COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP52 **Cir. Ct. No. 2013CV209**

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

BRUCE MIDDLETON AND ANGELA MIDDLETON,

PLAINTIFFS-APPELLANTS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, NEW CENTURY MORTGAGE CORPORATION AND BAC HOME LOANS SERVICING, LP,

DEFENDANTS,

SELECT PORTFOLIO SERVICING, INC. AND WELLS FARGO BANK, N.A.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Bruce and Angela Middleton appeal a summary judgment granted in favor of Wells Fargo Bank, N.A. and Select Portfolio Servicing, Inc. (collectively, Wells Fargo), declaring Wells Fargo is entitled to proceeds owed under the dwelling coverage section of a property insurance policy issued by American Family Mutual Insurance Company. The Middletons argue the terms of the mortgage do not give Wells Fargo the right to claim the insurance proceeds and Wells Fargo waived any claim to the insurance proceeds by electing foreclosure in lieu of a deficiency judgment. The Middletons also contend the note they signed was discharged in bankruptcy and, therefore, cannot be enforced. Alternatively, the Middletons argue Wells Fargo is estopped from seeking more than $95,017.57 from the subject insurance policy proceeds. For the reasons stated below, we reject these arguments and affirm the judgment.

BACKGROUND

¶2 In February 2007, the Middletons executed an adjustable rate note in favor of New Century Mortgage Corporation in the amount of $138,000. The note was secured by a mortgage on the Middletons' Osseo residence. Relevant to this appeal, the mortgage required the Middletons to obtain and maintain property insurance, and to name their lender-mortgagee as an additional loss payee on their insurance policy. The Middletons purchased an American Family insurance policy that provided personal property and dwelling coverage.

¶3 In July 2008, the mortgage was assigned to Wells Fargo, which is also the current holder of the note. In August 2008, Wells Fargo filed a foreclosure action against the Middletons and a foreclosure judgment was entered. The amount due under the note now exceeds $200,000 with post-judgment interest. In 2009, the Middletons individually filed for Chapter 7 bankruptcy and

subsequently received bankruptcy discharges. Despite the foreclosure and bankruptcies, the Middletons continued to occupy the property, as it had not yet been sold at a sheriff's sale.

¶4 On June 17, 2012, after the foreclosure judgment was entered, a fire at the property rendered it "uninhabitable and a total loss." The Middletons submitted an insurance claim, and American Family paid them approximately $96,000 under the policy's personal property coverage limits. Wells Fargo makes no claim to these proceeds. With respect to proceeds due for damage caused to the dwelling itself, American Family issued the Middletons a check for part of the proceeds and asked the Middletons to identify current loss payees. The Middletons filed the underlying suit seeking a declaration "that no other party" has any right to the policy's dwelling coverage proceeds. Wells Fargo counterclaimed. The circuit court ultimately granted summary declaratory judgment in Wells Fargo's favor and dismissed the Middletons' claims with prejudice.

¶5 Consistent with the circuit court's oral ruling, Wells Fargo submitted a proposed judgment stating, in relevant part, that Wells Fargo is entitled to "declaratory judgment for the full amount of the proceeds due and owing" under the policy "in the amount of $95,017.57," which was the amount American Family had represented was due and owing. Wells Fargo subsequently learned American Family was willing to pay $180,174 for the loss of the dwelling.

¶6 To conform with this new amount, Wells Fargo submitted a revised judgment, rearticulating Wells Fargo's entitlement to the "dwelling coverage proceeds due and owing," but eliminating reference to $95,017.57. The Middletons opposed the revised judgment, asserting that Wells Fargo was

estopped from claiming more than the $95,017.57 sought in its pleadings. The Middletons thus claimed they were entitled to the excess insurance proceeds. The circuit court disagreed, concluding Wells Fargo is "entitled to declaratory judgment for the dwelling coverage proceeds due and owing in accordance with the terms of the Mortgage and the dwelling coverage section" of the American Family policy. This appeal follows.

DISCUSSION

¶7 As an initial matter, we note that in a February 11, 2015 order, we denied Wells Fargo's motion to dismiss this appeal for lack of jurisdiction. Within its brief, Wells Fargo reasserts that the appeal should be dismissed for lack of jurisdiction. We disagree.

¶8 On October 26, 2014, Wells Fargo served the Middletons with notice of entry of judgment. In their initial motion, Wells Fargo argued the notice of appeal was not timely filed because the notice of entry shortened the appeal time from ninety to forty-five days, and the notice of appeal was filed beyond the forty-five-day deadline. The court of appeals has no jurisdiction over an appeal that is not timely taken. ***La Crosse Trust Co. v. Bluske***, 99 Wis. 2d 427, 428, 299 N.W.2d 302 (Ct. App. 1980).

¶9 This court, however, has generally required strict compliance with the procedures for providing notice of entry. ***Nichols v. Conlin***, 198 Wis. 2d 287, 289, 542 N.W.2d 194 (Ct. App. 1995). In the present matter, the notice of entry indicated: "PLEASE TAKE NOTICE that the Order for Summary Judgment and Judgment in this action was signed on October 7, 2014, and entered on October 8, 2014." Citing ***Bruns v. Muniz***, 97 Wis. 2d 742, 295 N.W.2d 11 (Ct. App. 1980),

Wells Fargo argues the judgment on appeal could not have been entered until October 8, when it was signed by the clerk.

¶10 ***Bruns***, however, is distinguishable on its facts. There, the judge's clerk received an "order for judgment" signed by the judge on December 31, 1979. ***Id.*** at 744. The judge's clerk time-stamped the order for judgment and delivered it to the clerk's office. ***Id.*** The deputy clerk signed the judgment and time-stamped it on January 2, 1980. ***Id.*** The ***Bruns*** court held that the judgment could not be considered "filed," and therefore "entered" until it had been "rendered"—that is, signed by the judge or by the clerk at the judge's written direction. ***Id.***

¶11 Here, the "Order for Summary Judgment and Judgment" drafted by Wells Fargo was signed by the judge on October 7, 2014, below verbiage stating: "IT IS FURTHER ORDERED that judgment *is* entered in accordance with the terms of this order set [forth] above." (Emphasis added.) A judgment is entered when it is filed in the office of the clerk of court. WIS. STAT. § 806.06(1)(b).[1] Because the judgment was signed by the judge and file-stamped by the clerk on October 7, the notice of entry did not properly identify the entry date of the judgment on appeal, and the appeal time was not shortened. We acknowledge that the document also included language indicating "The Clerk of this Court will enter this judgment" and the heading on the following page states "**JUDGMENT**" with "Judgment entered this 8th day of October, 2014" and the clerk's signature. The judgment was entered, however, once signed by the judge and file-stamped on

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

October 7, thus effectively rendering the clerk's signature on October 8 superfluous.

¶12 At a minimum, ambiguity is created by the judgment's internal inconsistency of saying both that the judgment "is" entered and that the clerk "will" enter the judgment. As noted in the order denying Wells Fargo's motion to dismiss, when the documents relating to this court's appellate jurisdiction create ambiguity as to the right and time to appeal, this court is required to liberally construe the documents in favor of timely appeals. *See* ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶46, 299 Wis. 2d 723, 728 N.W.2d 670. Because the notice of entry misidentified the judgment's entry date and ambiguities are construed in favor of timely appeals, we reiterate that the notice of entry did not shorten the appeal time.

¶13 Wells Fargo nevertheless argues that "assuming there was anything ambiguous about the judgment itself, it was whether it was entered on October 7 or October 8." Wells Fargo thus suggests that "any potential to mislead the Middletons as to their right and time to appeal is limited to a 24-hour period," and any perceived ambiguity justified filing the notice of appeal only one day past the shortened forty-five day deadline. Here, the notice of appeal was filed forty-four days past what would have been the shortened deadline. We do not, however, utilize a sliding scale to calculate the due date for a notice of appeal. If the shortened deadline does not apply, as is the case here, the Middletons had ninety days from entry of the judgment to file their notice of appeal. The Middletons timely filed their notice of appeal on day eighty-nine.

¶14 Turning to the merits of the appeal, this court reviews summary judgment decisions independently, applying the same standards as the circuit

court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶15 The Middletons argue the terms of the mortgage do not give Wells Fargo the right to claim the insurance proceeds, as the mortgage secures only a promise to pay, but does not secure any insurance proceeds. We are not persuaded, as the express terms of both the mortgage and the insurance policy establish Wells Fargo's right to the dwelling coverage proceeds. In addition to requiring the Middletons to obtain and maintain property insurance, and to name their lender-mortgagee as an additional loss payee on their insurance policy, the mortgage provided that in the event of loss: "If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower." Further, under the insurance policy's "mortgage clause," insurance proceeds are to be paid to the mortgagee, with any remaining proceeds paid to the Middletons.[2] Here, there are no excess proceeds owed to the Middletons because the amount of the proceeds does not cover the unsatisfied foreclosure judgment.

[2] The clause provides:

> The word "mortgagee" includes trustee and a contract of sale titleholder. If a mortgagee is named in this policy, any loss payable on buildings will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

¶16 Next, the Middletons contend Wells Fargo waived any claim to the insurance proceeds by "electing" foreclosure in lieu of a deficiency judgment. Noting that the election of remedies doctrine is designed to prevent double recoveries for the same wrong, the Middletons assert that by not pursuing a deficiency judgment, Wells Fargo chose the property over any monetary damages, including any insurance proceeds. To support this contention, the Middletons cite an unpublished per curiam opinion, claiming it "controls the present dispute." That decision, ***Minor v. Jacek***, No. 2004AP645, unpublished slip op. (WI App Feb. 15, 2005), is not binding on this court and its citation as 'controlling' authority is prohibited under WIS. STAT. RULE 809.23(3). Moreover, the question of a mortgagee's entitlement to insurance proceeds was not at issue in that case.

¶17 The present case is controlled by the decision in ***Disrud v. Arnold***, 167 Wis. 2d 177, 482 N.W.2d 114 (Ct. App. 1992). There, as here, the mortgagee sought to recover insurance proceeds paid after a fire loss. ***Id.*** at 180. The mortgagor, Scarlet Arnold, purchased a house and land from the mortgagee, Sheri Disrud, under a land contract. ***Id.*** Under the land contract's terms, Arnold was required to insure the premises and name Disrud as an additional insured on the policy. ***Id.*** The insurance policy provided: "If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear." ***Id.***

¶18 Disrud subsequently obtained a foreclosure judgment against Arnold. ***Id.*** Before Arnold was removed from the property, a fire destroyed the home and the insurer issued a check for the full amount owed under the dwelling coverage, payable jointly to Arnold and Disrud. ***Id.*** at 180-81. Arnold then filed for bankruptcy and sought the full amount of the insurance proceeds. ***Id.*** at 181.

¶19 The circuit court awarded the proceeds to Disrud and, on appeal, this court affirmed, rejecting Arnold's contention that Disrud forfeited any claim to the insurance proceeds by electing the remedy of foreclosure. ***Id.*** at 183. We noted that Disrud had not sued for the balance due under the land contract but, rather, based her claim on the coverage afforded by the insurance policy. ***Id.*** at 182. We also concluded that the circuit court, in treating the policy proceeds as a substitute for the damaged property, arrived at a reasonable result, noting it would be "unjust for Disrud to suffer the entire loss" and awarding Arnold the proceeds "would result in a windfall because she suffered no loss as a result of the fire." ***Id.*** at 186.

¶20 In the present matter, as in ***Disrud***, Wells Fargo did not file suit for a deficiency judgment but, rather, counterclaimed to collect on an insurance contract. "Where more than one remedy exists to deal with a single subject of action, but they are not inconsistent, nothing short of full satisfaction of the plaintiff's claim waives any of such remedies." ***Bank of Commerce v. Paine, Webber, Jackson & Curtis***, 39 Wis. 2d 30, 37, 158 N.W.2d 350 (1968). Here, the foreclosure judgment is distinct from, and consistent with, Wells Fargo's contractual claim to the insurance proceeds. The insurance proceeds at issue are merely a substitute for the damaged property and, therefore, belong to Wells Fargo—the party with the property interest. Additionally, there is no danger of double recovery, as Wells Fargo's only remaining remedy following the fire loss is the insurance proceeds.

¶21 The Middletons nevertheless contend their respective bankruptcies discharged their obligations to Wells Fargo. The Middletons argue that because the note was discharged in bankruptcy, enforcement of the note is enjoined. We disagree. Although the bankruptcy discharge operates to extinguish the Middletons' indebtedness, it does not affect the liability of the insurer to a

beneficiary under an insurance policy. ***Disrud***, 167 Wis. 2d at 182. Further, the United States Supreme Court has held:

> Even after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property. Alternatively, the creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that the surviving mortgage interest corresponds to an "enforceable obligation" of the debtor.

Johnson v. Home State Bank, 501 U.S. 78, 84 (1991). The Middletons' mortgage is enforceable post-bankruptcy and continues to secure Wells Fargo's interest in the collateral property. Under the terms of both the mortgage and the insurance policy, Wells Fargo is entitled to the insurance policy proceeds.

¶22 The Middletons alternatively argue the circuit court erred by revising the judgment, as Wells Fargo was estopped from seeking more than $95,017.57 from the subject insurance policy proceeds. We disagree. "Whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a decision within the discretion of the circuit court." ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. The record shows that throughout the litigation, Wells Fargo maintained it was entitled to the full amount of disputed policy proceeds up to its loss. Wells Fargo's counterclaim requested $95,017.57, as that was the amount American Family had represented was due under the policy's dwelling coverage. When Wells Fargo learned post-judgment that American Family was willing to pay $180,174, it sought a revised judgment. In light of this information, the circuit court reasonably exercised its discretion when revising the judgment to clarify Wells Fargo's entitlement to the full dwelling coverage proceeds due and owing under the insurance policy.

By the Court.—Judgment affirmed.

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