COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1776 **Cir. Ct. No. 2012CV1427**

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

JPMORGAN CHASE BANK NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

JENNIFER K. MIESCKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Jennifer Miescke appeals a circuit court decision granting summary judgment of foreclosure to JPMorgan Chase Bank, N.A. ("JPMorgan Chase" or "the Bank") on its foreclosure action against Miescke. The issues on appeal are whether JPMorgan Chase made a prima facie case for

summary judgment of foreclosure and, if so, whether Miescke rebutted the prima facie case by establishing a genuine issue of material fact or showing, based on the undisputed facts, that JPMorgan Chase is not entitled to judgment as a matter of law. We affirm.

BACKGROUND

¶2 The pertinent facts are undisputed and taken from the summary judgment record. On February 6, 2006, Miescke executed a promissory note for a $191,675 loan from Chase Bank USA, N.A., secured by a mortgage on property located at 141 West Kohler Street in Sun Prairie. JPMorgan Chase subsequently came to possess and hold the subject note. On April 6, 2012, JPMorgan Chase commenced this foreclosure action by filing a complaint against Miescke alleging that she failed to make required payments. At that time, Miescke owed the principal sum of $182,309.60 on the note, together with interest. It is undisputed that Miescke had defaulted on the note by failing to make the required payments since June 2010.

¶3 It is important to distinguish between three financial institutions that at some time held the note on the Miescke residence: Chase Bank USA, Chase Home Finance LLC, and JPMorgan Chase. As stated, Chase Bank USA made the loan to Miescke and was the original holder of the note. The copy of the note under review includes two allonges with endorsements: one endorsed to Chase Home Finance, the other an endorsement in blank from Chase Home Finance. JPMorgan Chase and Chase Home Finance merged on May 1, 2011, with JPMorgan Chase succeeding to Chase Home Finance's rights and interests, including the note at issue in this case. As for the mortgage on the subject property, on June 23, 2008, Chase Bank USA assigned the mortgage to Federal

National Mortgage Association (Fannie Mae), and, in turn, Fannie Mae, with JPMorgan Chase acting as its attorney-in-fact, assigned the mortgage to JPMorgan Chase on March 19, 2012.

¶4 JPMorgan Chase filed the first of two motions for summary judgment seeking a judgment of foreclosure based on the allegations in its complaint and summary judgment submissions. The circuit court denied the Bank's first motion for summary judgment because the note attached to the complaint had a "void" stamp on it, indicating that the note was void. The Bank then filed an amended complaint, attaching a different copy of the note that included the two allonges with endorsements. After discovery, the Bank filed the second motion for summary judgment, which the circuit court granted. The court ruled that JPMorgan Chase established a prima facie case for a judgment of foreclosure and that Miescke failed to establish a dispute of material fact to rebut the Bank's prima facie showing. The court entered a final judgment of foreclosure. Miescke appeals.

STANDARD OF REVIEW

¶5 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).[1] We first examine the moving papers and documents

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

supporting the motion to determine whether the moving party has made a prima facie case. ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). If those submissions make a prima facie case for summary judgment, the opposing party must then set forth facts demonstrating a genuine issue for trial. ***Id.*** at 567. "[W]e draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

DISCUSSION

¶6 Before proceeding to our analysis, we pause to identify the pertinent facts that are not in dispute. On appeal, Miescke does not present an argument or point to evidence in the record that challenges JPMorgan Chase's claim that Miescke entered into the note and mortgage for the subject premises, that she borrowed $191,675 from Chase Bank USA, that the note was secured by a mortgage on the property, and that she has defaulted on the loan for failing to make the promised payments. There is also no dispute that the pleadings set forth a claim for relief and joined issue. Thus, our discussion starts with determining whether JPMorgan Chase has established a prima facie case for summary judgment of foreclosure.

A. *JPMorgan Chase Established a Prima Facie Case*

¶7 JPMorgan Chase argues that it has established a prima facie case that it is the holder of the note with the authority to enforce it, because it possesses the note and the note is endorsed in blank. JPMorgan attached a copy of the note to its amended complaint and submitted an affidavit in which the affiant averred that the copy of the note was a true and correct copy of the original note, which was in the Bank's possession. We agree that this evidence established a prima facie case.

¶8 A note endorsed in blank is payable to the bearer, so long as the bearer can prove actual possession of the original note. ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶¶16-17, 350 Wis. 2d 411, 838 N.W.2d 119. An original promissory note is self-authenticating and need not be authenticated. *See* WIS. STAT. § 909.02(9). A copy of a promissory note, however, is not self-authenticating and "must be authenticated in order to be admissible." ***Dow Family***, 350 Wis. 2d 411, ¶20; WIS. STAT. § 909.01.[2] "The testimony of a 'witness with knowledge that a matter is what it is claimed to be' is one means of authenticating evidence." ***Dow Family***, 350 Wis. 2d 411, ¶21 (quoted source omitted). When, as here, the plaintiff seeks to prove actual possession of the original note by affidavit, the affiant must aver personal knowledge that the original note is in the proponent's possession and that the copy attached to the affidavit is a true and correct copy of the original. *See* ***id.***

¶9 JPMorgan Chase submitted an affidavit and deposition testimony from one its employees, Richardra Winder, a Home Loan Research Officer and Assistant Vice President. Winder averred in an affidavit included with JPMorgan Chase's summary judgment submissions that a document labeled as Exhibit B was a "true and correct copy of the original Note, which I found in [JPMorgan] Chase's account records for Miescke's loan." Winder further averred that she "verified that the copy of the Note" attached to her affidavit "is identical to the original Note in [JPMorgan] Chase's possession, which I have personally reviewed." Winder averred that the note includes two allonges, one endorsing the

[2] WISCONSIN STAT. § 909.01 reads as follows: "The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

note to Chase Home Finance, and another endorsing the note in blank. Miescke does not dispute that Winder possesses the requisite personal knowledge to make these averments.

¶10 Winder also explained how she came to have this knowledge during her deposition. At her deposition, Winder testified that JPMorgan Chase keeps the original documents in a "collateral file" and also uses a system called "I-Vault," which is a digital system with images of the documents. Winder explained that she personally viewed the original note in the collateral file. She also testified that, based on her inspection of JPMorgan Chase's records, JPMorgan Chase possessed the original note when it commenced the foreclosure action. Furthermore, JPMorgan Chase's counsel in this case averred in an affidavit that he was "in possession of the original note" and holding it on behalf of JPMorgan Chase during the pendency of this litigation.

¶11 We are satisfied that JPMorgan Chase established a prima facie case for summary judgment of foreclosure by presenting evidence that it possesses the original note, which is endorsed in blank. Summary judgment procedure now requires Miescke to come forward with admissible evidence that rebuts the prima facie case.

B. *Miescke Fails to Rebut JPMorgan's Prima Facie Case*

¶12 Miescke contends that there is a dispute of material fact as to whether JPMorgan Chase has standing and the authority to enforce the note. For the reasons we explain below, we conclude that Miescke has failed to show that a dispute of material fact exists regarding JPMorgan Chase's standing and authority to enforce the note.

¶13 Miescke's primary theory appears to be that the allonges that endorse the note in blank are invalid, inauthentic, or otherwise unenforceable. She makes a series of arguments concerning the allonges without providing evidence to support her claims. We will address each argument in turn.

¶14 First, Miescke claims that the signatures on the allonges "were obviously copied and pasted into the documents" or were otherwise forged or unauthorized. Miescke does not support these assertions with any evidence in the record, and thus, she has not established a dispute of material fact on this topic. For example, Miescke complains that the Bank failed to submit any proof that the signer of the allonges, Cynthia Corona, "placed her electronic signatures on the allonges." Miescke asserts that Corona's signatures on the two allonges "were obviously pasted into each document." Miescke also deduces that the endorsements were not attached to the note when the complaint was filed. However, even if these deductions are accurate, they do not suggest that the signatures on the allonges were forged or unauthorized. Both of these arguments as to the validity of the signatures are speculative and lack evidentiary support.

¶15 Miescke's next argument arises out of allegations that JPMorgan Chase purportedly refused to produce images of the note and allonges purportedly in the Bank's exclusive possession during discovery. Specifically, Miescke alleges that she asked the Bank during discovery to match the images of the six notes produced by the Bank with the image files in the computer directory. Miescke alleges that she had sought other information during discovery "to determine whether the purported endorsements were made with authority and were authentic." Miescke then argues that we should draw factual inferences in her favor that the allonges were created after the complaint was filed because

JPMorgan Chase failed to produce material evidence during discovery on this topic.

¶16 This argument is easily rejected because, as we explain below, Miescke forfeited her right to seek a circuit court order compelling JPMorgan Chase to produce the requested documents. The record shows that Miescke did not file a motion to compel the production of these purported documents, which is a procedural safeguard readily available to her in the circuit court if an adverse party does not respond to a discovery request or responds incompletely. *See* WIS. STAT. § 804.12(1). In addition, Miescke does not identify any impediment to her ability to seek a court order compelling discovery, and our review of the submissions does not indicate any such barrier. Miescke's allegations that JPMorgan Chase failed to fully comply with her discovery requests should have been brought first in the circuit court, to afford the court the opportunity to weigh in on the validity of the request. Generally, this court will not review issues that were not first raised to the trial court, and we will not do so here. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). This issue is, thus, forfeit.

¶17 For the same reason, we choose not to address two other arguments that Miescke makes for the first time on appeal. The first is that the signatures on the allonges were made without authority under JPMorgan Chase's limited power of attorney and the second is that the allonges were not properly affixed to the note. As for the limited power of attorney issue, we acknowledge that the general topic was raised in the circuit court. The problem is that the argument Miescke makes on appeal on this topic differs from the argument she made in the circuit court. In the circuit court, Miescke argued that the document granting the Bank a limited power of attorney, itself, did not grant authority to the Bank to endorse the note in blank to itself, along with other similar arguments. In stark contrast, on

appeal, Miescke argues that case law does not permit the Bank to endorse the note in blank to itself. We do not address this new issue on appeal.

¶18 As for the argument that the allonges were not properly affixed to the note, after a careful review of the parties' briefs related to the Bank's second motion for summary judgment, we are reasonably certain that Miescke did not raise this issue before the circuit court. It is worth noting that, in its written decision, the circuit court did not address the issue Miescke raises on appeal. Thus, we end our inquiry on this topic here.

¶19 Next, Miescke argues that we should consider the original complaint as an admission by a party opponent because the note attached to the Bank's original complaint and the Bank's first summary judgment submissions did not include an allonge with endorsements. This argument lacks merit. As the circuit court noted, "attaching an incorrect note to the original pleading, then the correct note to an amended pleading does not create a material dispute of fact on summary judgment" (citing ***Bank of Am. NA v. Neis***, 2013 WI 89, ¶5 n.4, 349 Wis. 2d 461, 835 N.W.2d 527). Moreover, "an amended complaint supersedes or supplants the prior complaint … [and] becomes the only live, operative complaint in the case …." ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 484, 596 N.W.2d 358 (1999) (footnote omitted).

¶20 Miescke's final argument is that JPMorgan Chase cannot enforce the note because it has not proven that it possessed the actual note endorsed in blank when the complaint was filed. The problem for Miescke is that JPMorgan Chase is not obligated to prove that it had the note when the complaint was filed. *See* ***Park Bank v. Millar***, 2013AP523, unpublished slip op. ¶18 (WI App Nov. 27, 2013) (so long as notice pleading standard is met, standing can be proved later).

Miescke does not cite authority that says otherwise and we are not aware of any. Wisconsin is a notice pleading state, and thus, JPMorgan Chase was only required to allege that it had possession of the note when the complaint was filed. It is not until the summary judgment stage that JPMorgan Chase is required to produce proof that it holds the note, and as discussed, it did so.

¶21 The thread that runs through all of Miescke's rebuttal arguments is that she does not point to any evidence such as an affidavit, deposition transcript, or discovery response that supports her view of the facts. While she questions the evidence the Bank relied upon to state a prima facie case, she does not point to any evidence whatsoever that rebuts that prima facie case. For example, while denying that JPMorgan Chase has proven that it possesses the original note, she does not offer any evidence that anyone other than JPMorgan Chase possesses the original note. In short, Miescke has not identified a material dispute of fact or law that would rebut the Bank's prima facie case.

¶22 In sum, we are satisfied by the summary judgment record that JPMorgan Chase established a prima facie case for summary judgment of foreclosure, and that Miescke has failed to raise a dispute of material fact or shown that JPMorgan Chase is not entitled to judgment as a matter of law. Accordingly, we affirm the circuit court's order of summary judgment in favor of JPMorgan Chase.

By the Court.—Judgment affirmed.

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