

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 10, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

**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.

**Appeal No. 2014AP2904**

**Cir. Ct. No. 2011CV2768**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR  
TRUSTEE TO BANK OF AMERICA, N.A., AS SUCCESSOR  
TO LASALLE BANK, N.A., AS TRUSTEE FOR THE  
MERRILL LYNCH FIRST FRANKLIN MORTGAGE LOAN  
TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES,  
SERIES 2007-3,**

**PLAINTIFF-RESPONDENT,**

**v.**

**LORI A. HERMES, BY TYLER HERMES AS EXECUTOR  
OF THE ESTATE OF LORI A. HERMES,**

**DEFENDANT-APPELLANT,**

**CAPITAL ONE BANK USA NA,**

**DEFENDANT.**

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APPEAL from orders of the circuit court for Brown County:  
THOMAS J. WALSH, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Lori Hermes, pro se, appeals an order denying her WIS. STAT. § 806.07<sup>1</sup> motion for relief from a foreclosure judgment granted in favor of Bank of America, N.A. and an order confirming the sheriff's sale.<sup>2</sup> Hermes argues Bank of America fraudulently obtained the foreclosure of her property and further contends that a consent judgment in a federal case required Bank of America to cease the foreclosure action. Hermes alternatively argues Bank of America agreed to cease the foreclosure action as part of a private settlement with Hermes. Finally, Hermes asserts the circuit court "did not act impartially" in this matter. For the reasons stated below, we reject Hermes's arguments and affirm the orders.

### BACKGROUND

¶2 In April 2007, Hermes executed a note and a mortgage with First Franklin Mortgage to purchase property in Green Bay. The mortgage identified Mortgage Electronic Registration System (MERS) as the nominee for First Franklin. First Franklin subsequently transferred the note, endorsed in blank, to U.S. Bank, and both MERS and First Franklin assigned the mortgage to U.S.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

<sup>2</sup> After briefing was completed, Tyler Hermes, as executor of the estate of Lori Hermes, submitted what we construed as a suggestion of death under WIS. STAT. § 803.10(1), indicating he would be responding on Lori's behalf to a then-pending motion to dismiss. Because Tyler identified himself as the proper party for substitution, we amended the caption accordingly.

Bank. Hermes subsequently ceased payments on the note and, in December 2011, Bank of America, as servicer of the loan, filed the underlying foreclosure action. Bank of America moved for summary judgment and Hermes countered with a motion to dismiss, claiming Bank of America lacked standing. The circuit court denied Hermes's motion to dismiss and granted summary judgment of foreclosure to Bank of America. Hermes appealed to this court.

¶3 While that appeal was pending, the servicing of Hermes's loan was transferred from Bank of America to Nationstar Mortgage. Hermes moved to remand the case to the circuit court, asserting Bank of America lost standing to continue the appeal. This court ordered Bank of America to clarify the appropriate parties to the appeal, and we ultimately amended the caption to remove Bank of America as servicer of the loan. We also affirmed the foreclosure judgment. *See U.S. Bank v. Hermes*, No. 2013AP139, unpublished slip op. (WI App Sept. 4, 2013).

¶4 The property was later sold at a sheriff's sale and Hermes filed a series of postjudgment motions attempting to undo the foreclosure and derivative sheriff's sale. Hermes filed a WIS. STAT. § 806.07 motion for relief from the foreclosure judgment, alleging the judgment was "void based on fraud, mistake or misrepresentation." The circuit court denied that motion and the subsequent motion for reconsideration, as well as Hermes's motion to dismiss the confirmation hearing and a second § 806.07 motion for relief from judgment, alleging "fraud on the court." The sheriff's sale was ultimately confirmed and this appeal follows.

## DISCUSSION

¶5 We review a circuit court’s order granting or denying a motion for relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion. *See Lenticular Europe, LLC v. Cunnally*, 2005 WI App 33, ¶9, 279 Wis. 2d 385, 693 N.W.2d 302. “We affirm a discretionary decision if the circuit court examined the relevant facts, applied the correct law, and using a rational process reaches a reasonable result.” *Id.*

¶6 Many of Hermes’s arguments are based on her interpretation of the impact a federal case has on her relationship with Bank of America. That case was an enforcement action brought by the United States, various federal agencies and several states, including Wisconsin, against Bank of America in the United States District Court for the District of Columbia. The parties in that matter ultimately entered into a consent judgment to resolve their dispute over Bank of America’s foreclosure practices.

¶7 Hermes argues that the consent judgment in the federal action establishes that Bank of America defrauded her. The consent judgment, however, specifically states that Bank of America “does not admit the allegations of the Complaint other than those facts deemed necessary to the jurisdiction of this Court.” The consent judgment further states there has been no adjudication of any issue of fact or law and the judgment does not constitute evidence against Bank of America. Accordingly, nothing in the consent judgment establishes that Hermes was defrauded by Bank of America.

¶8 Hermes nevertheless contends that the consent judgment required Bank of America to cease all foreclosure activities against her. At most, however, the servicing standards in the consent judgment required Bank of America to

refrain from proceeding with foreclosure sales of owner occupied properties under the following circumstances: (1) if the borrower “is in compliance with the terms of a trial loan modification, forbearance, or repayment plan”; or (2) if a short sale or deed-in-lieu of foreclosure has been approved by all parties and proof of funds or financing has been provided to the servicer. Even assuming the subject property was owner-occupied, Hermes has not established that her situation fell under either of these circumstances.

¶9 Hermes also argues that a \$300 payment she received from Rust Consulting, Inc., establishes that Bank of America obtained the foreclosure judgment in her case through fraud. The circuit court acknowledged that Hermes received a payment in connection with an enforcement action. The cover letter from Rust Consulting indicates: “You were recently sent a notice that you are eligible to receive a payment as a result of an agreement between federal banking regulators and Bank of America in connection with an enforcement action related to deficient mortgage servicing and foreclosure processes.” As noted above, however, there was no adjudication of any issue or fact in the federal case, and the consent judgment did not constitute evidence against Bank of America. The fact that Hermes received a payment in connection with the enforcement action does not prove the foreclosure judgment was obtained through fraud.

¶10 Hermes nevertheless contends the \$300 payment and letter from Rust Consulting are proof that she entered into a private settlement with Bank of America in which Bank of America agreed to withdraw as servicer and “drop” the foreclosure action against her. The payment and letter, however, are not evidence of a private settlement between Bank of America and Hermes, as the letter does not include any of the terms of this purported settlement. Rather, it appears the check was a unilateral payment from a fund established as part of an agreement

between Bank of America and federal banking regulators. Further, servicing of Hermes's loan was not transferred as a result of any settlement. Hermes was notified that this was common practice in the mortgage lending industry, and that the transfer did not affect any terms or conditions of her mortgage loan, "other than those terms directly related to the servicing of the loan." Because the record does not support Hermes's assertions that the foreclosure judgment was obtained by fraud, the circuit court properly denied Hermes's WIS. STAT. § 806.07 motions for relief from the judgment.<sup>3</sup>

¶11 Finally, Hermes asserts the circuit court "did not act impartially" in this matter. Whether a judge was a neutral and detached magistrate is a question of constitutional fact we review independently. *State v. McBride*, 187 Wis. 2d 409, 414, 523 N.W.2d 106 (Ct. App. 1994). The presumption against bias must be overcome with a preponderance of evidence. *Id.* at 415. Both subjective and objective factors come into play. *See id.* Here, the record gives no indication that the judge believed he was biased, thus ending our inquiry into the subjective test.

¶12 Under the objective test, one must demonstrate that he or she was treated unfairly and that the judge was actually biased. *Id.* at 416. Hermes asserts the circuit court erroneously treated her WIS. STAT. § 806.07 motion as a summary judgment motion and then refused to allow her to file a brief in support of that motion. The record belies this claim. Although the circuit court's briefing schedule referenced a summary judgment, it appears this reference was

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<sup>3</sup> Although Hermes filed a notice of appeal from the order confirming the sheriff's sale, her challenge to the confirmation order appears to derive from her claims that the underlying foreclosure judgment was obtained by fraud. To the extent Hermes intimates that Bank of America lacked standing to pursue confirmation of the sheriff's sale, the record indicates that counsel for U.S. Bank, which was the holder of the note, moved to confirm the sheriff's sale.

inadvertent as the record shows the court treated Hermes's filing as a motion for relief from judgment.

¶13 Further, although Hermes did not file a document that was captioned as a brief, her motion included a four-page argument identifying the facts and law upon which she relied, as well as an attached affidavit and exhibits. The circuit court's briefing schedule consequently set forth the times for the responding party to submit its response and for Hermes to file her reply. To the extent Hermes intimates that the circuit court's decisions exhibit bias against her, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Because Hermes was given the opportunity to fully present her arguments, and the circuit court based its decision on facts of record, we reject Hermes's bias claim.<sup>4</sup>

*By the Court.*—Orders affirmed.

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

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<sup>4</sup> Consistent with this court's June 26, 2015 order, we reiterate that to the extent Hermes raises new issues in her reply brief, we do not address them. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

