COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP726 **Cir. Ct. No. 2015CV124**

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

JOHNSON BANK,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. BONKOSKI AND BECKY A. BONKOSKI,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Brian and Becky Bonkoski, pro se, appeal a judgment of foreclosure on their residential real estate. The circuit court excused Johnson Bank from responding to the Bonkoskis' discovery requests, denied their request for a jury trial, struck their affirmative defenses, dismissed their counterclaims, and granted Johnson Bank's motion for summary judgment. The Bonkoskis raise numerous issues challenging the circuit court's rulings. We reject their arguments and affirm the judgment.[1]

¶2 The Bonkoskis challenge both the circuit court's subject matter and personal jurisdiction. A mortgage foreclosure action is a quasi in rem proceeding. *See* ***Syver v. Hahn***, 6 Wis. 2d 154, 160-61, 94 N.W.2d 161 (1959). Because the real estate is located in Washburn County, the circuit court had subject matter jurisdiction over the property as well as the parties. *See* ***id.*** The circuit court had personal jurisdiction over the Bonkoskis as they are natural persons within this state when served, they were domiciled within this state, and because the action arises out of Bonkoskis' promise to Johnson Bank to create an interest in real estate situated in this state. *See* WIS. STAT. §§ 801.05(1)(a), (b) and (6). The Bonkoskis cite WIS. STAT. § 701.0202 in support of their challenge to the circuit court's personal jurisdiction. However, that statute relates to personal jurisdiction in cases involving trusts. No trust is involved in this action.

[1] In its brief, Johnson Bank moves to strike the Bonkoskis' brief as redundant, immaterial, impertinent, disrespectful, scandalous or indecent, and for failure to comply with several Rules of Appellate Procedure. Because the matter has been briefed on the merits, we will not strike the brief, even though many of Johnson Bank's characterizations of the appellants' brief are well taken. However, we reprimand the Bonkoskis for their violations of WIS. STAT. RULE 809.19 (2015-16), and, in any future appeals, we will not countenance their disrespect for the circuit court.

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

¶3 The Bonkoskis contend they were entitled to a jury trial. The circuit court may enter summary judgment against a party notwithstanding the request for a jury trial if the supporting papers show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Rao v. WMA Sec. Inc.***, 2008 WI 73, ¶107, 310 Wis. 2d 623, 752 N.W.2d 220. This standard was satisfied here.

¶4 The Bonkoskis next argue that the circuit court erred by striking their discovery requests and proceeding directly to summary judgment. Decisions regarding discovery are committed to the circuit court's discretion. *See* ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶151, 297 Wis. 2d 70, 727 N.W.2d 857. Because the circuit court correctly found the requested materials were irrelevant, the court properly exercised its discretion by striking the discovery requests. The discovery requests were irrelevant because they related to the Bonkoskis' defenses and counterclaims, which had no arguable merit.

¶5 The Bonkoskis contest the circuit court's characterization of the property as "homestead property." They cite deeds that show it was not homestead property when it was sold to them. Whether it was homestead property when they bought it does not establish whether it was homestead property at the time of the foreclosure. Johnson Bank's affidavits were not contradicted by affidavits from the Bonkoskis. Therefore, the Bonkoskis have not established any outstanding issue of material fact regarding the determination of homestead property.

¶6 The Bonkoskis assert there was no consideration for the promissory note. The consideration consisted of money paid by Johnson Bank to satisfy a prior note and mortgage to WESTconsin Credit Union. The affirmative

defense/counterclaim alleging lack of consideration was properly stricken and dismissed.

¶7 The Bonkoskis cite WIS. STAT. § 425.107 of the Wisconsin Consumer Act, arguing that the mortgage agreement was unconscionable. The Consumer Act applies to debts of less than $25,000 and does not apply to a first lien. WIS. STAT. §§ 421.202(6) and (7). Because the mortgage was for more than $25,000 and was a first lien, the Consumer Act does not apply.

¶8 Citing WIS. STAT. § 706.05, the Bonkoskis argue the promissory note was not filed in Washburn County. That statute does not require the note to be filed. Only the mortgage must be recorded under the statute.

¶9 The Bonkoskis next argue the note and mortgage were not signed by a representative of Johnson Bank. A signature by Johnson Bank's representative is not required. The note is a promise of the maker to pay a debt. The mortgage is a lien against the property. A representative of Johnson Bank was not required to sign the promise to pay, and the lien arises from the note.

¶10 The Bonkoskis complain that Johnson Bank failed to disclose how many times it profited due to "fractional lending." Johnson Bank's profits are not relevant. The Bonkoskis claim Johnson Bank withheld evidence that the mortgage was paid in full. The Bank submitted an affidavit detailing the Bonkoskis' failure to make payments on the note. The Bonkoskis did not file an affidavit refuting the Bank's accounting. The Bonkoskis cite WIS. STAT. § 403.601 to support their claim that the debt was discharged. Under that statute, a debt can be discharged if the lender agrees. Here, there is no evidence of the lender's agreement. The Bonkoskis point to Exhibit D to their answer in which an individual named "David Nemeth" wrote to the Secretary of the Treasury with an "Affidavit of

Acquaintance and Discharge" purporting to tender payment under the Trading with the Enemy Act of 1917. There is no legal authority to discharge this debt in that manner.

¶11 The Bonkoskis cite numerous provisions of the Uniform Commercial Code that apply to the sale of goods. Real estate is not included in the definition of goods. *See* WIS. STAT. § 402.105(1)(c). Therefore, the circuit court properly rejected all defenses and counterclaims based on those statutes.

¶12 The Bonkoskis contend the note and mortgage were impermissibly bifurcated. Johnson Bank is the holder of the original note and is, therefore, authorized to enforce it. Under the principle of equitable assignment, transfer of the note carries the mortgage with it. ***Dow Family, LLC v. PHH Mortg. Corp.***, 2014 WI 56 ¶21, 354 Wis. 2d 796, 848 N.W.2d 728. The mortgage is also in Johnson Bank's name. There is no bifurcation of the note and mortgage. The Bonkoskis contend the Bank was unjustly enriched because it sold the note to Freddie Mac. However, Johnson Bank remains the servicer for the loan and possesses the note. As the holder of the note, Johnson Bank is entitled to enforce it. *See* WIS. STAT. § 403.301.

¶13 Citing the Fair Debt Collections Practices Act, 15 U.S.C. § 1692, et seq., the Bonkoskis contend Johnson Bank ignored their request to view the original promissory note. Johnson Bank attempted to provide the Bonkoskis with validation of the debt as required by the Act. There is no provision of the Act that a creditor must show the original promissory note to the debtor. Therefore, the circuit court appropriately rejected that affirmative defense/counterclaim. The Bonkoskis' argument that the circuit court is a "debt collector" under the Act or that the court engaged in racketeering or theft by granting the foreclosure

judgment is an unsupported and egregious claim that will not be dignified by any further response.

¶14 The Bonkoskis cite other federal statutes that are inapplicable. They cite provisions of the bankruptcy code even though there is no bankruptcy involvement in this case. They cite the Federal Trade Commission Act, 16 C.F.R. § 433.2, which applies only to goods and services.

¶15 The Bonkoskis accuse Johnson Bank of fraud. That claim was not pled with particularity as required by WIS. STAT. § 802.03. Their claim of conspiracy was properly dismissed for the same reason.[2]

¶16 The Bonkoskis argue that they rescinded their signatures. A contract cannot be rescinded by a party in default. *See* ***Appleton State Bank v. Lee***, 33 Wis. 2d 690, 692-93, 148 N.W.2d 1 (1967).

¶17 Finally, the Bonkoskis argue impossibility of performance because lawful payment must be made in gold or silver. That argument was rejected in ***Kauffman v. Citizens State Bank of Loyal***, 102 Wis. 2d 528, 530-33, 307 N.W.2d 325 (Ct. App. 1981).

By the Court.—Judgment affirmed.

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

[2] The conspiracy allegation includes a footer on the Judgment and Findings of Fact and Conclusions of Law stating: "This is an attempt to collect a debt, and any information obtained will be used for that purpose." No issue regarding that footer was raised in the circuit court, and we will not consider an issue raised for the first time on appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).