

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3238

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF STEVENS POINT,

PLAINTIFF-RESPONDENT,

V.

JOHN PLISKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
FREDERIC W. FLEISHAUER, Judge. *Affirmed.*

Before Eich, Roggensack and Dillon, JJ.¹

¹ Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 PER CURIAM. John Pliska appeals from a judgment of foreclosure on a mortgage which he had granted to the City of Stevens Point in lieu of a bond pending his prior appeal of several building code violations. He claims the foreclosure action was barred by the statute of limitations and laches and that the record fails to show he was in default on the mortgage. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Pliska was convicted of several building code violations in 1988, and a series of judgments were entered against him assessing forfeitures in the amount of \$8,631. He appealed the decisions to this court. In lieu of a bond on appeal, he granted the City of Stevens Point a mortgage on property which he owned. The mortgage was duly recorded with the Portage County Clerk of Courts.

¶3 The forfeiture judgments were affirmed on July 13, 1989. Pliska, however, never paid the forfeitures. The City sent Pliska letters in May and July of 1998, attempting to collect the amount outstanding on the debts secured by the mortgage. When Pliska still did not pay, the City commenced a foreclosure action. The trial court granted the City summary judgment, and Pliska appeals.

STANDARD OF REVIEW

¶4 We apply the same summary judgment methodology as that employed by the circuit court. *See* WIS. STAT. § 802.08 (1997-98);² *State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *See id.* If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See id.*

ANALYSIS

Statute of Limitations

¶5 Pliska argues that the foreclosure action should be barred by the six-year statute of limitations for contracts set forth in WIS. STAT. § 893.43 because the mortgage represented a promise of payment in lieu of a bond under WIS. STAT. § 66.12(2). However, WIS. STAT. § 893.33(2) sets forth a statute of limitation of thirty years for actions “affecting the possession or title of any real estate.” We are satisfied this is the section which applies to the City’s action to foreclose on Pliska’s mortgage, regardless of the nature of the underlying debt which the mortgage secured. The City initiated its suit well within the applicable thirty-year statute of limitations.

Laches

¶6 The doctrine of laches may bar an action when there has been “unreasonable delay, knowledge of the course of events and acquiescence therein, and prejudice to the party asserting the defense.” *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) (citation omitted). Here, the City had knowledge of all of the events which it alleges established Pliska’s default on the mortgage, and it has

provided no reasonable explanation of why it delayed its prosecution for ten years following the appellate decision affirming the forfeitures. It contends, however, that Pliska has failed to established a factual dispute on the issue of prejudice.

¶7 Pliska claims prejudice from the fact that both the interest due on his forfeiture judgments and the value of his mortgaged property have significantly increased during the delay. However, while we agree with the general proposition that a mortgagee could be prejudiced by having to pay considerably more for his default than he would have had to do if a foreclosure action been more timely brought, *see Mutual Fed. Sav. & Loan Ass'n v. American Med. Servs., Inc.*, 66 Wis. 2d 210, 223 N.W.2d 921 (1974), that is not the situation here because the City expressly waived any claim to interest before the trial court. Accordingly, the trial court did not include any interest amount in the calculation of the amount owing to the City set forth in the foreclosure judgment. Since the amount of the debt the City claimed did not increase, any increase in the value of the mortgaged property would accrue to Pliska's benefit. In sum, we conclude that Pliska failed to establish a factual basis for the prejudice element of laches.³

Default

¶8 Pliska concedes that he never paid the forfeitures. However, he claims the City cannot show he was in default because there is no language in either the mortgage or the underlying forfeiture judgment specifying the date on which his payment was due or the amount of time after payment was due which would constitute default. We disagree.

³ In light of our conclusion that the City's waiver eliminated the relevance of any increase in the amount of interest due or the value of the property, we need not address whether Pliska's affidavits were in proper form.

¶9 The mortgage was executed on a standard, fill-in-the blank form provided by the State Bar. It stated that it was “to secure payment of judgments entered in Portage County Case Nos.: 87FM-1372, 87FM-1373 & 88FM-27” in the amount of \$8,631. It also provided, in relevant part:

4. DEFAULT AND REMEDIES. Mortgagor agrees that time is of the essence with respect to payment of principal and interest when due and in the performance of any of the covenants and promises of the Mortgagor contained herein or in the note(s) secured hereby. 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

Because the underlying debt arose from judgments, rather than a note executed to repay a loan, payments were not due in installments subject to acceleration upon default. Rather, by operation of law, the forfeitures were due in full as soon as the appeal process was completed and the underlying judgments became final. *See* WIS. STAT. § 66.12(2). It was not necessary to specify a date by which payment was to be made. The City could properly consider Pliska in default on the underlying debt when the forfeitures were not paid by the standard time allowed to satisfy judgments.

By the Court.—Judgment affirmed.

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

