herlaches had not given them credit for all of their payments. The court required the Zahrans to submit an affidavit itemizing their claimed credits.[4] The court did not permit further discovery because neither party had undertaken any discovery during the four months the action had been pending. The court found that if the Zahrans had legitimate concerns about the amount claimed by the Herlaches, the

[4] For this reason, the computer print-out offered by the Zahrans did not comply with the court's ruling and was apparently disregarded by the court. The court focused on the Herlaches' payment history and affidavit, and the paragraphs of the Zahrans' affidavits which itemized their claimed credits.

Zahrans could have demanded documentation through discovery. The Zahrans did not object to the circuit court's discovery ruling.

¶15 We conclude that the circuit court did not misuse its discretion in limiting discovery and establishing the manner in which summary judgment proofs would be organized. *See* ***Konle v. Page***, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996). We will uphold a circuit court's discretionary determination if there is any reasonable basis to sustain it. *See* ***Domain Indus., Inc. v. Thomas***, 118 Wis. 2d 99, 103, 345 N.W.2d 516 (Ct. App. 1984).

¶16 "Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." ***GMAC Mortgage Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). Given the parties' conceded record-keeping and related proof problems, the court had a reasonable basis for exercising its equitable authority to impose a framework for the proof on summary judgment. As the Herlaches had already offered their payment history and the Zahrans were claiming some of their payments were not reflected in the payment history, it was reasonable for the circuit court to require the Zahrans to come forward with their claimed credits to determine whether any material facts were disputed.

¶17 Having upheld the manner of proof, we now turn to the proof itself. The Zahrans claim that there were disputed material facts regarding the amount due which should have precluded summary judgment. Our review of the record confirms that there are no material factual disputes regarding the amount owed by the Zahrans. In affidavits, the Zahrans claimed numerous credits. All of these credits, save a $607.62 milk assignment payment, as discussed below, were conceded by the Herlaches in affidavits and at the summary judgment hearing. These concessions

eliminated the factual issues in the case and the necessity for a trial. We will now briefly address the specific credits claimed by the Zahrans on appeal.

¶18 The Zahrans claim they paid $14,576 in November 1997. However, they did not offer evidentiary proof of that amount which satisfied the court's discovery requirements. The court specifically required the Zahrans to produce an affidavit with any additional checks attached. Robin Zahran's affidavit contains only the bald assertion that a $14,576[5] payment was delivered in November 1997 without any documentary evidence.[6] Furthermore, at the summary judgment hearing the Zahrans did not mention the $14,576 payment as an amount in dispute.[7] We contrast this with the Zahrans' claim at that hearing for credit for a $607.62 payment on a milk assignment, which was supported by a statement from the dairy identifying Herlache as a recipient of proceeds from the sale of the Zahrans' milk.

¶19 The Herlaches' payment history does not give credit for the $607.62 milk assignment, although all other milk assignments similarly documented were credited upon the Herlaches' stipulation at the summary judgment hearing. Because there remains a question regarding whether the Zahrans paid $607.62 to the Herlaches and whether that amount should be credited against the debt on the note, we reverse and remand for the limited purpose of addressing this claimed credit.

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[5] In their reconsideration motion in the circuit court, the Zahrans state that the payment was $14,765. This discrepancy does not change the result on appeal.

[6] The affidavit states that the $14,576 payment was delivered upon the representation that the Herlaches would rectify the title problems. The affidavit also seems to state that the Herlaches did not cash the check. The lack of clarity in Zahran's affidavit is not sufficient to create a factual issue relating to the alleged $14,576 payment.

[7] The payment history attached to the findings of fact shows a $14,576 payment in May 1996 and no payment in that amount thereafter.

¶20 The Zahrans also claim that they did not receive credit for payments of $4861.44 and $877.21. However, both of these amounts appear in the Herlaches' affidavits and payment history as credited amounts.

¶21 The Zahrans claim that check number 1354 for $1215 was not credited. However, the record does not contain any proof relating to check number 1354. Therefore, the Zahrans did not create a factual dispute regarding this claimed credit.

¶22 The Zahrans also claim a credit for $2430.48, check number 51689. That check is clearly credited in the Herlache affidavit.

¶23 Finally, the Zahrans claim that they should have been credited with a $4860.96 payment. The payment history attached to the court's findings of fact includes a $4860.96 payment in December 1984. The Zahrans do not provide an adequate record reference to substantiate that this amount was deleted from the payment history or to permit this court to determine whether the Zahrans raised a factual issue regarding this amount.

¶24 The Zahrans complain that the evidence of their indebtedness kept changing. We agree. However, the circuit court devised a framework for determining their indebtedness and the Zahrans had an opportunity to present evidence of claimed credits. As those credits were substantiated or otherwise agreed to, the amount of the Zahrans' indebtedness was reduced. The changing calculations did not indicate a factual dispute. Rather, they were the result of the whittling down of factual disputes in the summary judgment process.

¶25 The Zahrans argue that the circuit court misused its discretion when it denied their request to amend their pleadings to include claims for conspiracy,

abuse of process and fraud. The premise of the Zahrans' argument is flawed: the Zahrans never moved the court to amend their pleadings. Rather, they were involved in a dispute with their counsel over whether amended pleadings would be filed. This resulted in counsels' motion to withdraw. However, there is nothing in the record to indicate that a motion to amend the Zahrans' pleadings was before the court.[8]

¶26 The Zahrans contend that the circuit court erred when it did not impose estoppel and waiver against the Herlaches because they waited until almost six years after the note came due to sue the Zahrans. Foreclosure is an action in equity, *see* ***id.***, and is governed by the doctrine of laches, *see* ***Suburban Motors, Inc. v. Forester***, 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986). Laches is an equitable defense to an action based on an unreasonable delay in bringing suit under circumstances that prejudice the opposing party. *See* ***Sawyer v. Midelfort***, 217 Wis. 2d 795, 806, 579 N.W.2d 268 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 124, 595 N.W.2d 423 (1999).

¶27 The Herlaches exercised forbearance and continued to accept payments from the Zahrans even after the note came due. We see no basis to bar the Herlaches' claim in order to relieve the Zahrans of an obligation which the Herlaches could have enforced much earlier.

¶28 The Zahrans protest the court's finding that they must pay ten percent interest through the redemption period. We reject this argument. It appears from the findings of fact that the circuit court imposed interest at five percent pursuant to WIS. STAT. § 138.04 from the due date of the note rather than

[8] The Zahrans do not refer us to that portion of the record which substantiates this claim.

the ten percent the Zahrans challenge on appeal. The Herlaches concede this. The Zahrans have not established that the final calculation of their indebtedness includes interest at ten percent during the redemption period.

¶29 The Zahrans also challenge the attorney's fees awarded to the Herlaches' counsel because the foreclosure action was filed contrary to the note's notice requirement and the Herlaches' affidavits and calculations kept changing. We have already held that the notice requirement did not apply and the court's order regarding the presentation of proof necessitated updating the parties' submissions to the court regarding the balance due.[9]

¶30 In conclusion, we reverse and remand for a determination relating to the $607.62 milk assignment. All other aspects of the judgment are affirmed.

¶31 No costs on appeal to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

[9] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Management, Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977), *cert. denied,* 439 U.S. 865 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").