COURT OF APPEALS
DECISION
DATED AND FILED

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2353 **Cir. Ct. No. 2009CV283**

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

PNC BANK, NA, SUCCESSOR BY MERGER TO NATIONAL CITY BANK, SUCCESSOR BY MERGER TO NATIONAL CITY BANK OF INDIANA, A DIVISION OF WHICH WAS FNMC,

PLAINTIFF-RESPONDENT,

V.

SHEILA M. SPENCER,

DEFENDANT-APPELLANT,

JOHN DOE SPENCER,

DEFENDANT.

APPEAL from an order of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. Sheila Spencer appeals the circuit court's grant of summary judgment to PNC Bank, NA, on PNC's foreclosure action against Spencer. We address the only argument that we discern Spencer making on appeal that is even somewhat developed, and reject as wholly undeveloped the rest of the arguments that Spencer purports to advance on appeal, including her argument challenging an order of the circuit court striking her answer and counterclaims both as untimely and on the ground that the counterclaims failed to state a claim upon which relief may be granted. As to the somewhat developed argument, we conclude that it fails under controlling Wisconsin law, and further observe that a decision of the United States Court of Appeals for the Seventh Circuit rejecting the argument that she now makes stands as law of the case on this issue. Accordingly, we affirm.

BACKGROUND

¶2 Most of the facts developed in the voluminous record in this long-delayed foreclosure case do not matter to our resolution of this appeal, and we summarize only essential background.[1]

¶3 FNMC, a Division of National City Bank of Indiana n/k/a National City Bank, filed a foreclosure complaint against Spencer in 2009, asserting that it was the holder of a note and associated mortgage on property owned by Spencer, and that Spencer was in default on her obligations under the note and mortgage. In her answer, Spencer admitted that FNMC was the holder of the note. After

[1] Delays in this case have been extreme, for reasons evident in the record but which we need not address. We note, however, that briefing in this appeal was not completed until December 2015.

National City Bank merged with and into PNC, PNC filed an amended complaint asserting its status as holder of the note and Spencer's default. Spencer did not answer the amended complaint.

¶4 PNC filed a motion for summary judgment. Spencer filed a "List of Issues of Procedural and Substantive Errors," including an objection to PNC prosecuting the foreclosure in its own name. PNC filed a motion to substitute PNC as the real party in interest. After a hearing, the circuit court granted PNC's motion and scheduled a hearing for PNC's motion for summary judgment.

¶5 Spencer removed the case to federal district court, arguing as a basis for federal court jurisdiction that The Federal Home Loan Mortgage Corporation, popularly known as Freddie Mac, a public government-sponsored enterprise, owned the "mortgage loan." The district court rejected Spencer's jurisdictional argument regarding Freddie Mac's ownership interest, and remanded the case for further proceedings in state court. Spencer appealed, and the federal court of appeals affirmed the remand to state court. As pertinent to the issues Spencer raises in this appeal, the holding of the federal court of appeals was that "PNC is the holder of the mortgage note" and therefore "PNC is entitled to enforce it." *See* ***PNC Bank, N.A. v. Spencer***, 763 F.3d 650, 654 (7th Cir. 2014).

¶6 Following remand to state court, Spencer filed an answer and counterclaims in response to the amended complaint. PNC filed a motion to strike the answer or dismiss the counterclaims, which the circuit court granted, on the ground that the answer and counterclaim were untimely filed and on the alternative ground that the counterclaims failed to state a claim upon which relief could be granted.

¶7 PNC filed a renewed motion for summary judgment and, subsequently, a second amended motion for summary judgment.

¶8 The circuit court granted PNC's motion for summary judgment. The court concluded that it was undisputed that Spencer had defaulted on her obligations under the note and mortgage and that Spencer failed to successfully rebut the prima facie case that, as the holder of the note, PNC had the right to enforce the note and accompanying mortgage. Spencer appeals, seeking reversal of the court's grant of summary judgment to PNC and reversal of the court's order striking her answer and dismissing her counterclaims.

DISCUSSION

¶9 Spencer's challenge to summary judgment centers around a theme, stated without citation to legal authority, that in order to obtain a foreclosure judgment PNC "must produce evidence that it is the **owner and holder** of the Note and Mortgage," and that the evidence shows that PNC is merely the "custodian of the [m]ortgage owned by Freddie Mac," rather than the "owner" of Spencer's note and mortgage (emphasis in original). We reject Spencer's assertion that PNC needs to show that it is the owner of the note in order to enforce the note, and conclude that there is no genuine issue of fact on the question of whether PNC is the holder of the note, which is what matters.

¶10 Under Wisconsin law, the holder of a note, meaning a person who is in actual possession of the original note, is entitled to enforce it regardless of whether the holder actually owns the note. *See* WIS. STAT. § 403.301 (2013-14)[2];

[2] WISCONSIN STAT. § 403.301 provides as follows:

(continued)

PNC Bank, N.A. v. Bierbrauer, 2013 WI App 11, ¶10, 346 Wis. 2d 1, 827 N.W.2d 124 ("The 'holder' of an instrument has the right to enforce that instrument."). This settles the disputed issue here regarding the enforceability of the note, which is a promise to repay debt secured by the mortgage. *See* ***Bank of New York Mellon v. Carson***, 2015 WI 15, ¶51, 361 Wis. 2d 23, 859 N.W.2d 422 (Prosser, J., concurring) ("In simple terms, a 'mortgage conveys an interest in the real estate to the lender as security for the debt, while the mortgage note is a promise to repay the debt.'" (quoted source omitted)); ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶32, 350 Wis. 2d 411, 838 N.W.2d 119 ("'the purchase of a note or debt secured by a mortgage carries with it the lien of the mortgage'" (quoted source omitted)).

¶11 Regarding the evidence submitted on summary judgment to show that PNC possesses the original note, Spencer has little to say. Even so, we have reviewed the record and have determined that the evidence proffered by PNC establishes a prima facie case that PNC is the holder of the note and thereby entitled to enforce the note against Spencer, and that there is no evidence rebutting the prima facie case.[3] Spencer fails to point to any admissible evidence that rebuts

> **Person entitled to enforce instrument**. "Person entitled to enforce" an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument under s. 403.309 or 403.418(4). *A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument* or is in wrongful possession of the instrument.

(Emphasis added.) All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] While not necessary to our resolution of this issue, we observe that, in a separate federal bankruptcy proceeding filed by Spencer, the bankruptcy court made a finding that PNC possesses the original note.

the prima facie case. We therefore conclude that, as holder of the original note, PNC has the right to enforce it.

¶12 We also reject Spencer's "owner" argument on the independent ground that the law of the case doctrine applies here, because this issue has been previously resolved in favor of PNC by a federal appellate court. The federal court of appeals directly rejected Spencer's argument that PNC is not entitled to enforce the note because it is not the "owner" of the note when Spencer appealed the federal district court's denial of her removal attempt. *See* ***Spencer***, 763 F.3d at 654 (concluding that "since PNC is the holder of the mortgage note, PNC is entitled to enforce it.").

¶13 "The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783 (quoted source omitted), *cert. denied*, 546 U.S. 998 (2005). Spencer does not dispute that the law of the case doctrine applies to coordinate court systems, including between state and federal courts on removal and remand, and we see no reason that it should not. *See* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure vol. 18B, § 4478.4 (2d ed., West 2002). Instead, as a purported reply on this issue, Spencer merely reverts to her unmeritorious "owner" argument, asserting that "[n]either federal court made the determination that [PNC] is the **owner** of the [n]ote." (Emphasis in original.)

¶14 While the general rule is that a legal issue by an appellate court must be followed in all subsequent proceedings in the same case, exceptions are possible when "'the evidence on a subsequent trial was substantially different, [or]

controlling authority has since made a contrary decision of the law applicable to such issues.'" ***State v. Brady***, 130 Wis. 2d 443, 446-48, 388 N.W.2d 151 (1986) (quoted source omitted). Spencer does not argue that either of these exceptions apply here.

¶15 We decline to address, as completely undeveloped, Spencer's remaining arguments, including her assertions that the circuit court erroneously exercised its discretion in striking Spencer's answer and counterclaims as untimely and that Spencer has been denied procedural due process.[4] The undeveloped arguments, which sometimes consist of nothing more than a sentence or two, would require us to develop them, which we decline to do. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (courts may not act as advocates; inadequately briefed arguments may be ignored). While the particular shortcomings of Spencer's many undeveloped arguments vary, generally the purported arguments consist of conclusory statements without citation to authority or to the record and violate the Wisconsin rules of appellate procedure, which

[4] We note that, even if we were to review the merits of Spencer's argument challenging the circuit court's decision to strike her answer and counterclaims as untimely, we see no reason that we would not uphold the circuit court's decision as a proper exercise of the court's discretion, given that Spencer attempted to file the answer and counterclaims almost two years after PNC filed the amended complaint naming PNC as plaintiff.

Separately, given that we conclude that Spencer's argument challenging striking the answer and counterclaims is undeveloped, we deny as moot a motion Spencer has filed in this court in connection with her undeveloped argument. The motion asks that we take judicial notice of a form scheduling order from Spencer's federal district court case before it was remanded to state court, because the scheduling order allegedly establishes an "adjudicative fact" supporting an argument Spencer raises for the first time in her reply brief "pertaining to the time allowed for filing amended pleadings in the removed action." Further, even if Spencer's motion was not rendered moot, we observe that we would likely deny it because it involves an argument that she makes for the first time on reply. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (appellate courts do not, "as a general rule, consider arguments raised for the first time in a reply brief" (citations omitted)).

require that "[t]he argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on...." *See* WIS. STAT. RULE 809.19(1)(e); ***Pettit***, 171 Wis. 2d at 646 ("We choose not to address these arguments because [the appellant's] brief violates a host of appellate rules.").

CONCLUSION

¶16 For all these reasons, we affirm the circuit court's order granting summary judgment to PNC.

By the Court.—Order affirmed.

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