

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 12, 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. 2015AP877

Cir. Ct. No. 2014CV215

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

J & T LENDING, LLC,

PLAINTIFF-RESPONDENT,

V.

DONALD F. NITSCHKE AND KRISTAL R. NITSCHKE,

DEFENDANTS-APPELLANTS,

JOHN C. SPITZ,

DEFENDANT.

APPEAL from an order of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Donald F. Nitschke and Kristal R. Nitschke (collectively referred to as “the Nitschkes” unless the context requires otherwise) appeal an order denying their motion for reconsideration of a summary judgment of foreclosure granted in favor of J & T Lending, LLC. We affirm.

I. BACKGROUND

¶2 This appeal stems from a mortgage foreclosure initiated by J & T Lending against real estate owned by the Nitschkes in Shawano County, Wisconsin. The Nitschkes used the mortgage to secure a loan guaranty given by Donald Nitschke to Park Bank. Donald Nitschke’s guaranty related to a real estate investment located in Oak Creek, Wisconsin.

¶3 For the purpose of acquiring the Oak Creek real estate, Park Bank made four loans to Oak Leaf 130, LLC; Oak Leaf 135, LLC; and Oak Leaf 155, LLC (collectively, “the Oak Leaf entities”). The Oak Leaf entities are the companies that hold the Oak Creek real estate and are equally owned by Donald Nitschke, John Spitz, and Tim Zignego. The Park Bank loans were personally guaranteed by Nitschke, Spitz, and Zignego.

¶4 From 2010 until 2014 Park Bank routinely renewed the loans. At the end of January 2014, however, it decided that a condition of renewal would be for the Oak Leaf entities to pay down the principal balances of the notes.

¶5 Ten days before Park Bank’s notes matured, the Nitschkes filed for Chapter 7 bankruptcy relief. Spitz and Zignego then formed J & T Lending, which borrowed in excess of four million dollars from Home Federal Bank to

refinance the Park Bank loans. J & T Lending additionally loaned approximately \$680,200 to the Oak Leaf entities to effectuate the refinancing.¹

¶6 In February 2014, Park Bank assigned Donald Nitschke's guaranty and mortgage (along with all other loan documents relating to the Oak Creek real estate investment) to J & T Lending. J & T Lending argued that the underlying loan obligations owed by the Oak Leaf entities were due and payable and because the obligations were secured by Donald Nitschke's guaranty and mortgage, J & T Lending could foreclose against the Nitschkes' Shawano County real estate.

¶7 In December 2014, J & T Lending moved for summary judgment of foreclosure. The Nitschkes opposed the motion.

¶8 In its January 22, 2015 order granting summary judgment of foreclosure to J & T Lending, the circuit court concluded Nitschke had not established a genuine issue of material fact with regard to:

¹ In their appellate briefs and during the circuit court proceedings, the parties variously asserted that this amount was \$680,000, \$680,200, or \$700,000.

In their reply brief, the Nitschkes submit that the amount actually loaned by J & T Lending to the Oak Leaf entities was \$704,267.96. They advise: "the main request on appeal is for this Court to find that the loan balance owed to J & T [L]ending is \$704,267.96." (Emphasis omitted.) This court cannot find facts. See *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals is constitutionally granted appellate jurisdiction that does not confer the right to find facts).

Moreover, the Nitschkes indicate that they are currently seeking a judgment in a separate case (Waukesha Cty. Circ. Ct. Case No. 14CV616) that the correct loan balance owed to J & T Lending amounts to \$704,267.96. Given that this issue appears to be the focus of a separate circuit court proceeding, we will use the \$680,200 amount as initially argued by the Nitschkes in their brief-in-chief.

- A. Any invalidity in the assignment of the Notes, Guarantees and Mortgage to J & T that would prevent J & T from foreclosing the Mortgage;
- B. Any insufficiency of the consideration paid by J & T in exchange for the assignment of the Notes, Guarantees and Mortgage from Park Bank that would prevent J & T from foreclosing the Mortgage;
- C. The amount of money that is owed to J & T under the Notes and Guarantees;
- D. The amount due to J & T under the Notes and Guarantees; and
- E. Donald F. Nitschke's default on his obligation of payment under the Guarantees and the Notes.

The circuit court found J & T Lending was entitled to judgment in the amount of \$5,012,626.28 plus interest.²

¶9 On February 13, 2015, the Nitschkes moved the court to reconsider its decision to grant summary judgment. On March 16, 2015, the circuit court entered its order denying the motion for reconsideration.

II. DISCUSSION

¶10 The Nitschkes do not appeal the circuit court's order granting summary judgment of foreclosure in favor of J & T Lending; rather, they appeal the circuit court's order denying their motion for reconsideration. This court has jurisdiction to review an order denying a motion for reconsideration if the motion raised issues separate from those determined in the order from which reconsideration was sought. *See Silverton Enters., Inc. v. General Cas. Co. of*

² The Nitschkes filed a notice of appeal from the summary judgment of foreclosure. J & T Lending moved this court to dismiss the appeal as untimely. That same day, the Nitschkes filed a notice of voluntary dismissal, which we accepted.

Wis., 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). Our jurisdiction is limited, however, to reviewing only the new issues presented on reconsideration. See *Harris v. Reivitz*, 142 Wis. 2d 82, 88-89, 417 N.W.2d 50 (Ct. App. 1987). To determine whether new issues are presented, we compare the issues raised in the motion for reconsideration with those disposed of in the original order or judgment. See *id.* at 87.

¶11 In their motion for reconsideration, the Nitschkes argued that the circuit court erred by not concluding:

- (1) that that the balance due under the Park Bank notes assigned to J & T lending was zero because the loans were paid in full, or, alternatively, that the balance due under the Park Bank notes was \$680,200;
- (2) that the Nitschke loan guaranty was void or released when the loans were refinanced; and
- (3) that the Nitschkes were entitled to an offset based upon the funds loaned by Home Federal Bank to the Oak Leaf entities³ and paid to Park Bank as part of the refinancing.³

1. Balance Due under the Park Bank Notes

¶12 The issue of whether the Park Bank notes were paid in full, or, if instead, the balance due under the notes was \$680,200, was disposed of by the order for summary judgment. The foreclosure action, by its very nature, required the circuit court to determine the amount that was due to the foreclosing party, J & T Lending.

³ The Nitschkes made a number of arguments in their motion for reconsideration, some of which have been abandoned on appeal.

¶13 The Nitschkes' brief in opposition to summary judgment argued that the notes held by J & T Lending were "paid in full" or in the alternative, that "the most that J & T Lending could legitimately argue as due and owing from Mr. Nitschke is one-third of \$680,200." The transcript from the summary judgment hearing further reveals that counsel for the Nitschkes made numerous arguments that the amount due to J & T Lending was \$680,200 (or \$680,000). The circuit court found that J & T Lending was entitled to \$5,012,626.28 plus interest and that there was no genuine issue of material fact as to the amount due to J & T Lending.

¶14 Because it is not a new issue, this court lacks jurisdiction to determine whether the Park Bank notes were paid in full or whether the balance due was \$680,200. *See id.*

2. Status of the Loan Guaranty

¶15 The Nitschkes' position that the Park Bank notes were "paid in full" is premised on the refinancing of the Park Bank debt by Home Federal Bank, which resulted in the assignment of the Park Bank notes to J & T Lending. Based on this assignment, the Nitschkes asserted both in opposition to summary judgment and in their motion for reconsideration that the Nitschke guaranty of the Park Bank debt was void or released.

¶16 In its order for summary judgment, the circuit court found that the Park Bank notes were not paid in full by the refinance. Because this is not a new issue, we lack jurisdiction to determine that Donald Nitschke's guaranty was void or released by full payment. *See id.*

¶17 J & T Lending concedes, however, that the Nitschkes raised one new issue in the motion for reconsideration that was not raised in their objection to

summary judgment: whether the Nitschke guaranty was discharged by the February 21, 2014 subordination of the Park Bank mortgage on the Oak Leaf properties to the new Home Federal mortgages.

¶18 The circuit court concluded that the Nitschkes' bankruptcy discharge eliminated their liability on the guaranty and preserved the lien on the Shawano County real estate. Aside from citations for the general proposition that a change in the underlying obligations of a principal discharges a guarantor, the Nitschkes have not adequately developed a challenge to the circuit court's conclusion as it relates to bankruptcy law. They have not established a manifest error of law or fact. *See Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. ("To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact."). "A 'manifest error' is not demonstrated by the disappointment of the losing party." *Id.* (citation omitted). Rather, a manifest error of law is "the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Id.* (citation omitted).

¶19 Arguing that it relates to the discharge of Donald Nitschke's guaranty, the Nitschkes submit that the circuit court should have considered evidence that Zignego used cash collateral he previously pledged to Park Bank to help J & T Lending take an assignment of the Park Bank loan documents—a fact that was not discovered by them until after the summary judgment hearing occurred.

¶20 "A party may not use a motion for reconsideration to introduce new evidence that could have been introduced at the original summary judgment

phase.” *Id.*, ¶46. The Nitschkkes have not explained why the information in the affidavit could not have been introduced at the time the court entered summary judgment. *See id.* Therefore, we cannot conclude that the circuit court erred by excluding it based on the Nitschkkes’ failure to discover it earlier.

(3) Claim for Offset

¶21 The Nitschkkes argue the circuit court erred when it did not grant them an offset against the Park Bank loans in an amount equal to the new money provided by Home Federal Bank. This is not a new issue.

¶22 At the hearing on J & T Lending’s summary judgment motion, the Nitschkkes’ attorney argued that the most J & T Lending was owed was \$680,200 because Home Federal Bank had loaned the rest of the money used to refinance the Park Bank debt.

¶23 In their reconsideration motion, the Nitschkkes argued that they were entitled to an offset based on funds loaned by Home Federal Bank to Oak Leaf and paid to Park Bank as part of the refinancing of the Park Bank loans. This amounts to an attempt to have the circuit court hear old arguments: namely, that the amount due to J & T Lending was limited to the amount of the new money it advanced to pay off Park Bank. Because this issue was disposed of at summary judgment, we lack jurisdiction over it here. *See Harris*, 142 Wis. 2d at 87.

¶24 In summary, the Nitschkkes’ subordination argument fails because they did not establish a manifest error of law or fact. Their remaining arguments fail because they did not present new issues. Rather, they reveal litigants hoping

the court would rehear old arguments; however, the Nitschkes' right to appeal from the summary judgment of foreclosure has expired.⁴

By the Court.—Order affirmed.

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

⁴ In light of this conclusion, we do not address the mootness issues argued by J & T Lending. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed); *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the “narrowest possible ground”).

