COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2276 **Cir. Ct. No. 2012CV180**

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

OCWEN LOAN SERVICING LLC,

PLAINTIFF-RESPONDENT,

V.

FREDERICK G. WEBER,

DEFENDANT-APPELLANT,

UNKNOWN SPOUSE OF FREDERICK G. WEBER,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Frederick Weber appeals a judgment of foreclosure entered by the circuit court in favor of Ocwen Loan Servicing, LLC.

On appeal, Weber contends that the circuit court erred by: (1) admitting certain business records into evidence at trial under WIS. STAT. § 908.03(6) (2015-16),[1] the exception to the hearsay rule for records of regularly conducted activity; and (2) determining that the balance due on Weber's note was $142,812.43. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In February 2007, Weber executed a promissory note in the amount of $126,650 in favor of Popular Financial Services, LLC. The note was secured by a mortgage on Weber's residential property. In November 2008, the servicing rights of Weber's mortgage were assigned, sold or transferred to Litton Loan Servicing, LP. In May 2010, Weber entered into an agreement modifying the note and mortgage. Under the terms of the loan modification, the principal balance of Weber's note was increased to $144,072.02. In August 2011, the servicing of Weber's loan was transferred from Litton Loan Servicing to Ocwen.

¶3 In January 2012, Ocwen filed a complaint with the circuit court seeking to foreclose on the secured property. Following a trial to the court, the circuit court entered judgment in favor of Ocwen. The court found that the unpaid principal balance on the note was $142,812.43 and that as of the date of trial, Weber's total indebtedness, including interest, fees, and costs, was $209,225.75. Weber appeals. We set forth additional facts below.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

¶4 Weber contends that the circuit court erred in: (1) determining that there was a proper foundation to admit into evidence at trial certain exhibits under WIS. STAT. § 908.03(6); and (2) in determining that the outstanding principal balance on the note was $142,812.43. We address each argument in turn below.

A. Admissibility of Business Records

¶5 Weber asserts that Ocwen's and Litton's business records were improperly admitted into evidence at trial under WIS. STAT. § 908.03(6) because the evidence at trial did not establish that Kevin Flannigan, the witness who testified as to those records had personal knowledge as to how Ocwen and Litton created those records. Although Weber refers to Ocwen's and Litton's business records as a whole when arguing that Flannigan was not qualified to lay a foundation for the admission of Ocwen's and Litton's business records, Weber argues that only the admission of exhibit 7, a history of payments made by Weber that was prepared by Litton while Litton serviced Weber's loan, and exhibit 9, the notice of default, are prejudicial.

¶6 As to exhibit 9, at trial Weber's trial counsel stated "no" when asked if he had any objection to the admission of the exhibit. A party forfeits any objection to the admissibility of evidence when the party fails to raise that objection before the circuit court. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. While there is an exception to the forfeiture rule for plain error, *see* ***id.***, Weber does not assert that the admission of the notice of default was plain error. Accordingly, we limit our analysis to the admission of exhibit 7, Weber's Litton payment history.

¶7 Generally, we review a circuit circuit's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Martindale v Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. "However, not all evidentiary rulings are discretionary…. [I]f an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented and our review is de novo." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶14, 324 Wis. 2d 180, 781 N.W.2d 503. Because the admissibility of Litton's payment history turns on the application of a legal standard to the testimony provided by Flannigan as to that exhibit, our review is de novo. *See* ***Deutsche Bank Nat'l Trust Co. v. Olson***, 2016 WI App 14, ¶20, 366 Wis. 2d 720, 875 N.W.2d 649.

¶8 The evidentiary rule at issue here is WIS. STAT. § 908.03(6), which sets forth an exception to the rule against hearsay for records of regularly conducted activity. Section 908.03(6) provides:

> RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

In ***Palisades***, we explained that the custodian, or other qualified witness, "must be qualified to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." ***Palisades***, 324 Wis. 2d 180, ¶20. To testify on these two points, a custodian or qualified witness does not need to be

the author of the records or have personal knowledge of the events recorded. ***Id.***, ¶22. However, the custodian or qualified witness "must have personal knowledge of how the [records] were prepared and that they were prepared in the ordinary course of [] business." ***Id.***, ¶21.

¶9 At trial, the sole witness to testify as to Weber's payment history while Litton was the loan servicer was Flannigan, a senior loan analyst with Ocwen. Flannigan testified that prior to working for Ocwen, he was employed as a senior litigation processor for Litton Loan Servicing, which was also a mortgage servicing company and was acquired by Ocwen in 2011. Flannigan testified that as a senior litigation processor, he was responsible for managing loans that were being litigated and contested and for reviewing those loans for disputes or other issues. Flannigan testified that as part of Litton's business, Litton created and maintained business records, that he had received training as to how Litton "created and maintained account records," and that he was familiar with how "Litton created and maintained the account records for [Weber's] loan account."

¶10 With regard to exhibit 7, a document purportedly prepared by Litton and purportedly showing Weber's payment history while the loan was serviced by Litton, Flannigan further testified as follows:

> [Question]. Could you review Exhibit 7 and let me know when you've finished?
>
> [Flannigan]. Okay. I'm familiar with this document.
>
> ….
>
> [Question]. Have you seen it before?
>
> [Flannigan]. Yes, I have.

[Question]. … did you routinely review Litton payment histories as a Litton senior litigation process servicer?

[Flannigan]. Yes, sir, I have.

[Question]. And have you received training on how to understand and interpret Litton payment histories?

[Flannigan]. Yes.

[Question]. Have you received training on how Litton generates its payment histories?

[Flannigan]. Yes.

[Question]. Have you received training regarding how to analyze and verify the accuracy of Litton payment histories?

[Flannigan]. Yes. I have.

[Question]. And in your experience are Litton payment histories accurate and reliable?

[Flannigan]. Yes.

[Question]. Did Litton create and maintain payment histories for a business purpose?

[Flannigan]. Yes.

….

[Question]. … does Litton in the ordinary course of its business generate payment histories?

[Flannigan]. Yes.

[Question]. Okay. And are payment histories generated by Litton made by a person with knowledge of the transaction?

[Flannigan]. Yes.

[Question]. … after payment histories are made, are they kept in the regular course of Litton's business?

[Flannigan]. Yes.

> [Question]. And for loans that service transferred from Litton to Ocwen, did Litton in the ordinary course of its business transfer payment history forms to Ocwen?
>
> [Flannigan]. Yes.

¶11 Weber argues that Flannigan was not a "qualified witness" under WIS. STAT. § 908.03(6) to testify as to the payment history because Flannigan's testimony did not establish that he had personal knowledge of how the payment history was created. More specifically, Weber argues that Flannigan did not testify as to the contents of his training, who developed the training, who provided training to Flannigan, and how Flannigan's training was conducted, and there was no evidence aside from Flannigan's testimony that the training provided Flannigan with personal knowledge of how the payment histories were created and maintained.

¶12 Weber does not direct this court to any legal authority supporting his position that, to establish that a witness has knowledge of how records were prepared, when a witness testifies that he or she acquired that knowledge by being trained as to how those records were prepared, evidence must be presented as to what the witness's training more specifically entailed and who developed and conducted that training. This court does not consider conclusory assertions and undeveloped arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56. We reject Weber's argument on that basis.

¶13 Moreover, we observe that on its face, Flannigan's testimony establishes that Flannigan had personal knowledge through training of how Litton created its payment histories. If Weber wanted to show that Flannigan's training

was inadequate, Weber had an opportunity to do so on cross-examination, but did not.

¶14 Accordingly, we conclude that the payment history was not improperly admitted at trial.

B. Principal Balance

¶15 Weber contends the circuit court erred in finding that the outstanding principal balance of his note was $142,812.43.[2] Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2). A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

¶16 In its complaint, Ocwen pled that Weber executed a note in the amount of $126,650.00, that Weber failed to make payments as required under the note, and that Weber owed a principal balance of $142,812.43. In his answer, Weber admitted that he had executed a note with Popular Financial Services, but asserted a general denial of Ocwen's allegation as to the outstanding principal balance of the debt. Prior to trial, Ocwen moved the circuit court to find as a matter of law that the unpaid principal balance on the note was $142,812.43. The court granted Ocwen's motion, determining that "the defense of payment is not

[2] Ocwen argues that Weber forfeited the right to challenge on appeal the court's determination as to the principle balance of the note. We assume, without deciding, that Ocwen did not.

available and the amount unpaid at the time of the complaint … $142,812.43 … has not been disputed as the balance due at that time."

¶17 The circuit court relied on ***Virkshus v. Virkshus***, 250 Wis. 90, 93-95, 26 N.W.2d 156 (1947). In ***Virkshus***, our supreme court concluded that no genuine issue of material fact existed as to an allegation that no payments had been made on a $10,000 mortgage debt except a $75 interest payment because "[p]ayment [on a note] is an affirmative defense. When non-payment is alleged payment must be affirmatively alleged to raise an issue."

¶18 Weber argues that we should conclude that the court erred in determining the principal balance of the debt is $142,812.43 because the circuit court's reliance on ***Virkshus*** was misplaced. Weber argues that ***Virkshus*** is not applicable to the facts of this case because of the factual differences between this case and ***Virkshus*** and because of the complexity of today's mortgage loans. We need not address whether ***Virkshus*** applies here, because we affirm the circuit court for a different reason.

¶19 As we now explain, at trial Ocwen presented evidence establishing that the outstanding principal balance was $142,812.43 and Weber has made no attempt to refute that evidence on appeal.

¶20 Flannigan testified that under the terms of the note, the original of which was admitted into evidence, Weber promised to pay a principal balance of $126,650, plus interest. Flannigan testified that Weber subsequently entered into a loan modification agreement. The loan modification agreement, which was entered into evidence, provided for a new principal balance of 144,072.02.

¶21 Using the new principal balance as a starting point, and looking to Weber's "payment history" generated by Litton and another document that Weber does not challenge, Weber's "transaction history" generated by Ocwen, Flannigan explained that the documents show that Weber made fourteen payments, totaling $1,259.59, that were credited to the principal balance of Weber's loan. Flannigan testified that, because of Weber's payments, the principal balance on Weber's mortgage had been reduced to $142,812.43. Thus, Flannigan effectively explained that the new principal balance following the loan modification, $144,072.02, was reduced by $1,259.59 leaving a principal balance of $142,812.43.

¶22 Weber has made no attempt to argue that there was no credible evidence presented at trial to support the circuit court's finding that the outstanding principal balance was $142,812.43. As we have shown above, there was substantial credible evidence to support the court's finding. Accordingly, we reject Weber's argument that the court's finding that the principal balance at the time of trial was $142,812.43 was erroneous.

CONCLUSION

¶23 For the reasons discussed above, we affirm the judgment of foreclosure.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).