

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 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. 2015AP1142

Cir. Ct. No. 2010CV63

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MIDCOUNTRY BANK,

PLAINTIFF-APPELLANT,

V.

TODD BORK AND CAROLYN BORK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Burnett County:
KENNETH L. KUTZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. MidCountry Bank appeals a judgment denying, on equitable grounds, MidCountry's efforts to enforce a note and mortgage by foreclosing upon Todd and Carolyn Bork's Wisconsin real property. We conclude the circuit court properly exercised its equitable discretion in denying foreclosure

in this instance. We reject MidCountry's argument that the circuit court's exercise of discretion accomplished a double recovery for the Borks and thus was erroneous. Accordingly, we affirm.

BACKGROUND

¶2 The Borks are the owners of Todd Enterprises, LLC, which operated a tree farm in Minnesota. The Borks have a lengthy history with David Larson, who, during the times relevant to this appeal, worked as an agricultural lending officer. Larson had long assisted the Borks in obtaining new financing, or refinancing existing loans, through the various banks at which Larson has worked, including MidCountry.

¶3 With Larson's assistance, the Borks financed the purchase of real property in Wisconsin in 2003. It is undisputed that, in 2005, the Borks executed and delivered a promissory note on behalf of Todd Enterprises for approximately \$2.4 million to refinance existing loans. *See Todd Enters., LLC v. MidCountry Bank*, No. A12-1635, 2013 WL 4045765, at *1 (Minn. Ct. App. Aug. 12, 2013). As part of the refinancing, they also executed and delivered a \$636,000 promissory note on their own behalf, which note was secured in part by a mortgage on the Borks' Wisconsin property.

¶4 The Borks and Todd Enterprises ultimately defaulted on their payments under their respective notes. In early 2010, they commenced a lawsuit in Minnesota against Larson and MidCountry. They alleged four claims against both defendants: breach of fiduciary duties, fraud, rescission, and promissory estoppel. *See id.* MidCountry "counterclaimed with various allegations of breach of contract in relation to Todd Enterprises's and the Borks' payment defaults." *Id.*

¶5 Shortly after the Minnesota lawsuit was filed, MidCountry filed the present action in Burnett County to foreclose on the Borks' Wisconsin property. The Borks answered, admitting they had missed payments but denying that such missed payments constituted a default. The Borks raised several affirmative defenses, including unclean hands, and asserted a counterclaim for breach of fiduciary duty.

¶6 Following the Borks' answer, MidCountry filed a motion for summary judgment in the Wisconsin action. On January 18, 2011, the circuit court granted MidCountry summary judgment on the issue of default, concluding the undisputed material facts established the Borks had failed to make necessary payments on the note secured by the Wisconsin mortgage. However, the court declined to enter a judgment of foreclosure:

The defendants have raised a number of defenses and claims in their pleadings which clearly involve factual issues that need to be resolved at trial and which, if proven, could potentially defeat and/or offset the plaintiff's right of foreclosure in this case. Furthermore, granting a judgment of foreclosure to the plaintiff triggers certain statutory rights of the parties, especially the defendants' right to redeem the property prior to any sheriff's sale of the same. Until the defendants' claims are resolved, the amount necessary to redeem the property cannot be set in order to permit them a reasonable opportunity to exercise that right.

The parties agreed to pause the Wisconsin foreclosure action and litigate the remaining factual issues regarding the Borks' affirmative defenses and counterclaim in the Minnesota action, the outcome of which they agreed would be used to resolve the Borks' Wisconsin claims.

¶7 The Minnesota action proceeded to a jury trial, at which the Borks prevailed on their breach-of-fiduciary-duty claim. As the Minnesota Court of Appeals explained:

A jury found that a fiduciary relationship had been established between the Borks and Larson, that Larson had breached his fiduciary duties in regard to certain loan transactions, and that the Borks were entitled to \$636,000 in damages.^[1] The jury also found that no fraud was committed in connection with the loan transactions. Following the trial, the district court denied the Borks' motion to rescind the loan documents based on the theory of constructive fraud. ... The district court subsequently granted a motion by MidCountry to amend the findings to reflect the Borks' remaining indebtedness under the loan documents.^[2]

Todd Enters., 2013 WL 4045765, at *1. The Minnesota Court of Appeals addressed several issues the Borks raised on appeal, most notably rejecting the Borks' argument that the lower court erred by declining to order rescission of the mortgage³ on the theory of constructive trust. *See id.*, at *3-4. The court concluded rescission was not appropriate "because the jury already awarded [\$636,000 in] money damages for the breach-of-fiduciary-duty claim and the two remedies are mutually exclusive." *Id.*, at *4.

¹ The Minnesota Court of Appeals concluded there was sufficient evidence to support the jury's findings regarding the Borks' breach-of-fiduciary-duty claim: "The evidence revealed that Todd Bork and Larson had a personal friendship, that Larson offered the Borks financial and business advice, that Larson assisted the Borks in preparing financial statements, and that Larson knew that Todd Bork had no formal education and lacked a high school degree." *Todd Enters., LLC v. MidCountry Bank*, No. A12-1635, 2013 WL 4045765, at *5 (Minn. Ct. App. Aug. 12, 2013). The circuit court in the Wisconsin action remarked that the basis for the Borks' breach-of-fiduciary-duty claim was that Larson induced the Borks to purchase the Wisconsin property and, without their knowledge or approval, set up a financing that resulted in a negative amortization and improperly included the Wisconsin transaction in a refinancing package with the business loans.

² The jury found the Borks and Todd Enterprises in default of outstanding loans and returned a verdict of approximately \$4.3 million in MidCountry's favor.

³ The Minnesota Court of Appeals did not clarify the specific mortgage to which it was referring. There were up to three mortgages at issue in the Minnesota litigation. *See Todd Enters.*, 2013 WL 4045765, at *1.

¶8 Following the Minnesota Court of Appeals decision, MidCountry filed another motion for summary judgment in the Wisconsin action. MidCountry argued the court should enter a judgment of foreclosure and dismiss the Borks' Wisconsin counterclaim for breach of fiduciary duty under the doctrine of res judicata,⁴ or claim preclusion, because the Borks had "already been awarded damages for their breach of fiduciary duty claim."

¶9 The Borks objected to MidCountry's motion and filed their own motion for summary judgment. The Borks argued that claim preclusion did not apply and, rather, that issue preclusion required the circuit court to grant their summary judgment motion. According to the Borks:

Although the Minnesota proceedings could not have resolved the Wisconsin foreclosure claim for lack of subject matter jurisdiction, they did resolve issues of law and fact that are now barred from re-litigation by the doctrine of issue preclusion. Specifically, the Minnesota jury made factual and legal findings to support[, in the Wisconsin action,] the Borks' claim for breach of fiduciary duty and affirmative defense of unclean hands. Because they found that the Plaintiff breached its fiduciary duty to the Borks, and harmed them by such breach, the Borks no longer need to prove the validity of this claim for this Court to take it into consideration when "balancing the equities" of this foreclosure action.

¶10 The circuit court requested further briefing regarding the "appropriate remedy in light of the [Minnesota jury's] finding that the bank breached its fiduciary duty with regard to the mortgage loan on the Borks'

⁴ "The doctrine of res judicata states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983). In 1995, our supreme court stated that "claim preclusion" is the proper term for the concepts previously couched in the term "res judicata." See *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

Wisconsin residence.” MidCountry took the position that the finding should have no effect on the foreclosure action, reasoning the Borks had received a \$636,000 offset against the bank’s approximate \$4.2 million judgment and, accordingly, the Borks had been “made whole and are not entitled to any additional remedies or relief for their claimed breach of fiduciary duty.” In response, the Borks argued that, because the Minnesota jury awarded \$636,000 in damages for breach of fiduciary duty, which amount was equal to that due on the promissory note secured by the Wisconsin mortgage, the jury *must* have determined the breach related to the Borks’ acquisition of the Wisconsin property. Thus, the Borks urged the circuit court to exercise its equitable discretion to “entirely undo the transfer and void the note and mortgage.”⁵

¶11 Because the parties and the circuit court agreed that the factual findings of the Minnesota case eliminated any need for a trial in the present action, the court framed the question before it as a pure question of law: “[W]hat effect, if any, does [the Minnesota] jury’s finding of breach of fiduciary duty on the part of [MidCountry], along with its specific finding of damages in the sum of \$636,000, have on [MidCountry’s] ability to pursue its foreclosure action in this case[?]” Citing the amount the Minnesota jury awarded the Borks on the breach-of-fiduciary-duty claim, the court first concluded the breach related specifically to the Wisconsin land transaction, although it acknowledged the jury “never made a specific finding in this regard.” Relying on its equitable authority to craft an

⁵ Later in their brief, the Borks clarified that they did not want “pure rescission,” because “rescinding the sale would simply transfer the property back to the seller, who would be required to repay the Borks the \$234,000 they put in originally.” Rather, the Borks requested that the court “undo the specific transaction found to be unconscionable, which here is the Bank’s entry into the note and mortgage on the Wisconsin property.”

appropriate remedy individualized to each case, the circuit court determined it would be inequitable to allow MidCountry to foreclose on the Borks' Wisconsin property given its breach of fiduciary duty.

¶12 The circuit court also rejected MidCountry's argument that the refusal to enter a foreclosure judgment would produce a double recovery for the Borks. The court observed its ruling "does not change the amount owed by the defendants to the Bank under the Minnesota proceedings by one cent." Rather, the court understood the effect of its decision was simply to remove foreclosure of the Wisconsin property as one of MidCountry's options for recovering its judgment. The court noted MidCountry "still has all of the other rights and remedies of a judgment creditor under Wisconsin law, including the right to execute on the defendants' property under Chapter 815 of the [Wisconsin] Statutes." MidCountry appeals.

DISCUSSION

¶13 "Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." *GMAC Mortg. Corp. v. Gisvold*, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998); *see also JP Morgan Chase Bank, NA v. Green*, 2008 WI App 78, ¶11, 311 Wis. 2d 715, 753 N.W.2d 536. The court may exercise this discretion to ensure that no injustice is done to any of the parties, even after a foreclosure sale is confirmed. *GMAC Mortg. Corp.*, 215 Wis. 2d at 480. Only a "clear and valid legislative command" limits the circuit court's authority to grant or deny equitable relief. *Id.* (quoting *State v. Excel Mgm't Servs.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983)). "We affirm discretionary decisions if the

circuit court applies the correct legal standard to the relevant facts and reaches a reasonable outcome.” *JP Morgan Chase Bank*, 311 Wis. 2d 715, ¶11.⁶

¶14 Here, MidCountry’s only argument is that the circuit court’s refusal to enter a foreclosure judgment achieved a double recovery for the Borks. MidCountry cites several cases for the generic proposition that courts should not permit double recovery for a single wrong, none of which was a foreclosure action. *See, e.g., Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶57 n.14, 312 Wis. 2d 251, 752 N.W.2d 800; *Olstad v. Microsoft Corp.*, 2005 WI 121, ¶82, 284 Wis. 2d 224, 700 N.W.2d 139.⁷ MidCountry believes the Borks have already been awarded “full and final relief” for the breach of fiduciary duty and have been made

⁶ At times, MidCountry refers to the circuit court’s purported “abuse of discretion.” Concluding this phrase carried an “unjustified negative connotation,” our supreme court abandoned the use of that terminology in 1992. *See Hefty v. Hefty*, 172 Wis. 2d 124, 128 n.1, 493 N.W.2d 33 (1992).

⁷ MidCountry’s failure to cite any case involving the application of the double recovery bar in the foreclosure context is noteworthy because in *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶57 n.14, 312 Wis. 2d 251, 752 N.W.2d 800, the court qualified the scope of the bar by noting double recovery is “generally not permitted under the common law.” While certain foreclosure varieties were known at common law—particularly strict foreclosure—judicial foreclosures currently take place under a “comprehensive statutory scheme.” *See Harbor Credit Union v. Samp*, 2011 WI App 40, ¶28, 332 Wis. 2d 214, 796 N.W.2d 813. This is all by way of saying that MidCountry has failed to clearly establish that principles of double recovery limit the circuit court’s exercise of equitable discretion in a foreclosure action. In any event, for reasons stated herein, we conclude the Borks did not receive a double recovery when the circuit court elected not to order foreclosure.

whole in the Minnesota action, and it faults the circuit court here for effectively granting rescission of the mortgage.⁸

¶15 The Borks, for their part, contend the circuit court’s decision does not award them an additional \$636,000 benefit. However, they reach this conclusion by construing the Minnesota jury’s award to them as effectively granting “cancellation of the \$636,000” loan secured by the Wisconsin mortgage. The Borks accuse MidCountry of ignoring the setoff in the Minnesota action, and they assert the circuit court properly barred MidCountry’s efforts to foreclose on the Wisconsin residence because it did not also enter a money judgment in the Borks’ favor.⁹

¶16 We conclude there was no double recovery in this case. Notably, MidCountry does not directly take issue with the circuit court’s “finding” that the Borks were awarded tort damages in Minnesota for a breach of fiduciary duty in connection with the acquisition of the Wisconsin property and/or refinancing of

⁸ MidCountry attempts a one-paragraph argument regarding the application of claim preclusion. It contends, without record citation or analysis of the Minnesota proceedings, that the Borks’ breach-of-fiduciary-duty claim “has already been litigated to final judgment in the Minnesota action.” We deem this argument undeveloped. See *Lechner v. Scharrer*, 145 Wis. 2d 667, 676, 429 N.W.2d 491 (Ct. App. 1988) (declining to review one-paragraph argument unsupported by record citations); see also *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“We may decline to review issues inadequately briefed.”).

⁹ The Borks are correct that MidCountry’s argument ignores the setoff in the Minnesota action. However, the Borks themselves either misunderstand the import of that setoff or purposely attempt to use it in this case for a greater purpose than the law or logic permits. Put simply, if the \$636,000 in tort damages awarded to the Borks were used to reduce the monetary damages awarded to MidCountry, as they were, then the \$636,000 cannot also be used to eliminate the note.

the Wisconsin loan.¹⁰ The circuit court, in the exercise of its equitable authority, honored the parties' agreement that the outcome of the Minnesota proceedings would control for purposes of the Borks' counterclaim and affirmative defenses. Accordingly, it concluded that, under the circumstances of this case, it would be inequitable to allow MidCountry to benefit from its breach of fiduciary duty by foreclosing upon the Wisconsin property. MidCountry fails to establish this conclusion is incompatible with Wisconsin law.

¶17 Contrary to MidCountry's suggestion, the circuit court did not effectively grant rescission of the mortgage, although it potentially could have done so. *See Groshek v. Trewin*, 2010 WI 51, ¶21, 325 Wis. 2d 250, 784 N.W.2d 163. ("Rescission is an appropriate remedy when property is acquired in connection with a breach of fiduciary duty."). "Rescission is an equitable remedy, the effect of which is to 'restore the parties to the position they would have occupied if no contract had ever been made between them.'" *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶41, 335 Wis. 2d 566, 799 N.W.2d 815 (quoting *Seidling v. Unichem, Inc.*, 52 Wis. 2d 552, 557-58, 191 N.W.2d 205 (1971)).

¶18 Here, neither MidCountry nor the Borks have been returned to their respective positions prior to the execution of the note and mortgage. MidCountry

¹⁰ We note the Minnesota jury made no specific finding to this effect. Nonetheless, there is apparently no dispute that the breach as found by the jury related in some way to the Wisconsin land transaction, even if it also involved other transactions in Minnesota. It is also possible that the claims were presented at trial such that the only evidence before the Minnesota jury on the Borks' breach-of-fiduciary-duty claim related to the Wisconsin transaction. However, the parties' briefs do not describe in detail the testimony or other evidence presented to the jury. Because any such argument would have to be developed for the parties, *see Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82, and we have no duty to scour voluminous trial transcripts to find support for such an argument, *see Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256, especially from a trial in a foreign jurisdiction, we decline to address the matter.

is still owed the amount outstanding on the note, and it retains a security interest in the Borks' Wisconsin property. The effect of the circuit court's decision was simply to preclude foreclosure as a means of enforcing that security interest, due to the apparent breach of fiduciary duty committed by one of the bank's employees.

¶19 Accordingly, the Borks are incorrect that they have no further obligations under the note and mortgage. They received compensation for MidCountry's breach of fiduciary duty in the Minnesota action; however, neither the Minnesota litigation nor this Wisconsin foreclosure action resulted in "cancellation of [the] note," as the Borks claim. To the extent the note secured by the mortgage on the Wisconsin property remains unaffected by the Minnesota judgment, any sum left unpaid on the note remains due and interest will continue to accrue under the note's terms.¹¹ The Wisconsin property remains encumbered as a result of the mortgage.¹² In addition, MidCountry now has a Minnesota judgment well in excess of the Wisconsin property's value. It may attempt to enforce that foreign judgment in accordance with WIS. STAT. § 806.24 (enforcement of foreign judgments) and WIS. STAT. ch. 815 (enforcement of judgments by execution), subject to any other applicable laws or defenses that may be raised by the Borks regarding such enforcement attempts.

¹¹ As far as we can tell, nothing that has occurred in this foreclosure action affects the parties' rights and obligations under the note, with the exception that foreclosure is no longer a viable means for MidCountry's enforcement of its security interest. We recognize that the circuit court made certain remarks about the evidence presented in the Minnesota action, including that Larson engaged in clandestine efforts to secure financing that involved a negative amortization. *See supra* ¶7 n.1. However, to our knowledge the Borks have not been successful in seeking to void, rescind, or otherwise invalidate the underlying note.

¹² This encumbrance may become significant if, for example, the Borks attempt to sell or otherwise transfer the property.

By the Court.—Judgment affirmed.

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

