COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP858 **Cir. Ct. No. 2015CV399**

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

TODD D. O'BRIEN AND JANICE K. O'BRIEN,

PLAINTIFFS-APPELLANTS,

V.

WALWORTH STATE BANK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Todd and Janice O'Brien appeal from a judgment dismissing their complaint against Walworth State Bank and awarding attorney's fees and costs to Walworth State Bank pursuant to the terms of the parties' loan documents. We affirm in all respects.

¶2 The relevant facts are not disputed. Between 2006 and 2010, the O'Briens entered into loan transactions with Walworth State Bank to develop a subdivision. The O'Briens defaulted on their obligations. The bank commenced a foreclosure action in February 2011 and obtained a foreclosure judgment in September 2011. To the extent relevant here, in June 2015, the O'Briens sued the bank alleging breach of contract and breach of duty of good faith. The O'Briens alleged that the bank failed to extend loan funds which caused them to default on their obligations and lose the ability to develop the subdivision.

¶3 On summary judgment the bank argued that the O'Briens' claims were barred because they were compulsory counterclaims that should have been brought in the foreclosure action. The bank also argued that any arguments that a bank vice president's representations were part of the parties' contract were barred by the parol evidence rule because the parties' contract contained an integration clause. Finally, the bank sought payment of its attorney's fees and costs as provided for in the loan documents. The O'Briens opposed summary judgment. The circuit court granted summary judgment on the grounds offered by the bank and awarded the bank attorney's fees and costs pursuant to the loan documents. The O'Briens appeal.

¶4 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That

methodology has been recited often and we need not "repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** at 496-97. The application of the common-law compulsory counterclaim rule to the undisputed facts presents a question of law that we review independently. ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶15, 302 Wis. 2d 41, 734 N.W.2d 855.

¶5 In their appellants' brief, the O'Briens argue that a bank vice president repeatedly assured them that they would have access to necessary development funds. The O'Briens claim that they relied upon these oral representations for a never-ending stream of funds. This argument fails as discussed below.

¶6 The O'Briens' argument is premised upon the bank vice president's representations and would require this court to consider parol evidence. The circuit court ruled that the presence of an integration clause in the loan documents barred the use of parol evidence to establish this claim.[1] The O'Briens do not challenge the circuit court's parol evidence ruling on appeal. Therefore, we deem this challenge abandoned, ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (1998), and we do not consider any argument premised upon the bank vice president's alleged representations.

¶7 We turn to application of the compulsory counterclaim rule. The compulsory counterclaim rule "bars a subsequent action by a party who was a

[1] The parol evidence rule provides that "'[w]hen the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.'" ***Dairyland Equip. Leasing, Inc. v. Bohen***, 94 Wis. 2d 600, 607, 288 N.W.2d 852 (1980) (citation omitted)

defendant in a previous suit if 'a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action'" ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶¶27–28, 282 Wis. 2d 582, 698 N.W.2d 738 (citation omitted); *see also* ***Moser v. Anchor Bank FSB***, No. 2012AP2700, unpublished slip op. ¶1 (WI App June 20, 2013)[2] (explaining that the common-law compulsory counterclaim rule barred claims against a bank in a post-foreclosure action because those claims should have been asserted as counterclaims in the foreclosure action).

¶8 The compulsory counterclaim analysis starts with determining whether the elements of claim preclusion are satisfied. ***Menard***, 282 Wis. 2d 582, ¶28. Claim preclusion requires "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Elements (1) and (3) are satisfied in this case; we focus on element (2), identity between the causes of action in the two suits.

¶9 We agree with the circuit court that the identity between the causes of action element is satisfied in this case. We rely upon ***A.B.C.G. Enterprises v. First Bank Southeast***, 184 Wis. 2d 465, 515 N.W.2d 904 (1994). In that case, A.B.C.G. failed to defend a foreclosure action, and a default judgment was

[2] WISCONSIN STAT. RULE 809.23(3)(b) (2015-16) ("an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under [WIS. STAT.] § 752.31(2) may be cited for its persuasive value").

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

entered. ***Id.*** at 471. Thereafter, A.B.C.G. sued the foreclosing bank alleging misrepresentation, breach of contract and other conduct by the bank, all of which allegedly caused A.B.C.G. to default on its mortgage obligations and lose its interest in various properties as a result of foreclosure. ***Id.*** at 471-72. The supreme court held that A.B.C.G.'s claims arose from the same transactions as the bank's foreclosure claims. ***Id.*** at 481-82. Therefore, A.B.C.G.'s claims should have been brought as counterclaims in the foreclosure action and were, for that reason, barred. ***Id.*** at 482-83.

¶10 The O'Briens allege that their breach of contract and good faith duty claims are distinct from the foreclosure action commenced by the bank. We disagree. The O'Briens allege that the bank caused their default and a bank vice president made representations that should have precluded a default determination. In the foreclosure action, the bank obtained a judgment on the grounds that the O'Briens defaulted on their obligations. If successfully litigated, the O'Briens' claims would impair the bank's rights as established in the foreclosure action and undermine the determination that they were indebted to the bank and had defaulted on their obligations. *See* ***id.*** at 482-83. The O'Briens' claims are barred by the compulsory counterclaim rule. Summary judgment was appropriate.

¶11 The O'Briens challenge the circuit court's award of attorney's fees and costs to the bank as provided in the loan documents.[3] The O'Briens do not contest that the loan documents required them to pay the costs of collection including reasonable attorney's fees. Rather, they challenge the application of this

[3] The O'Briens do not challenge the amount of attorney's fees and costs awarded by the circuit court.

provision to this case, which they characterize as a post-foreclosure case in which the bank was not seeking to collect a debt.

¶12 We have held that the claims brought in this case were compulsory counterclaims in the foreclosure case. In the foreclosure action, the bank alleged that the O'Briens were indebted under a December 2009 Business Credit Agreement by which the bank extended funds to the O'Briens. The Agreement states: "Customer agrees to pay all costs of collection, before and after judgment, including, without limitation, reasonable attorneys' fees (including those incurred in successful defense or settlement of any counterclaim brought by Customer ….). We conclude that the O'Briens were contractually bound to pay attorney's fees and costs in this case because they brought claims that were compulsory counterclaims in the foreclosure action.

¶13 The O'Briens next argue that the terms of their last note should govern, and the last note does not include language requiring them to pay costs and attorney's fees relating to counterclaims. The bank responds that this argument is raised for the first time on appeal. The O'Briens did not file a reply brief to counter the bank's response. Therefore, we assume that the O'Briens concede that they did not make this argument in the circuit court. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (where a party on appeal does not address an issue raised by the opponent, we assume the party concedes the issue). We decline to address this issue raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

¶14 After briefing concluded in this appeal, the bank filed a motion seeking attorney's fees and costs in case it prevailed on appeal. The bank's

motion does not claim that the appeal is frivolous. WIS. STAT. RULE 809.25(3). Our August 31, 2016 order held the motion in abeyance pending a decision in this appeal. Because the motion does not specify the costs and fees sought, the motion does not suffice as a RULE 809.25(1) statement of costs. Therefore, the motion is denied. If, as the prevailing party, the bank seeks RULE 809.25(1) costs and fees, the bank shall file a statement of costs as contemplated by RULE 809.25(1)(c).

By the Court.—Judgment affirmed.

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